THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 11

Case No. 5806 — Case No. 6393

WILLIAM S. HEIN & CO., INC.
BUFFALO, NEW YORK
1995

Library of Congress Catalog Number 95-75068
ISBN 0-89941-924-0

Printed in the United States of America.

The quality of this reprint is equivalent to the
quality of the original work

This volume is printed on acid-free paper by
William S. Hein & Co., Inc.

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GREY—HERAN

Case No. 5,806—Case No. 6,393

ST. PAUL
WEST PUBLISHING CO.
1895

FEDERAL CASES.

BOOK 11.

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

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

Case No. 5,806.

GREY v. THOMAS et al.

[1 N. J. Law J. 139.]

District Court, D. New Jersey. Feb. 26, 1878.

BANKRUPTCY—FRAUD.

A bill of complaint to set aside as fraudulent a transfer of personal property by the bankrupt, if the petition in bankruptcy was filed before the amendment of June 22, 1874 [18 Stat. 178], must allege that the transfer was made with the knowledge of the defendant that it was fraudulent.

On demurrer to bill of complaint filed by assignee in bankruptcy to set aside as fraudulent a transfer of personal property by the bankrupt to the defendants. The special causes assigned for demurrer were: 1, That the bill does not allege, nor does it anywise appear, that the transfer was made within two months next preceding the time of filing the petition in bankruptcy. 2, That there is no allegation that at the time of the transfer the defendants knew that it was fraudulent in law.

James Wilson, for demurrer.

Samuel H. Grey, for assignee.

NIXON, District Judge. The petition in bankruptcy was filed June 13, 1874, and before the amendment of June 22, 1874, was enacted. The transfer complained of took place while the original act was in force, to wit, about April 1, 1874; and the question raised by the demurrer is, whether the case is to be determined by the law as it stood when the transfer was made, and the petition in bankruptcy was filed, or by the law as it has been amended when the suit was commenced. There has been considerable discussion of this question in other districts, the judges reaching different conclusions, but it is now raised for the first time in this court. As to the conflicting views elsewhere, see Hamlin v. Pettibone [Case No. 5,995]; Brooke v. McCraken [Id. 1,932]; Van Dyke v. Tinker [Id. 16,849]; In re Montgomery [Id. 9,732]; Bradbury v. Galloway [Id. 1,764]; In re King [Id. 7,781]; Singer v. Sloan [Id. 12,898]; Boothe v. Brooks [Id. 1,650]; In re Griffiths [Id. 5,825]. It is to be borne in mind that the transaction complained of was the transfer of property by a debtor to a creditor to pay an antecedent debt: an act not forbidden in morals, or by the common law, but contrary to the provisions of the bankrupt law of 1867, [14 Stat. 517,] and, if impeachable, it is only so because it was done within the time and under the circumstances prohibited by said law. When the transfer was made and when the petition in bankruptcy was filed, the assignment could not be invalidated, unless other creditors took steps by involuntary proceedings in bankruptcy to set it aside within four months from the date of the transfer and the creditor, who received the conveyance, had reasonable cause to believe that it was made in fraud of the provisions of the act. This suit was brought in August, 1876, and then the limitation in time had been narrowed to two months, and the preferred creditor was required to know that a fraud upon the law was intended.

These two changes were introduced by the 10th and 11th sections of the amendatory act of 1874. As they are remedial in their character, it was within the power of congress to have them applicable to the decision of cases growing out of pending bankruptcy proceedings if they desired to do so. The constitution of the United States imposes no restraint upon the legislative authority in regard to the enactment of retroactive laws, whether they affect vested rights or the obligation of contracts. The prohibition there is to ex post

facto laws, which have always been held to include only penal and criminal statutes. Watson v. Mercer, 8 Pet. [33 U. S.] 110; Carpenter v. Com., 17 How. [58 U. S.] 463; Cooley, Const. Lim. 264.

The power being clear, what was the intention? In determining this, the 13th section of the Revised Statutes of the United States, in force when the amendment was approved (see section 5601, Rev. St.), must not be overlooked. It was originally enacted in 1871, and was entitled "An act prescribing the form of the enacting and restraining clauses of acts and resolutions of congress, and rules for the construction thereof," and is as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." This section may be regarded as a congressional approval of the rule of construction announced by the supreme court in Harvey v. Tyler, 2 Wall. [69 U. S.] 347; to wit, "that all statutes are to be considered prospective, unless the language is express to the contrary, and there is a necessary implication to that effect."

It is not necessary to speculate upon what would have been the effect of the provisions of this section on the action if it had been pending when these changes in the law were enacted. It has been commenced since, and the changes will be operative and will release or extinguish any liability incurred at the time of the repeal, if it appears expressly or by necessary implication that congress intended them to be applied to all subsequent suits. They have reference to the remedy solely: and involve (1) the time between the transfer and the adjudication, and (2) the evidence by which the suit is to be maintained. By the last section of the amendatory act of 1874, all acts and parts of acts inconsistent with its provisions are expressly repealed. The change in regard to the lapse of time between the transfer and the adjudication in bankruptcy was not to take effect until two months after the passage of the act. The other change was absolute and instantaneous in its operation. If congress had intended to except future suits, instituted beyond the period of two months from the date of the enactment, that intention would have been manifested in view of the well-settled principle, that the right to a particular remedy is not a vested right, and where a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide. This was held by the supreme court in the case of Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 492. The state of Ohio had a law in force authorizing administrators to sell the real estate of intestates for the payment of debts by order of the county courts. Such an order was obtained in this case, but pending the proceedings under it and before the order for sale was fully executed, the law was repealed. Chief Justice Marshall, delivering the opinion of the court, held the repeal terminated all the proceedings under the order. "The repeal of such a law," says he, "divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

Demurrer sustained.

Case No. 5,807.

GREYOR v. The BLACK WARRIOR.

District Court, D. Louisiana. March 18, 1858.

[This was a proceeding involving the construction of Act Cong. March 3, 1851, § 2 (9 Stat. 635), which provides that the master, agent, or owner of a vessel receiving precious metals for shipment shall not be liable as carrier thereof, unless the shipper gives "a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor." In 2 Pars. Shipp. & Adm. 123, it is stated that this case seems opposed to a liberal construction of the act, which would render the note in writing unnecessary on the part of the shipper, if he has acted honestly, and the necessary statement is contained in the bill of lading; though it is nowhere stated whether or not the bill of lading in fact contained the statement required by the statute.]

[See Wattson v. Marks, Case No. 17,296.]

[Nowhere reported; opinion not now accessible.]

Case No. 5,808.

GRIDLEY v. NORTHWESTERN MUT. LIFE INS. CO.

[14 Blatchf. 107.] [1]

Circuit Court, E. D. New York. Jan. 27, 1877.[2]

LIFE INSURANCE — ANSWER TO QUESTIONS IN APPLICATION BLANK—HEREDITARY INSANITY.

This question was put to the applicant for a policy of insurance in a life insurance company: "Have the person's parents, uncles. aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" He answered, "No, except one brother temporarily insane six years since; causes, domestic and financial trouble, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family, on either side of house, to my knowledge." The policy having been afterwards issued, in a suit brought on it the defendant proved the temporary insanity of an uncle of the applicant, but there was no evidence of any hereditary insanity in the family of the applicant: *Held*, that the question put to the applicant was only an inquiry whether any of the diseases mentioned in it had appeared among the relatives of the applicant in the form of an hereditary disease; that

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

[2] [Affirmed in 100 U. S. 614.]

the applicant understood it in that sense; and that the answer was true.

[Cited in Sinclair v. Phoenix Mut. Ins. Co., Case No. 12,896.]

[See note at end of case.]

[This was an action at law by Mary L. Gridley, against the Northwestern Mutual Life Insurance Company.]

Sewell & Pierce, for plaintiff.
Salomon & Burke, for defendant.

BENEDICT, District Judge. This is a motion for a new trial. The action is brought upon a policy of insurance, issued by the defendant upon the life of Fayette R. Gridley. The question of law presented is as to the proper construction to be put upon a question contained in the application for the policy, and on the answer given thereto by the applicant. The question is as follows: "Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" The answer given is as follows: "No, except one brother temporarily insane six years since; causes domestic and financial trouble, followed by hard drinking, and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family, on either side of house, to my knowledge."

Upon the trial the defendant proved the temporary insanity of an uncle of the applicant. There was no evidence of knowledge of this fact by the applicant, and no evidence showing any hereditary insanity in the family of the applicant. Upon this evidence it is claimed, in behalf of the defendant, that the plaintiff cannot recover, upon the ground that the question and answer above referred to are not confined to hereditary insanity, and that proof of the temporary insanity of an uncle of the applicant showed the answer to this question in the application to be false in a material respect, and that, therefore, the policy is void by its terms. But I am unable to agree to this construction of the question and answer under consideration. I fail to see any incongruity in the question, if it be understood as confined to hereditary disease. It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word "other," to my mind, plainly indicates that the question was intended to be an inquiry, whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease. This construction of the question derives support from the fact that the question is put in respect to the parents, uncles, aunts, brothers or sisters of the applicant. The point of the inquiry was, whether any hereditary taint had been developed. If this meaning of the question be not plainly expressed by its language, it is manifest that the applicant understood it in this sense, for, having answered the question by the unqualified negative "No," he then mentions the insanity of a brother, and explains how this fact is consistent with the negative he has given, by showing that the insanity of his brother was temporary; and he sums up his answer in the statement, "no hereditary taint of any kind in family, to my knowledge," which is equivalent to saying, "none of the hereditary diseases mentioned in the question I am answering, nor any other hereditary disease, has appeared in my family." So understood, the answer was true.

Entertaining this view of the proper construction of this application, I must adhere to the ruling made at the trial and deny the motion for a new trial.

[NOTE. The insurance company appealed to the supreme court, where the decision of the circuit court was affirmed in an opinion by Mr. Justice Swayne (100 U. S. 614). The defense upon the trial should have proved three things: That the alleged insanity of the uncle had existed, that it was hereditary, and that both these things were known to the applicant when he answered the question. The subject had been fully considered in National Bank v. Insurance Co., 95 U. S. 673. "The intent of the lawmakers is the law, and here the intent of the parties is the contract." The contract was narrowed down to what the applicant knew personally of the subject of hereditary insanity.]

Case No. 5,809.

In re GRIEVES et al.

[15 Alb. Law J. 167.]

District Court, D. Massachusetts. Feb. 8, 1877.

BANKRUPTCY—DISCHARGE OF DEBTORS — FAILURE TO KEEP CORRECT ACCOUNTS.

[Failure of the bankrupts to enter on their books several transfers of property, made about the time their affairs became embarrassed, will, in the absence of a sufficient excuse, prevent a discharge.]

[In the matter of Grieves Bros., bankrupts. On application for the debtors' discharge.]

About the time of their failure there were several transfers of property made by the bankrupts which did not appear on the books, and these could not be taken advantage of as preferences, because the bankruptcy was some three or four months after the failure.

THE COURT said that one of the most important parts of the duty to keep books was to show what is done at or about the time that the affairs became embarrassed, and that it would be dangerous to admit excuses for the want of proper entries at that time. He was not willing to decide that books, which omit entries of considerable importance, could be considered proper books, unless some peculiar circumstances were shown to account for the absence of those entries. As there was an insufficient excuse in this case, the discharge was refused.

Case No. 5,810.

In re GRIFFEN.

[2 Ben. 209;[1] 1 N. B. R. 371 (Quarto, 83); 1 Am. Law T. Rep. Bankr. 120.]

District Court, S. D. New York. March 11, 1868.

WITNESS FEES—BANKRUPT'S WIFE.

1. The wife of a bankrupt, attending under an order, and being examined as a witness, is entitled to witness and travel fees, calculated according to the third section of the fee bill act of February 26, 1853 [10 Stat. 165].

2. If a witness in bankruntcy proceedings is, by the adjournments of the examination, obliged to attend at intervals, and it is reasonable for him to return home during the intervals, he is entitled to travel fees, at five cents a mile, for going and returning each time, and to $1.50 for each day's attendance.

3. The fees of a witness must be paid or tendered at the time of the service of the summons or subpoena.

4. If there is an adjournment, he is entitled to be paid his attendance fee for the adjourned day, and travel fees, if it is reasonable for him to return home, of which the register is to judge.

5. If the fees are not paid and the witness attends, the fees are to be collected as in ordinary actions.

[In this case Register [Charles L.] Beale certifies to the judge, that in the due course of proceedings the following questions, pertinent to the same, arose, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. John P. H. Tallman, who appeared for the bankrupt [William Griffen], and Mr. Alland Anthony, who appeared for Henry Bostwick, one of the creditors of said bankrupt. The bankrupt's wife was required to attend before the court to be examined as a witness under section 26 of the act [of 1867 (1 Stat. 529)], at the request of the opposing creditor; she thus attended once a week for five weeks, and was sworn on the last day. It appears she resides fourteen miles from the place of trial, and travelled this distance each time, requiring seven days. The payment of the following bill is asked in her behalf, as a witness, to wit: Attended court 5 times; 7 days necessary absence from home, at $1.50, $10.50; travelled 28 miles 5 times, 150 miles, at 5 cents, $7.00. The creditor refuses to pay the bill. Question 1st. Is the wife of the bankrupt entitled to any pay as a witness under section 26? Question 2d. If so, on what principle? Is she entitled to fees for more than one day's attendance and travel? Question 3d. How is payment in such case to be enforced? And the said parties requested that the same should be certified to your honor for your opinion thereon.

[On these questions the register also certifies his opinion. First. That the wife of the bankrupt, although appearing in obedience to an "order" instead of a "summons," still being "examined as a witness," is entitled to fees the same as any other witness. Second. I am of opinion that such fees should be at the following rates: Travelling fees five cents per mile from her residence to the place where the examination was conducted, and $1.50 per diem for each day's actual attendance as such witness, until such examination shall have been completed. Third. I am of opinion that the payment of such fees is to be enforced as in ordinary actions, and according to the practice of the court.][2]

BLATCHFORD, District Judge. 1. The wife of the bankrupt is entitled to witness fees for attendance and travel, the same as any other witness.

2. Such fees are to be those prescribed for witnesses by the third section of the fee bill act of February 26th, 1853. General order No. 29 provides that the fees of witnesses shall include their travelling expenses to and from the place at which they may be summoned to attend. This means no more than the travelling fees allowed by the act of 1853. But, if the witness was, by adjournments of the examination, obliged to attend at intervals, and it was reasonable for her, during the intervals, to return to her residence, she is entitled to travelling fees, at five cents per mile, for going and returning, as often as she went and returned, and to $1.50 for each day's attendance before the register.

3. By general order No. 29, the fees of a witness must be tendered or paid to him at the time of the service of the summons or subpoena. The fees, so to be tendered or paid at the time of such service, are the fees for going and returning once and for one day's attendance. If there be an adjournment, the witness must be paid for another day's attendance, before he is bound to attend on the adjourned day; and, if it is reasonable for him to return to his residence, to be judged of by the register, he is entitled to be paid his travel fees for going and returning a second time, before he is bound to come a second time. If the fees are not so paid, and the witness nevertheless attends, the payment of the fees is to be enforced as in ordinary actions and according to the practice of the court therein.

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

Case No. 5,811.

GRIFFENBERG v. The JOHN LAUGHLIN.

[2 Wkly. Notes Cas. 612.]

District Court, E D. Pennsylvania. May 13, 1876.

JURISDICTION IN ADMIRALTY — ACT OF ASSEMBLY OF 13TH JUNE, 1836, § 1 (P. L. 616; PURD. DIG. 94)—LIEN UPON VESSEL—MARITIME SUPPLIES.

1. Masts and spars furnished to a vessel while she is being built are not maritime supplies.

2. An admiralty court has no jurisdiction under the statute of the state (Act Pa. June 13, 1836, § 1), or otherwise, to enforce a lien against a vessel, where the demand is not distinctively for maritime supplies.

[2] [From 1 N. B. R. 371 (Quarto, 83).]

This was a libel against the barkentine John Laughlin brought by one Griffenberg for masts and spars furnished by him to said vessel. The libelant claimed a lien under the act of assembly of Pennsylvania of June 13, 1836, § 1 (supra). The hull of the vessel was built and completed at Seaford, Del., and was then taken up to Philadelphia to be rigged. A contract was made with the libelant in Delaware to furnish the necessary masts and spars, etc., which were prepared and finished in Wilmington, and then towed up to Philadelphia to be fitted in the hull.

Mr. Coulston, for libelant, claimed that, under the case of The Lottawanna, 21 Wall. [88 U. S.] 558, a lien, existing under the state law for materials furnished in fitting out a vessel, could be enforced by proceedings in rem in admiralty.

Mr. Flanders, contra, contended that a court of admiralty had no jurisdiction to enforce such a lien, citing People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393; Roach v. Chapman, 22 How. [63 U. S.] 129.

CADWALADER, District Judge. Whether there was a lien under the Pennsylvania statute is an immaterial question, because the demand is not for maritime supplies, and if it had been the place of supply would have been the home port of the vessel. The demand arose before she was equipped so as to be in a condition to receive "supplies" in the distinctive sense of that word. The libel is dismissed for want of jurisdiction, with costs.

GRIFFIN, Ex parte. See Case No. 4,650.

Case No. 5,812.

In re GRIFFIN.

[8 Ben. 388.] [1]

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

COSTS—COMPOSITION—EXAMINATION OF BANKRUPT.

A bankrupt is primarily liable for the costs of the register incurred in the examination of the bankrupt by contesting creditors, at a meeting of creditors held under an order of the court in relation to a composition proposed by him.

The register in this case certified to the court that by order of the court in this matter it was referred to the register to hold a meeting of creditors at his office, at which the bankrupt [James Griffin] should propose a composition to his creditors in settlement of his debts; that the meeting was held at which the bankrupt made his proposition and filed his statement of debts and assets and offered himself for examination, and was examined by the attorney for certain contesting creditors on different days; that the register had requested the bankrupt to pay the costs of such proceedings and the bankrupt objected to paying them and requested the register to certify the question to the court. The register added to his certificate his opinion, "that the costs so charged against the alleged bankrupt for services so rendered are primarily chargeable to and payable by the alleged bankrupt, the proceedings generally being had at his instance and request; and that the bankrupt should pay such costs, leaving the question to be decided in future as to whether the examination was justified by the circumstances of the case and the results attained."

BLATCHFORD, District Judge. I concur in the views of the register.

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

Case No. 5,813.

In re GRIFFIN.

[2 N. B. R. 254 (Quarto, 85); 2 Am. Law T. Rep. Bankr. 23; 1 Chi. Leg. News, 103.] [1]

District Court, S. D. Georgia. Nov. 7, 1868.

LEVY BY UNITED STATES MARSHAL—EXEMPTION OF PROPERTY OF BANKRUPT.

Property of the bankrupt, exempt, both by state and bankrupt law from levy and sale, cannot be sold after he has filed his petition in bankruptcy, although then levied on by a United States marshal.

By FRANK S. HESSELTINE, Register:

I, the undersigned, having been designated by the court as the register in bankruptcy before whom the proceedings in the above matter of the bankruptcy of Jesse H. Griffin are to be had, do hereby certify, that in the due course of such proceedings the following question, pertinent to the same, arose and was stated and agreed to by Richard K. Hines, Esq., attorney for J. Waxlebaum et al., purchasers at United States marshal's sale, J. John Beck, Esq., assignee of the estate of the bankrupt, and A. Wood, Esq., and C. B. Wooten, Esq., attorneys for the bankrupt.

Jesse H. Griffin filed his petition to be adjudged a bankrupt on the 3d day of March, 1868. On the 27th day of the same month he was adjudged a bankrupt. On the 10th day of February, 1868, the United States marshal, by virtue of a fieri facias in favor of certain creditors of the said bankrupt, levied upon one house and lot and a storehouse in the town of Morgan, Ga., and lot 150 of the Tenth district, Telfair county, Ga., all the real estate of the said Griffin, and on the 7th day of April sold the same at public outcry to J. Waxlebaum et al., executing a deed therefor. Question: Could the United States marshal sell the said real estate, and thus deprive the bankrupt of his right to a home-

[1] [Reprinted from 2 N. B. R. 254 (Quarto, 85), by permission. 1 Chi. Leg. News, 103, contains only a partial report.]

stead therein? And the said parties requested that the same should be certified to your honor for your opinion thereon.

By the bankrupt act [of 1867 (14 Stat. 517)], the bankrupt, on the filing of his petition for the benefit of its provisions, and complying with the requirements of the eleventh section thereof, is entitled to have exempted and set apart to him by the assignee, in addition to such as is exempted by the fourteenth section of the act, and that exempted by the laws of the United States, "such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy." By the Code of Georgia, there is exempted to the head of a family, from levy and sale, "fifty acres of land, and five additional acres for each of his or her children under the age of sixteen years. This land shall include the dwelling-house, if the value of such house and improvements does not exceed the sum of two hundred dollars;" or, in lieu of the above land, "real estate in a city, town, or village, not exceeding five hundred dollars in value," beside other property therein specified. The bankrupt, in compliance with the general orders and forms in bankruptcy, claimed, in his schedule under form "B 5," to have exempted to him, with other property, "a dwelling house and lot containing three acres, in the town of Morgan, Calhoun county, Ga., value five hundred dollars." It is my opinion that the act of filing his petition in bankruptcy, on the 3d day of March, A. D. 1868, entitled the bankrupt, provided he conformed to all his duties under the bankrupt act, to all the privileges and benefits thereof; that one of those benefits was the preserving to him all the property specified in the act as exempted to those who come under its provisions. Another was a discharge from all his debts. I therefore do not understand that after the bankrupt had applied for the benefit of the act, one of his creditors, who had been served with notice that a warrant in bankruptcy had been issued out of the district court of the United States for the Southern district of Georgia, against the estate of Jesse H. Griffin, adjudged a bankrupt upon his own petition, could continue to collect his debts out of the estate by selling, under fieri facias, the homestead secured to the bankrupt by the bankrupt act. The relief which he sought from this court against his creditors, and the preservation of a home for himself and family, is not to be defeated by any act of one of those creditors. He with good reason understood that in this court, by surrendering all his estate, his debts would be discharged, and he allowed from his estate a shelter for his family. His house and certain other property he could have saved by applying to the state court. It is impossible that having applied to this court in accordance with an act constitutionally passed by the general government for the full relief of insolvent debtors, that it is less powerful to save his home from the grasp of the creditor whose claim is being discharged by its action.

In brief, my opinion is that the homestead of a bankrupt cannot be sold after he has filed his petition in bankruptcy, although it may then be levied on by the United States marshal. In this case he served the notices of the issuing of the warrant in bankruptcy, and should have suspended proceedings on the fieri facias.

There is another very good reason why this sale should be set aside by your honor, which I deem it my duty to bring to your attention. For some cause, the whole of the real estate of the bankrupt, returned by him as worth fifteen hundred dollars, was sold for one hundred and twenty-five dollars—the homestead alone bringing fifty dollars. The generally known fact that Griffin was in the bankrupt court, and was entitled thereto to the exemptions allowed under the bankrupt act, together with the opinion generally entertained in the vicinity where the bankrupt dwells, that all other legal proceedings against a person are stayed by his filing his petition in bankruptcy, may have been the reason why this valuable property sold for so mere a trifle. The purchasers are before this court, having joined in asking that this question be certified to your honor, and I recommend that the sale be set aside, and the assignee directed to take charge of this property, and dispose of it in accordance with the requirements of the bankrupt act.

ERSKINE, District Judge. I have carefully considered the able opinion of Mr. Register HESSELTINE, in Re Jesse H. Griffin, a bankrupt, and affirm his decision.

GRIFFIN, In re. See Cases Nos. 5,810 and 5,815.

Case No. 5,814.

The GRIFFIN.

[4 Blatchf. 203.] [1]

Circuit Court, S. D. New York. Sept. 14, 1858. [2]

LIABILITY OF VESSEL FOR LOSS OF GOODS — NEGLIGENCE OF MASTER—COMMISSION TO TAKE TESTIMONY—EXECUTION OF.

1. Where goods shipped, under a bill of lading, from New York to Rio Janeiro, were not delivered to the consignee because, through the neglect of the master of the vessel, they were not entered on the manifest, or declared at the time of the delivery of the manifest to the custom-house officers, and were seized by the Brazilian government, and forfeited for such omission: *Held*,

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

[2] [Affirming Case No. 5,789. Decree of the circuit court affirmed in 22 How. (63 U. S.) 491.]

that the vessel was liable for the value of the goods to the consignee.

[Cited in Parkhurst v. Gloucester Mut. Fish. Inv. Co., 100 Mass. 305; Elwell v. Skiddy, 77 N. Y. 294.]

[See note at end of case.]

2. Where a commission for the examination of witnesses confers the power to execute it upon any one of several commissioners, it may be executed by one of them.

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

This was a libel in rem, filed in the district court, against the barque Griffin, to recover the value of 132 boxes of furniture, shipped on board that vessel at the port of New York, consigned to the libellants at Rio Janeiro. The ground of the claim was the non-delivery of the goods. It appeared that the vessel arrived at the port of destination with the goods on board; that they were discharged at the custom-house wharf, and were received into the custom-house, preparatory to inspection and the payment of duties; and that, while there, they were seized by the Brazilian government for an alleged violation of the revenue laws. Through the neglect of the master of the vessel, the 132 boxes were not entered upon the manifest, nor was any declaration made of them at the time of the delivery of that document to the custom-house officers. For that omission, the goods were forfeited to the Brazilian government, according to the regulations of the revenue department. After a decree for the libellants [Case No. 5,789], the claimant appealed to this court.

Daniel Lord and Henry G. De Forest, for libellants.

Edwin W. Stoughton, for claimant.

NELSON, Circuit Justice. It is insisted on the part of the claimant, that the goods in question had been delivered to the consignees, in pursuance of the bill of lading, previous to the seizure; and that, in order to invalidate such delivery, and sustain this suit, a judicial condemnation of the goods for the forfeiture was necessary. I need not, however, stop to examine this question. The gravamen of the libel is, the non-delivery of the goods to the consignees, and this view of the case must be established, in order to sustain a recovery.

I have looked into the proofs upon this question, and concur with the court below, that the goods were in the exclusive possession and custody of the revenue officers, after they were discharged from the ship, until they were seized by the government; and that they were not delivered to the consignees at the time of the discharge, or at any time subsequently. On the contrary, the consignees were deprived of the assertion of any right or title to them, in consequence of their seizure by the government.

Several objections have been taken to the depositions returned on the execution of a commission on behalf of the libellants. I have looked into them, and am of opinion that they are not well founded. The objection that the commission was executed by but one of the commissioners, is answered by the terms of the commission, which conferred the power upon any one of them. Several formal objections to the return are answered by the 113th rule of the district court. And, as to the use of copies of papers instead of originals, on the trial, this was authorized by the stipulation of the proctors.

Prima facie evidence was given of the value of the goods at Rio Janeiro, and such evidence does not seem to have been controverted.

The decree below must be affirmed.

[NOTE. The case having been appealed to the supreme court by the claimants, the decree of the circuit court was affirmed in an opinion by Mr. Justice Campbell (22 How. [63 U. S.] 491), who held that it was the duty of the master of the bark to acquaint himself with the laws of the country with which he was trading, and to conform his conduct to those laws. "It is the habit of every nation to construe and apply their revenue and navigation laws with exactness, and without much consideration for the hardship of individual cases." The contract of the owners of the vessel was to deliver the cargo safely, the perils of the sea only excepted. The only safe delivery contemplated by the contract was a transfer of the property into the possession of the consignees.]

Case No. 5,815.

GRIFFIN'S CASE.

[Chase, 364; 2 Am. Law T. Rep. U. S. Cts. 93; 8 Am. Law Reg. (N. S.) 358; 25 Tex. Supp. 623; 2 Balt. Law Trans. 433; 3 Am. Law Rev. 784.] [1]

Circuit Court, D. Virginia. May Term, 1869.

RECOGNITION OF STATE GOVERNMENT — FOURTEENTH AMENDMENT—VIRGINIA — GOVERNMENT OF, AFTER END OF CIVIL WAR—EX POST FACTO LAWS.

1. The government established at Wheeling, Virginia, soon after the secession of the state of Virginia, having been recognized by the executive and legislative departments of the national government as the lawful government of Virginia, this recognition is conclusive upon the judicial department.

2. This government was in contemplation of law, the government of the whole state of Virginia, though excluded as the government of the United States itself was, from the greater portion of the territory of the state.

3. A construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference.

4. The prohibitory provisions of the fourteenth amendment to the constitution of the United States, did not, instantly, on the day of its promulgation vacate all offices held by persons with-

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 2 Am. Law T. Rep. U. S. Cts. 93, 3 Am. Law Rev. 784, and 8 Am. Law Reg. (N. S.) 358, contain only partial reports.]

in the category of prohibition, and make all official acts performed by them since that day, null and void.

5. A person convicted by a jury, and sentenced in court by a judge de facto, acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.

[Cited in Sheehan's Case, 122 Mass. 449.]

6. G. a colored man is indicted and tried in the circuit court for Rockbridge county, Virginia, for shooting with intent to kill, convicted and sentenced to confinement in the penitentiary for two years. The court was presided over by a judge disqualified to hold office by the fourteenth amendment to the constitution of the United States, but he had been in office two years before the amendment was adopted. G. applied to the United States circuit court for Virginia, to be discharged on habeas corpus. *Held*, he can not be discharged.

[Cited in Re Osterhaus, Case No. 10,609.]

7. When the functionaries of the state government, existing in Virginia at the commencement of the late Civil War took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a government for the state of Virginia which could be recognized as such by the national government.

8. It is clear that if the government instituted at Wheeling, was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries, for the existence of the state of West Virginia depends on the consent of Virginia.

9. When the state government, recognized by the United States, was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state; as such it was entitled under the constitution to the same recognition and respect in national relations as the government of any other state.

10. The ratification of the fourteenth amendment to the constitution of the United States, was officially promulgated by secretary of state on July 28, 1868.

11. Persons in office by lawful appointment or election before the promulgation of this amendment, were not removed therefrom, by the direct and immediate effect of the prohibition to hold office contained in the third section.

12. Legislation by congress was necessary to give effect to the prohibition by providing for such removal.

13. The exercise of their several functions by these officers until removed in pursuance of such legislation is not unlawful.

14. Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.

15. The whole spirit of the federal constitution is against ex post facto laws, or bills of attainder in form of trials by jury, and denies to the legislature power to deprive any person of life, liberty, or property without due process of law.

16. A provision which at once without trial deprives a whole class of persons of offices held by them, for cause, however grave, is inconsistent with this spirit and general purpose, and therefore no such construction can be given the third clause of the fourteenth amendment.

17. In the judgment of some enlightened jurists, its legal effect was to remit all other punishment. Such was certainly its practical effect.

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

Caesar Griffin, a negro, was indicted in the county court of Rockbridge county, for an assault with intent to kill. He removed his case as under the law he had the right to do into the circuit court for that county, and was there tried by a jury which found him guilty and assessed his punishment at imprisonment for two years in the penitentiary. He was accordingly sentenced by the court to that imprisonment. While on his way thither, in the custody of the sheriff of Rockbridge county, he sent out this writ which was served on the sheriff. That officer produced the petitioner in the district court then in session in Richmond, and made return to the writ that he held him by virtue of the conviction and sentence of the circuit court for Rockbridge county, making the record of the trial and conviction there a a part of his return. This return the petitioner traversed, denying that there was any court or judge in Rockbridge county as pretended by said pretended record, and that the paper exhibited was any record as alleged. The state of Virginia appearing by the attorney-general, Mr. ——, Judge H. W. Sheffey, the judge of the circuit court for Rockbridge by Bradley T. Johnson, Esq., and the sheriff by James Neeson, Esq. they joined issue on this traverse. The petitioner then proved that Judge Sheffey had been a member of the house of delegates in 1849. That in 1862, he was speaker of the house of delegates, and that his votes were recorded for affording men, money and supplies to support Virginia and the Confederate States, in the war then flagrant with the United States. It was admitted that he was duly appointed on February 22, 1866, by the then government of Virginia, to be judge of the circuit including the county of Rockbridge; that he immediately entered on the duties of that office, and that he has ever since and still is discharging the functions of the same.

The cause was argued at great length in the district court, before the district judge in December, 1868, who ordered the discharge of the petitioner, whereupon an appeal was prayed by the sheriff under the habeas corpus act of 1867 [14 Stat. 385], to the circuit court, and the petitioner admitted to bail. Before the circuit court could meet other writs of habeas corpus were sued out by other parties convicted of felonies, two of them of murder, on the same ground as in this case, and the petitioners were discharged. A motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This

statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case. In consequence of the failure to oust the state officers disfranchised under the fourteenth amendment by these and similar judicial proceedings, congress in February, 1869, passed a joint resolution directing that all such officers should be removed by the military commanders of military districts into which the late Confederate States had been divided. Thus all the old officers of the state government of Virginia were removed except a very few, and new ones appointed not obnoxious to the denunciation of the federal bar—the supreme court of appeals of Virginia; the judges thereof having been removed by the major general commanding, he appointed as judges in their stead, a colonel of his staff, and two others, who had held or did then hold commissions in the United States army. The president judge of the court performed his functions and drew his pay as colonel and judge advocate on the staff, overlooking the execution of the laws of the military, and at the same time those of presiding judicial officer of the state.

Mr. Bundy, for petitioner.

The first question to be met in the argument of this case, is the question of the power of this court or of your honor as circuit judge, sitting at chambers, to interpose the arm of federal authority and grant us the relief which we ask: Whether, or not, this court would have a right, independent of any express grant of power in the statute, to interfere for the protection of citizens of the United States who were held in custody in violation of the constitution or laws of the United States, is a question which, happily for the patience of the court, we are relieved from considering at all by the act of February 5, 1867, under which this proceeding is brought, the important section of which is as follows: "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus, in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made, shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ, and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless said person be detained beyond the distance of twenty miles, and if beyond the distance of twenty miles and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution and laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, and thereby, the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony, and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court, to the supreme court of the United States, on such terms and under such regulations and orders as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings as may be prescribed by the supreme court, or in default of such, as the judge hearing said cause may prescribe, and pending such proceedings or appeal, and un-

til final judgment be rendered therein, and after final judgment of discharge in the same, any proceedings against such person so alleged to be restrained of his or her liberty in any state court, or by or under the authority of any state, for any matter or thing so heard and determined or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be null and void."

It will be observed that the statute is so framed as to exclude, so far as language is able, all doubt or cavil as to what is the legislative will. No restrictive or ambiguous words, no qualifying clauses, no circuity of language, are employed. The fullest and largest powers are conferred upon the several courts of the United States, and the several judges and justices thereof: and to leave nothing to doubt as to the powers granted being cumulative, and in enlargement of the powers heretofore vested therein, it reads, "in addition to the authority already conferred by law shall have power to grant, &c." The necessary effect of such general and inclusive language is to render inapplicable to this case much of the judicial authority which two centuries of adjudication and discussion have thrown upon the nature and use of this ancient and beneficent writ.

From 1627, when the first statute of personal liberty—that of Charles Second of England—was wrung from kingly prerogative, down through our own Revolutionary annals, and at intervals ever since, crises have occurred in our national affairs which have called for the enlargement of the powers of courts by means of this remedial writ of habeas corpus, and so necessary a part has it become of our judicature that it has not inappropriately been termed the "water of life to redeem from death of imprisonment." Although the constitution (article 1, § 9) declared "that the writ of habeas corpus shall not be suspended, except when in cases of rebellion or invasion the public safety may require it," yet without an act of congress to give it "life and activity" it would only exist as a bare right without the appropriate means and rules for its exercise: Hence the judiciary act of 1789, prescribed the jurisdiction of the federal courts and justices under this writ. The fourteenth section of this act provides—"That all the before mentioned courts of the United States (supreme court, circuit court, and district court), shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of inquiry into the causes of commitment, provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless when they are in custody under and by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." This statute was deemed sufficient for all the purposes of security to personal liberty, until the year 1833, when the hostile attitude assumed by South Carolina towards the general government, became the occasion for the passage of the act of March 2, 1833 [4 Stat. 634], which has especial reference to commitments by the courts and magistrates of the several states. It provides as follows: "That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, anything in any act of congress, to the contrary notwithstanding." Again, in 1842, the arrest and trial of Alexander McLeod by the state authorities of New York, upon the charge of burning the steamer Caroline in the Niagara river, and the apparent insufficiency of the statute to enable the general government to maintain good faith towards foreign nations, where the jurisdiction of a state had first attached, forced congress to pass the act of August 29, 1842 [5 Stat. 539], by which power was given justices of the supreme court and judges of the district courts of the United States to grant this writ, for the purpose of bringing before them all persons who are committed or confined, or in the "custody of" the authority of any state, on account of any alleged order or sanction of any foreign state, the validity or effect whereof depends upon the law of nations. During the late war, the powers of the federal courts were again still further enlarged by the act of March, 1863, to extend to a class of offenders who had fallen into military custody, and who, but for this act devised for their relief, might languish in prison without a trial.

Next in the order of legislation by congress is the act of February 5, 1867, under which this proceeding is brought, and this act, like its predecessors, is sui generis, and expressly framed for the emergency that called it forth. What was that emergency? And what the proper scope and purpose of this act? Blackstone lays down the rule for the interpretation of statutes in his Commentaries (volume 1, marg. pp. 50–60) as follows: "We must consider the cause that moved the legislature to enact the law. The fairest and most rational method of devising the will of the legislator is, by exploring his intentions at the time when the law was made by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effect and con-

sequences, or the spirit and reason of the law." The same rule is laid down by the United States supreme court in Ex parte Milligan, 4 Wall. [71 U. S.] 114. They say—"In interpreting a law the motives which must have operated with the legislature in passing it are proper to be considered." With this rule for our authority, let us glance at the condition of the country, at the date of the passage of this act (Feb. 5, 1867), and therefrom seek for the motives of congress in passing it.

At the surrender of the armed forces of the Rebellion, the officers and soldiers were paroled to go home, there to remain free from molestation as long as they continued faithful to the laws of the land. Beyond this nothing was settled by the surrender. Over all the territory comprised within the ten states lately in arms, civil governments and all political institutions were completely demolished. The then incumbents of state and municipal offices had sworn to support the constitution of the "Confederate States of America" against all enemies, and especially against the authority of the United States. The surrender of her armies left the legislative, executive, and judicial departments of each state, and of the central Confederate power, without the breath of life. Over the whole territory civil government was prostrate, and the inhabitants reduced to disorganized communities. Then followed two years of fruitless experiment with the "policy" of the president. No power able to speak the dead to life had raised its voice until congress passed the series of reconstruction acts over the presidential veto by the constitutional majority of two-thirds, and then, for the first time, the disjointed parts of the framework of southern society began to come together, and the revolted states were put in train for re-admission to all the rights and privileges in states of the Union. The grounds upon which congress based its action are clearly set out in the preamble to that act, and are as follows: "Whereas, no legal state governments or adequate protection for life or property now exists in the rebel states of Virginia, &c.; and, whereas, it is necessary that peace and good order should be enforced in said states until loyal and republican state governments can be legally established, Therefore, be it enacted, &c." That act first sweeps away the debris of the civil wreck that occupied the territory of the rebel states, and supplies its place by a military establishment with the fullest powers over life, liberty and property, only limited by the conditions, "that no cruel or unusual punishment can be inflicted," and no sentence of death can be carried into effect without the approval of the president. So complete is the substitution of the military for the civil power by the scope and tenor of this act, that without the special discretion given the district commander in the third section, to "allow local civil tribunals to take jurisdiction of, and to try offenders," it was foreseen that he would be deprived of a useful means, familiar to the people, for the prevention and punishment of crime. But this permission to the district commander to "allow the local tribunals," &c., in no degree relieves him from his official responsibility to the government for the faithful execution of the laws. These local tribunals act only by his permission, and their acts have no validity or effect except as he "allows" and approves them. This being the character of the tribunals known as "courts," within this state—little more than ministerial agents or agencies of the military commander—it is plain that many of the presumptions and maxims of the law that obtain in communities where the structure of civil society has remained undisturbed for many years, and where courts exist not by the orders of a military officer, but proprio vigore, do not here apply; for example, under the latter conditions of society, there is a presumption of law, that a "man acting in a public capacity is duly authorized so to do," and that "the records of a court of justice have been correctly made according to the rule 'res judicata pro veritate accipitur,'" that "the decision of courts of competent jurisdiction are well founded, and their judgments regular and legitimate," &c., yet these presumptions, resting upon the general principle that the continued existence and regularity of long-established institutions will be presumed until the contrary is shown, can have no proper force within the unreconstructed states. But no correct interpretation of this act is possible without taking into one view all the other acts constituting the series of reconstruction acts. The first in order of these is the civil rights bill, then the joint resolution of June 16th, 1866, submitting, for ratification, to the several states, the constitutional amendment known as the fourteenth article. Then follows the habeas corpus act, and lastly, the act of March 2, 1867 [14 Stat. 428], to "provide for the more efficient government of the rebel states," and the acts amendatory thereof. Of this series of reconstruction measures only two, the constitutional amendment, and the habeas corpus act, are permanent in their nature. The other two are mere scaffolding, to be removed when they have served their temporary purpose in building up the strong pillars of the constitutional amendment. Although a considerable period of time elapsed between the passage of the first and last of these laws, the congressional history of that period will show that they were under consideration by the national legislature at the same time, and each was passed in view to its mutual and combined operation with the others. In this relation, then, should they be interpreted by the courts.

The facts in this case, as set forth in the petition, are briefly these: Caesar P. Griffin was tried in September last upon a charge of felony, and thereof convicted by the circuit

court of Rockbridge county, Hon. Hugh W. Sheffey presiding as circuit judge. It is set out in the petition and fully proved upon the trial, that Hugh W. Sheffey falls within the class of persons who are expressly disqualified and forbidden by the fourteenth article of the amendments of the constitution from holding any office, civil or military, under the United States, or under any state. We claim, therefore, that being so disqualified to perform the functions of a judge, by constitutional prohibition, his acts as such judge are wholly null and void, and therefore, that the officer holding the petitioner in custody, having no valid authority in law for his detention, must be ordered by this court to discharge him. The return of the respondent merely sets out as his authority for holding the petitioner, the record of his trial, conviction and sentence: claiming for the court the authority of a de facto court, and for the record that it can not be disputed in any other court, whether state or national. The petitioner denies the truth of the return in toto, and reaffirms the allegations in his petition, thus putting squarely at issue both the legal validity and the authentication of the proceeding of the pretended court. The third section of the amendment provides that "No person shall . . hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but congress may by a vote of two-thirds of each house, remove such disabilities." In the interpretation of this section of the amendment, it is important to know the proper and generally accepted meaning of the word "hold"—as upon the signification of that word much of the force of the argument rests. Webster defines the word, to hold "to stop, to confine; to restrain from escape; to keep fast, to retain," and he remarks—"It rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined."

I respectfully submit to the court the following propositions as applicable to this case, and as well founded in law: I. That the fourteenth article of the amendment acts proprio vigore, and without the aid of additional legislation to carry it into effect. II. That it is binding upon all courts, both state and national, and that every United States judge is required by his oath of office to take cognizance thereof. III. That the holding of the office of circuit judge by Hugh W. Sheffey, after the proper announcement that this amendment had been ratified, was a daily usurpation of office in open defiance of the highest law of the land. IV. That Hugh W. Sheffey being so disqualified and prohibited from holding any office, he was not in law a judge, either de jure or de facto, and his acts as a pretended judge have no legal validity whatsoever, but are simply trespasses. V. That the act of February 5th, under which this proceeding is brought, authorizes this court to inquire into the authority by which the petitioner is deprived of his liberty, and to determine whether that authority is exercised in contravention of the constitution of the United States, and in such case to grant the prayer of the petitioner.

It is sufficient in support of the first proposition to cite the proclamation of the secretary of state, of the date of July 28, 1868, reciting among other things the joint resolution of the two houses of congress declaring the fourteenth article of the amendments duly ratified and adopted as a part of the constitution of the United States, and following with his own official declaration in these words: "And I do further certify, that the said amendment has become valid to all intents and purposes as a part of the constitution of the United States," and the formal recognition of the same fact by the judiciary in the person of the chief justice of the supreme court, in his charge to the grand jury at Wheeling, West Virginia, in August last. The second proposition is supported by the constitution itself (article 6, § 2), which declares—"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The truth of my third proposition necessarily follows from the two former.

The first serious difficulty is met in the support of the fourth proposition. We are met at the threshold of the inquiry with the objection that whatever may have been the personal disqualifications of Hugh W. Sheffey, his official acts are those of a de facto judge, and as such, they are shielded by the law from question in any other court, except upon writ of error or appeal. But this is to beg the whole question. Exactly what we are contending for, and have set up and proved in this case, is that Hugh W. Sheffey was not, on the day of the trial of the petitioner, a judge in any character, either de facto or de jure, being then expressly disqualified and prohibited from holding such office, and that his acts are purely trespasses. It will be observed that the objection is not that we do not go the right way about this inquiry, but that the petitioner can not make the inquiry at all. We will suppose that a subject of some foreign power had sat in Sheffey's place, and had been able by force or fraud to usurp the powers of a court for the time being, and had sentenced the petitioner to be hanged, and

this court had been called upon at the last hour to interfere by habeas corpus. Would it be a sufficient return to this writ to set out the record of his trial and conviction, attach thereto a seal, and under the protection of that seal, to claim for the court proceedings, whatever may have been their character, absolute immunity from investigation? and yet the objection must go so far as this or it is good for nothing; and this rule once adopted within the territory of Virginia, the habeas corpus act of 1867 becomes a dead letter, and there is absolutely no right of appeal to the federal courts in the very class of cases that this act was devised and intended to meet. Again, if this rule that we can not go behind a court record by this proceeding, is to prevail, what is to prevent Lynch law from overriding all legal authority: providing only, the "regulations" can obtain a court seal with which to cover the record of their violence? Suppose Judge Lynch were to open his court at some four corners within this state for the trial of a band of horse-thieves. The "jury" arraign the prisoners, hear the evidence, and condemn them to death; one of them has powerful friends who sue out a writ of habeas corpus in his behalf; he is brought before the United States circuit court, with the cause of his detention duly certified by the pretended officer, who sets out in his return that he holds the prisoner by virtue of a judgment and sentence of a "court" (meaning Judge Lynch's court), which has found him guilty of horse-stealing. Would this court be debarred from inquiry into the jurisdiction of such a judge, and from discharging the prisoner, merely because the mob have proceeded under the forms of law? and hence are a de facto court? And yet such a tribunal has as much claim to power as the circuit court for Rockbridge county. Both are illegal tribunals for want of judicial authority; and the judgments of both, however righteous in themselves, are absolutely void; for such a court has no more power to render a just than an unjust judgment, and no power at all to render either the one or the other, because both tribunals are forbidden by the supreme law of the land. No human being in this country can exercise any kind of public authority, which is not conferred by law, and under the United States it must be conferred by the special words of a written statute. While it is true that I have not been able to find any adjudicated case that could be followed as a precedent in the case now before the court, the sufficient reason for that is found in the fact that no historical parallel for the political and civil condition of this state is known to exist. For certain purposes Virginia is a conquered territory, while for certain other purposes she is held never to have severed her relations with the Federal government as a state. But whatever may be the present practical relations of the state to the general government, the allegiance of the people comprised within her limits, was never successfully withdrawn. In the language of Chief Justice Chase, in Shortbridge v. Macon [Case No. 12,812], an opinion delivered in Raleigh, North Carolina, in June, 1867, under the reconstruction act. "On no occasion, however, and by no act have the United States ever renounced their constitutional jurisdiction over the whole territory, or over all the citizens of the Republic, or conceded to citizens in arms against the country the character of alien enemies, or to their pretended government the character of a de facto government."

But independent of the habeas corpus act, there are many decisions of authority that stop but little short of the extent to which we contend this right of one court to inquire into the legal authority of another should be carried. The supreme court of the United States in Williamson v. Berry, 8 How. [49 U. S.] 540, says: "It is a well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has risen under the laws of nations, the practice in chancery, or the municipal laws of states." This court applied it as early as the year 1794, in the case of Glass v. The Betsey, 3 Dall. [3 U. S.] 7; again, in 1808, in the case of Rose v. Himely, 4 Cranch [8 U. S.] 241; afterwards, in 1828, in Elliott v. Piersol (in case of ejectment) 1 Pet. [26 U. S.] 328, 340. In the last case it is said—"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority its judgment and orders are nullities; they are not voidable, but simply void." See likewise, Wilcox v. Jackson, 13 Pet. [38 U. S.] 499; Schriver v. Lynn, 2 How. [43 U. S.] 59; Lessee of Hickey v. Stewart, 3 How. [44 U. S.] 750; also, Serg. Const. Law, 286; U. S. v. Almeida [Case No. 14,433]; and Mead v. Deputy Marshal [Id. 9,372]; case of Ex parte Pleasants [Id. 11,225]; also case of Ex parte Randolph [Id. 11,558]. This right to inquire into the validity of a judgment has been so repeatedly exercised by all the states, that I do not deem it necessary to cite more than two or three cases. In Massachusetts the question was made in 1814. Com. v. Harrison, 11 Mass. 63. On the trial of this case, counsel for the defense cited the opinion of Kent, C. J., in Ferguson's Case, 9 Johns. 239, that the state courts have no jurisdiction in cases of this kind. The court answered very briefly, but emphatically—"This court has au-

thority, and it will not shun the exercise of it, on proper occasions, to inquire into the circumstances under which any person brought before them by a writ of habeas corpus is confined or restrained of his liberty."

While upon this general subject, what defects will render judgment and process absolutely void, I will cite two leading cases, that of Brooks v. Adams, 11 Pick. 441, where it is held that jurisdiction may be shown to be defective in the organization of the court, and Slocum v. Simms, 5 Cranch [9 U. S.] 363, where it is held by Chief Justice Marshall that a judgment may be defective in respect to the qualification of the officer, where a magistrate was held incompetent to sit in the discharge of a debtor under the insolvent laws of Virginia, and the judgment of discharge rendered by magistrates, of which he was one, was declared to be wholly void: and this too when this decision was against personal liberty, and its effect the recommittal of the bankrupt to prison, where the law should receive a restrained construction. See, also, Hill v. Wait, 5 Vt. 124, and Bates v. Thompson, 2 D. Chip. 96, for the effect upon a judgment where the justice is related to one of the parties, and therefore disqualified by statute. But it is sometimes said that the judges in Virginia, holding their offices directly under the authority of the military district commander, they are not accountable to any civil tribunal. The answer we make to this, is, that we are not trying nor seeking to try Hugh W. Sheffey. We are merely trying the effect of this judgment, and that depends upon his legal authority to make it. If he had no such authority—if he usurped a jurisdiction which the law had forbidden him any longer to exercise, then his acts are absolutely void, and no military order from whatever source can make them valid; for says the supreme court in Ex parte Milligan, 4 Wall. [71 U. S.] 120, 121, "The constitution of the United States is a law for rulers and people equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." So that whatever may have been the right of the district commander to employ or "allow" courts of this character to try offenders before the ratification of the fourteenth article, he certainly had no such right or authority after the ratification of that article, because it then became a law to him as well as to the courts. The language of the third section of the fourteenth article is, that "no person shall hold any office, civil or military, under the United States or under any state." This language is in the alternative, and if the officer in question be found to belong to either the one or the other of these classes, then the constitutional prohibition applies, and the incumbent who falls into the disqualified class of persons, was on July 28, 1868, divested of his judicial powers and authority, and became that day, in the fullest sense of the word, functus officio. But it is sought to break the force of these deductions by the suggestion, that the constitution has no application nor force in the unreconstructed states. If so, when was it withdrawn by the general government, or when was it thrown off by Virginia? Did congress, by the act of March 2, 1867, design to withdraw the constitution from the states to which that act applies? It is not denied that such an act might have been done by the law-making power, but certainly it is not conceivable that it would be done by a mere implication, without express words of solemn enactment. And that it was not done, is sufficiently evidenced by the notorious fact that the highest court of the nation had under consideration at its last session, and still has, undecided, the question of the constitutionality of this very act. But it is an indignity offered to this court to assert that it is now sitting for a judicial district that is situated without the pale of the constitution, unless forsooth that pleasant fiction of the law of nations that clothes our ambassadors to foreign courts with an atmosphere of our own nationality can be applied to our federal judges, and they can be said to reside "near" the city of Richmond in the province of Virginia, as the former are said to reside "near" the court of St. James and St. Cloud. But the judge must then fetch and carry the constitution with him, for it is his own "vital breath," and his coming and going would indeed mark the summer and winter solstice of this dreary blank in the republic.

If, then, the constitution of the United States is in force within this state, and "is a law for rulers and people," the plain infraction of its provisions, by Hugh W. Sheffey, in trying and committing the petitioner, furnishes the occasion for which the remedy provided by congress in the habeas corpus act of February 5, 1867, may be rightfully invoked; for that act empowers judges and courts "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty, in violation of the constitution of the United States." The objections to this theory are variously stated, but they can mainly be resolved into two, one of which, at least, is founded in a misapprehension of the effect and nature of this remedy. It is said by those whose dependence upon the honor or profits of office, seems to have quickened their sensibilities to the dangers of any scrutiny into their qualifications, that we cannot attack the authority of a judge in such a collateral proceeding; that our proper remedy is by proceeding in the nature of a quo warranto, and they add, that this can only be carried on by the supreme authority of the state. This has already been answered by showing that the object had in view by us, is not to unseat Hugh W. Sheffey, and no judgment of this court can have that effect. The public discussion of this question will doubtless tend to call public attention to the effrontery of his pretension that he can continue to perform the functions of a judge in

daily defiance of the supreme law of the land. But the direct and avowed purpose sought by this petition, is the release of Caesar P. Griffin from unlawful imprisonment, and beyond this the court is neither asked nor expected to go.

The remaining objection to granting the prayer of the petitioner is found in the principle sought to be applied to this case, that the acts of a "judge de facto, if within the rightful jurisdiction of the office he exercises, are as valid and binding as the acts of an officer de jure." The term "de facto" from being applied to officers acting colore officii, and with apparent authority of law, has in this argument been used to describe every species of pretender to official character, however disqualified or prohibited he may be by law. This is certainly a great latitude of interpretation, and must have the effect to obscure or destroy the original and true meaning of the expression. According to the argument upon the other side it seems only necessary, in order to establish for any man the character of a de facto judge, to prove actual manual possession of the bench, and control of the seal, no matter how obtained. This argument, if carried out, would give full faith and credit to judicial acts of a deposed judge, done after conviction of impeachment, or judgment of ouster in a proceeding by quo warranto, and provided only the pretender were bold enough, he might perpetuate his official character. In the 1st volume of J. J. Marshall's (Ky.) Reports (pages 206, 207) may be found the case of Hildreth's Heirs v. McIntire's Devisee, where Judge Robertson discusses at length the proper limits to be given to the use of the term "de facto" in a state that is under a written constitution. The case arose upon an attempt of the legislature of Kentucky to supersede the court of appeals, and to provide a new court in its place. Under the new law four judges were duly appointed, and organized by the appointment of a clerk. An appeal was taken from Bourbon county to the court of appeals, and by them dismissed, because the record was not filed with F. P. Blair, who was acting as clerk to them. A certificate of dismissal signed by Blair, as clerk of the court of appeals, was presented to the clerk of the court of Bourbon, and though objected to by the counsel of the appellants, was received and entered upon the record of the court, and thereupon a habere facias was directed to issue to carry into effect the original decree, to reverse which the appeal had been granted. Says the court—"The only question presented for our decision is whether the court erred in obeying the mandate of Messrs. Barry, &c., certified by F. P. Blair, and a solution of this question depends on another, viz., whether Barry, &c., were judges of the court of appeals, and Blair its clerk. Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they have been regularly appointed under and according to the constitution. A de facto court of appeals cannot exist under a written constitution which ordains one superior court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. . . Where there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky, as a de facto court of appeals. There can be no such court whilst the constitution has life and power. There has been none such."

With him, L. H. Chandler, U. S. Dist. Atty.; H. H. Wells, Military Governor of Virginia.

Bradley T. Johnson, for Judge Sheffey.

The petitioner in this case was regularly indicted, tried, and convicted in the circuit court for Rockbridge county, of a felony under the laws of Virginia, and sentenced, according to the verdict of the jury which tried him, to imprisonment for two years in the penitentiary. While on his way thither, in the custody of the sheriff of that county, in obedience to the mandate of the court and the requirement of the law, the steps of that officer are arrested by the writ of habeas corpus issuing out of this court on the petition of the party. He applies to be discharged from custody, alleging that he is detained under color of a pretended judgment —pretended to have been entered by a pretended court, presided over by a pretended judge. He then charges that Hugh W. Sheffey, who acted as judge on his trial, which took place since the adoption of the constitutional amendment, was in law no judge at all, he having been disqualified from acting after the adoption of the constitutional amendment known as the fourteenth article; Judge Sheffey having taken the oath to support the constitution of the United States, and acted in a legislative office in the state of Virginia, and afterwards aided the Rebellion. To the writ, the sheriff makes return, producing the prisoner, that he holds him by virtue of a conviction for felony, and sentence thereon, of the circuit court for Rockbridge county, and that he was on his way to take him to the penitentiary when the writ was served. He exhibits the record of trial, conviction, and sentence of the Rockbridge court as part of his return. The petitioner files a reply or traverse to this return, denying that there is any court as alleged, or any judge as alleged, or that the paper produced and exhibited as a record is any record as alleged.

On this traverse the state joins issue. The petitioner then offered evidence: 1. To prove that Judge Sheffey was a member of the house of delegates of Virginia in 1849; and, 2. That in 1862, being speaker of the then house of delegates, he voted men, money, and supplies to support the state of Virginia and the Confederate States, in the war then wa-

ging with the United States. To this evidence the state objected; but the court admitted it, and the state excepted. The petitioner then read from the journals of the house of 1849 and 1862 to prove these facts, and also by a former clerk of the senate who had been clerk since 1853, that it was the custom for members of the senate to produce to the clerk a certificate from a justice of the peace or other proper officer that such member had duly taken all the oaths required by the constitution to be taken. No evidence was offered that Judge Sheffey, as member of the house of delegates, took the oath to support the constitution of the United States. It was then admitted that the Hugh W. Sheffey mentioned in the journals of 1849 and 1862 was the same Hugh W. Sheffey who sat on the trial of the petitioner; and further it was admitted, that Hugh W. Sheffey was on the 22d day of February, 1866, duly appointed by the then existing government of Virginia to be judge of the circuit including the county of Rockbridge; that he immediately entered on the duties of that office, and that he has ever since, and still is, discharging the functions of the same. These are the facts on which the petitioner asks his discharge.

The proposition on which he bases his claim is this: That Judge Sheffey has been rendered ineligible as judge by the adoption of the constitutional amendment, and therefore all his acts since that period are void; in other words, that the acts of an officer illegally in office being void, the consequences of those acts are also void. A proposition so monstrous in its results, so extraordinary in its application to all the affairs of men, which strikes at the very foundation of civil society, deserves strict examination and careful investigation, if it be law. If it be not law, it must be peremptorily thrust out of a court of justice, branded with all the ignominy of judicial denunciation. If the acts of officers disfranchised by the constitutional amendment are void, and of no effect, then judgments rendered, decrees made, deeds acknowledged and recorded, wills proved, notes protested—all fall with the ineligible officer. If these acts of theirs are void, all acts are void; although qualified themselves, they may have been sworn into, appointed, or elected to office by disqualified officers. The source being corrupt, the whole stream of consequences partakes of that corruption. Disqualification from bribery, dueling, nonresidence, age, citizenship, or alienage, all work the same result. If a judge is appointed by a legislature, some of whose members are disqualified from holding their seats, then his appointment, according to this argument, is void, and his acts are void. The legislature itself may all be eligible, but some members may have been elected by illegal votes. Therefore the acts of the legislature, being vitiated by the original taint of illegality, all the consequences flow from it. If a constitution be adopted by illegal votes, then all officers under it become mere intruders and pretenders to official functions. The existence of this very fourteenth article itself may be attacked in precisely the mode the judicial functions of Judge Sheffey are sought to be invalidated. One of the state legislatures at least, adopted it by the votes of members who were afterwards declared ineligible, and their seats vacated; and under this theory of law, the inquiry might be pursued, until it was found that it had never received the assent of a sufficient number of legal legislatures composed of legal members duly sworn in by legal officers, and elected by legal voters. The statement of such a proposition is its own sufficient refutation. If it be true, no legal act, no legal existence anywhere is secure. All may be attacked by showing that somewhere, at some time, some person disqualified by law from holding office contributed by some official act to it. That established, the whole falls.

I propose to show that no such proposition has been sanctioned in any court for centuries of any such principle of law, and that an unbroken current of authorities in this country, and in England, against it, is never rippled by a dissenting or even objecting opinion from any court, any judge, or any law-writer. The writ of habeas corpus is the writ of right, say the fathers of the law; but it is in no case a writ of error, and it never had been used to review the decisions of other tribunals. From the earliest times down to later days it has been universally held that where the party applying for it appeared on his own application to be committed by the judgment of a court of competent jurisdiction, the writ would be refused him, or that where such commitment appeared on the return to the writ, that such return was conclusive. This is the settled law of habeas corpus in England and here. Crosby's Case, 3 Wils. 188; Ex parte Kearney, 7 Wheat. [20 U. S.] 45; Ableman v. Booth, 21 How. [62 U. S.] 506. The only inquiry that could be made was: 1. Had the court jurisdiction over the subject and the subject-matter? and, 2. Did that jurisdiction legally attach Sir William Chancey's Case, 12 Reporter [Coke] 82; Goldswain's Case, 2 W. Bl. 1207; Gardener's Case, Cro. Eliz. 821; 2 Hawk. P. C. c. 15, § 78; People v. Cassels, 5 Hill, 164? And this was the law of the federal courts under the act of 1789 [1 Stat. 73], which authorized them to issue writs of habeas corpus, "agreeably to the principles and usages of law." In the course of time, however, collisions became inevitable between the concurrent state and federal jurisdictions.

Parties might be deprived of their liberty contrary to the laws of the United States. The slow process of writ of error from the state courts contemplated by the judiciary act was utterly ineffectual as a remedy for such wrong, and the writ of habeas corpus,

the return showing the party to be held by judgment of a court of competent jurisdiction, could afford no relief. Besides, in many states the record on writ of error would disclose nothing contrary to federal laws and federal right. A party might be indicted, tried, and convicted for robbery, and the record would only show that charge, no bill of exceptions being allowed in criminal cases at common law, or in states adhering to common law. The appeal, therefore, to the federal tribunal would be vain, while in truth and fact the robbery for which the party was convicted was collection of federal taxes. To meet such cases, the jurisdiction in habeas corpus was extended by the act of 1833, which provided, that whenever any officer of the United States was in custody, for any act done or omitted to be done by federal authority, then the federal court might on habeas corpus inquire into all the circumstances of his committal or conviction, and vindicate his federal rights. This act extended over all officers of the Federal government, the perfect and complete panoply of the federal jurisdiction, and secured them perfect protection for all acts done by them in the execution of their office. Though passed to force South Carolina, attempting to nullify, it was never practically operative until applied to cases arising under those state laws which actually did, by personal liberty acts, nullify the laws of congress and the constitution of the United States. And the federal judges, without exception, applied the law, and protected officers of the United States in the discharge of their duties. They released them when held by state authority in defiance of their federal rights. U. S. v. Morris [Case No. 15,811]; Ex parte Sifford [Id. 12,848]; Ex parte Jenkins [Id. 7,259]. After this, however, it was found that other cases might arise requiring federal intervention to protect other cases of violated right. McLeod committed a felony within the jurisdiction of the state of New York, and was tried for it by the state authorities. The government of Great Britain, whose officer he was, assumed the responsibility of his act, and under the law of nations, the agent should have been released, and the principal alone held responsible. New York, however, refused to release McLeod, and in consequence, the act of 1842 was passed, extending federal protection to all aliens held anywhere, by any authority, in violation of treaty rights, or those under the laws of nations. Treaty rights, created by federal authority, or international rights, recognized and guaranteed by federal authority. This law also was to intervene the federal authority to protect federal rights. The act itself is in the main a copy of the act of 1833, so far as those provisions go, which give the federal courts the right to inquire into the cause of commitment. By these two acts of congress, therefore, the aegis of the federal power was thrown around its officers and those aliens partaking of its hospitality. Those two classes alone were thus secured by this prompt and efficient remedy from any infringement of rights secured to them by the federal authority. They could not be obliged, when held to answer in a state court, to wait the slow process of trial there, appeal to the state supreme tribunal, and thence to the supreme federal court, with the certainty in many cases, as I have shown, of being unable to prove by the record in what manner their rights were injured. Whenever they were injured, habeas corpus afforded a remedy, simple and prompt. But no other person had such a right. A citizen of one state, going into another state, might there be molested in some mode contrary to his federal rights, and if his liberty was restrained, his only remedy was by process of appeal or writ of error. Prior to 1867, it was considered necessary to remedy this omission in the law. It was charged that many southern states, under the pretense of labor, police, and vagrant laws, were endeavoring to evade the force of the constitutional amendment abolishing slavery, and were shaping their policy so as to restore the substance of involuntary servitude, under the name of penalty for crimes. Therefore the act of 1867 [14 Stat. 385], was passed, extending the habeas corpus to all cases where any person was restrained of his liberty, contrary to the constitution, laws, or treaties of the United States. It is a copy of those provisions of the acts of 1833 and 1842, as to the right of the court to examine into the cause of detention, whether by judgment of a court or otherwise, and in effect strikes out the provisions limiting the application of the act of 1833 to officers of the United States, and of 1842 to aliens, and inserts, instead of those provisions, the words, "all persons restrained of their liberties, in contravention of the constitution, laws, or treaties of the United States." The federal protection before extended only to federal officers and federal guests, i. e., aliens, was now made to embrace all persons, citizen and alien, officers, and those who wanted to be officers, of the federal government; in fact, all mankind. "It brings within its scope," says Chase, C. J., "every possible case of privation of liberty, contrary to the laws, constitution, or treaties of the United States. It is impossible to widen the jurisdiction." Ex parte McCardle, 6 Wall. [73 U. S.] 326.

The writ of habeas corpus, therefore, when issued by a federal court, embraces every case where a person is alleged to be deprived of his liberty in contravention of the constitution, laws or treaties of the United States. And the court issuing the writ is authorized in every case to go behind every return, and to pass upon the facts in every case, and if it appear that the party applying is injured in his federal rights, then such court is authorized to protect him by discharging him, whether committed on a charge of, or on a conviction for, crime. Therefore, it only re-

mains to this court to inquire if this person, the petitioner, is deprived of his liberty, contrary to the constitution, the laws, or the treaties of the United States? Has he, by state authority, been injured in his federal rights? The first question that presents itself is, What are his federal rights? 1. Those secured by treaty or under the laws of nations do not apply in this case. 2. Those enuring to federal officers to be protected in their functions are not involved here. 3. The federal rights secured by the constitution to all persons are: (1) The right of every citizen of a state to be secured in those rights in every other state, which provision is universally construed to mean civil rights as distinguished from political rights. (2) The rights of trial by jury as secured by the reservations in the original amendments to the constitution. (3) The right to be secured against involuntary servitude, except as a punishment for crime. (4) The right to a republican form of government. In this proceeding, this court is to inquire if this petitioner has been injured in any of these federal rights? Has he been denied any of them? If, on a full investigation of all the facts, without regard to the form of the record, it is found that he is denied federal rights, then he is to be discharged; if not, he is to be remanded.

No question as to form of government, or to involuntary servitude, or to the rights of citizens of different states enjoying all the civil rights of citizens of this state, arises in this case, and therefore the first, third, and fourth sub-divisions of rights have no application. The only question to be considered is whether the petitioner has been denied his right to be tried by a jury? The universal judgment of all courts, federal and state, heretofore has been that this right is only to secure a trial by jury in federal courts. But for the sake of the argument, we concede that every person within the United States, has a right to the trial by jury, according to the course of the common law. This is the extreme proposition in favor of the petitioner, and although against the law, we concede it for the purpose of this argument. This court is therefore to inquire, whether the petitioner has been deprived of his right to a trial by jury, according to the course of the common law? Admitting that this is a federal right, we are limited to the inquiry as to whether it has been infringed in this case. It is charged that, although tried by jury, under a law denouncing a penalty against a felony, equally applicable to all persons, triable and punishable in the same way as to all persons, citizens, aliens or officers, without regard to color, state or condition, still, nevertheless, the judge being disfranchised by the constitution of the United States from sitting as judge, that the trial was no trial; was contrary to that constitution, and that thereby the petitioner was deprived of his federal rights, and denied a trial by jury which implies the presence of a legal judge. That Judge Sheffey, being constitutionally ineligible from the moment of the adoption of the constitutional amendment, became eo instanti dead as a judge, and by no possibility could be author of a legal trial of any person.

I shall first admit, for the purpose of this argument in this place, that Sheffey was, by the adoption of the constitutional amendment on July 28, 1868, rendered ineligible for his office, and from that moment became, in law, incapable of holding it. This being admitted, for the sake of the argument, and also it being admitted in the cause, that he was appointed judge in 1866, and has ever since, and is now discharging the functions of judge, I shall prove: 1. That he was judge de facto when the judgment against petitioner was entered. 2. That the act of a judge de facto has precisely the same legal effect as that of a judge de jure. If one is binding, the other is, and that there is legally no difference between the acts of a judge de facto and of one de jure, except when those of a judge de facto may enure to his own advantage.

First. Was he a judge de facto? There is no better definition of an officer de facto than that laid down by Lord Ellenborough in the case of King v. Corporation of Bedford Level, 6 East, 368: "An officer de facto," says he, "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." And it plainly appears that Judge Sheffey was, and is, such an officer. No matter whether he be denounced by the constitutional amendment or whether he be disqualified by law, or ineligible to his assumed office, he was, and is, a judge de facto, having the reputation of being the judge he assumes to be, and yet, according to the assumption, is not a good officer in point of law. This, I think, is conclusive. At the time of this judgment he was judge de facto.

Next I will prove that as to the acts of an officer de facto and an officer de jure, there is no legal difference except where the acts of an officer de facto inure to his own benefit. Wherever they do, wherever they are tainted with selfish considerations, they are invalid, but whenever they inure alone to the benefit of the public, they are as good and binding as if done by a judge, anointed by oil which ever was poured on the head of a legitimate monarch by an archbishop consecrated through a line of a hundred predecessors.

It is a fundamental maxim, not of the law, but of civilized society, that the acts of officers de facto are valid. Without it, there would be no security for life, or liberty, or property. It took form and shape in a statute in the time of Edward as to the rights of a king de facto, but its foundation was beyond that. Without the rights of de facto governments, who would recognize the Norman titles against the Saxon barons? Who

the varying rights of York and Lancaster, or Tudor and Plantagenet, of king and commonwealth, and king again, of Stuart and Orange, or Stuart and Brunswick? Where would you find your resting place in the history of civilization? In the Roman empire? In its Gothic conquerors? In the house of Charlemagne? In that of Hugh Capet? In the Bourbon or the Buonaparte? The kingdom, the republic, the empire, the kingdom, the republic, the empire again. In 1789, in 1783, in 1800, in 1815, in 1848, or in 1852? When, where, and how, would you base your rights de jure? Brandenburgh rises on the ruins of other houses, as Hapsburg before it, and will fall again, as Hapsburg has done. The history of the world is the history of kingdoms and empires, and civilizations de facto, becoming de jure, because they are de facto.

Whenever a power, or a government, or an officer are able to maintain themselves in power, it becomes necessary for the peace, the progress, the development of society, that such government, power, or officer should be recognized pro tempore as the legal power, and full effect and validity be given to acts under it. This is the rule of law as well as the rule of reason. Governments acknowledge it. After the war of 1812, the supreme court of the United States decided that the port of Castine having been captured by the British, and held during the war, the British domination was to be considered de facto and pro hac, released the citizens of Castine from their obligations de jure, as citizens of the United States. U. S. v. Rice, 4 Wheat. [17 U. S.] 253. Subsequently, in the war of the South American republics, the secretary of state of the United States held that a sale of guano islands made by a de facto government to citizens of the United States, conveyed a title which the United States were bound to recognize and protect. The doctrine that acts of de facto officers are as valid as if by officers de jure, is undenied and undeniable. It is affirmed in Blackstone, Kent, and every elementary author, and illustrated in Bacon, Comyns, Viner, and every abridgment of the common law. I spare the court the recital from such authorities, and content myself with producing the adjudications of the older English courts and the latest American ones on these questions. I have with some labor compiled the decisions in all the states up to the present time, and instead of presenting the court with a mere reference to cases, have gathered the sense of each particular adjudication, to illustrate the general meaning and signification of the doctrine.

The whole uninterrupted current of decisions is that the acts of an officer de facto are good, valid, and binding. They can not be questioned collaterally, nor in any way, except in a proceeding against the incumbent of the office, to oust him therefrom. Whenever a party holds office, having, as Lord Ellenborough says, "the reputation of being the officer he assumes to be, although not a good officer in point of law," then, in such cases, his acts have precisely the validity and force as if performed by an officer de jure. A person by color of election may be officer de facto, though indisputably ineligible. Knight v. Corporation of Wells, 1 Lutw. 508; 16 Vin. Abr. 114. Where there was a bishop of Ossory, and another was installed bishop de facto, judicial acts of latter held good. O'Brian v. Knivan, Cro. Jac. 552. Where a steward of a manor, appointed without authority of law, yet acting as steward, and being de facto steward, his grant of copyhold land held good by Lord Bacon: "Acts done by one who keeps court as steward without authority, if they come in by presentment from the jury, are good." Harris v. Jays, Cro. Eliz. 699. A commission to take testimony executed by judges after the demise of James I., when their terms expired, and they were not judges, but acting without authority, was held good. The judges certified that "no inconvenience could arise on such proceedings before notice of the king's demise; but, if otherwise, it would draw in question many trials by verdict of nisi prius, and trials and attainders upon jail delivery; whereupon divers have been arraigned and executed since the king's demise." Sir Randolph Crew's Case, Cro. Car. 97. Officers de facto of corporation bind the corporation. Ang. & A. Corp. 280; Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64. Whether sheriffs be de facto or de jure can not be questioned collaterally. Morse v. Calley, 5 N. H. 223. Acts of sheriffs de facto valid as respects third persons. Doty v. Gorham, 5 Pick. 487; Fowler v. Bebee, 9 Mass. 231; Com. v. Fowler, 10 Mass. 290; Buckman v. Ruggles, 15 Mass. 180. In action of ejectment the title of a constable who sold the land not to be questioned. Being de facto sufficient. Burke v. Elliott, 4 Ired. 355. In same action, title of register who registered the deed, not to be questioned. Gilliam v. Riddick, Id. 368. In action of trespass for seizing a hog by town commissioner. Acts of those holding de facto good. Commissioners of Trenton v. McDaniel, 7 Jones (N. C.) 107. In action against defendant for trespass, his acting as officer proves him officer de facto. Id. 375. Judicial act of an alderman de facto holding and exercising the office not under mere color of right, but possessing a commission on its face, constitutional and legal, can only be examined in a proceeding to which he is party, and in which he can be heard. Cornish v. Young, 1 Ashm. 153. Party relying on the record of a deed need not show that he who recorded it was an officer de jure—de facto is sufficient. Brush v. Cook, Brayt. 89. The acts of an officer de facto who comes into office by color of title are valid, as it concerns the public or third persons. McInstry v. Tanner, 9 Johns. 135. Where one acts under a colorable title

to an office, his title can only be examined before the supreme court, and that directly. McKim v. Somers, 1 Rawle, Pen. & W. 297. The acts of an officer de facto, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned; and neither the title of such an officer nor the validity of his acts as such can be indirectly called in question in a proceeding to which he is not a party. Plymouth v. Painter, 17 Conn. 586; Hoagland v. Culvert, 1 Spencer [20 N. J. Law] 387; Farmers' & Merchants' Bank v. Chester, 6 Humph. 458. An officer de facto holding colore officii is as well qualified to act while thus in office as if legally appointed and duly qualified. Smith v. State, 19 Conn. 493. The right of a person acting colore officii to the office in which he acts, can be tried only in a proceeding to which he is a party, directly presenting that question, and not in a collateral way, between third parties. Id. 499. A person acting as an officer under color of a commission is de facto such officer, until ejected by a proceeding having that object in view. His authority can not be questioned, in a collateral way, and his official acts, until ejected, are valid. Aulanier v. Governor, 1 Tex. 653. The regularity of the election or the qualifications of an officer can not be questioned collaterally. Bean v. Thompson, 19 N. H. 290. The general rule is that acts of officers de facto in which other parties or the public have an interest are valid. State v. Perkins, 4 Zab. [24 N. J. Law] 409. The acts of an officer de facto valid, and not to be questioned collaterally. State v. Brennan's Liquors, 25 Conn. 278. The official acts of an officer de facto can not be impeached collaterally. Stokes v. Kirkpatrick, 1 Metc. (Ky.) 138. The acts of officers de facto are valid when they concern the public or rights of third persons, who have an interest in the acts done. Venable v. Curd, 2 Head, 582; Patterson v. Miller, 2 Metc. (Ky.) 493; Gourley v. Hankins, 2 Cole (Iowa) 75. Acts of an officer de facto are valid when they concern the public or the rights of third persons, and can not be indirectly called into question in a suit to which said officer is not a party. It is only in a suit against him that his right can be questioned. Hooper v. Goodwin, 48 Me. 79. An officer who has entered on the discharge of the duties of his office is an officer de facto, and his eligibility can not be inquired into collaterally, though it may be by quo warranto. Satterlee v. San Francisco, 23 Cal. 314. The right to an office can not be determined by an action of replevin of its appurtenances. Desmond v. McCarthy, 17 Iowa, 525. A person elected as county judge for the full time may signify his refusal to qualify, and thereupon the office becomes vacant for that time, and an appointment may be made immediately, although, to prevent an interregnum, the old incumbent of the office is authorized to perform its functions until his successor has qualified. State v. Washburn, 17 Wis. 658; People v. Bangs, 24 Ill. 187. Acts of officers de facto valid. Scadding v. Lorant, 13 Q. B. 697; 66 E. C. L. 686. Where a judge was ousted from office on quo warranto, held that his acts while illegally in office were binding and valid. People v. Bangs, 24 Ill. 184. Where the law under which a judge was appointed was held to be unconstitutional, and, therefore, his appointment void. Acts done by such judge held valid and binding. Taylor v. Skrine, 2 Tread. Const. 696. When a judge was ousted on quo warranto and a party sentenced to penitentiary by him while illegally in office was discharged on habeas corpus after the judgment of ouster on quo warranto, the supreme court of Wisconsin reversed the decision of the lower court discharging the prisoner, and remanded him to the penitentiary, on the ground that the acts of the judge de facto were good as to all the world, although he was afterwards regularly pronounced not to be legally in office. State v. Bloom, 17 Wis. 521.

These authorities fully establish my proposition, that the acts of a de facto judge are as valid and binding as if done by a judge de jure, except where such acts are for his own benefit. And hence it follows that this petitioner has not in any way been injured or denied his rights under the federal constitution, so far as being tried by a legal judge is one of those rights. For his trial by a judge de facto has precisely the same legal effect as if by a judge de jure. But another view is equally conclusive: Whether the legal state government of Virginia was overthrown on April 17, 1861, at Richmond, or on April 9, 1865, at Appomattox, makes no difference for the purposes of this argument. If the former, then the occupation of the territory of Virginia was a mere re-occupation, a re-possession, a re-extension of federal laws over territory from which they had been temporarily excluded by belligerent forces. The laws of Virginia of course remained intact and in full force and vigor. On the other hand, if the legal government fell at Appomattox, then the possession of Virginia was conquest. On conquest, the conqueror is bound to administer the laws of the conquered country until he provides another code for them. This doctrine Lord Mansfield lays down in Campbell v. Hall, Cowp. 205, where he enters into a detailed statement of the conquests of Great Britain. And in Sir Thomas Picton's Case, 30 How. St. Tr. 225, the lord chief justice acted on it by allowing proof that the Spanish law in the conquered island of Granada allowed torture to be administered, and that, therefore, its application by the British military governor was justifiable and legal. The law of Virginia being, therefore, in force fully and perfectly, the section relating to de facto officers (Code, 101), exactly establishes the law by statute, as I have proved it by prin-

ciple and authority. That section, in effect, declares that all acts of officers de facto shall be as valid and have the same effect as if done by officers de jure, except where such acts might inure to the benefit of such officer de facto. By it, therefore, all questions as to the validity of the acts of Judge Sheffey, or any other officer denounced by the constitutional amendment, are set at rest. All acts of all such officers are acts of officers de facto, and therefore are good and valid acts.

I have argued the case so far on the hypothesis that Judge Sheffey was in fact and in law rendered ineligible to office on July 28, 1868, and has ever since held office in defiance of law; and I have shown that even if he be disqualified for every cause known to the constitution and laws of Virginia or of the United States, if he be an alien, has fought a duel, be a non-resident, over or under the legal age, and in addition to all of these disqualifications, all of which he unites in his own proper person, he is disfranchised by the constitutional amendment, still, all his acts are good, valid and binding, and can never be challenged or questioned by reason of his said numerous disqualifications. It is argued that the adoption of the constitutional amendment operates like a judgment of ouster on a quo warranto by a court of competent jurisdiction; and that, therefore, from the moment it goes into effect, no person disfranchised by it can hold office colore officii, or can be an officer de facto. This would be true if the individual to which it was to be applied were designated and named in the article itself. It would doubtless be competent for the sovereign power to convict and punish individuals by name, without trial; but then like an act of attainder it must name those individuals. Where a party is so specially attainted, the law operates at once on him like a judgment of an ordinary court. But until he is selected and condemned by name by due process of law, no judgment can have effect as against him. He must be personally condemned by an act of sovereignty like a constitutional amendment, or by a judgment of a court after trial and conviction. While, therefore, it may be true that a party condemned by a judge, ousted by name from office by a constitutional amendment, would be deprived of his liberty contrary to the constitution of the United States, it is clear that, until a judge is thus ousted by name, either by a sovereign act of attainder without trial, or by a conviction after trial, his holding office is still colore officii, and his acts those of a judge de facto. The constitutional amendment is a general act of attainder—a statute denouncing a general penalty for crime. The penalty applies to every person who is guilty; but his guilt can only be ascertained, the identity of the individual can only be made certain, the penalty applied to that particular individual, only by due process of law—i. e., trial, conviction and judgment. It might be competent for a constitutional amendment to declare that A. B. had been guilty of murder, and should be hung. In such case, the conviction of that individual would be final. But when it declares that all persons guilty of murder shall be hung, that penalty can only be applied to individuals according to law. Each person, before being hung, must be tried, convicted and adjudged that that particular penalty shall apply to him. The constitutional amendment only differs from a penal statute in this, that being ex post facto, it could only have become law by becoming part of the constitution. No other authority but the sovereign power could enact it. It is, therefore, an ex post facto law—legal only because part of the constitution. But its provisions are general, like every penal statute denouncing a general penalty, which general penalty can only be applied to each particular case by due course of law, trial, conviction and judgment. No officer, therefore, holding office, who is in fact ineligible under the constitutional amendment, can be affected by it until its provisions are applied to him according to law, nor can his holding be contrary to the constitution until such application is legally made. So it is clear that the constitutional amendment does not affect officers now in office. Future federal legislation may provide the mode of bringing it to operate on this class, but acting proprio vigore, it does not affect them. The deprivation of office is a punishment of the highest class. Taking that from a man which he has and enjoys, and is entitled to, and is in possession of, may be done as a punishment; but then it must be done according to law.

Garland's Case [4 Wall. (71 U. S.) 333] in the supreme court settled the law that test oaths were unconstitutional so far as they went to deprive him of his office of attorney, being ex post facto, and operating so as to make the party convict himself. This being the law, it must follow that a man enjoying the office of judge can not be deprived of it except by due process of law. No man, under the federal constitution, can be tried or convicted unless by a jury, and it is therefore clear that the only mode by which the fact that any person holding an office is within the constitutional amendment is by the verdict of a jury, on an indictment for aiding in rebellion. Aiding rebellion is a crime, and can only be proved for the purpose of punishing the party, by the oaths of two juries, by an indictment, a verdict, and a judgment. That is the only evidence that the law knows, or can know, of guilt or criminality. That a party held an office, and took an oath to support the constitution, may be proved by the best evidence that can be had; but that he aided the rebellion can only be proved by the record of his conviction —where he was confronted with the wit-

nesses against him, was heard by the jury in his defense, and enjoyed all those protections and rights which the laws secure to parties charged with crime. It is clear that the constitutional amendment can operate on no man holding office when it went into operation, until such party is duly convicted of aiding rebellion, and even then it will require some process by which he can be ousted. Whether this can be done by the imposition of a test oath or not, it is useless now to inquire. It is certain that no means of any kind are provided for putting the amendment into operation. But further than this, it seems that Judge Sheffey is not in fact disfranchised. When he was in the legislature in 1849, the Code of 1819 was in operation; and by it no oath was required of members of the legislature to support the constitution of the United States. There is no proof in this cause that he ever took such an oath, and I am almost certain that, in point of fact, he never did take it. At any rate, it can not be presumed that he did take it when such tremendous criminal consequences are sought to be deduced from the taking of it. Being in office, every presumption is in favor of his being eligible. The burden of proof lies in those who charge his disqualification; and they must prove it. No presumption of law will make up for this deficiency of proof.

I have demonstrated: 1. That the only inquiry that can be made on the return to this writ is, whether the petitioner has, in the state court, been deprived of any federal right. 2. That, admitting Judge Sheffey to be disqualified under the constitutional amendment, he was still acting as judge, colore officii, and was judge de facto, and that his presiding at the trial as judge in no way contravened any federal right of the petitioner. 3. That therefore the petitioner must be remanded. 4. That Judge Sheffey, in fact, is not disfranchised under the constitutional amendment according to the proof in this cause. 5. That the only proof which is admissible of his aiding the Rebellion is the record of his conviction in a court of competent jurisdiction. 6. That the constitutional amendment can not operate proprio vigore on persons holding office at the time of its adoption, but requires further action by congress to prescribe the mode by which it can be applied to such persons. These propositions are conclusive, and the party must be remanded. He must, however, be remanded to the custody of the sheriff of Rockbridge county for another reason. Admitting even that his conviction is illegal, and is no conviction, still it appears by the return that he is charged on the oaths of twelve men with a felony committed in Rockbridge county. In any event, therefore, he must be remanded.

With him, James Neeson; Thos. R. Bowden, Attorney General of Virginia.

CHASE, Circuit Justice. This is an appeal from an order of discharge from imprisonment made by the district judge acting as a judge of the circuit court, upon a writ of habeas corpus, allowed upon the petition of Caesar Griffin. The petition alleged unlawful restraint of the petitioner, in violation of the constitution of the United States, by the sheriff of Rockbridge county, Virginia, in virtue of a pretended judgment rendered in the circuit court of that county by Hugh W. Sheffey, present and presiding therein as judge, though disabled from holding any office whatever by the fourteenth amendment of the constitution of the United States. Upon this petition a writ of habeas corpus was allowed and served, and the body of the petitioner, with a return showing the cause of detention, was produced by the sheriff, in conformity with its command.

The general facts of the case, as shown to the district judge, may be briefly stated as follows:

The circuit court of Rockbridge county is a court of record of the state of Virginia, having civil and criminal jurisdiction. In this court, the petitioner, Caesar Griffin, indicted in the county court for shooting with intent to kill, was regularly tried, in pursuance of his own election; and, having been convicted, was sentenced according to the finding of the jury, to imprisonment for two years, and was in the custody of the sheriff to be conveyed to the penitentiary, in pursuance of this sentence.

Griffin is a colored man; but there was no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of color. It was not claimed that the grand jury, by which he was indicted, or the petit jury, by which he was tried, was not in all respects, lawful and competent. Nor was it alleged that Hugh W. Sheffey, the judge who presided at the trial, and pronounced the sentence, did not conduct the trial with fairness and uprightness.

One of the counsel for the petitioner, indeed, upon the hearing in this court, pronounced an eulogium upon his character, both as a man and as a magistrate, to deserve which might well be the honorable aspiration of any judge.

But it was alleged and was admitted that Judge Sheffey, in December, 1849, as a member of the Virginia house of delegates, took an oath to support the constitution of the United States, and also that he was a member of the legislature of Virginia in 1862, during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States; and it was claimed in behalf of the petitioner, that he thereby became, and was at the time of the trial of the petitioner, disqualified to hold any office, civil or military, under the United States, or under

any state, and it was specially insisted that the petitioner was entitled to his discharge upon the ground of the incapacity of Sheffey, under the fourteenth amendment, to act as judge and pass sentence of imprisonment. Upon this showing and argument, it was held by the district judge that the sentence of Caesar Griffin was absolutely null; that his imprisonment was in violation of the constitution of the United States, and an order for his discharge from custody was made accordingly.

The general question to be determined on the appeal from this order is whether or not the sentence of the circuit court of Rockbridge county must be regarded as a nullity because of the disability to hold any office under the state of Virginia, imposed by the fourteenth amendment, on the person, who, in fact, presided as judge in that court. It may be properly borne in mind that the disqualification did not exist at the time that Sheffey became judge. When the functionaries of the state government existing in Virginia at the commencement of the late Civil War took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia, which could be recognized as such by the national government. Their example of hostility to the Union, however, was not followed throughout the state. In many counties, the local authorities and majority of the people adhered to the national government; and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state. This government was recognized as the lawful government of Virginia by the executive and legislative departments of the national government; and this recognition was conclusive upon the judicial department. The government of the state thus recognized was in contemplation of law the government of the whole state of Virginia, though excluded, as the government of the United States was itself excluded, from the greater portion of the territory of the state. It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. To the formation of that state, the consent of its own legislature, and of the legislature of the state of Virginia, and of congress, was indispensable. If either had been wanting, no state, within the limits of the old, could have been constitutionally formed; and it is clear that if the government instituted at Wheeling was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries. It can not admit of question, then, that the government which consented to the formation of the state of West Virginia, remained in all national relations the government of Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force. Indeed, it is well known historically that the state and the government of Virginia, thus organized, was recognized by the national government. Senators and representatives from the state occupied seats in congress, and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state. As such it was entitled, under the constitution, to the same recognition and respect, in national relations, as the government of any other state.

It was under this government that Hugh W. Sheffey was, on February 22, 1866, duly appointed judge of the circuit court of Rockbridge county, and he was in the regular exercise of his functions as such when Griffin was tried and sentenced.

More than two years had elapsed after the date of his appointment, when the ratification of the fourteenth amendment, by the requisite number of states, was officially promulgated by the secretary of state, on July 28, 1868. That amendment, in its third section, ordains that "no person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

And it is admitted that the office held by Judge Sheffey, at the time of the trial of Griffin, was an office under the state of Virginia, and that he was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.

The question to be considered, therefore, is whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power.

One of the counsel for the petitioner suggested that the amendment must be construed with reference to the act of 1867, which extends the writ of habeas corpus to a large class of cases in which the previous legislation did not allow it to be issued. And it is proper to say a few words on this suggestion here.

The judiciary act of 1789 expressly denied the benefit of the writ of habeas corpus to prisoners not confined under or by color of

the authority of the United States. Under that act, no person confined under state authority could have the benefit of the writ. Afterwards, in 1833 and 1842, the writ was extended to certain cases specially described, of imprisonment under state process; and in 1867, by the act to which the counsel referred, the writ was still further extended "to all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States." And the learned counsel was doubtless correct in maintaining, that without the act of 1867, there would be no remedy by habeas corpus in the case of the petitioner, nor indeed in any case of imprisonment in violation of the constitution of the United States, except in the possible case of an imprisonment, not only within the provisions of this act, but also within the provisions of some one of the previous acts of 1789, 1833, and 1842.

But if, in saying that the amendment must be construed with reference to the act, the counsel meant to affirm that the existence of the act throws any light whatever upon the construction of the amendment, the court is unable to perceive the force of his observation. It is not pretended that imprisonment for shooting, with intent to kill, is unconstitutional, and it will hardly be affirmed that the act of 1867 throws any light whatever upon the question, whether such imprisonment, in any particular case, is unconstitutional. The case of unconstitutional imprisonment must be established by appropriate evidence. It can not be inferred from the existence of a remedy for such a case. And, surely, no construction, otherwise unwarranted, can be put upon the amendment more than upon any other provision of the constitution, to make a case of violation out of acts which otherwise must be regarded as not only constitutional, but right.

We come, then, to the question of construction. What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?

The proposition maintained in behalf of the petitioner, is, that this prohibition, instantly, on the day of its promulgation, vacated all offices held by persons within the category of prohibition, and made all official acts, performed by them, since that day, null and void.

One of the counsel sought to vindicate this construction of the amendment, upon the ground that the definitions of the verb "to hold," given by Webster in his Dictionary, are "to stop; to confine; to restrain from escape; to keep fast; to retain;" of which definitions, the author says that "to hold rarely or never signifies the first act of siezing or falling on, but the act of retaining a thing when seized on or confined."

The other counsel seemed to be embarrassed by the difficulties of this literal construction, and sought to establish a distinction between sentences in criminal cases, and judgments and decrees in civil cases. He admitted, indeed, that the latter might be valid when made by a court held by a judge within the prohibitive category of the amendment; but insisted that the sentences of the same court in criminal cases must be treated as nullities.

The ground of the distinction, if we correctly apprehend the argument, was found in the circumstance that the act of 1867 provided a summary redress to the latter class of cases; while in the former, no summary remedy could be had, and great inconvenience would arise from regarding decrees and judgments as utterly null and without effect.

But this ground of distinction seems to the court unsubstantial. It rests upon the fallacy already commented on. The amendment makes no such distinction as is supposed. It does not deal with cases, but with persons. The prohibition is general. No person in the prohibitive category can hold office. It applies to all persons, and to all officers under the United States, or any state. If upon a true construcuon, it operates as a removal of a judge, and avoids all sentences in criminal cases, pronounced by him after the promulgation of the amendment, it must be held to have the effect of removing all judges and officers, and annulling all their official acts after that date.

The literal construction, therefore, is the only one upon which the order of the learned district judge, discharging the prisoner, can be sustained; and was, indeed, as appears from his certificate, the construction upon which the order was made. He says expressly, "the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said Hugh W. Sheffey, to act (that is, as judge), and so to sentence the prisoner under the fourteenth amendment."

Was this a correct construction? In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument, it is true, can not prevail over plain words or clear reason. But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition.

The amendment applies to all the states of the Union, to all offices under the United States or under any state, and to all persons in the category of prohibition, and for all time present and future. The offenses, for which exclusion from office is denounced, are not merely engaging in insurrection or rebellion against the United States, but the

giving of aid or comfort to their enemies. They are offenses not only of civil but of foreign war.

Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country, and, nevertheless, held some office on July 28, 1868, or subsequently.

Is it a reasonable construction of the amendment which will make it annul every official act of such an officer? But, let another view be taken. It is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government, and it is not to be doubted that not a few among them, as members of congress, or officers of the United States, or as members of state legislatures, or as executive or judicial officers of a state, had before the war taken an oath to support the constitution of the United States. In their new homes, capacity, integrity, fitness, and acceptability, may very possibly have been more looked to than antecedents. Probably some of these persons have been elected to office in the states which have received them.

It is not unlikely that some of them held office on July 28, 1868. Must all their official acts be held to be null under the inexorable exigencies of the amendment? But the principal intent of the amendment was, doubtless, to provide for the exclusion from office, in the lately insurgent states, of all persons within the prohibitive description.

Now, it is well known that before the amendment was proposed by congress, governments acknowledging the constitutional supremacy of the national government had been organized in all these states. In some, these governments had been organized through the direct action of the people, encouraged and supported by the president, as in Tennessee, Louisiana, and Arkansas, and in some through similar action in pursuance of executive proclamations, as in North Carolina, Alabama, and several other states. In Virginia, such a state government had been organized as has been already stated, soon after the commencement of the war; and this government had been fully recognized by congress, as well as by the president.

This government, indeed, and all the others, except that of Tennessee, were declared by congress to be provisional only. But, in all these states all offices had been filled, before the ratification of the amendment, by citizens who, at the time of the ratification, were actively engaged in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the constitution, and had afterwards engaged in the late Rebellion; and most, if not all of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that by its operation their offices could be vacated without some action of congress.

If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers. No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity. It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states.

The argument from inconveniences, great as these, against the construction contended for, is certainly one of no light weight. But there is another principle which, in determining the construction of this amendment, is entitled to equal consideration with that which has just been stated and illustrated. It may be stated thus: Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.

And here it becomes proper to examine somewhat more particularly the character of the third section of the amendment. The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national government, in those states which had attempted to break up their constitutional relations with the Union, and to establish an independent Confederacy.

All citizens who had, during its earlier stages, engaged in or aided the war against the United States, which resulted inevitably from this attempt, had incurred the penalties of treason under the statute of 1790 [1 Stat. 112].

But, by the act of July 17, 1862 [12 Stat. 589], while the Civil War was flagrant, the death penalty for treason, committed by engaging in rebellion, was practically abolished. Afterwards, in December, 1863, full amnesty, on conditions which now certainly seem to be moderate, was offered by President Lincoln, in accordance with the same act of congress; and after organized resistance to the United States had ceased, amnesty was again offered in accordance with the same act by President Johnson, in May, 1865. In both these offers of amnesty extensive exceptions were made.

In June, 1866, little more than a year later, the fourteenth amendment was proposed; and was ratified in July, 1868. The only punitive section contained in it is the third, now under consideration. It is not improbable

that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office; but it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense.

It is true that in the judgment of some enlightened jurists, its legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the Rebellion. But this very effect shows distinctly its punitive character.

Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.

If there were no other grounds than these for seeking another interpretation of the amendment than that which we are asked to put upon it, we should feel ourselves bound to hold them sufficient. But there is another and sufficient ground, and it is this, that the construction demanded in behalf of the petitioner, is nugatory except for mischief.

In the language of one of the counsel, "the object had in view by us is not to unseat Hugh W. Sheffey, and no judgment of the court can effect that." Now the object of the amendment is to unseat every officer, whether judicial or executive, who holds civil or military office in contravention of the terms of the amendment. Surely a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found.

Is there, then, any other reasonable construction? In the judgment of the court there is another, not only reasonable, but very clearly warranted by the terms of the amendment, and recognized by the legislation of congress. The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress.

Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that "congress shall have power to enforce, by appropriate legislation, the provision of this article."

There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment. These are its words: "But congress may, by a vote of two-thirds of each house, remove such disability." Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

It results from the examination that persons in office by lawful appointment or election before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section; but that legislation by congress is necessary to give effect to the prohibition, by providing for such removal. And it results further that the exercise of their several functions by these officers, until removed in pursuance of such legislation, is not unlawful.

The views which have been just stated receive strong confirmation from the action of congress and of the executive department of the government. The decision of the district judge, now under revision, was made in December, 1868, and two months after-

wards, in February, 1869 [15 Stat. 344], congress adopted a joint resolution entitled "a resolution respecting the provisional governments of Virginia and Texas." In this resolution it was provided that persons, "holding office in the provisional governments of Virginia and Texas," but unable to take and subscribe the test oath prescribed by the act of July 2, 1862 [12 Stat. 502], except those relieved from disability, "be removed therefrom;" but a provision was added, suspending the operation of the resolution for thirty days from its passage.

The joint resolution was passed and received by the president on February 6, and not having been returned in ten days, became a law without his approval.

It can not be doubted that this joint resolution recognized persons unable to take the oath required, to which class belonged all persons within the description of the third section of the fourteenth amendment, as holding office in Virginia at the date of its passage, and provided for their removal from office.

It is not clear whether it was the intent of congress that this removal should be effected in Virginia by the force of the joint resolution itself, or by the commander of the first military district. It was understood by the executive or military authorities as directing the removal of the persons described, by military order. The resolution was published by command of the general of the army for the information of all concerned, March 22, 1869. It had been previously published by direction of the commander of the first military district, accompanied by an order, to take effect on March 18, 1869, removing the persons described from office. The date at which this order was to take effect, was afterwards changed to March 21.

It is plain enough from this statement that persons holding office in Virginia, and within the prohibition of the fourteenth amendment, were not regarded by congress, or by the military authority, in March, 1869, as having been already removed from office.

It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of congress, or to express any opinion concerning the validity of the joint resolution, or of the proceedings under it. The resolution and proceedings are referred to here only for the purpose of showing that the amendment had not been regarded by congress or the executive, so far as represented by the military authorities, as effecting an immediate removal of the officers described in the third section.

After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful. In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge de facto, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under sentence of a court held by such a judge.

Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the constitution ordaining that no person shall be a representative or senator, or president, or vice-president, unless having certain pre-prescribed qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The election or appointment itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually elected, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid.

But it is unnecessary to pursue the examination. The cases cited by counsel cover the whole ground, both of principle and authority. Taylor v. Skrine, 2 Tread. Const. 696; State v. Bloom, 17 Wis. 521; People v. Bangs, 24 Ill. 184. This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.

It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

Case No. 5,816.

GRIFFIN v. CLINTON LINE EXTENSION R. CO. et al.

[1 West. Law Month. 31.]

Circuit Court, N. D. Ohio. Nov., 1858.

CORPORATE EXISTENCE BY PRESCRIPTION IN OHIO — REQUISITES OF — SEAL — SUBSCRIPTIONS TO STOCK—CREDITOR'S BILL—ESTOPPEL.

1. In Ohio, no corporation has existence by prescription, nor otherwise than by virtue of an act of the legislature; and no corporation can be created or authorized by the legislature, except in pursuance of a general statute. Special acts of incorporation are prohibited by the constitution.

2. Nor, in that state, can there be a corporation de facto, merely, except when a corporation

de jure continues in the exercise of its functions, after a forfeiture or other extinguishment of its franchises.

3. The statute has made it essential to the creation of a railroad corporation, in Ohio that seals be annexed to the names of the corporators subscribed to the certificate which is required to be filed in the office of the secretary of state, for that purpose.

4. The certificate filed by "The Clinton Line Extension Railroad Co." is without seals; and is, therefore, a nullity; and the company is, consequently, a mere unincorporated association.

5. In this action the complainant filed a creditor's bill against the company, as a corporation, and against the other defendants, as debtors to the corporation, upon their subscription to its capital stock; alleging the recovery of a judgment by the complainant, in this court against the company, as a corporation, and the return of an execution issued thereon unsatisfied, and claiming to have the unpaid balance of the subscriptions applied to the payment of the complainant's judgment. The company allowed the bill to be taken pro confesso as against it, for want of answer. The other defendants answered, denying that the company was a corporation, and, consequently, denying any indebtedness to it upon their subscriptions. The plaintiff put in a general replication. Held—that if the subscriptions of the defendants who had answered, could, in any event, be considered as estopping them from denying that the company was a corporation, they could not have that effect, unless the facts constituting the estoppel were set forth by the complainant, either in his bill or his replication. But also held—

6. That the subscriptions could not constitute an estoppel: and were, at most, only prima facie evidence of the existence of the corporation, which the defendants who had answered, might rebut, under the issue of nul tiel record, raised by the pleadings; and that it was successfully rebutted by the fact of the want of seals annexed to the names of the associates subscribed to the certificate filed with the secretary of state.

7. An estoppel en pais arises only when the party against whom it is alleged, by his declarations, acts, or omissions, has misled the other party to a transaction to do that which will be turned to his prejudice by allowing the other party to disavow the legitimate consequences of his own acts.

8. It seems that the persons constituting "The Clinton Line Extension Railroad Company" are responsible as individuals, upon its contracts, and for its liabilities, as an unincorporated association.

[In equity. Bill by Oramel Griffin against the Clinton Line Extension Railroad Company and others.]

R. F. Paine, for complainant.

S. B. Prentiss, for defendants.

WILLSON, District Judge. This is a proceeding in chancery, in which a creditor's bill is filed against the Clinton Line Extension Railroad Company, (the judgment debtor,) and Delos Phelon, and others, who are alleged to be indebted to said company for unpaid subscriptions to its capital stock. The case was heard upon bill and the answers of Phelon and Warner, and replication, and upon exhibits and testimony.

By agreement of counsel at the argument, two questions, only, were submitted for our consideration. These are, 1st. Has the Clinton Line Extension Railroad Co. a legal existence as a corporation? And 2nd. If said company has no legal corporate existence, then, can the subscribers to its capital stock be made liable on their unpaid subscriptions, in this mode of proceeding? In order to comprehend the real issue, and the force and effect of the evidence, as well as the just application of the law of the case, it may be well to refer to the material allegations of the parties in their pleadings. The complainant, in his bill, alleges, that the Clinton Line Extension Railroad Co. is an existing corporation, created under and by virtue of the laws of the state of Ohio; that, at the November term, 1855, of this court, he recovered a judgment at law against said company for 2,122 75-100 dollars damages and cost of suit, which judgment remains in full force; that executions have been issued upon said judgment, directed to the marshal of this district, who duly returned the same, wholly unsatisfied, for the want of property of said company whereon to levy. It is further averred that the defendants, Phelon and Warner, were each subscribers to the capital stock of said company to the amount of $1,000; that by the terms of said subscriptions, that amount is due from each of them respectively, the greater proportion of which is still unpaid. The prayer of the bill is, that an account be taken of the balance due on said subscriptions, and the same be applied in satisfaction of the judgment.

To the bill, no answer, plea or demurrer has been interposed by the company. Phelon and Warner have filed answers setting forth in haec verba their contract, made in December, 1853, with the company, for taking a portion of its capital stock, which is as follows: "We, the subscribers, promise to pay to the treasurer of the Clinton Line Extension Railroad Company the several sums set against our names, for the number of shares, at fifty dollars per share, at such times, and in such instalments as the president and directors may, under their charter and by-laws, prescribe; provided always, that no collection shall be made of said stock except to defray expenses for preliminary surveys and engineering, until two hundred thousand dollars of the capital stock of said company shall have been subscribed in shares of fifty dollars each. The undersigned agree to take the amount of stock in the above road, provided said road is built inside of one hundred and fifty rods north of the centre of Huntington." And set opposite to such signatures of the respective defendants are the figures "20" and "$1,000." And the defendants, in their answers, insist that by so signing said paper, they did not become subscribers to the capital stock of said company, or stockholders in the same, nor did they assume or take upon themselves, nor was there imposed upon them, any legal or equitable obligation whatever; that said company was not at that time, or

at any time since, possessed of a legal existence as a corporation. They expressly deny the allegation in the complainant's bill, that the Clinton Line Extension Railroad Co. is an existing corporation, created under, and by virtue of, the laws of the state of Ohio; and say, that said company has never made out, acknowledged, procured to be certified and forwarded to the secretary of state, the certificate required by law, as preliminary and necessary to its existence as a corporation; but did make out a paper, purporting to be a certificate, which was not, in law or fact, a certificate, because it was not under the seals of those by whom it was signed, nor did it name the termini of said road: Wherefore they insist that said Clinton Line Extension Railroad Co. is not, and never was, a corporation, or had any legal existence as such, or any power, authority or capacity to construct any railroad, or receive subscriptions to the capital stock of any railroad, or to make any contract whatever. To the answers of these two defendants, the complainant has filed a general replication.

There is exhibited in evidence a copy of a certificate from the records of the state department, claimed to be one creating a corporation called the Clinton Line Extension Railroad Co., which reads as follows:—"Be it remembered, that we, Henry N. Day, Harvey Baldwin, Harvey C. Thompson, Edgar B. Ellsworth, and Van R. Humphrey, of Hudson, in the county of Summit, and state of Ohio, having associated ourselves together and become a body corporate with all the rights, privileges and powers conferred by and subject to all the restrictions of the act to provide for the creation and regulation of incorporated company's in this state, for the purpose of constructing a railroad; do hereby certify, that the railroad, whose construction is the object of this organization, shall be named, called and known by the name and style of the Clinton Line Extension Railroad Company. The said railroad shall commence in said town of Hudson, near the depot of the Cleveland & Pittsburgh, and Cleveland, Zanesville & Cincinnati Railroads, and at the terminus of the Clinton Line Railroad; and terminate in or near Lima, in Allen county, in said state of Ohio, at a point on the Cleveland and St. Louis Railroad; and pass through the counties of Allen, Hardin, Hancock, Wyandott, Crawford, Seneca, Richland, Huron, Lorain, Ashland, Medina and Summit, in said state of Ohio; and that the capital stock of said company shall consist of two millions of dollars." This paper bears date April 9th, 1853. It was signed by the five persons named in it, was acknowledged before a justice of the peace, certified by the clerk of common pleas, of Summit county, and duly forwarded to the secretary of state. But no seals were ever attached to the signatures of the corporators. And we are called upon in the first place to declare the effect of this omission in creating the corporation.

By the first section of the 13th article of the constitution of the state of Ohio, it is enjoined that "the general assembly shall pass no special act conferring corporate powers." But it is, nevertheless, declared, in section 2, of the same article, that "corporations may be formed under general laws." Under this last provision, the general assembly, did, on the first of May, 1852, pass "An act to provide for the creation and regulation of incorporated companies in the state of Ohio." Swan's St. 197. This law provides that any number of natural persons, not less than five, may become a body corporate, and, in associating to form a company for the purpose of constructing a railroad, they shall, under their hands and seals, make a certificate, which shall specify as follows: 1st. The name assumed by such company, and by which it shall be known. 2nd. The name of the place of the termini of said road, and the county or counties through which such road shall pass. 3rd. The amount of capital stock necessary to construct such road; and "such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the secretary of state, who shall record and carefully preserve the same in his office: and a copy thereof, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such company." And the act further declares, that when the foregoing provisions have been complied with, the persons named as corporators are authorized to carry into effect the objects named in said certificate.

In England, and in some of the older states of the Union, private corporations may exist by an implied assent of the power competent to create them. Corporations, however, whose existence is recognized by the common law and by prescription, are those only which have existed from time immemorial, and of which it is impossible to show the commencement by any particular charter or legislative enactment; the law presuming that such charter or act of the legislature, once existed, but that it has been lost by such accidents as length of time may produce. In Ohio no corporation exists by the mere implied assent of the state.—Under the old constitution the legislature was authorized to pass special acts conferring corporate powers. And when such special act was passed, the corporation was created. It then had a legal existence. Such charters were never granted upon a precedent condition. They might contain provisions, which were directory, in relation to organizations, or those in restriction, or those essential to the exercise of corporate powers and franchises, and these, by misuser or non-user, might work a forfeiture of the charter. But until

such forfeiture was pronounced by a court of competent jurisdiction, the corporation continued to exist and could remain in the enjoyment of its right as against all the world, except the sovereign state which created it. By the new and existing constitution, this right, in the legislature, to pass special acts, is prohibited; and its provision before referred to, that "corporations may be formed under general laws," is a clear implication that the framers of that instrument did not intend the creation of corporations, unless in conformity to these laws.

The act of 1852 does not, of itself, create railroad corporations. It simply declares the terms upon which they may be created. In other words, it prescribes conditions precedent to their existence. There is a broad distinction between that class of cases whose corporate powers are to rest upon the performance of a condition, and those where existing powers are to be divested upon a failure to perform a subsequeht condition. In the case of Fire Department v. Kip, 10 Wend. 268, the supreme court of New York declares, that, where a corporation is created by a statute which requires certain acts to be done, before it can be considered in esse, such acts must be shown to have been done, to establish the existence of the corporation; and this rule was held to have no application to a corporation, which is declared to be such, by its very act of incorporation, and which does not require any acts to be performed to give effect to its charter. By observing this distinction, the adjudged cases cited by opposing counsel, and which seems to be conflicting, may be reconciled upon principle. Applying these tests to the Clinton Line Extension Railroad Company, has it obtained a legal existence as a corporation? It will not be pretended that four natural persons, associating themselves together, and conforming to all the other requirements of the law of 1852, could thereby create a legal body corporate, for railroad purposes: and it is for the reason that the law requires a greater number to be associated to accomplish that object. If the law, as a prerequisite, requires five or more persons to be thus associated for this purpose, how can any other prerequisite of the statute be dispensed with, which is equally explicit? Should the seals of the corporators be declared immaterial, why not so declare the signing, or the acknowledging, or the certifying of the clerk of the court of common pleas? Certainly, if one of these statutory requirements is unnecessary, then all of them are unnecessary; and the complainant's theory of immaterial statutory requirements, if put to practical results, will lead to the legal paradox, of lawfully doing that which is by law prohibited. The mere attaching seals to signatures upon a certificate may seem to be a matter of trifling consideration; nevertheless, it is an imperative requirement of the general railroad law of the state; and for the court in this case to hold such an unsealed certificate valid and effectual for the purposes contemplated by the act, would be an assumption of those legislative functions, which belong exclusively to the general assembly of Ohio. The legal existence of this company as a corporation, does not arise as a collateral question. The issue of nul tiel corporation is directly tendered by the defendants in their answers. The complainant, accepts that issue by filing a general replication. In the Bank of Auburn v. Aikin, 18 Johns. 137, (a case very similar in principle to this,) the court says: "The plaintiffs ought to have replied specially, and shown how they were a corporation; for the act by which they were incorporated requires certain things to be done before the plaintiffs could become a corporation." Where, as in the case at bar, the issue of "corporation or no corporation," is made by the pleadings, the party holding the affirmative is always put to full proof. Ang. & A. Corp. §§ 631, 632.

We do not deem it necessary to consider the other alleged defect of the certificate in question, to-wit, the description of the western terminus of the road. It is sufficient to say, that on account of the want of seals to the signatures upon such certificate, the evidence fails to establish the allegation of the bill, that "the Clinton Line Extension Railroad Company is a corporation created under and by virtue of the laws of Ohio." But it is contended, that if this company is not a corporation de jure, it is, nevertheless, one de facto; and being such, the defendants, as subscribers to its capital stock, are precluded, by way of estoppel in pais, from denying their liability. The general policy of the law, in relation to this kind of estoppels, is, that admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them in all cases between him and the person whose conduct he has influenced. And this comprehends, is is said, not only all those declarations, but also that line of conduct, by which the party has induced others to act, or has acquired any advantage to himself. In such case the party is estopped, on grounds of public policy and good faith, from repudiating his own representations. But admissions, though in writing, not having been acted upon by another to his prejudice, are not conclusive against the party making them, but are left at large to be weighed with other evidence in the suit. It is, after all, a matter relating to the evidence, having application or not, according to the nature and exact issue of the parties in the particular case.

The question now is, whether the complainant, upon the issue made, should be permitted to produce proofs to show this company to be a corporation by virtue of its own acts, independent of a grant of power from the state. It is a fundamental maxim, both in courts of chancery and of law, that no proof

can be admitted of any matter not noticed in the pleadings. 1 Vern. 483; 11 Ves. 240; Langdon v. Goddard [Case No. 8,060]; 14 Johns. 501. This maxim has been adopted in order to obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention, to produce which, they had received no notice. Hence, proofs taken in a cause must be pertinent to the issue in that cause, secundum allegata. 2 Johns. Ch. 339.

The question made by the pleadings here, relates solely to the creation and existence of the Clinton Line Extension Railroad Company as a corporation under the laws of Ohio. That is the issue. No facts are alleged in the bill which constitute an estoppel, nor are any grounds stated, upon which the defendants should be precluded from denying the corporate existence of the company. Had the complainant relied upon any facts, which, if proved, would operate as an estoppel, suitable averments of those facts should have been made in the bill, or in the replication to the answers of the defendants. Such a state of the pleadings would have presented an issue, entirely different in its character from the one we are called upon to determine. At the hearing of the cause, the complainant, besides the certificate already referred to, produced in evidence, subject to exception, certain acts of the company, such as opening books for and receiving subscriptions to its capital stock—electing officers of the company—issuing bonds for money, and entering upon the construction of the road, &c.

By the rules of law governing the case, this proof of the acts of the company was clearly admissible, as it had no tendency to establish any of the allegations contained in the bill; and it ought, therefore, to be rejected as impertinent to the issue. But, suppose a different ruling should obtain, and this class of proof be admitted, to show the existence of a corporation de facto, as contradistinguished from a corporation de jure; how, under the constitution and laws of Ohio, can it avail the complainant? Can there, in fact, be a corporation in Ohio which was never legally created? If so, what is the measure of its rights, and what the extent of its powers? There being no constitutional or legislative authority under which it exists, there can be no legislative measure of its powers, rights and duties, or any restriction and limitation of its existence in perpetuity. If the mere associating of natural persons and their acting and claiming to act as a body politic and corporate makes them such, then corporations may be created otherwise than by the supreme legislative authority of the state, and such self-created corporations must, by parity of reasoning, and necessity, not only fix and determine their rights, powers and authority, and their relation to others, but also the extent of those rights and powers, and of that authority when brought in conflict with the power and authority of the state. To say that there can exist a self-creating power, equal to that conferred by the constitution upon the legislature, is in effect to declare the constitution a nullity, and the general assembly, as a co-ordinate branch of the government effete, and powerless in legislation.

It is clear, then, that a corporation cannot exist for any purpose, in Ohio, unless it has been created under and by virtue of the laws of the state. It is, nevertheless, contended by counsel that the defendants are not in a position, where they can deny the existence of this corporation, they having contracted with it as such. In other words, it is claimed, that whoever contracts with a pretended corporation is, by force of his contract, estopped from denying its existence; and a great number of authorities are cited in support of this proposition. The general rule to be deduced from the authorities, is, that a corporation, in a suit brought by it, must prove its corporate existence by the production of its charter; but if the action is upon a note or other written contract, the production of the note or contract dispenses with the proof of its charter, as the defendant's admission in such paper affords prima facie evidence of the corporate existence of the plaintiff; and this proof is sufficient in the action, until rebutted by proof from the defendant. Or, as the rule is more concisely stated by Ang. & A. Corp. p. 694: "Where a cognizance, mortgage, note or other instrument of writing is given, to a corporation, as such the party giving it is thereby estopped from denying the existence of the corporation; and no further proof is necessary until such proof is rebutted." But where the issue of "corporation or no corporation" has been directly made by the pleadings, no case can be found denying the right to make the inquiry touching the lawful creation of the corporation. The cases cited are those in which corporations had an original legal existence, but in consequence of a failure to comply with some of the requirements of their charters, their rights had been forfeited. In such cases, and where they continued in the exercise of their chartered powers after forfeiture incurred, the courts have called them, in legal parlance, "corporations de facto." Their rights in strict law having been forfeited, nevertheless, remain without interference from the courts, unless on the complaint and at the instance of the state, in a proceeding to divest them of their corporate powers and franchises. Further than this, the doctrine of estoppels, as applied to corporations, has never been carried by the courts in any well considered case. As thus understood in its application it is a rule founded in reason and common sense. Nor can its operation work injustice to a creditor of any pretended corporation.

A corporation at best is but a mere crea-

tion of the law, and derives all its powers and capacities from the law of its creation, and being thus created, it must, in all cases where it attempts to act, show that by its charter of creation it has powers so to act. If this company never existed as a corporation, it certainly had no power to contract, as such, either with subscribers to its stock or with any other persons for any purpose. The members thus associated, had neither the rights, the powers or the immunities of a corporation. In contracting debts with third persons under the name of the "Clinton Line Extension Railroad Company," they assumed the responsibilities and were subject to the liabilities of a private association, having a community of interest. And holding that relation to the public, the rights and remedies of a creditor of the company are as well defined as those governing other private persons associated and acting together for common and mutual benefits. From a careful consideration of the case, we are constrained to hold in the negative upon both propositions submitted, to wit, that the Clinton Line Extension Railroad Company is not a corporation; and that the subscribers to its stock can not be made answerable upon their subscriptions in this mode of proceeding. The bill is accordingly dismissed.

GRIFFIN, The (GREENWAY v.). See Case No. 5,789.

Case No. 5,817.

GRIFFIN v. JEFFERS.

[5 Cranch, C. C. 444.] [1]

Circuit Court, District of Columbia. March Term, 1838.

ASSUMPSIT—ACCOUNT—EVIDENCE.

If the defendant reads a part of the plaintiff's account, filed with the declaration, in evidence to the jury, he thereby makes the whole account evidence for the plaintiff.

Indebitatus assumpsit, "for sundry matter and articles properly chargeable in account, as by a particular account thereof herewith into court exhibited appears," amounting to $97.93.

Upon the trial, at March term, 1836, Mr. Z. C. Lee, for defendant [Matthias Jeffers], in order to prove certain dates, read in evidence to the jury a part of the plaintiff's account, which had been filed with the declaration.

Mr. Coxe, for plaintiff [Peter Griffin], contended, and prayed the court to instruct the jury, that the defendant's counsel, by reading a part of the account to the jury as evidence, had made the whole account evidence for the plaintiff.

THE COURT (THRUSTON, Circuit Judge, absent) gave the instruction as prayed. Verdict for the plaintiff, $97.93.

Mr. Lee moved for a new trial on the ground of misdirection of the jury, and cited the case of Gracy v. Bailee, 16 Serg. & R. 126, abridged in 1 Wheeler, Abr. 170.

But THE COURT overruled the motion. Judgment for plaintiff.

See Harrison v. Rowan [Case No. 6,141]; Blight v. Ashley [Id. 1,541]; Bell v. Davis [Id. 1,249], in this court, at December term, 1826; Coote v. Bank of U. S. [Id. 3,203], in this court, at the same term; and Smith v. Coleman [Id. 13,029], in this court, at Washington, April term, 1821.

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

Case No. 5,817a.

GRIFFIN v. NOKES.

[Hempst. 72.] [1]

Superior Court, Territory Arkansas. April, 1829.

DUEBILL—ASSIGNMENT OF—POWER OF AGENT.

A duebill payable to order or bearer, is assignable, and may be assigned by an agent.

Appeal from the Crawford circuit court.

[This was an action at law by Thomas Griffin against Jesse Nokes.]

Before JOHNSON and ESKRIDGE, JJ.

JOHNSON, J. The first question is, whether a duebill not payable to order or bearer is assignable. We have no doubt that a duebill is embraced by the words of the statute, "bonds, bills, and promissory notes." Geyer, Dig. 66. The second question is, whether a duebill can be assigned by an agent. Of this we have no doubt, and consider it too clear to require reasoning.[2] Kyd, Bills, 33; Chit. Bills, 198; Poth. Obl. 74, 448. Judgment affirmed.

Case No. 5,818.

GRIFFIN et al. v. WOODWARD.

[4 Cranch, C. C. 709.] [3]

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

DISTRESS FOR RENT—PROMISSORY NOTE GIVEN IN PAYMENT.

A negotiable note given by the tenant to his landlord, which, when paid, was to be received "on account of rent," is no bar to a distress for the whole rent due before the note became payable, although discounted for the landlord and the proceeds received by him upon his indorsement of the note to a bank.

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

[2] Story, Bills, 76; Bayley, Bills, 69–74. But this must be done in the name of the principal; otherwise the agent will be held personally liable. To bind the principal and exonerate himself, he should regularly sign thus: "A. B. (principal) by C. D., his agent" or "attorney," as the case may be, or what is less exact, but would suffice, "C. D. for A. B." Story, Bills, 76, 77; Story, Ag. 153. In commercial and maritime contracts to promote public policy and encourage trade, if it can on the whole instrument be collected that the object is to bind the principal, and not the agent, courts of justice will adopt that construction of it, however loosely or informally expressed. Story, Ag. 154.

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

Replevin. Cognizance [by defendant, T. Woodward], as bailiff of William Cooper, for rent-arrear. Plea, no rent-arrear, and issue. Upon the trial the plaintiffs [Griffin and Tilley], having offered evidence that they had given their note to the landlord at sixty days, payable on the 16th of December, 1834, which when paid was to be "on account of rent;" and that the note was discounted at the Bank of the United States to the credit of the landlord, and that the distress was made on the 10th of December, 1834, before the note had become payable; the sum of $266 of rent having become due on the 20th of November, 1834; and that, when the defendant came to levy the distress, one of the plaintiffs offered to pay the balance of rent, after deducting the amount of the note; but the defendant refused to receive it, on the ground that he had no authority from the landlord therefor. The defendant then offered evidence to prove that the rent for which the note was given was due at the time the note was given; that the note was regularly protested by the bank, and was afterwards taken up at the bank by the landlord, and which he produced in his possession; and that it had never been paid by the plaintiffs.

Whereupon, THE COURT (THRUSTON, Circuit Judge, absent), at the prayer of the defendant, instructed the jury that his taking of the promissory note as aforesaid, and the said offer to pay the said balance as aforesaid, were no bar to his remedy by distress; because the note, by the terms of the receipt, until paid, was no payment of the rent.

Mr. Brent, for plaintiffs, in argument to show that the remedy by distress was suspended until the note became payable, cited Harris v. Johnstone, 3 Cranch [7 U. S.] 311; Kearslake v. Morgan, 5 Term R. 517; Thacher v. Dinsmore [5 Mass. 299]; 2 Wheel. Abr. 316; De Symons v. Minchwich, 1 Esp. 430; Hogan v. Shee, 2 Esp. 523; Willson v. Foree, 6 Johns. 110.

Mr. Bradley, for defendant, cited Skerry v. Preston, 2 Chit. 245; Brown v. Gilman, 4 Wheat. [17 U. S.] 256; Chipman v. Martin, 13 Johns. 240; Drake v. Mitchell, 3 East, 251; Bull. N. P. 182; Com. Landl. & Ten. 405.

Verdict for defendant. Motion for new trial overruled.

Case No. 5,819.

GRIFFING v. GIBB et al.

[1 McAll. 212.] [1]

Circuit Court, N. D. California. Aug. Term, 1857.[2]

LEGISLATIVE GRANT—EMINENT DOMAIN—NAVIGABLE WATERS—NUISANCE—POWER OF UNITED STATES COURTS.

1. A legislative grant is equivalent to a patent; and one made to a class of persons is as valid as one made to an individual.

2. The sovereign or supreme legislative power may confirm an act originally void; an individual cannot.

3. Grants from the sovereign to individuals are to be strictly construed. Such rule is applied stringently to a grant made to individuals for franchises. Such application should not be made to a purchaser under a legislative grant. It should be interpreted according to the ordinary meaning of its language.

4. This court cannot declare an act of the state legislature void because it conflicts with the fifth amendment of the constitution of the United States.

5. The state law must conflict with some provision of the constitution, impair the obligation of a contract, be an ex post facto law, or come in collision with some act of congress passed in pursuance of the constitution of the United States.

[See Bennett v. Boggs, Case No. 1,319; Albee v. May, Id. 134.]

6. A nuisance existing under a local law, if it amounts not to a national one, will not be enjoined by this court.

7. A settled construction fixed by the highest judicial tribunal in a state upon one of its statutes, will control the decision of this court, where there is no conflict between it and the constitution of the United States.

8. Each state in the Union has a right to the soil under navigable water within her territorial limits. This right is subservient only to the surrender she has made to the general government, in the constitution, of the right to regulate commerce with foreign nations, and among the several states.

This bill was filed to obtain an injunction. The facts will be gathered from the allegations of the bill and the statements in the affidavits which have been filed. The former alleges, that complainant is the owner of certain lots in the city of San Francisco, described in the bill; that he is in the exclusive possession of the same, and has erected improvements thereon to the amount of $200,000; that said lots originally fronted on and formed a part of the natural shores of the bay of San Francisco, with a deep acclivity in the rear and a bold water-front where the tide regularly ebbed and flowed and still flows, and where ships of the largest class, sailing to and from the ocean, might approach in safety and receive and discharge cargo; that in 1850 complainant commenced improvements by excavating the hill for his present warehouses; at the same time preparing a suitable wharf in front for receiving and discharging cargoes of ships; that he purchased said property with the view of acquiring the uninterrupted use and enjoyment of said water-front, which is navigable for the largest vessels; that since the erection of his warehouses on said property in 1851, he has been in the enjoyment of said water-front and receiving thereat, in navigable tide-waters, cargoes from the largest vessels; that when he commenced his improvements there was no sign or appearance of either Battery or Filbert streets at or near the premises, but the lines of said streets were only definable on some of the maps of the city of San Francisco; that defendants are engaged

[1] [Reported by Cutler McAllister, Esq.]

[2] [For proceedings in the supreme court, see note at end of case.]

in driving piles in the ground under the navigable waters of the bay of San Francisco in front of plaintiff's premises, and declare their determination to construct a wharf covering one hundred varas square, forming the northeast corner of Filbert and Battery streets, as the same are defined on the maps of the city of San Francisco,—being a lot of land 275 feet square covered by the navigable waters aforesaid, where at low tide vessels of the largest class are in the habit of passing and repassing, sailing to and from the ocean in pursuit of commerce, and especially to approach the wharves in front of the property of the complainant; that such acts of filling and wharfing by defendants are wrongful and unlawful, and contrary to the constitution and laws of the United States; that if continued and completed, as projected by defendants, they will entirely obstruct and cut off complainant from the use of the present water-front, and cut off the access of vessels to it; that the effect of piling by the defendants will be to check the current at that point, and fill up that part of the bay above and below complainant's premises with sediment, so as to render the same unnavigable; that the works of defendants will, if permitted to be continued, greatly obstruct the navigation of that part of the bay, and will especially do irreparable injury to complainant. The bill concludes with a prayer for an injunction, damages, and general relief. A motion is made upon this bill for an injunction. This has been met by numerous affidavits. It is denied that the lots claimed by complainant originally fronted on, and formed part of the natural shore of the bay; and it is distinctly averred, that complainant himself has built upon a considerable extent of the water-front beyond low-water mark.

The defendants set forth that complainant purchased two of the lots, numbers 1846 and 1847, on the 8th of March, 1851; that the act of the legislature of the state of California, commonly known as the "Beach and Water Lot Bill," was passed on the 26th March, 1851, and that previous to its passing complainant had made no considerable improvements on said lots; that in front of these lots, numbered as above, are premises owned by one John Crowell, and that on a portion of the same and in front of said lots 1846 and 1847, viz., between the easterly line of Battery and the westerly line of Front street, there now exists and has existed for the last four years a wharf of some 275 feet in length, from east to west, running to or near the westerly line of Front street, known as "Crowell's Wharf;" that in relation to two of the four fifty-vara lots that lie north of Filbert street, they were purchased by complainant on the 29th March, 1851, and that no improvements of any kind were made on the same until the passing of the said beach and water lot bill; that at the time the complainant made his first purchase, on the 8th day of March, 1851, it was notoriously known that the only title which could be acquired to beach and water property in this city was by a grant from this state, and that at the time of the said purchase, the contemplated provisions and intent of the act which passed on the 26th March, 1851, were matters of notoriety.

It is denied, that plaintiff's warehouses have ever been situated on the water front of the bay; and it is affirmed, that at the time of the construction of the first house by complainant, it was well known to the public and to complainant that Battery street, a public street of said city, would run in front and to the eastward of said four lots of complainant; and at the time he made his first purchase of any of said four lots, said Battery street was distinctly laid out and defined on the official map of San Francisco; and that complainant holds title to two of the four fifty-vara lots which lie to the south of Filbert street under an alcalde's grant dated 13th June, 1847, to one William Hood, and the property conveyed therein, is described as a hundred-vara lot, bounded north by Filbert street, east by Battery street or place, south by Union street, and west by Sansome street, which grant was duly recorded. That on the 8th March, 1851, William Hood conveyed to complainant the northern half of said lots (1846 and 1847), and the property was described as "beginning at the southeast corner of Sansome and Filbert streets, running thence easterly one hundred varas along the southern line of Filbert street to the corner of Battery street, thence southerly along the westerly line of Battery fifty varas to a point equally distant from Filbert street and Union street, thence westerly one hundred varas to the easterly line of Sansome street at a point equidistant from Union and Filbert streets, thence north to the place of beginning, being the northern moiety of the hundred-vara lot bounded by Filbert, Battery, Union, and Sansome streets." It is also proved that the deed, from Hood to complainant, has been duly recorded. The affidavit proceeds to trace the title of complainant to the remaining lots, with a view to show that the deeds under which he holds describe the property like those above, as bounded by the same streets.

It is denied by defendants that complainant has any riparian rights. It is admitted that defendants claim title to the 100 varas which they are about to improve; that they derive title under an alcalde grant, under date of 26th June, 1848, which grant was duly confirmed according to the provisions of the act of the legislature of this state, 26th March, 1851. That record of said grant was made on the 26th June, 1848, and again on the 28th November, 1849; that by virtue of said record and grant, and by virtue of the confirmation and re-grant of same by the said legislature, defendants are owners of said premises. That under another act of

the legislature of this state, passed 15th May, 1853, entitled, "An act to provide for the sale of the interest of the state of California in the property within the water-line front of the city of San Francisco, &c.,"—the defendant, Daniel Gibb, became the purchaser of said property, and has since conveyed a moiety of same to his co-defendant, Frazer. The defendants admit their determination to improve their lot; but deny explicitly that the completion of their work will in any way obstruct the free navigation of the harbor, but will prove a decided benefit to it. Numerous affidavits from both sides have been filed; and upon bill and affidavits, a motion is made for an injunction.

Holloday, Cary & P. W. Shepperd, for complainant.

Hall McAllister, for defendants.

McALLISTER, Circuit Judge.—The title of defendants in this case rests upon a legislative grant from this state. The grounds on which complainant assails that title, are: 1st. That the acts of the legislature relied on did not pass to the grantee such interest in the land as would authorize the defendants, who have become subrogated to that title, to make the improvements they propose. 2d. If they have that effect, they are unconstitutional and void. We will consider them in their order.

A direct conveyance by legislative grant is equivalent to a patent (Lessee of Grignon v. Astor, 2 How. [43 U. S.] 319); and a conveyance by statute to classes of persons, is as legal as those made to specified individuals (Guitard v. Stoddard, 16 How. [57 U. S.] 494). The inquiry in limine is, did the acts of the legislature on which defendants rely, convey such interest as authorizes the making improvements on the lots?

The act of the legislature of this state, of 26th March, 1851 (Comp. Laws, 764), professes in its title to "dispose" of the property of the state. The first section gives the boundaries of certain land, within the limits of which the lot claimed by defendants is situated. In the second section, the use and occupation of the land previously described, and which had been sold or granted by any alcalde and confirmed by the ayuntamiento, and recorded in the manner and at the time prescribed, was granted for the term of ninety-nine years. The defendants hold under a grant from an alcalde, confirmed by the ayuntamiento, and recorded in conformity with the terms prescribed by the act of the legislature. They, therefore, come literally within the class of grantees to whom the use and occupation of the lands was intended to be granted. The third section of the act declares that the original written instrument of conveyance, or in case of its loss a record thereof, may be read in evidence in any court of justice in this state, upon the trial of any cause in which the contents of the same may be important to be proved, and shall be prima facie evidence of title and possession to enable the plaintiff to recover the land so granted. The fourth section of the act, declares that the boundary line described in section first, shall be and remain a permanent water front of said city; the authorities of which shall keep clear and free from all obstructions whatsoever, the space beyond said line, to the distance of five hundred feet therefrom. Now, if the alcalde grant be admitted ex gratia to be void, although a private individual cannot confirm that which was void, the sovereign or the legislature may. In this case, the legislature have not only granted the use and occupation of the land, but have made certain documentary title, now in the possession of defendants and produced by them, evidence of title and possession. I cannot doubt the meaning and effect of this statute.

It has been strongly urged that nothing is to be considered as passing by implication in a public grant, but it is to be strictly construed. Such is the proper construction made of a grant by the king at the suit of his subject. Such construction has been applied in its full extent by the courts of this country, to acts of the legislature granting privileges to private corporations, franchises and monopolies to individuals; but it may be well questioned, whether the rule is to be strictly applied to the purchaser under an act of the legislature. In such case, the act and every part of it, should be construed according to the ordinary and grammatical sense of its language. But it is not necessary to discuss this question; as the terms of the act under consideration clearly conveys by grant, the use and occupation of the land. That it was intended to permit structures and improvements on the land, within the water-front which had been granted, is evident from the provision introduced into the law,—that the authorities should keep clear all obstructions outside of that line. The last section of this act, provides that nothing therein contained shall be construed as a surrender by the state of its right to regulate improvements, so that they shall not interfere with the shipping and commercial interests of the bay of San Francisco. We consider this a mere reservation of the right of navigation police, by which the state very properly reserved to itself the protection of the shipping interests. The very fact that it reserved to itself the right to regulate the improvements, shows that such were contemplated to be made, and therefore such power was reserved to enable the state to interpose in case the structures made would injure the harbor.

The next act of the legislature on this subject, is that passed on 18th May, 1853 (Pamph. Laws 1853, p. 219.) This refers to the previous act, of 26th March, 1851, and the water-front adopted by it. This act makes provision for the sale of the interest

of the state in the property included in the boundaries described in the first section of the preceding act. In its 8th section it enacts that upon a sale made by the commissioners to whom by the act the sale is confided, so soon as the purchaser shall comply with the terms of sale, a deed shall be made to him, which shall be prima facie evidence of the regularity of the preliminary proceeding and sale, and the title and right of possession in the grantee his heirs and assigns, upon which actions for the recovery of real property, or for injuries thereto, may be sustained and defended in all the courts of this state.

It will be unnecessary further to discuss the question as to the quantity of interest which passed under the acts of the legislature we have had under consideration; as that question has been adjudicated on by the highest judicial tribunal in this state, to which we shall hereafter refer.

2d. The second ground taken for the complainant is, that if these acts of the legislature do pass a title to the land as alleged by defendants, they are unconstitutional and void. It is urged in argument, that the legislature of this state in the enactment of these laws have legislated retro-actively, have divested vested rights, have devoted property that should have been held sacred to public use, to private purposes; that the obstruction, if completed, will amount to a nuisance within the meaning of the definitions given to it by law. With the vindication of this law from the foregoing objections, this court has nothing to do. That must be left to the decision of the supreme court of this state. So far as this court is concerned, all the foregoing objections to these acts of the legislature may be valid; still, if neither shall be found to conflict with the constitution of the United States, or some act of congress passed in pursuance thereof, they cannot authorize it to declare those laws unconstitutional and void. Thus, if the legislature of a state were to take by its action private property for public use, without just compensation, this court could not declare it void; because the 5th amendment of the constitution of the United States, which inhibits the so doing, is only a limitation on the powers of the United States, and not applicable to the legislatures of the states. Barron v. Baltimore, 7 Pet. [32 U. S.] 243. In the case of Baltimore & Susquehanna Co. v. Nesbit, 10 How. [51 U. S.] 395, the supreme court say: That there exists in the state legislatures a power to enact retrospective laws, "is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically ex post facto, or such as impair the obligation of contracts." In the case of Carpenter v. Pennsylvania, 17 How. [58 U. S.] 456, 462, it is said: "This court has no authority to revise the act of Pennsylvania upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the constitution of the United States, or the treaties and laws made under it?"

It is next urged, that the mischief complained of constitutes a nuisance within the meaning given by the definition annexed to that term by law. It may be admitted that the obstruction in this case may (although existing by an act of the legislature) be considered a nuisance, in view of the common-law definition of the term; yet it surely cannot be successfully contended, that it is within the power of this court to abate what the legislature has willed to exist, on the ground that it is a nuisance at common-law! Arguments and authorities adduced in relation to mere local nuisances, and as to the alleged injustice and inconsistency of these acts of the legislature of this state, are to be discarded by this court; and the question confined to the single inquiry, "Does either of these acts conflict with any provision of the constitution of the United States, or any act of congress passed under it?" Another reason precludes inquiry into them. They, as well as the interest they convey, have been adjudicated on by the constituted authorities of this state. How far is this court concluded by the construction placed by the highest judicial tribunal of this state upon one of its local statutes? In Woolsey v. Dodge [Case No. 18,032], the learned judge says: "This court brings into a state no novel principles. * * * It administers the law of the state. In giving effect to the statutes of a state, where there is no conflict with the federal constitution, the courts of the Union follow implicitly the rule established by the supreme court of the state." So far has this been carried, that the supreme court of the United States has reversed its own decision in order to conform to a change of the supreme court of a state in the construction of its statutes. In McKeen v. Delancy's Lessee, 5 Cranch [9 U. S.] 22, the principle enunciated is, that, in construing the statutes of a state, the supreme court will adopt the construction settled in the state courts, though not in accordance with its opinion. In Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 157, it is affirmed, that if the construction of a state statute is settled by the highest court of a state, this court adopts the construction. "If (said C. J. Marshall) this question has been settled in Kentucky, we must suppose it to be rightly settled." Such is the unbroken authority on this point. To pursue it further is unnecessary.

We now turn to the exposition given by the constituted authorities of this state to the acts of the legislature before cited.

In the case of Eldridge v. Cowell, 4 Cal. 80, a bill was filed for the very purpose sought in the present. In that, as in this, the defendant relied upon the same legislative acts as the warrant for his structures. Under the instruction of the court, a verdict was rendered against the plaintiff. The case was carried to the supreme court. In adjudicating the case, that tribunal enunciated the following propositions: 1st. That the extension of the water-front of the city, as laid down by the survey, and in the plan of the city of San Francisco, was perfectly legitimate in the establishment of a seaport town. 2d. That the right of the owners of water-lots, to fill them in with earth for the purpose of improvement and use, was practically admitted by plaintiff, by filling in part of his own lot, and the street in front of it, which was in the water. 3d. That it was sufficient that, by the act of 26th March, 1851, the plan of the city was recognized by the state, and property covered by tide-water vested in individuals. In another case, that of Cooke v. Bonnet, 4 Cal. 397, that court again recognized the validity of the act of 26th March, 1851. By a uniform rule, we have seen it is the duty of this court to conform to the construction placed by the highest state court on the statutes of her state. This will render it unnecessary to discuss many questions which have been raised in this case; and we will confine ourselves to the question we are to decide, are these acts of the legislature of this state in conflict with the constitution of the United States, or any act of congress passed in pursuance thereof? The first inquiry is, as to the right of California to pass these laws; and this involves her right to the soil under navigable waters within her territorial limits. The second inquiry is, to what extent is such right diminished by her membership in the Federal Union? When the Revolution was consummated, the people of each state became sovereign, and in that character had the absolute right to all navigable waters and the soil under them in their then limits, and still hold that right subject to any surrender of it by the constitution of the United States. Martin v. Waddell, 16 Pet. [41 U. S.] 411. When California was admitted into the Union she became entitled to the same right, being admitted on an equal footing with the original states. Pollard's Lessee v. Hagan, 3 How. [44 U. S.] 212, 229. The right of eminent domain over the shores and soil under navigable waters, for all municipal purposes belongs exclusively to the states within their respective territorial limits, and they only have the power to exercise it. This right of eminent domain consists of the right of the sovereign to dispose of all the wealth contained in the state. Id. 223, 230. Such is the right of California to the soil under the waters of the bay; and it is only qualified by the prerogatives she has surrendered to the United States when she came into the Union. One of those prerogatives was the right to regulate commerce. Any exercise of her right of eminent domain which does not conflict with a regulation of commerce is legitimate. This statement would seem to show that a partial, local, or slight obstruction which operates only on some specific spot,—for instance, the construction of a wharf, the establishment of a water-front to the city, and the like,—cannot per se constitute such a national nuisance as would conflict with the power of congress to regulate commerce, or empower this court to abate it. The state must grossly abuse her right by an essential and material obstruction of a communication, which it is the right as well as the duty of the government of the United States to keep open as a high road to the commerce of the citizens of the United States and of the world. There may be many obstructions which a state may authorize, nay, many which by local laws would be nuisances; still, if they are not in nature essential and serious, so far as this court is concerned they must remain so long as the authorities of the state, legislative and judicial, decree their existence.

Let us see to what extent the power invoked in this case has been exerted by the federal judiciary. In Pennsylvania v. Wheeling & Belmont Bridge Co., 9 How. [50 U. S.] 647, it has been carried to a greater extent than in any case I have seen. A bill was filed to enjoin persons from the construction of a bridge across the channel of the Ohio. Before the argument of the cause, the work was completed and spanned the whole channel between Zanesville and the main Virginia shore, a distance of 1,000 feet. The cause was referred to a commissioner with power to take proofs and report whether the bridge was an obstruction, and if so, what change in the structure might be made, if any could be, consistent with the continuance of the same, that will remove the obstruction to the free navigation. Upon the report of the commissioner, finding among other things it was an obstruction, the court decided, that if the navigation could be restored by a draw, so as to render it in the opinion of the court free from unreasonable obstruction, the bridge should not be treated as a nuisance. By their final decree they directed an elevation of the bridge to the height of eleven feet above low-water mark by the Wheeling gauge of the Ohio river, such elevation to be maintained the distance of three hundred and eleven feet on a level headway over the channel of the river. Thus the bridge was permitted to span in its former dimensions over two thirds of the river's channel. If the existence of an obstruction across a navigable stream ceases by diminishing it one third, it shows that obstructions created by a state are not to be treated by this court as common nuisances. The United States and the state government both have rights, which in such cases the court is bound to protect. In Spooner v. McConnel [Case No. 13,245], the court say, "We, therefore, can entertain

no doubt that the legislature may improve at their discretion the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigableness."

We come now to the character of the obstruction. The act of congress approved 9th September, 1850 [9 Stat. 452], under which California was admitted into the Union, declares "that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor." This provision may be considered to extend to keeping the navigation free from material obstructions; and if such be the case, then if in this case the obstruction complained of were of a character to obstruct the free navigation of the waters of the bay, it would be the duty of this court to interpose. Can it be that the structure of a wharf on the front line of a city can be of such character? Such does not seem the opinion of the pilots of this port. The affidavits of seventeen of them have been filed in this case. They all swear they are duly licensed as pilots, and unite in deposing that in their opinion the contemplated structure of defendants, if completed, would in no way impede or injure the free navigation of any part of the bay now navigable, but would be an advantage to the harbor of San Francisco, by affording wharfage to many vessels that cannot now approach the wharves in that part of the bay. This body of testimony is sustained by the depositions of several others, among them George Simpton, formerly a pilot and subsequently harbormaster of this port. Opposed to this testimony there are numerous depositions filed as counter-proof. Several of these limit the apprehended danger to the immediate locality. But looking at the construction itself, we cannot consider it an unreasonable one, amounting to that national nuisance of which this court, in a controversy arising out of the action of a state towards its citizens, can take cognizance. The width of the bay opposite to the spot where the contemplated wharf is to be built, is believed to be seven miles; the width of the ship channel opposite the same spot, a fraction less than two miles; and the distance intermediate the spot where the wharf is to be built and the usual track of vessels entering into and departing from the harbor, as given by the pilots, is five hundred feet. This spot is part of the soil below low-water mark, the property of the state, granted by her to those under whom defendants claim.

There is nothing in this case which would authorize this court to declare the structure of a wharf at that locality to be a nuisance, on the ground that it impeded the free navigation of the bay. The bill does not so treat it. There is a general allegation that the work is wrongful and if continued and completed will obstruct and cut off this plaintiff from the use and enjoyment of his riparian rights, and entirely destroy his present water-front. The only additional allegation in the bill on this point is, "that if said work be permitted to progress, the same will greatly impede the free navigation of that part of the bay now navigable, and great wrong will accrue to the public, especially to the plaintiff." There is no allegation in this bill of any obstruction which will impede or threatens to impede the harbor or bay, as a common highway. The bill is predicated upon the idea that an obstruction to any extent of a portion of navigable water by the construction of a wharf in pursuance of a system of improvement laid down by the state in establishing a water-front to her port of entry, can in itself constitute a nuisance which this court may enjoin. Upon a careful examination of this case we consider that the motion for an injunction must be denied; and it is ordered accordingly.

[NOTE. The defendants then demurred to the bill. The court sustained the demurrer, and, the plaintiff having failed to amend the bill within the time limited by the rule of court, a final decree was passed, dismissing the bill. Thereupon the plaintiff took an appeal to the supreme court. 2 Black (67 U. S.) 519. Mr. Justice Wayne delivered the opinion, holding that the complainant had shown, by the facts stated on the face of the bill, a case for relief within the jurisdiction of a court of equity, admitted by the general demurrer to be true. Nor was it possible, owing to the state of the pleadings, for the supreme court to judicially notice certain acts of the legislature of California. The decree of the circuit court was reversed.]

GRIFFIN, The JOHN. See Cases Nos. 7,347 and 7,348.

GRIFFIN'S CASE. See Case No. 5,815.

Case No. 5,820.

In re GRIFFITH et al.

[18 N. B. R. 510; 26 Pittsb. Leg. J. 140.] [1]

District Court, S. D. New York. Oct. 18, 1878.

BANKRUPTCY — MEMBERSHIP OF FIRM—ADJUDICATION.

1. The court has jurisdiction on a voluntary petition for the adjudication of a firm, to entertain and determine the question what persons in fact constitute the firm, and an adjudication based upon the determination of such fact is valid until set aside or reversed.

[Cited in Re Kitzinger, Case No. 7,861; Pelham v. The B. F. Woolsey, 3 Fed. 461; Allen v. Thompson, 10 Fed. 124.]

2. In 1872 the bankrupts were adjudicated upon a voluntary petition, which alleged that they composed the firm of G. & W. In 1874, in a proceeding in the state court, it was held that one A. was a general partner in said firm, and not a special partner, as he was believed to be at the time the petition was filed. On a petition filed in 1878 to set aside the adjudication, *held*,

[1] [Reprinted from 18 N. B. R. 510, by permission. 26 Pittsb. Leg. J. 140, contains only a partial report.]

that the application should be denied, on the ground that so long an interval had elapsed since the adjudication that rights and interests of other parties had grown up under it and been adapted to it.

[Cited in Re Meade, Case No. 9,370; Lavin v. Emigrant Industrial Sav. Bank, 1 Fed. 666.]

In bankruptcy.

C. Norwood, Jr., for petitioners.

W. H. Arnoux, contra.

CHOATE, District Judge. November 30, 1872, on the petition of George W. Wundrum, praying that he and his alleged partner, John Griffith, composing the firm of Griffith & Wundrum, be adjudicated bankrupts, they were so adjudicated, and the case has proceeded regularly ever since; an assignee having been appointed, assets converted into money, and in whole or in part distributed. The petitioners, Van Dolsen and Arnot, by petition dated March 28, 1878, allege that they are creditors of the firm and have never proved their debt; that the firm consisted of Griffith, Wundrum, and one Abendroth; that the petitioners were ignorant of that fact till shortly before the time of filing their petition; that at the time of the commencement of the bankruptcy proceedings, and till long afterwards, Abendroth was believed to be a special partner and not a general partner; that in a suit brought in the superior court, which came to trial and decision in 1874, it was shown that Abendroth had not complied with the provisions of the law relating to limited partnerships, in respect to the time and manner of paying in his capital, and that he was held to be in fact a general partner; that this decision has been affirmed by the court of appeals, and petitioners allege that Abendroth was a general partner, and they pray that the adjudication be vacated on the ground that the court has no jurisdiction over copartnerships, unless all the copartners are made parties and adjudicated, and therefore that the court had no jurisdiction in this case.

Assuming that all the facts relied on are as claimed by the petitioners, still they cannot claim as of right, as creditors of the firm, to have the adjudication set aside. Assuming that the court has jurisdiction only over all the copartners and not over some of them less than all, still the court had power and authority, in other words had jurisdiction, to entertain and determine the question what persons in fact did constitute the firm. The fact that Griffith & Wundrum alone did constitute the firm was alleged in the petition, and was necessarily found and determined by the court, before it could or did determine that the adjudication should be made. This was the determination by the court, in the due and proper exercise of its jurisdiction, of a fact. Now, although that fact may be called a jurisdictional fact, nevertheless the rule of law is, that the determination by the court of a fact, though a jurisdictional fact, is binding on all parties to the suit and on all those who had an opportunity to be heard to contest that fact. Dyckman v. City of New York, 5 N. Y. 434; and see Chemung Canal Bank v. Judson, 8 N. Y. 254.

Although a case in bankruptcy is anomalous and peculiar in its forms, I think that the creditors of the firm are bound as parties by this determination, and are within the application of the principle above stated. The proceeding is against the firm's property and for the benefit of the firm's creditors. While they do not receive notice of the original application, they are made parties to the proceeding in form immediately afterwards, and are notified to come in and participate therein. No doubt if they have any interest adverse to the adjudication and promptly apply for relief before other rights intervene, they may have an adjudication set aside on the ground that the court erred in determining the jurisdictional fact. This would be almost a matter of course upon an immediate application, but until the proceeding is thus opened and the fact re-determined, the judgment of the court stands and must stand as against all parties and all persons allowed to come in and be made parties; nor do I see how a mere stranger to the proceeding, if these creditors claim to be such, can have any standing in this proceeding itself to have such determination set aside.

The ground taken that the adjudication is in itself absolutely void is not tenable. It is a judgment of a court, based upon the determination of a fact which it had jurisdiction to determine, and as such it is valid until set aside or reversed. The court may open the judgment and rehear the case on suggestion of error, on the application of a party, and possibly on the application of a stranger, if he shows that he is injured thereby, and the application can be granted without prejudice to the rights and interests of others, but such an application, like any other application to open and rehear a case, is addressed to the discretion of the court.

In the present case it would clearly not be a proper exercise of that discretion to grant this application. There is no suggestion of fraud in the obtaining of the original adjudication. Griffith, Wundrum, Abendroth, and, so far as appears, all the creditors of the firm at the time of that adjudication, understood and believed that Abendroth was a special and not a general partner. Among others these creditors, though apprised of the action taken, rested upon and acquiesced in it, taking no measures, so far as appears, to investigate the fact. Afterwards other creditors, suspecting or having information of facts tending to show that Abendroth was a general partner, sued him, and in 1874 had disclosed in trials of their actions those facts. It cannot be said therefore that the facts tending to show that he was a general partner were so hidden and undiscoverable that creditors could not by diligence ascertain

them long before this petition was filed. But aside from this great delay in discovering the facts, I think the application should be denied on the ground that so long an interval of time has elapsed since the adjudication that rights and interests of other parties have grown up under it and been adapted to it. These creditors claim that they are injured in their special interests by having this adjudication pleaded and held as conclusive against them in their suits against Abendroth as a copartner with Griffith & Wundrum. It may be that they have lost thereby possibilities of collecting their debts of Abendroth, but it would introduce a most dangerous precedent to set aside a judgment after six years' acquiescence, on suggestion of error of fact, for the relief of a single party who might have had the adjudication vacated at the outset if he had not been content to assume as true what was then accepted apparently without any careful examination, but without any deceit on the part of anybody, as to the real state of the case. Perhaps these petitioners have a remedy now by having Abendroth brought in and adjudicated as a partner with Griffith & Wundrum. Such amendments have been allowed on the discovery of a mistake. In re Lewis [Case No. 8,311]; In re Little [Id. 8,390]; and see In re Henry [Id. 6,370]. Such a proceeding would seem to give the creditors their full rights against Abendroth's estate, if he was in fact a general partner, without the injustice that might result from vacating the adjudication of giving certain creditors an advantage over others. But whether this remedy would be proper is not the question now before the court. Petition dismissed.

GRIFFITH (BLANDY v.). See Cases Nos. 1,529 and 1,530.

Case No. 5,821.

GRIFFITH v. BRADSHAW et al.

[4 Wash. C. C. 171.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1821.

SURVEY — PRIORITY OF SETTLEMENT RIGHT — OUTSTANDING TITLE — FIFTEEN YEARS' POSSESSION IN PENNSYLVANIA.

1. A survey returned and accepted is, prima facie, presumed to have been legally made, and it is for him who says it was not, to prove the fact. In a survey of adjoining tracts returned and accepted, it is not necessary to produce the original, or copies of the surveys and connected plots, unless so far as they may be necessary to identify the land.

[Cited in Collins v. Barclay, 7 Pa. St. 69.]

2. Where a man sets up a settlement right against another settlement right, or against a warrant and survey, he must prove his settlement to be prior to the opposing right, and continuing; or he must content himself with the right of some prior settler, by deducing a title from him down to himself.

3. If the defendant sets up an outstanding title in a third person, he must show it to be a legal subsisting title, and better than the plaintiff's.

4. What laches in a settler will postpone him to a warrant and survey.

5. What is a sufficient survey of a number of tracts adjoining each other, belonging to the same person? Each tract need not be run on the land.

6. Fifteen years' possession under the act of the assembly of Pennsylvania of 1785 to bar ejectment, is only where the possession had commenced when the law was passed.

[Cited in Billon v. Larimore, 37 Mo. 384.]

The plaintiff [Mary Griffith's lessee] claimed under a patent dated in 1801, and to prove the location of the particular land in dispute, she produced the original survey in the name of Robert Glenn, and of the adjoining tracts, dated in 1774, together with the original connected plat of those tracts. She also proved, by the surveyor, who, under an order of this court, retraced the lines of this survey, and of the adjoining tracts, that he found two of the corner trees of the tract surveyed in the name of Richard Bache, which this tract calls to adjoin on the upper side, but that no other of the lines and corners of this, or of the tract surveyed in the name of Joshua Shea, which it calls to adjoin on the lower side, were found. He stated, however, that with the original surveys, and the connected plat in his hands, he found no difficulty in laying down John Shea, the lines of whose survey are all marked; Walter Shea, lying between that tract and the tract in question, and Richard Bache, as well as the land in question. The defendants set up no title whatever, but length of possession. They also insisted, (1) that the land in question was not actually surveyed and marked on the ground; and (2) that the conveyance to the lessor of the plaintiff by J. B. Wallace, in whom the title was regularly vested, was merely colourable, to give jurisdiction to this court; it having been proved by a witness, that when he called to serve a notice on Mrs. Griffith, she stated that she knew nothing of this land, or that she had a title to any lands in the county of Bradford, where these lands were said in the notice to lie. To meet this evidence, it was proved by the attorney at law of Mrs. Griffith, that he was verbally authorized by her to make arrangements, with W. G. in respect to a large debt due by him, and for which J. B. Wallace was in some way bound; and that for the better securing of the said debt, he, as the attorney of Mrs. Griffith, took the deed in question, which, though absolute in form, was intended to operate as a mortgage. That he communicated what he had done to his client, and received her approbation.

Wallace & Peters, for plaintiff.

Mr. Baldwin, for defendants.

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

WASHINGTON, Circuit Justice (charging jury). The plaintiff appears before the court with a paper title apparently unexceptionable. The patent bears date in 1801, and recites a survey of the land in dispute, made and returned in 1774. The defendants assert no title whatever, but rely upon certain alleged defects in the plaintiff's title, and upon length of possession in themselves. The first alleged objection to the plaintiff's title is, that the land said to have been surveyed in 1774, in the name of Robert Glenn, never was in reality surveyed and marked on the ground, because the surveyor, J. Bennet, who was directed by the order of this court to retrace and examine the lines of this and the adjoining tracts, could discover but two marked trees on the line which divides this from the tract of Richard Bache. This objection may at once be disposed of, by applying it to two or three general principles of law, which have so frequently been laid down, and so constantly adhered to by this court and the courts of this state, as to have become great land marks of property.

The first is, that the owner of a warrant which has been surveyed, and the survey returned into the land office, and there accepted; and especially where the title has been consummated by a patent, need not, when called upon to assert his right, produce further evidence than the return and acceptance of the survey, or the patent, where a patent has issued. That the surveyor, a public officer, acting under the sanction of his oath, has made the survey in a legal manner, is to be taken as a fact, unless the contrary be proven; and the burthen of this proof lies upon the person who questions the legality of the survey. It is often necessary for the party claiming under the survey to prove the identity of the location, so as to show that the possession of the defendant interferes with it; and on this account, it may become necessary to produce the original survey, and frequently to have the lines retraced: but if, on this examination, the identity of the land is established, either by its own marks or those of adjoining tracts, this is sufficient; and if the defendant goes farther, and denies that an actual survey was ever made, he must prove that fact, as before observed, to the entire satisfaction of the jury.

Another rule is, that where there is a series of warrants taken out by the same person adjoining each other, and commencing with a leader, it is a sufficient survey if the exterior lines are run and marked on the ground, and corners marked on the interior lines sufficient to enable the surveyor to protract the lines of the different tracts, without actually running them on the ground. In this case the defendants, assuming the labour which the law imposes upon them of satisfying you that this tract was not surveyed, rely upon the evidence of the surveyor who retraced the lines of these surveys under the order of this court, that no marked trees were found on the line which divides this land from the tract surveyed in the name of Walter Shea, which it calls to adjoin on the south-west, nor any on the north-west and south-east lines. But the location of Joshua Shea's tract is proved by the marked lines and corners of John Shea's land, which it calls to adjoin on the south-west, and the two corner trees of Richard Bache's survey, which this tract, in the name of Robert Glenn, calls to adjoin on the north-east, viz. the maple and the white oak, fixes with sufficient certainty the location of this survey. By beginning at the maple, and running the line of Richard Bache the number of poles mentioned in the survey, it necessarily runs eighty-nine perches beyond Bache's line, into land then vacant, as mentioned in the survey; thence the surveyor had only to run the course and distance to the line of Joshua Shea, thence along his line the given distance, and thence to the beginning, which would be the closing line. The surveyor has further stated, that with the original survey and connected plat in his hands, he found very little difficulty in running the lines of the tract in question. Upon this evidence, it is for you to decide whether the defendants have supported this objection.

2. The next objection to the plaintiff's title is, that the deed from Wallace to the lessor of the plaintiff was not made with her privity, but was intended to give jurisdiction to this court. The explanation of this transaction given by the attorney for Mrs. Griffith is, that he was employed by her to make arrangements with a gentleman who was her debtor, for the security of that debt, and that he took from Mr. Wallace, who was in some way responsible for the debt, a deed for the land in controversy; that he communicated to his client from time to time the measures which he had adopted, of which she approved. The deed is absolute in form, and conveys the legal estate to the lessor of the plaintiff, and the only question is, whether it was bona fide or not, as to which you must judge.

3. The last question is, whether the plaintiff is barred by length of possession? This suit was brought in April, 1817, and it is incumbent on the defendants to satisfy you that they have had an uninterrupted adverse possession for twenty-one years preceding that period. The defendants do not pretend to assert even a colour of title to the lands in their possession, and it is therefore necessary for them to prove, not only that their possession has been adverse, but that it has been continuing. As to the argument that possession for fifteen years is sufficient to bar the plaintiff, whose title accrued prior to the act of 1785, there is nothing in it. The section in that law, as to fifteen years' possession, is confined to an adverse possession existing at that time; whereas it is not pretended that the possession of these defendants comemnced as early as 1785.

The jury found a verdict for the plaintiff.

GRIFFITH (DECKER v.). See Cases Nos. 3,724 and 3,725.

Case No. 5,822.

GRIFFITH v. EVANS et al.

[Pet. C. C. 166.] [1]

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

EJECTMENT—EVIDENCE—SURVEY.

1. Ejectment for land in Beaver county, Pennsylvania. An extract from the books of the surveyor general of the land office, is not evidence.

2. Ex parte proceedings by the board of property, under which a survey was made, which in the opinion of the board ascertained the invalidity of a former survey, and in consequence of which the plaintiff's survey was ordered to be struck from the records of the land office, cannot be read in evidence. Such proceedings have no effect on the plaintiff's title.

This was an ejectment for land lying in Beaver county, Pennsylvania, on Beaver creek. The plaintiff produced a regular paper title, which was objected to by the defendants, on the ground that the survey was executed by Leets, the deputy surveyor of district No. 10, whereas the land lies in district No. 11: and to prove this fact, they offered to read the following evidence: First, an extract from the surveyor general's book of Leets' instructions. Second, an order of the board of property dated the 17th of June last, directing the surveyor to run the lines of districts Nos. 10 and 11, according to their true boundaries; and a survey and plot, made in pursuance of said order and returned to the office; which it was contended would show that the land in question lies out of district No. 10. Third, an order of the board of property, dated the 17th of October last, founded upon the above order and survey; declaring the survey in question to be void, having been executed by the surveyor of district No. 10, and directing it to be erased from the records of the board. The court overruled the first piece of evidence, because it was only an extract. Also the residue of the evidence, because the whole proceedings of the board of property were ex parte; and the lessor of the plaintiff, who claims under a patent regularly issued, so far as appears to the court, cannot be affected by any such order or judgment of the board of property. If it was intended to controvert the validity of the survey, upon the alleged ground, the defendants [Evans and Lewis] should have produced witnesses before this court to establish their allegation; or should have had a survey made, under an order of this court, and upon notice to the adverse party.

THE COURT directed a verdict to be found for plaintiff, which was done.

[Another verdict in favor of the plaintiff for the same land was given in Case No. 5,823.]

[1] [Reported by Richard Peters, Jr., Esq.]

GRIFFITH (HAYFORD v.). See Cases Nos. 6,263 and 6,264.

GRIFFITH (JOHNSON v.). See Case No. 7,386.

GRIFFITH (MACBEE v.). See Case No. 8,660.

GRIFFITH (McFARLANE v.). See Case No. 8,790.

Case No. 5,823.

GRIFFITH v. TUNCKHOUSER.

[Pet. C. C. 418.] [1]

Circuit Court, D. Pennsylvania. April Term, 1817.

EJECTMENT—EVIDENCE—SURVEY.

1. A paper purporting to be "a certified extract from the general draft of certain districts, as framed by the surveyor-general, remaining in his office, under the seal of the office," is not evidence; it being only an extract, and not being a copy of an office paper.

[Cited in Lee v. Thorndike, 2 Metc. (Mass.) 318; Farr v. Swan, 2 Pa. St. 250; Gamache v. Piquignot, 17 Mo. 313.]

2. A paper offered to prove a particular fact, but which is not relevant to that fact, was rejected.

3. The proceedings of the board of property of Pennsylvania, directing a survey of certain districts, and the survey and plot returned thereon, is not evidence.

4. A connected plot or sundry tracts, made and put together by an officer in the land office, is not evidence.

5. A warrant and survey returned into the land office and accepted, in Pennsylvania vests a legal title.

[Cited in Herron v. Dater, 120 U. S. 472, 7 Sup. Ct. 624.]

6. Every presumption is to be made in favour of the regularity of a survey made by a sworn officer, returned into the land office, and then accepted, until the contrary is proved by the party who impeaches it.

7. A survey of land in the district appropriated to satisfy depreciation certificates, is not void by the provisions of the act of the assembly, passed in 1785; although the survey has not been made by going upon the land and running all the lines; provided the lines of the adjoining survey, have ascertained precisely the boundaries of the tract in question, or so many of them, as that the remaining lines can be laid down with mathematical certainty.

8. A survey made by a deputy surveyor, out of his district, is void, and the patentee cannot recover in ejectment.

9. The tract of country appropriated for the satisfying depreciation certificates, having been surveyed by authority of the state of Pennsylvania, it was not required that the deputy surveyor should run and mark the lines of a tract anew, in order to apply to it a warrant which came into his hands afterwards.

This was an ejectment for a tract of land in Beaver county, Pennsylvania. The plaintiff exhibited in evidence ten warrants, granted to Ann Duncan and nine others, on the 14th of April, 1792, which were surveyed on the 14th of February, 1795; Ann Duncan's warrant being the leading warrant, and the others adjoining thereto. These warrants

[1] [Reported by Richard Peters, Jr., Esq.]

having become vested in the Population Company, were surveyed for that company; and it was agreed by the defendant, that the title, if a good one, was vested in the lessor of the plaintiff. But the following objections were made to the plaintiff's title: First, that the survey was not made by going upon and measuring the land, and marking the lines. Second, that the survey was made before the warrants came to the hands of the deputy surveyor. Third, that the survey was made by Jonathan Leet, the surveyor of district No. 10; and the land lies in Hoge's district, No. 11. For these reasons it was contended, that the survey was void. 3 Smith's Ed. Laws Pa. 70, 310; 2 Smith's Ed. Laws Pa. 317.

The deposition of Leet, taken in the cause, stated generally that he had duly surveyed those warrants. In order to ascertain the true division line of districts Nos. 10 and 11, an order of this court was made at a former term, directing Mr. Martin to go upon the land, and to survey and ascertain the boundaries of those districts as they had been laid off according to law. His survey and return were given in evidence by the plaintiff, in which he lays down the reputed, and, as he states, the well established line between those districts; the district No. 10, commencing at about eight miles from the western boundary of the state. From this survey, the lands in question lie considerably within the district No. 10, being on the east side of Beaver creek; whereas the dividing line, as laid down by Martin, is considerably to the west of that creek. It appeared in evidence, that the tract of country where these warrants were located, had been surveyed by the authority of the state, in 1785 or 1786, and divided into tracts for the purpose of being sold to satisfy depreciation certificates; but only a part of them having been found necessary to answer that purpose, the residue remained unsold, and was open to purchasers under the act of the 3d of April, 1792. Jonathan Leet, had acted as an assistant to Daniel Leet in making those surveys, and had retraced the lines in 1793. After the ten warrants, before mentioned, were put into his hands, he went on the ground and ran one line to ascertain the variation. He also tried some of the lines of the different tracts, so as to satisfy himself that they were correct, as they had been formerly laid down. He then attached Ann Duncan's, the leading warrant, to the ground it called for, and adjoined the others in succession, amongst which was one in the name of Reigle, being the tract in question.

Witnesses were also examined by the plaintiff, to prove that the line laid down in Martin's survey, made under the order of this court, beginning eight miles from the west boundary of the state, is a well marked line, known and reputed in that country as the dividing line between Hoge's and Leet's districts. Other evidence to corroborate this testimony was given, which is noticed in the charge of the court. In order to prove the boundary line between Hoge's and Leet's district, and that Leet's district had been laid off by the surveyor general, with the approbation of the governor, to begin twelve miles east of the west boundary of the state, the defendant offered in evidence: First. A paper purporting to be "a certified extract from the general draft of the districts north and west of the Ohio and Alleghany, as framed by the surveyor general, the 7th of April, 1792, and approved by the governor the 9th of April, 1792; remaining in the surveyor general's office." This certificate was under the seal of the office. The map annexed purported to be the sections, No. 11 and No. 10. Second. Instructions given by the surveyor general, to Leet in the year 1793, which recited that he had been commissioned to act as deputy surveyor in district No. 10, beginning twelve miles from the west boundary of the state, and so directing him as to his duty, in making surveys within his district. Third. The proceedings of the board of property, directing a survey of districts Nos. 10 and 11, and the survey and plot returned by McCullough in obedience to the order, which was offered in evidence in the case of Griffith v. Evans [Case No. 5,822], was again offered. Fourth. A connected plot of different tracts, made out and put together in the land office, by an officer of that establishment, was also offered in evidence.

All the above testimony was rejected by the court. As to the first, because the paper was not a copy of any document remaining of record in the office, but an extract, which is not evidence. It is impossible for the court to say how far the parts not certified, might throw light on the mutilated part offered in evidence. It is for the court, and not the officer who certifies this paper, to determine this. At all events, the paper offered in evidence is not a copy of one in the office, and therefore the certificate is not evidence. Second. This paper is not evidence for the purpose for which it is offered; because, except that part of it which recites the substance of the commission, (and which is not evidence, as the commission itself should be produced,) it does not relate to the boundary line of the districts. It is therefore irrelevant, and on that account not proper to be given in evidence. Third. This was overruled, for the reasons assigned in the case of Griffith v. Evans [supra]. Fourth. This was decided not to be evidence, because it does not profess to be a copy of any plot of record in the office, but is the act of an officer of that department, putting together a number of tracts of land, in order to show their relative positions. That officer might have been examined as to this matter, but he cannot certify it to be a copy of any paper in the office. The defendant gave in evidence another plot of district No. 11, made under the order of this court by Martin, by the direction of the defendant's agent, which extends the north line of district No. 11, to nearer twelve miles instead

of eight, as laid down in the survey made for the plaintiff. A witness was also examined, to prove that Leet told him that he did not go upon the land in question to survey it, after the warrants came to his hands. The witness also stated, that he had examined the tract in question, and could find neither corner nor line trees, to correspond with those laid down in the survey made for the Population Company.

WASHINGTON, Circuit Justice (charging jury). The plaintiff appears in court with a regular paper title, a warrant and survey returned into the office and accepted, which, according to the law of this state, vests in him a legal title. The defendant sets up no title whatever, and resting upon his possession merely, endeavours to defend it, by insisting that the survey, though apparently legal, was in point of fact unduly made. A defence of this kind by a mere intruder, is not entitled to much favour, and although the plaintiff cannot recover if this survey be void, still every presumption is to be made in favour of the regularity of a survey made by a sworn officer, returned into the land office and there accepted, until the contrary is proved by the party who impeaches it.

The first question is, whether this warrant was duly surveyed on the ground, after the warrants came to the hands of the surveyor? Independent of the return of the surveyor, a sworn officer of the government, and the acceptance of it by the land office, without an objection having ever been made to it by caveat or otherwise; Leet the surveyor, has given his deposition, in which he states, that after the warrants came to his hands, they were entered in his books, and duly surveyed. A witness was examined, to prove that Leet informed him that he did not survey these warrants on the ground after he received them. This evidence being merely hearsay, is not competent to prove the fact, that the warrant was not surveyed on the ground, but was admitted by the court, merely to discredit the testimony of Leet, who has sworn that the warrant was duly surveyed. If, after weighing the credit of the two witnesses, the jury should be of opinion, that Leet's evidence ought not to be believed, his return of the survey and the acceptance of it by the office, fortified by the presumption in its favour that it was regularly made, not being impeached by any positive evidence, will be sufficient for the plaintiff. But, admit that it appeared in evidence that no actual survey was made on the ground, it does not follow, I conceive, that the survey is for that reason void.

The ninth section of the act of 1785, requires that every survey, thereafter to be returned into the land office, upon any warrant which should be issued upon the passing of the act, should be made by actually going upon and measuring the land, and marking the lines, after the warrant authorising the survey should come to the hands of the deputy surveyor. It then proceeds to declare, that every survey made theretofore, that is, before the warrant had come to the hands of the deputy surveyor, shall be accounted clandestine and void. But the same consequence is not declared, if the survey be not actually made on the ground, in the manner described in this section; and it would be strange, if in every case, it should be required to measure and mark all the lines of the survey, whether the same should be necessary or not, and this under the penalty of the survey being void. If the lines of adjoining surveys ascertain precisely the boundaries of the tract in question; if three or even two of the lines of a square be surveyed, so that the remaining line or lines can be laid down by protraction with mathematical certainty; can it be believed, that the legislature meant to avoid the survey, unless those lines were actually measured and marked? This is not to be presumed. In cases where accuracy in designating the particular tract of land cannot be attained without an actual running of the lines, it was certainly proper to require that they should be run and marked on the ground. Infinite confusion would arise, were a different course permitted. The direction in this section to the deputy surveyor, was clearly intended for the benefit of the warrant-holder, by requiring so accurate a description of the boundaries of his land, as to prevent interferences with the adjoining tracts. But, if every object of the law can be obtained without running all or any of the lines, it is going beyond the words, and, I clearly think, beyond the plain intention of the legislature, to declare the survey void, because an act altogether unnecessary was not performed. This has more than once been declared to be the opinion of this court, and it has the clear authority of the supreme court of this state, in the case of McRhea's Lessee v. Plummer, 1 Bin. 227, to support it. In this case, too, the argument that an actual survey is proper, for the purpose of giving notice in pais of the boundaries of the land, is most satisfactorily answered. The entries in the books of the surveyor, and the plots returned into the office, together with such marks as are to be found on the land, will always afford full information to actual settlers and others, of the real boundaries of each survey.

Now, what are the facts in this case? The tract of land in question, as well as all the others, appended to that of Ann Duncan, were surveyed by Jonathan Leet, as assistant to his brother Daniel, under the authority of the state, in the year 1785 or 1786; after these warrants came into his hands, Jonathan Leet went on the ground, and ran so many of the lines as to satisfy himself that a second actual survey was unnecessary. No evidence has been given to show that he was mistaken in this respect; for although one witness has declared, that he searched for the

lines of this tract and could find no marks to distinguish it, he admits that he had neither chain nor compass to assist him, and that no person on behalf of the lessor of the plaintiff was present, or was even called upon to show the lines and marks. It can never be endured, that the acts of a sworn officer, approved by his superiors, should be impeached by the unsuccessful examination of officious and unauthorised individuals. The order of this court put it in the power of the defendant to have this point ascertained in a fair and proper manner, of which he did not chuse to avail himself. But, in opposition to the unsatisfactory evidence of the witness just noticed, is that of Enoch Marvin, who says, that he traced the outward line of all these surveys from Ann Duncan's down to that now in controversy, and found the corner trees of each survey. As to the objection, that the actual survey of this tract of land was made before the warrant came to the hands of the deputy surveyor, it is conclusively answered and obviated by the decision in the case of McRhea's Lessee v. Plummer, in which we entirely concur. In that case, it was decided that the tract of country on which those warrants fell, having been surveyed by authority of the state for satisfying depreciation certificates, but which was afterwards open to appropriation warrants, coming afterwards to the hands of the deputy surveyor, might be applied by him to the survey so made, without running and marking the lines anew. No further observations need be made on this objection.

The next and last objection to the validity of this survey is, that it was made in district No. 10, whereas the land lies in district No. 11. If the fact be so, there is no doubt but that the survey is void, and the lessor of the plaintiff cannot recover. Whether the fact be so or not, is a question for the jury to decide on the evidence. The fourth section of the act of 3d April, 1792, declares, that the surveyor general shall, with the approbation of the governor, divide the lands thus offered for sale into proper and convenient districts, in such manner as he may think expedient, so that the boundaries of each district, either natural or artificial, may be known; and shall appoint a deputy surveyor for each district. Whether these districts were laid down by the surveyor general, on any diagram or plot of that country remaining in his office, is unknown to the court or jury, as no evidence of that fact has been given. But, if there was any such paper division made, still it is presumable, independent of all positive evidence, that the lines of division were also run and marked on the ground, for the information of purchasers, as well as of the several deputy surveyors, so that, in the words of the law, "the boundaries of each district, either natural or artificial, might be known."

The defendant's counsel, in their argument, have assumed the fact that there was a paper demarkation of those districts of record in the land office, and insist that the nonproduction of that species of evidence is fatal to the plaintiff's title. But to this argument there are two answers, which seem to the court to be conclusive. The first is, that there is no evidence that any such paper ever did exist, and that if it did, the defendant might prove it, although its nonexistence cannot so easily be proved. The next is, that if there is in the land office any paper which marks the original boundaries of these districts, inconsistent with those existing on the ground, it is for the defendant who impeaches this survey, to produce it, and not for the plaintiff who rests upon his survey made by a sworn officer, returned into the land office and there accepted, as affording prima facie evidence that it was regularly made. What then is the evidence of the dividing line between districts No. 10 and No. 11? The depositions of Hoge, the deputy surveyor of district No. 11, and of Jonathan Leet, the deputy surveyor of No. 10, corroborated by their official acts, establish, so far as they are believed, the line laid down by Martin as the division line; which line is to the west of Beaver creek, somewhat more than eight miles from the western boundary of the state. The official acts of these surveyors, appear in the connected plots which they respectively made of their surveys, each of them running up to that line as the acknowledged limit of his district. These connected plots were returned into the land office, and there accepted, without an objection having ever been made to them by the surveyor general; the man, whose particular duty it was to see that his deputies did not transgress the limits of their districts, and who, of all others, best knew what those limits were. Martin, who ran the dividing line under the order of this court, and Mr. Williams, both of whom have for many years resided in that part of the country, have sworn that this is the reputed, the well known, and established line of division, between those two districts. In addition to this testimony, Howel's map of this state has been given in evidence, which lays down the line considerably to the west of Beaver creek. On the other side is another survey made by Martin, at the instance of the defendant, which extends the northern line of these districts as contended for by the defendant, nearly twelve miles from the west boundary of the state; and if the defendant had directed him to extend it twelve miles further, it would have been the duty of the surveyor, acting under the order of this court, to have run that distance. But this of itself proves nothing. The survey and plot which accompanies it, are merely intended to exhibit on paper the dimensions, and relative position of the land, so that the evidence to prove its agreement or disagreement with the boundaries, as asserted by each party, may be the better understood. The deposition of Hugh McCullough was also read, who states, amongst other things, that he made a survey

of these districts, under an order of the board of property, made in the year 1815; in which he ran twelve miles from the west boundary of the state, as the northern line of Hoge's district. But, as the court refused to suffer that order or the survey made under it to be given in evidence, upon the ground that, as between these parties, they were ex parte and in no manner binding upon them, the evidence of the person who made that survey, as to the lines which he ran, can prove nothing in this cause. He has given no evidence, as to his own knowledge of the division line. He speaks, it is true, of some marked trees which he found on the line running south to the Ohio, twelve miles from the west boundary of the state, as do also Martin and E. Evans, on the line which the former ran, at the distance of eleven miles and one hundred and seventeen perches from the west boundary. But, whether these marked trees designate the district line, or merely the lines of the different surveys adjoining that line, is not explained by any one of the witnesses. Upon this evidence the jury must decide.

Verdict for plaintiff.

[The first verdict for the plaintiff was given in Case No. 5,822.]

GRIFFITH (UNITED STATES v.). See Case No. 15,263.

Case No. 5,824.

GRIFFITH v. WORTMAN.

[The case reported under above title in 13 Leg. Int. 361, and 19 Law Rep. 376, is the same as Case No. 18,057.]

GRIFFITH (WORTMAN v.). See Case No. 18,057.

Case No. 5,825.

In re GRIFFITHS.

[2 Lowell, 340;[1] 10 N. B. R. 456; 1 Cent. Law J. 507; 10 Alb. Law J. 249; 1 Am. Law T. Rep. 476.]

District Court, D. Massachusetts. Sept., 1874.

BANKRUPTCY—DISCHARGE.

Section 9 of the statute of 22d June, 1874 [18 Stat. 180], concerning the conditions upon which a discharge is to be granted to bankrupts, applies to cases pending when the act was passed. Such a statute is not retrospective in the legal sense.

[Cited in Re Watson, Case No. 17,273; Re Derby, Id. 3,816; Re Lowenstein, Id. 8,573; Re Gifford, Id. 5,408; Re Townsend, 2 Fed. 562.]

In bankruptcy.

LOWELL, District Judge. The question presented by the register's certificate is whether section 9 of the act of June 22, 1874 (18 Stat. 180), which dispenses with the consent of creditors to the bankrupt's discharge in compulsory cases, applies to pending cases. It was settled by several decisions in Massachusetts that such amendments of the law affected all cases. Ex parte Lane, 3 Metc. [Mass.] 213; Eastman v. Hillard, 7 Metc. [Mass.] 420; Ex parte Bartlett, 8 Metc. [Mass.] 72; Eddy v. Ames, 9 Metc. [Mass.] 585. But as the law has been pronounced to be otherwise in relation to this statute, in an able opinion of Judge Blatchford's, I feel bound to give briefly my reasons for agreeing with the earlier decisions.

Section 9 says, in substance, that in cases of compulsory bankruptcy the provisions of the former laws requiring the payment of a certain proportion of debts, or the assent of a certain number of creditors, as a condition of a bankrupt's discharge, shall not apply; but if otherwise entitled, he is to have the discharge without such payment or assent. And in cases of voluntary bankruptcy no discharge shall be granted to a debtor whose assets shall not be equal to thirty per cent of the debts proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section 33 of the principal act [14 Stat. 533], requiring fifty per cent of such assets, is repealed.

It is plain, I think, that the section, on the face of it, applies to all cases in which a discharge is applied for after the passage of the act. It was so explained to the house of representatives by Mr. Tremain, who had the bill in charge. Congressional Record, June 17, 1874, p. 60. And the words are almost precisely like those of the statute, which was so construed in Ex parte Lane, 3 Metc. [Mass.] 213, in which Wilde, J., speaking for the court, said: "The court can have no authority to grant a discharge against a prohibition in the statute." And the other cases cited are similar. In all, the law was changed without any express application to future or past cases, and the court unhesitatingly applied it to both classes.

This construction is aided by the express words of repeal which are found in sections 9 and 21. The repeal is unqualified, and I know of no rule which will authorize me to limit the scope of the enactment of repeal, unless it were, indeed, to save rights or titles already vested. And this brings me to what I venture to call the fallacy that such a change in the bankrupt law is retroactive if it is made to affect pending cases. A law which discharges debts already contracted may well be called retroactive; and this law, if retroactive at all, would be so not merely as to cases begun, but as to contracts entered into before its passage. But it is well settled that a mere modification of the conditions upon which a discharge shall be granted to bankrupts, is not retroactive. "It is clear," says the eminent jurist already

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

quoted, "that the appellant had no vested right to a discharge at the time of filing his petition. Such a right could be acquired only by proving, at the time of applying for a certificate of discharge, that he had in all respects complied with the provisions of statutes 1838 and 1841 [5 Stat. 440] (the latter of which was passed after he had been adjudged an insolvent), by which only a right could be acquired. The latter statute, therefore, is not to be considered a retrospective act, disturbing vested rights, but as altogether prospective in its operation, although it (the discharge) might depend, in some cases, upon acts done before it took effect." 3 Metc. [Mass.] 215. The definition of a retrospective statute is: one which impairs vested rights or imposes new duties or disabilities in respect to transactions already passed. Society for the Propagation of the Gospel v. Wheeler [Case No. 13,156], adopted by Sedg. St. Law, 188; Smith, St. Law, 289. This law is not retrospective in that sense.

The statute in Ex parte Lane [supra] was much more like a retrospective act than is that of 1874, because it actually deprived the insolvent of a discharge for a preference given before the act went into operation. This law neither creates new frauds nor relieves a bankrupt from the consequences of any which he has committed, but merely lightens somewhat the arbitrary conditions before imposed on honest bankrupts as a preliminary to obtaining a certificate. Such a law is always held to be remedial. In re Billing [Case No. 1,408]; Revere v. Newell, 4 Cush. 587.

It is said that one section of the amended act explicitly declares its applicability to pending cases, and another limits itself to cases begun after a certain day. This is true of those sections. But most of the sections leave the matter to interpretation, and must be judged by the subject-matter. Thus, section 14 says that all proceedings may be discontinued upon the assent of a majority of the creditors. There can be no doubt that this covers all cases, whether begun before or after June 22. To settle a case in that way may disappoint some hopes of creditors, but it is remedial, and disturbs no vested rights. So of the section now under consideration. The words seem plain to my apprehension; and the cases cited show how such laws have usually been understood.

I do not mean that there may not be many pending cases which have passed the stage at which the law would be applicable to them, in which, for instance, the debtor or the creditors may have been already entitled to a decree, which only remained to be formally pronounced when the new law went into operation. But, speaking generally, I say that the law was prospective, and applied to all cases in which the actual right had not been acquired, and that all inconsistent acts are unconditionally repealed.

[A much more difficult question, in my judgment, may arise in respect to voluntary cases, namely, whether the assent referred to is that of the given number and value of all creditors who have proved their debts, or only of those to whom the bankrupt is liable as principal debtor; but as this is a compulsory case, that point need not be decided now. Discharge granted.] [2]

[As the act was originally amended by the senate, it retained the words, "as provided by existing laws" in the 9th section. The conference committee struck out these words, and substituted the present requirements.] [2]

GRIFFITHS, In re. See Case No. 3,540.

GRIFFITHS (COLLENDER v.). See Case No. 3,000.

GRIFFITHS (HAYFORD v.). See Case No. 6,264.

GRIFFON, The (GREENAWAY v.). See Case No. 5,789.

Case No. 5,826.

GRIGG v. The CLARISSA ANN.

[2 Hughes, 89.] [1]

Circuit Court, E. D. Virginia. 1877.

ADMIRALTY—JURISDICTION.

The admiralty jurisdiction attaches where there is no other question than that of title to a ship, and no pretence of a maritime contract or a marine tort; and this unquestionably so where the ship is or has been afloat.

[Cited in The G. Reusens, 23 Fed. 404.]

In admiralty. An involuntary petition in bankruptcy was filed in the Eastern district of New York on the 14th November, 1873, against Daniel Dolton. On the 21st of the same month he was adjudicated a bankrupt. In due course of proceedings, Rufus T. Grigg was appointed assignee; and, on the 16th January an assignment of the effects of the bankrupt was made to the assignee. Among the bankrupt's property was the sloop Clarissa Ann, which, before the assignment to the assignee, the bankrupt had brought off from New York to Norfolk, and has kept here ever since. After long inquiry and search, the assignee found the sloop here; and, claiming title, libelled the sloop in admiralty, praying that possession be delivered to him. A petition is filed by a material-man, and also one by two seamen, for amounts due them, aggregating about $140.

HUGHES, District Judge. Whether the admiralty jurisdiction attaches where there is no other question than that of title to a ship, is no longer a matter of doubt in this country. For a very long period in England the admiralty court exercised jurisdiction in cases of titles to ships where the rights could

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[2] [From 10 N. B. R. 456.]

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

be determined by actions of detinue or trover at common law, and decided questions of disputed title without reserve. After the Restoration, however, it was informed by the higher common law courts that such matters were not cognizable before it; and, after that time, it was very reserved in taking cognizance of such cases (2 Dod. 289); "submitting to authority rather than reason." But the statute 3 & 4 Vict. c. 65, § 4, restored the authority which the court of admiralty had thus abrogated; and, in England, that court has since taken cognizance of petitory actions as well as possessory, for ships; that is to say, actions to try the mere title, as well as actions concerning the possession of ships incidental to proceedings in rem affecting them. In Virginia, as early as 1659–60, the court of admiralty had authority by express statute to try questions of title; and generally, in this country, the original jurisdiction of admiralty to entertain petitory suits for ships has never been laid aside or successfully disputed. Here there has never been felt that jealousy of the admiralty jurisdiction which has been exhibited in England; and the decision of the English courts on admiralty jurisdiction, during the century and a half preceding the present reign, are not authority here. But the courts of the two countries are not in accord on the subject of petitory actions concerning ships. The leading case in this country is that of The Tilton [Case No. 14,054], decided by Justice Story, which gives a complete exposition of the learning and law of the subject. The authoritative case settling the law of the subject for this country is that of Ward v. Peck, 18 How. [59 U. S.] 267. There, all the justices were present but one, and the decision was concurred in by all except one. The dissenting justice raised the point that the question was merely that of title to a ship, there being no pretence of a maritime contract or a maritime tort; that it was a question clearly within the ordinary and settled jurisdiction of the common law courts, triable by an action of detinue or of trover at law, or bill in equity; that there was nothing in the fact that the subject of the action was a ship to give jurisdiction to the admiralty court; and that if the court could try the right of title in the case under trial, it could do so although the ship were still on the stocks, and never had and never should touch the water. In the face of this energetic and plausible protestation of the dissenting justice, the supreme court sustained the jurisdiction of the admiralty court in the case before it, declaring that in this country, where the admiralty have not been subject to such jealous restraints as the supreme courts of common law had thrown around the admiralty court in England, the ancient jurisdiction over petitory suits or causes of property has been retained. Before this decision, in The Sarah Ann [Case No. 12,342], affirmed by 13 Pet. [38 U. S.] 387, the question of jurisdiction to entertain a petitory suit had not been raised. The American authorities on the general question are Taylor v. The Royal Saxon [Case No. 13,803]; The Friendship [Id. 5,123]; The Tilton [Id. 14,054]; [Ward v. Peck] 18 How. [59 U. S.] 267. The English authorities are 1 Vent. 173, 308; 2 Saunders, 26; 2 Lev. 25; 2 Barn. & C. 244; 1 Hagg. Adm. 81, 240; 2 Dod. 41, 258; 2 Browne, Civ. & Adm. Law, 130; 3 C. Rob. 133; 1 Show. 179.

I will give an order for the delivery of the vessel to the assignee, on bond being filed for the payment of any decree that may be rendered in favor of the material-men and seamen.

GRIGG (FRY v.). See Case No. 5,139.

GRIGGS (COX v.). See Case No. 3,302.

Case No. 5,827.

GRIGSBY v. LOVE et al.

[2 Cranch, C. C. 413.] [1]

Circuit Court, District of Columbia. May 22, 1823.

ATTACHMENT—PRIORITY OF LIEN.

In attachments in chancery, under the statute of Virginia, the attaching creditors have priority according to the time of service of their respective attachments.

There were six chancery attachments, served at different times in behalf of several creditors. The question was whether all the attaching creditors shall come in pari passu, or whether the attachment first served shall have the preference. The case was at November term, 1821.

Mr. Taylor and Mr. Mason, for the first creditor.

The bills do not aver that Love is insolvent. These attachments are all under the statute, and not under the general principles of equity. They do not affect the whole of the debtor's property. By the act of assembly of 26th December, 1792 (page 115), the attached effects may be delivered to the plaintiff. To which of these plaintiffs shall they be delivered, if they are to be shared equally by all? Although in the form of suits in equity, these attachments are, in effect, actions at law, and the plaintiff is entitled to the benefit of his own diligence. Love is merely an absent, not an absconding, or an insolvent debtor. The principle, pari passu, applies only to cases of insolvency, or where the whole funds are before the court, as a court of equity, and are insufficient to pay all. The statute gives jurisdiction to a court of chancery in such cases merely as a mode of getting at the effects. Wilson v. Koontz, 7 Cranch [11 U. S.] 204.

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

Mr. Swann, contra, for the subsequent creditors.

The statute says that the court may "make such order and decree therein as shall appear just." A just decree would be a decree for equal distribution among all the creditors. The property cannot be delivered over to the plaintiff until the return of the process, and then all the attachments are returned together; and the court may order the attached effects to be distributed, or to be delivered to the plaintiff or plaintiffs "upon their giving security for the return thereof to such persons and in such manner as the court shall direct." No reported case in Virginia has decided this question.

THE COURT continued the case for advisement, and to obtain information as to the practice of the courts in Virginia upon this statute. At May term, 1822, the case was mentioned again, and the case of Wright v. Hencock, 3 Munf. 526, was cited. And now at May term, 1823, Mr. Taylor stated to the court that he was informed by the chancellor of Virginia that the rule pari passu does not apply to attachments of this kind; and on the 22d of May, 1823, this court so decided. THRUSTON, Circuit Judge, absent.

GRIMES (FENWICK v.). See Cases Nos. 4,733 and 4,734.

Case No. 5,828.

GRIMES et al. v. UNITED STATES.

[Hoff. Land Cas. 107.] [1]

District Court, N. D. California. Dec. Term, 1855.

LAND GRANT—ABANDONMENT—BOUNDARY.

Objections removed by additional testimony, and by the ruling of the supreme court in Fremont v. U. S. [17 How. (58 U. S.) 542.]

Claim for eight leagues of land in San Joaquin county, rejected by the board, and appealed by the claimants [Hiram Grimes and others].

A. C. Whitcomb, for appellants.
S. W. Inge, U. S. Atty.

HOFFMAN, District Judge. The claim in this case was rejected by the board of commissioners. Since the filing of the transcript in this court, additional testimony has been taken, and the case has been submitted on the brief filed by the counsel for the appellees. No argument was made or brief filed on the part of the United States, and the district attorney, it is presumed, relies upon the objections to the claim which are set forth in the opinion of the board.

With regard to the delivery of the original grant to the grantee, the commissioners, although their decision is not placed upon that ground, seem to have entertained some doubt, from the fact that it is not produced by the claimants. But we think that this objection, whatever force it might have under the testimony submitted to the board, is entirely obviated by the evidence of Mr. Eversheld, Capt. Halleck, and Balentin Higuera, taken in this court. The circumstance that the grant is found among the archives and not in the possession of the party is by these witnesses satisfactorily explained.

With regard to the performance of the conditions, it appears that the original grantees had, before obtaining the grant, but subsequently to the date of their application to the governor for the land, built a corral upon it and placed there about two hundred head of horses and some work oxen. Higuera also built a sort of rude hut in which he lived, and the witness Romero testifies that he was on the rancho about fifteen or sixteen days assisting Higuera. The further improvement of the land seems in some degree to have been prevented by the Indians, and in 1849 the grantees sold out to McKee, under whom the appellants claim, and who appears to have laid out a city on the rancho. There were in 1850 six frame buildings on the site of the intended city, and McKee seems to have expended considerable sums of money on his purchase. It is also stated in the deposition of Hernandez, whose rancho adjoined that of Higuera and Feliz (the grantees in this case) that the latter occupied the land along the San Joaquin river up to the Arroyo de la Puerta, and had upon it a corral and a house on the banks of the San Joaquin, about opposite the Stanislaus river. The witness, however, assigns no date at which the corral and house were erected. Higuera, one of the original grantees, who swears that he no longer has any interest in the case, testifies that soon after obtaining the grant he built a corral and house on the land, and had cattle and horses thereon, but took them away in 1849 through fear of the Indians.

Under all the testimony of the case, we think there is nothing to show that the performance of the conditions has been unreasonably delayed, or that the grantees had abandoned their grant. The objection, therefore, of nonperformance of conditions must, under the principles laid down in Fremont v. U. S. [17 How. (58 U. S.) 542] be overruled. With regard to the location of the grant, there seems to be no difficulty. In the title the land is described as the tract known by the name of "Pescadero," and bounded by the river, by Buenos Ayres to the Pass of Pescadero, and the limits which shall be set at the time of the possession, on the side of the valley. In the fourth condition, the land is declared to consist of eight leagues, or a little less, as the corresponding map explains. On reference to the map the boundaries of the tract appear to be

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

delineated with tolerable accuracy, and the testimony in the case leaves no room for doubt that its limits are well known and capable of being precisely ascertained. The grant, it will be perceived, mentions two boundaries—the river (San Joaquin) and Buenos Ayres to the Pass of the Pescadero. The Arroyo de la Puerta seems also indicated as the southerly boundary of the map, but all doubt on this subject is removed by the evidence, not only of the colindantes and others who testify as to the extent and boundaries of what was known as the "Pescadero Rancho," but by the production of the expediente for the Hernandez rancho, which lies immediately to the south of the tract now claimed. In the diseño which accompanies that expediente, the Arroyo de la Puerta is distinctly marked as the lindero or boundary of the two ranchos, the arroyo forming in fact the northern boundary of the Hernandez and the southern boundary of the Pescadero ranchos. The boundaries seem thus to have been fixed or recognized by the highest authority, the governor himself, almost contemporaneously with the grant, for the Hernandez concession was made but a few days after the grant under consideration.

The above are all the objections to the validity of the grant which are noticed in the opinion of the commissioners, and none other have been suggested to this court. The expediente in this case is defective, for the decree of concession is not contained in it. Whatever suspicions this fact might give rise to, are dispelled by the proofs which have been submitted of the execution and delivery of the formal title to the grantees, and the almost contemporaneous grant to Mariano and Pedro Hernandez, in which the governor mentions the land of "Don Balentin Higuera" as one of the boundaries of the tract granted to them. The mesne conveyances seem to be regular, and a decree of confirmation must therefore be entered.

GRIMES (UNITED STATES v.). See Cases Nos. 15,264 and 15,265.

Case No. 5,829.

In re GRINNELL.

[9 N. B. R. (1874) 137.] [1]

District Court, S. D. New York.

BANKRUPTCY—SALE OF PLEDGE.

Where stock is pledged to secure call loans, the pledgee need not obtain leave of the court, on the bankruptcy of the pledgor, to sell the stock pledged and pay the surplus into court for the benefit of whom it may concern.

[Cited in Bradley v. Adams Express Co., 3 Fed. 898.]

[1] [Reprinted by permission.]

The petition of the Pacific Bank shows that the above named bankrupt, on the 17th day of October, 1873, filed his petition in bankruptcy, and obtained a adjudication thereon; that the bankrupt, as a member of the firm of George B. Grinnell & Co., which firm was composed of said George B. Grinnell and Joseph C. Williams, the said Williams being now also a bankrupt, about the 3d day of May, 1873, borrowed of said bank, on a call loan, the sum of fifty thousand dollars; and also borrowed of said bank, on a call loan, June 3d, 1873, fifty thousand dollars; and also borrowed, on a call loan, June 5th, 1873, for said firm, one hundred thousand dollars; and also borrowed, on a call loan, July 17th, 1873, for the same firm, the sum of fifty thousand dollars, all of which loans were made by the said bank in the regular course of business, which money so loaned was to be paid on demand; that to secure said loans said bankrupts duly sold, hypothecated and delivered to said bank, various bonds and stocks; that all the aforesaid bonds, stocks and securities were hypothecated and delivered to said bank to secure the prompt and faithful payment, on demand, of the several aforesaid loans, amounting in all to the sum of two hundred and fifty thousand dollars; that the payment of the several loans above mentioned has been duly demanded of said bankrupt; that the estate of said bankrupts have an interest in equity in any surplus that might remain after the sale of said bonds and securities, and the payment of said sum of two hundred and fifty thousand dollars to said bank. And while your petitioner believes that said bank has the right by law to sell said stocks and securities, in the usual way, without an order for that purpose, and pay the surplus into court for the benefit of whom it might concern, yet as the equitable interests of the other parties might be better protected by application to this honorable court for direction as to the manner of selling said stocks, bonds and securities, your petitioner asks the direction of this court in the premises. Wherefore your petitioner prays that an order may be made requiring said bankrupt and their attorneys, and all other persons having charge of said bankrupt's estate, to show cause, if any they have, at an early day, why your petitioner should not sell said stocks and bonds above described, and why your petitioner should not retain, out of the proceeds of said bonds, stocks and securities, the aforesaid sum of two hundred and fifty thousand dollars and interest, and expenses and the costs of this proceeding, and deposit in this court the surplus, if any there be, to the credit of the estate of said bankrupts.

On this petition the endorsement by BLATCHFORD, District Judge, is: "I do not see that any leave is necessary. S. B."

[For a full discussion of the same point by Blatchford, District Judge, see Case No. 5,830.]

Case No. 5,830.

In re GRINNELL et al.

[7 Ben. 42;[1] 9 N. B. R. 29; 21 Pittsb. Leg. J. 82.]

District Court, S. D. New York. Nov., 1873.

LIEN ON BANKRUPT'S PROPERTY—SALE OF PLEDGE BEFORE THE APPOINTMENT OF AN ASSIGNEE—POWER OF THE COURT.

1. Stocks and bonds were deposited with B. B. & Co., bankers, as collateral security for loans to G. & Co., then solvent, but who afterwards became bankrupt. Before an assignee was appointed, B. B. & Co. applied to the court for an order authorizing them to sell the collaterals to reimburse themselves for the loans, which had become due: *Held*, that the court could not, before the appointment of an assignee, make the order for sale contemplated by the 20th section of the bankruptcy act [of 1867 (14 Stat. 526)], nor authorize any sale which would cut off or affect the rights of an assignee thereafter to be appointed; but that, there being no suggestion of the invalidity of the debt, or of the lien of the petitioners, or that they would not be able to respond for any liability which they might incur by making the sale, an order might be made allowing them to sell the securities at their own risk, and reserving all the rights and powers of the court to hold them to account for the property and proceeds thereof to an assignee, when he should be appointed—a sworn statement of such sale and proceeds to be filed within two days after sale.

2. It is the principle of the bankruptcy act, that all valid liens, which exist on the property of a bankrupt when the bankruptcy proceedings are commenced, are preserved, and will be respected and enforced by the bankruptcy court.

3. But it is confided to that court to determine whether the debt or lien is valid, and to regulate the disposition of the property, and, for this purpose, power is given to the court, in involuntary cases, by the 40th section, to restrain the debtor and any other person from making any disposition of any part of the debtor's property.

4. The filing of a petition in bankruptcy, whether voluntary or involuntary, if followed by an adjudication, and the appointment of an assignee, operates, from the time of such filing, as a practical restraint on a pledgee of the property of the bankrupt, who is notified of such filing, from disposing of it, otherwise than at his own risk, until the bankruptcy court can act in the premises.

[Cited in Re Duncan, Case No. 4,131; Taylor v. Robertson, 21 Fed. 214.]

[In bankruptcy. In the matter of George Bird Grinnell and Joseph C. Williams.]

J. H. Choate, for petitioners.

BLATCHFORD, District Judge. This is a case of voluntary bankruptcy, the petition in which was filed on the 15th of October, 1873. The formal adjudication was made on the next day. On the 9th of September, 1873, the firm of Blake Brothers & Co. loaned to the firm of George Bird Grinnell & Co., a firm composed of the bankrupts as general partners, and of a special partner, the sum of $100,000, payable on demand, with simple interest, on a pledge and hypothecation of certain collateral securities deposited with the former firm by the latter firm, to secure the loan, the securities consisting of certain bonds and shares of stock. On the 18th of September, 1873, more shares of stock were added. Some of the shares of stock have been sold, and their proceeds applied towards the payment of the loan, and there is now due thereon $76,393.17, with interest from September 30th, 1873. On the 15th of September, 1873, a further loan was made of $25,000, payable on demand, with simple interest, on the pledge and hypothecation, as collateral security, of certain other shares of stock. No part of that loan has been repaid. On the 17th of September, 1873, a further loan was made of $150,000, payable on demand, with simple interest, on a pledge and hypothecation, as collateral security, of certain other shares of stock and certain other bonds. On the 18th of September, 1873, more shares of stock were added. Some of the shares of stock have been sold, and the interest on some of the bonds has been collected, and the proceeds applied towards the payment of the last-named loan, and there is now due thereon $108,781.84, with interest from October 4th, 1873. On the 17th of September, 1873, a further loan was made of $75,000, payable on demand, with simple interest, on a pledge and hypothecation, as collateral security, of certain other shares of stock. On the 18th of September, 1873, more shares of stock were added. Some of the shares of stock have been sold, and the proceeds applied towards the payment of the last-named loan, and there is now due thereon $49,528, with interest from September 30th, 1873. All the said securities, except the shares of stock so deposited on the 18th of September, 1873, were deposited simultaneously with the making of the loans. To further secure said loans, and to cover any deficiency there might be on either of them, after applying thereto the specific securities on which it was made, and specially relating to it, the borrowers, on or about the 18th of September, 1873, deposited with, and pledged and hypothecated to, the lenders, certain other shares of stock and certain other bonds, and, on the 19th of September, 1873, made a further pledge and hypothecation to, and deposit with, the lenders, of certain other bonds. The securities not so sold are still held by the lenders. Each of the loans was made payable on demand, and under an understanding and agreement between the lenders and the borrowers, that, in case of any default in paying the same on demand, the lenders might immediately reimburse themselves for the amount due to them thereon, by a sale of the collaterals given to secure it. On the 20th of September, 1873, the lenders demanded from the borrowers the payment of the amounts due on all of the loans, but none of them were paid.

A petition is now presented to this court, by Blake Brothers & Co., setting forth the above facts, and further stating that they did not, at the time of the taking place of any of the foregoing transactions, know, or sus-

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

pect, or believe, and had not been informed, that the borrowing firm, or either of its members, were or was insolvent, or in contemplation of insolvency, or that bankruptcy proceedings were contemplated, or could properly be had by or against them; that they, during all of said times, and especially when the loans were negotiated, were in good standing and credit; that the petitioners supposed, and had good reason to suppose, that they were entirely solvent, and free from embarrassment; that the first meeting of the creditors of the bankrupts will not be held until the 14th of November, 1873; that the petitioners, pursuant to the provisions of the bankruptcy act, have duly proved the said indebtedness, as a debt with security, as above described, against the estate of the bankrupts; and that they desire to sell the said securities, or so many of them as may be necessary for such purpose, and reimburse themselves therefrom for the amount of said indebtedness, and desire that the value of said securities may be ascertained by a sale to be made in such manner as this court may direct. The petitioners pray that an order may be made by this court, authorizing and empowering them to sell the said securities, or so many and such parts of them as may be necessary to be sold, in order to reimburse themselves the amount due to them on account of said loans, and to make such sale at public auction, in the city of New York, after three days' notice of the time and place of such sale, by publication thereof in such newspapers, in said city, as the court may designate for that purpose, and after such other notice thereof, and in such manner, in other respects, as the court may direct. Notice of the presenting of the petition, and of a motion for the order prayed for, was served on the attorneys for the bankrupts. They did not appear on the motion. The first meeting of creditors not having been held, no assignee in bankruptcy has, as yet, been appointed or elected.

This is an application to the court to direct a sale of the property, so as to ascertain its value, as between the pledgees of it and the estate of the bankrupts, in order to arrive at a basis for determining whether the pledgees will remain creditors of the estate, after deducting such value from their debt, or whether such value will pay the debt and leave a surplus for the estate. The application is supposed by the petitioners to be such an one as is provided for by the 20th section of the act, which contains this language: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and, in either case, the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold, or released and delivered up, the creditors shall not be allowed to prove any part of his debt."

It is well settled, that a creditor holding security for a debt does not in any manner prejudice his claim to the security he holds by proving his debt, as a debt with security, and setting out in the proof the particulars of the security, and its estimated value. Such a form for a proof of debt is one of the forms prescribed by the supreme court. He does not, by such a form of proof, release his security, and prove his debt as an unsecured debt. On the contrary, such a form of proof insists on and maintains the security. Moreover, proving a debt, by such a form of proof, is a necessary prerequisite, if a secured creditor desires to maintain his security, and, at the same time, invoke the mode of procedure provided for by the 20th section. This is apparent, from a consideration of various provisions of the act, and the same provisions also show that the 20th section can have no operation until an assignee has been appointed or elected. The 14th section provides, that, when an assignee is appointed and qualified, and an assignment is made to him of all the estate, real and personal, of the bankrupt, such assignment shall relate back to the commencement of the proceedings in bankruptcy (which commencement is the filing of the petition, if followed by an adjudication), and that thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in such assignee. The 14th section also provides, that all property conveyed by the bankrupt in fraud of his creditors, and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, and all his rights of redeeming such property or estate, shall, in virtue of the adjudication of bankruptcy, and the appointment of the assignee, be at once vested in the assignee. The 14th section also provides, that "the assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same, subject to such mortgage, lien, or other encumbrances." The 17th of the general orders in bankruptcy, prescribed by the

supreme court of the United States, to carry out the foregoing provision of the 14th section, declares, that, "whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, * * * the assignee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor in the office of the clerk of the district court, and thereupon the court shall appoint a suitable time and place for the hearing thereof," and the publication of a notice of ten days is provided for, "so that all creditors and other persons interested may appear and show cause" why the prayer of the petition should not be granted. The supreme court have also prescribed a form (Form No. 34) for a petition by the assignee, setting forth that a certain portion of the bankrupt's estate, describing it and its estimated value, is subject to a mortgage or a lien, or, if personal property has been pledged or deposited, and is subject to a lien, describing its nature, and praying to be allowed to redeem the property from the lien, or to sell it subject to the lien. The 1st section of the act gives power to the court to ascertain and liquidate the liens, and other specific claims, on the assets of the bankrupt, and to adjust the various priorities and conflicting interests of all parties, and to marshal and dispose of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors. The 22d section provides, that the court may examine into claims, and shall reject all claims not duly proved, and all claims founded on fraud or illegality. The same section also provides the mode in which claims shall be duly proved, and prescribes what the deposition for proof shall contain, and says, that, to entitle a claimant against the estate to have his demand allowed, the deposition must set forth certain specified particulars, among which is, whether any and what securities are held for the demand, and that no other security has been received than that so set forth.

In view of all these provisions, it is impossible to say that the sale contemplated by the 20th section can take place before an assignee is appointed. The assignee is the only person who can represent the creditors other than the particular secured creditor. Whether such other creditors are wholly unsecured or insufficiently secured, they have an interest in seeing that the debt of the particular secured creditor is duly proved, and is not fraudulent or illegal, and that the securities held for it are applied on it at their proper value, whether such value is ascertained by agreement between such particular secured creditor and the assignee, or by a sale. Before such application of the securities is made, the assignee has a right, on behalf of such other creditors, to elect whether he will redeem the pledged property, by paying the debt and taking the property, or whether he will ask to have it sold subject to the lien, or whether he will give it up to the secured creditor on receiving an agreed sum as its excess of value over the debt. Nothing of all this can be done until there is an assignee.

But the distinct principle of these provisions is, that all valid liens which exist on the property of a bankrupt when the proceedings in bankruptcy are commenced are preserved, and will be respected by the bankruptcy court, and enforced, and allowed to be paid out of the proceeds of the property on which they are liens. It is, however, confided to the bankruptcy court to determine whether the debt is valid, and whether the lien is valid, and to regulate the disposition of the property on which the lien is claimed. For this purpose, in involuntary cases, power is given to the court, by the 40th section, to restrain the debtor and any other person from making any transfer or disposition of any part of the debtor's property not excepted by the act from the operation thereof, and from any interference therewith. This power is to be exercised when the order to show cause is issued, and is intended to restrain the disposition of the debtor's property until there can be an adjudication of bankruptcy, and proper proceedings thereafter. The same effect results from the filing of a voluntary petition, for the debtor, in filing it, brings all his property under the protection and within the control of the court. It by no means follows, however, that the court will allow the assignee, or any of its officers, to take from the possession of pledgees occupying the position of bona fides and solvency which appears to be that of the present petitioners, property of the character of that pledged to them in the present case, unless such disturbance of their possession shall be adjudged in the course of, or as the result of, a suit to be brought by the assignee against them, to set aside the pledge as fraudulent or void, for some cause for which the assignee has the right conferred on him, by the act, to set it aside in such a suit. Nor does it follow that, the debt and the lien not being disputed by the assignee, the court, while regulating the time and manner of selling such pledged property, will take it from the possession of such pledgees before, or for the purposes of, the sale, or take from their possession so much of its proceeds as may be necessary to discharge the debt due to them. It, nevertheless, remains true, that the filing of a petition in bankruptcy, whether voluntary or involuntary (if followed by an adjudication and the appointment of an assignee), operates, from the time of such filing, as a practical restraint on a pledgee of the property of the bankrupt, who is notified of such filing, from disposing of it otherwise than at his own risk, until the bankruptcy court can act in the premises. For it was held by Judge

Woodruff, in the circuit court for this district, in the case of Miller v. O'Brien [Case No. 9,586], that a sheriff who, after proceedings in bankruptcy are commenced, wherein an assignee is appointed, levies an execution upon and sells property which was of the bankrupt, is liable to the assignee for the proceeds of such property, although he pays such proceeds to the execution creditor before receiving actual notice of the bankruptcy. The contingency of the bankruptcy of a pledgor, before the debt is paid, is one which, so long as the bankruptcy act exists, with the provisions now found in it, must enter into and form a part of every contract of pledge. The moment the pledgor is adjudged bankrupt, the pledgee can no longer deal with him as continuing to be the owner of the property, or deal with the property as continuing to be the property of the pledgor. If a demand of payment be necessary to be made of the pledgor, or if a notice of sale of the pledged property be necessary to be given to the pledgor, such demand cannot be made on, or such notice given to, the pledgor, after the adjudication, so as to cut off any rights which will belong to the assignee. It is as if the pledgor were to die, and there were to be an interval between his death and the appointment of his executor or administrator, during which there would be no one to represent the estate of the pledgor and to receive a demand or a notice. Contingencies of this character are incident to the remedies on all contracts. The right to sue for the breach of a contract is suspended by the death of the person to be sued. There is no one to respond for his estate until a legal representative of it is created. The same thing occurs on an adjudication of bankruptcy. The pledgees who make the present application can, however, if they choose, take the risk of the validity of their debt, and of the validity of their lien, and of the allowance of a proper value for the pledged property, and, assuming such risk, may sell such property. But the court can make now no order directing a sale, or any order which shall cut off or affect any rights of an assignee in bankruptcy who may hereafter be elected or appointed. Irrespective of the views already suggested, it is against the principles of justice to do anything which may conclude the rights of an absent party. There is nothing to suggest the invalidity of the debt or of the lien of the petitioners, or that they are not fully able to respond pecuniarily for any liability they may incur by making the sale. Under such circumstances, the court is disposed to do all that is possible, to show that the petitioners have applied to the court, and, failing to obtain the order asked for, have been granted what the court could grant. An order may, therefore, be entered, that the petitioners may, notwithstanding the pendency of these proceedings, sell, in any manner authorized by the terms of their contracts with the bankrupts, and by the laws of the state of New York, all the stocks and bonds remaining in their hands, mentioned in their petition, and may use and dispose of the proceeds of the stocks and bonds so sold as if they were their own, subject, however, to, and reserving the right and power of, this court to ascertain and liquidate the liens and specific claims of the petitioners on said securities or the proceeds thereof, and to marshal and dispose of such proceeds; but the order must provide that it is not to be construed as a direction, or as affecting any of the rights of any assignee in bankruptcy who may be appointed herein, and that it is made on condition that the petitioners file, in this court, within two days after the future sale of any of said securities, a sworn statement of the particulars of such sale.

[On the same point, see Case No. 5,829.]

GRINNELL (CROSBY v.). See Case No. 3,422.

Case No. 5,831.

GRINNELL et al. v. LAWRENCE.

[1 Blatchf. 346;[1] 19 Hunt, Mer. Mag. 533.]

Circuit Court, S. D. New York. Sept. 30, 1848.

CUSTOMS DUTIES—DUTIABLE VALUE—PENALTIES.

1. A cargo of Canton goods was shipped from Canton to London, and thence to New-York. In collecting duties on them the freight from Canton to London was added as part of the dutiable value: *Held*, that this charge was not authorized by section 16 of the tariff act of August 30, 1842 (5 Stat. 563).

[Applied in Wilbur v. Lawrence, Case No. 17,635; Griswold v. Maxwell, Id. 5,838. Cited in Gant v. Peaslee, Id. 5,212; Millar v. Millar, Id. 9,546; Harding v. Whitney, Id. 6,052.]

2. *Held*, also, that even if this freight were a proper charge, it would form no part of the "appraised value" of the goods, and its addition would not authorize the imposition of the 20 per cent. penalty under section 8 of the act of July 30, 1846 (9 Stat. 43).

[Cited in Wilson v. Maxwell, Case No. 17,824; Cobb v. Hamlin, Id. 2,922.]

This was an action to recover back an alleged excess of duties paid to the defendant [Cornelius W. Lawrence], as collector of the port of New-York.

On the 15th of November, 1847, the plaintiffs [Henry Grinnell and others] shipped from London to New-York, in the ship American Eagle, 1050 rolls of Canton matting, containing 42,000 yards, at the cost of $3,880. A commission of 2½ per cent. was added, making a total of $3,977, on which a duty of 25 per cent. was charged, amounting to $994.25. The entry was made at the custom-house from the original invoice which accompanied

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

the goods when shipped from Canton to London on the 10th of August, 1846. This invoice also accompanied the goods on their reshipment from London to New-York. On the entry of the goods at New-York, the collector directed the appraisers to report the charges upon each roll of the matting, and they reported, accordingly, to be charged on each, $1 50 for freight from Canton to London, making the additional sum of $1,575, upon which duties were chargeable, which, at 25 per cent., amounted to $393 75. It being claimed that the appraised value of $5,552, (which included the addition of the charges for freight from Canton to London,) exceeded, by ten per cent., the value, $3,977, as entered at the custom-house, a duty of 20 per cent. on such amended value was also imposed and charged by way of penalty, under section 8 of the act of July 30, 1846 (9 Stat. 43), which amounted to $1,110 40. The aggregate amount of duties, including the penalty of 20 per cent. thus charged upon the Canton matting, was $2,498 40. The sum of $393 75, the duty on the charges for freight from Canton to London, and also the $1,110 40 imposed by way of penalty, making the sum of $1,504.15, was paid to the collector under protest. There was also shipped, at the same time, and in the same vessel, a quantity of crape shawls, which were entered at a cost, including charges and commissions, of $4,079 47; and charged with a duty of 30 per cent. amounting to $1,223 84. These articles had also been shipped from Canton to London, and reshipped by the plaintiffs [Henry Grinnell and others] to New-York. The charges for freight from Canton to London were added to the entry, amounting to $102, on which a duty of 30 per cent. was exacted, amounting to $30 60. This sum, also, was paid under protest, making an aggregate of $1,534 75, with interest from the time of payment, which the plaintiffs claimed to recover, and for which a verdict was taken subject to the opinion of the court.

Daniel Lord, for plaintiffs.

Benjamin F. Butler, (Dist. Atty.,) for defendant.

NELSON, Circuit Justice. The charges for freight of the goods from Canton to London were not authorized, by any of the existing tariff acts, to be added to form the ad valorem dutiable value. The act of July 30, 1846 (9 Stat. 42), did not prescribe the mode of arriving at the dutiable value of the goods, but referred to the existing enactments on that subject. These will be found in the provisions of the act of August 30th, 1842 (5 Stat. 548). The sixteenth section of the latter act provides, that it shall be the duty of the collector to cause the actual market value, or wholesale price of the goods, at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised and ascertained, and to such value or price shall be added all costs and charges except insurance, and including, in every case, a charge for commissions, as the true value at the port where the same may be entered, upon which the duties shall be assessed. It is clear that the costs and charges here referred to, mean those that have been incurred subsequent to the purchase of the goods, and in the course of their shipment to the United States; not costs or charges that may have been incurred in any previous shipment of them to the place whence they were exported to this country. The latter enter into and form constituent parts of the market value, or wholesale price of the goods at the place of exportation. To add them again, would be including the same charges twice, in fixing the valuation. The market value of goods at a given port, includes all previous costs and charges of production, and of transportation to and delivery at that market.

Then follows the proviso to the section, that in all cases where the goods shall have been imported into the United States from a country in which the same shall not have been manufactured or produced, the foreign value shall be appraised and estimated according to the current market value or wholesale price of similar articles at the principal markets of the country of production or manufacture, at the time of the exportation to the United States. This proviso is to be construed with reference to and in connection with the enacting clause, and not as an independent provision. If it were construed according to the latter view, then no charges would be admissible, as none are provided for. But, taken in connection with the previous clause, it is, in legal effect, a substitution, in all cases of shipments of goods from a place other than the country of production or manufacture, of their current market value in that country instead of their market value at the place of exportation.

The general rule given for the appraisal is the market value or wholesale price at the time of the purchase, in the principal markets of the place whence the goods are imported. The exception is where the goods are the production of some other country, when their current market value in that country is to be taken. In each case the costs and charges are to be added, as prescribed in the enacting clause; and the costs and charges in both cases are those which have been incurred at the port of shipment. The current market value at the principal markets of the country of production, was, doubtless, regarded by congress as affording, upon the whole, a fairer and more uniform measure of value, than the market value at the place of shipment; and, therefore, that measure was substituted in the particular case thus provided for, leaving the costs and charges the same in both cases.

The principle of this proviso was first in-

corporated into the act of March 1, 1823 (3 Stat. 729). The fifth section of that act provided, that to the actual cost of the goods, if purchased, or the actual value, if otherwise procured, at the time and place when and where purchased or procured, or to the appraised value, if appraised, should be added all charges, except insurance; provided, that in all cases where the goods should have been imported from a country other than that of their production, the appraisers should value the same at their current value in the country where they were produced or manufactured. This was a simple substitution of one measure of valuation for another, in case the goods were shipped from a country different from that of their production. The costs and charges remained the same. The same remarks are true of the acts of May 19, 1828, and of July 14, 1832 (4 Stat. p. 273, § 8, and Id. pp. 591, 593, §§ 7, 15.) There was, therefore, no authority for adding the freight of the goods in question from Canton to London, as part of the charges in fixing the dutiable value.

But if otherwise, and the freight was properly added, the penalty of 20 per cent. was not chargeable. The eighth section of the act of July 30th, 1846, imposes this duty in cases where the appraised value of the goods imported shall exceed, by ten per cent. or more, the value as declared in the entry. The "appraised value," as used in this act of 1846, and in that of August 30th, 1842, and, indeed, in all of the revenue acts, means the value of the goods to be estimated and ascertained by the appraisers, either according to the "actual cost," "actual value," or "market value," as the case may be, exclusive of charges. To this value, thus ascertained, charges are to be added, in making up the dutiable value. Charges are not appraised, but are ascertained, and added to the appraisal. This is especially so provided in the sixteenth section of the act of 1842. It directs the goods to be appraised, and to the value thus ascertained are to be added the costs and charges. The eighth section of the act of 1846, in question, is to be read in connection with this sixteenth section of the act of 1842. Independently of the charge for freight, the appraised value of the Canton matting not only did not exceed, by ten per cent., the value as entered at the custom-house, but was admitted to be correct. The case, therefore, did not arise which justified the imposition of the 20 per cent. penalty under the eighth section of the act of 1846. The plaintiffs are entitled to recover back, not only the amount of the penalty, but also the duties charged on the freight from Canton to London, with interest from the time of payment.

Judgment for plaintiffs.

GRINNELL (SEDGWICK v.). See Cases Nos. 12,612 and 12,613.

GRINNELL (SHAW v.). See Case No. 12,719.

Case No. 5,832.

GRISAR v. McDOWELL.

[4 Sawy. 597.] [1]

Circuit Court, N. D. California. July 17, 1866.[2]

MUNICIPAL LANDS — RESERVATION OF PUEBLO LANDS—TITLE TO PUEBLO LANDS.

1. Although a pueblo of some kind existed at the site of the present city of San Francisco, previous to and on the acquisition of the country, July 7, 1846, possessing some interest in lands within certain prescribed limits, yet the former government, until such acquisition, retained a right to control the use and disposition of these lands, until by action of the officers of the pueblo, or other competent authority, they became vested in private proprietorship, and that right upon the cession passed to the United States, and could at any time thereafter be exercised by reserving parcels of the lands for public purposes. Parties taking possession of any of the municipal lands thus reserved held them at the pleasure of the government.

[See note at end of case.]

2. Although an order of the president excepts and reserves from sale certain lands within the pueblo, using the language employed when a reservation of public lands is made, to which no adverse claim is asserted, yet the order is expressive of an intention to withdraw the lands from the control and disposition of the authorities of the pueblo, and will be enforced as effectual for that purpose.

[Cited in U. S. v. Hare, Case No. 15,303.]

[See note at end of case.]

3. The title of the pueblo to its municipal lands was an imperfect one, requiring further action of the government before it could be turned into an indefeasible estate. The claim of the city had, therefore, to undergo judicial investigation before the board of land commissioners, and to depend for its validity in extent upon the determination of the board and the tribunals of the United States to which it could be carried. The claim of the city, having been thus investigated, was confirmed to four square leagues, subject to certain exceptions, among which were all such parcels of land as had been previous to that time "reserved or dedicated to public uses by the United States." The lands thus reserved include Black Point, the premises in controversy in this case.

[See note at end of case.]

This was an action to recover the possession of certain real property, situated at or near the place known as Black Point, or Point San Jose, in the city of San Francisco. The plaintiff [Emil Grisar] claimed to be the owner in fee of the premises, deriving his title from the city of San Francisco by virtue of the ordinance of the common council for the settlement of land titles in the city, passed on the twentieth of June, 1855, commonly known as the "Van Ness Ordinance," and the act of the legislature of the state ratifying and confirming the same. The defendant [Irwin McDowell] is an officer in the army of the United States, commanding the department of the state of California, and as such officer, acting under the authority of the United States, entered upon and now holds possession of the premises as part of

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

[2] [Affirmed in 6 Wall. (73 U. S.) 363.]

the public property of the United States reserved for military purposes.

At the time the ordinance named was passed the city of San Francisco asserted title, as successor of a Mexican pueblo established and in existence on the acquisition of the country, to four square leagues of land, embracing the site of the present city, and had presented her claim for the same to the board of land commissioners created under the act of March 3, 1851 [9 Stat. 631], and the board had confirmed the claim to a portion of the land embracing the premises in question, and rejected her claim for the residue. Dissatisfied with the limitation of her claim, the city had prosecuted an appeal from the decision of the board to the United States district court, and this appeal was then pending and undetermined. By the second section of the ordinance the city relinquished and granted all the title and claim which she thus held to the land within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the first of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. In March, 1858, the legislature of the state ratified and confirmed this ordinance. The party through whom the plaintiff traced his title was in such actual possession of the premises in controversy, both at the time designated by the ordinance, and also on the passage of the confirmatory act of the legislature, and therefore acquired whatever right or title the city possessed; and he improved and cultivated the premises, and erected a building thereon, which was occupied by the plaintiff as his residence when he was removed by the defendant. On the other hand, the authorities of the United States, since 1850, claimed the right to hold the premises as lands set apart for public purposes. In November of that year President Fillmore ordered that they should be exempted and reserved from sale for such purposes; and in June of the following year notice of this order was communicated by the commissioner of the general land-office at Washington to the surveyor-general of the United States for California, and has ever since remained on file in his office. This order was afterward modified in some respects, and the land designated by means of a map with greater precision than was done in the first instance, but it was never revoked, although actual possession of the entire portion was not taken until it became necessary for the protection of our commerce to have the fortifications of the harbor increased. The question presented was, therefore, between the title of the city, as it existed on the first of January, 1855, and the title of the United States. The case was tried by the court upon stipulation of the parties without the intervention of a jury, at the June term, 1866.

B. S. Brooks and Geo. E. Whitney, for plaintiff.

Delos Lake, Dist. Atty., for defendant.

FIELD, Circuit Justice. It may be considered as settled that a pueblo of some kind existed at the site of the present city upon the acquisition of the country by the United States on the seventh of July, 1846; that the pueblo possessed some claim to or interest in lands to the extent of four square leagues, measured off from the northern portion of the peninsula upon which the city of San Francisco is situated; and that the city succeeded to the claim and interest of the pueblo.[3] This has been frequently held by the courts of the state and by this court. And though the fact is not admitted in this case by the counsel of the government, it is not seriously controverted by them. We shall assume such to be the fact in the consideration of the case; it is upon the supposed existence of such fact that the pretension of the plaintiff rests.

It is difficult to state with precision the exact character of the title or interest which the pueblo possessed in its municipal lands. It is sufficient to say that the government undoubtedly retained a right to control the use and disposition of these lands, until by action of the officers of the pueblo, or other competent authority, they became vested in private proprietorship. Numerous grants to individuals within the limits of the four square leagues claimed were made by the governors of the department, some with and some without the sanction of, or even consultation with, the authorities of the pueblo. If they could thus pass the title to private persons, it would seem to be a reasonable inference that they could reserve from the disposition of those authorities such portions of the lands as might be required by the government for public purposes. And this is the conclusion expressed by this court in the opinion rendered when the pueblo case was decided. This power of control and disposition which existed with the former government passed upon the cession of the country, with all other public rights, to the United States, and could, at any time thereafter, be exercised in furtherance of their policy or the execution of their laws. Whoever took possession of any of the municipal lands over which the United States had thus

[3] The term "pueblo" answers to that of the English word "town," in all its vagueness and all its precision. As the word "town," in English, generally embraces every kind of population from the village to the city, and also, used specifically, signifies a town "corporate and politic," so the word "pueblo," in Spanish, ranges from the hamlet to the city; but used emphatically, signifies a town "corporate and politic."—Dwinelle's Colonial History of San Francisco, p. 7.

exercised their power, held such lands at the pleasure of the government. This view meets and overthrows the pretension of the plaintiff.

Though the order of the president exempts and reserves the lands from sale, using the language employed when a reservation is made of public lands to which no adverse claim is asserted, and which, but for such reservation, would be open for sale and settlement, yet it is as expressive of an intention to withdraw them from the control and disposition of the authorities of the pueblo as if it had in terms so declared.

There is another view of the title or interest of the pueblo to her municipal lands, which leads to the same conclusion. That title or interest, whatever it may have been, was an imperfect one; it was, in fact, only a restricted and qualified right to alienate portions of the lands in lots for building or cultivation, and to use the residue for commons, for pasture lands, or as a source of revenue or other public purposes; subject, however, in all particulars, to the control of the government of the country. Further action of that government was therefore necessary before absolute ownership could be affirmed in the pueblo. And since the change of jurisdiction, this imperfect right of the city—the successor of the pueblo—to her lands, required recognition and action of the new government before it could be turned into an indefeasible estate as known to our laws. The lands, too, had never been designated and measured off by the former government, and remained in this respect undefined upon the acquisition of the country. The claim of the city had therefore to undergo judicial investigation before the board of land commissioners, created under the act of March 3, 1851, and to depend for its validity and extent upon the determination of the board and of the tribunals of the United States to which it could be carried. The authorities of the city so regarded the claim, and by their direction it was presented to the board in July, 1852. In December, 1854, the board confirmed the claim, as we have already stated, to a portion of the four square leagues, and rejected it for the residue. From the decision, an appeal was taken by the filing of a transcript of the proceedings and decision of the board with the clerk of the district court. The appeal was by statute for the benefit of the party against whom the decision was rendered—in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed; and both parties gave notice of their intention to prosecute the appeal.

Subsequently, in February, 1857, the attorney-general withdrew the appeal on the part of the United States, and in March following, the district court, upon the stipulation of the district attorney, ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. This leave was not accepted, and the case remained until September, 1864, in the district court upon the appeal of the city. This appeal kept the whole issue open, the proceeding in the district court being in the nature of an original suit in which new evidence was admissible, and in which new positions could be assumed. U. S. v. Richie, 17 How. [58 U. S.] 534; San Francisco v. U. S. [Case No. 12,316], and Le Roy v. Wright [Id. 8,273]. On the first of July, 1864 [13 Stat. 332], congress passed the act "to expedite the settlement of titles to land in the state of California." By the fourth section of this act the district courts of California were authorized to transfer cases for the confirmation of claims to land under the act of March 3, 1851, pending before them on appeal to the circuit court of the United States, when they affected the title to lands within the corporate limits of any city or town. Under this act the district court, in September, 1864, transferred the pueblo case to the circuit court, and in October following, the circuit court confirmed the claim of the city to four square leagues, subject to certain exceptions, among which were all such parcels of land as had been, previous to that time, "reserved or dedicated to public uses by the United States." The lands thus reserved from the confirmation include the premises in controversy in this case. The right asserted by the plaintiff of course fell with the claim of the city, under which he held. The counsel of the plaintiff meets this conclusion by the fact that an appeal from the decision has been taken to the supreme court. This appeal he insists suspends the operation of the decree, and takes from it all efficacy as evidence of title. Such, undoubtedly, is the general effect of an appeal in these land cases; that is to say, the decrees rendered therein will not support the title of the confirmees or those claiming under them, pending appeals therefrom, when by the judgment of the appellate court the claim of the confirmee to the premises in controversy may be defeated. But such cannot be the effect of any judgment of the supreme court in the present case. That court can hear the case only upon the record, and can affirm or reverse or modify the decree only in those particulars in which error is alleged by the appellant. And the city has not appealed; she does not seek a reversal of the decree which excludes from confirmation to her the lands in controversy. The United States are the appellants, and a judgment rendered in their favor could only have the effect of defeating the entire claim of the city, or of restricting its extent in a still greater degree. We say the city has not appealed. She applied at the October term for an allowance of an appeal from so much of the decree as includes in the estimate of the quantity of

four square leagues confirmed, the parcels of land reserved or dedicated to public uses; in other words, she asked an appeal not to obtain a reversal of the decree in that it excluded the reserved lands from the confirmation, but in that the decree did not give to her four square leagues after excluding them. The allowance was, however, refused, and no action has since been taken by the city in the matter. It follows that the decree of the circuit court, as rendered, is conclusive upon the title of the plaintiff; it determines finally the validity of the reservation of the United States; it adjudges that the title has been in them since the conquest, or at least since the date of the reservation they claimed in 1850.

Judgment must therefore pass for the defendant.

[NOTE. The plaintiff having carried the case to the supreme court, the judgment of the circuit court was there affirmed in an opinion by Mr. Justice Field, who held that the authority of the president of the United States to make reservations of land is recognized in many acts of congress, and that from an early period in the history of the government it has been the practice of the president to order, from time to time, parcels of land belonging to the United States to be reserved from sale, and set apart for public uses. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. Their interest in the land was not an indefeasible estate. The interest amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. [The proceeding in the district court, though called in the statute an appeal, was not in fact such. It was essentially an original suit, and the dismissal of the appeal on the part of the United States did not, therefore, bind it to the terms of the original decree. In the execution of its treaty obligations with respect to property claimed under Mexican laws the government may adopt such modes of procedure as it may deem expedient. The act of congress of March 8, 1866 [14 Stat. 4], specifically settled all question of controversy in respect to the titles of the lands in question. 6 Wall. (73 U. S.) 363.]

Case No. 5,833.

GRISWOLD v. CONNOLLY.

[1 Woods, 193.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1871.

WRIT—VALIDITY—SIGNATURE TO.

1. When a writ of venditioni exponas, issued from the circuit court, ran in the name of the president of the United States, bore teste of the chief justice of the United States, was under the seal of the court, but was not signed by the clerk, but by the deputy clerk in his own name, neither the writ nor the proceedings under it are void.

2. The defect in the writ could only be taken advantage of in a direct, and not in a collateral proceeding.

3. The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree.

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

Action at law. The parties waived a jury and submitted the cause to the court, both on the facts and law.

Allen C. Story and Wm. Grant, for plaintiff.

L. Madison Day, H. J. Leovy, and E. T. Merrick, for defendant.

WOODS, Circuit Judge. The plaintiff brings his action to establish his title to, and to recover possession of certain real estate in the city of New Orleans. It is shown that the plaintiff was in possession of the premises, claiming title prior to and up to May 6, 1862. It is conceded that he ought to recover, unless the evidence adduced by defendants shows that his title has been divested. To establish this, the defendant introduces a record of this court in the case of U. S. v. Confederate Rifle Factory [unreported], by which it appears that the property in question was condemned by the court on the 20th of May, 1864, as forfeited to the United States, and ordered to be sold by the marshal, which was done, and the property adjudicated to Ellen Christy. The deed of the marshal to her is in evidence, and deeds from Ellen Christy to John Hughes & Co., and from John Hughes & Co. to defendant Connolly. If the proceedings in the United States court, in the case just mentioned, were operative to divest plaintiff's title, it is admitted that defendant's title is good, and the finding and judgment of the court should be for him. The only objections to the record in that case which were not passed upon in the case of Bragg v. Lorio [Case No. 1,800], decided in this court during the present term, are: That the venditioni exponas, which constituted the marshal's authority for the sale, was signed by F. B. Vinot, deputy clerk, in his own name as such deputy, and not by the clerk. No other defect is alleged to exist in the writ. It ran in the name of the president of the United States; it bore teste of the chief justice of the United States, and was under the seal of the court. It emanated from the court and was returned to the court, and the proceeds of the sale made under it were distributed by the court. In my opinion, the signing of the vendi by the deputy clerk in his own name, and the want of the signature of the clerk himself was an irregularity only, and did not avoid the writ and proceedings under it. It was such an irregularity as could be taken advantage of only in a direct and not in a collateral proceeding. This objection to the record must therefore be overruled.

It is next objected to the record that the plaintiff Griswold, the owner of the property condemned under the name of the Confederate Rifle Factory, took the oath of amnesty on the 15th of March, 1864, which was before the decree of condemnation, and as it is conceded he was not within any of the exceptions in the proclamation of amnesty of

the president, dated the 8th of December, 1863, therefore his property was relieved from confiscation. Unquestionably this would have been a good defense, if pleaded, to the decree of condemnation. Armstrong's Foundry, 6 Wall. [73 U. S.] 766; St. Louis Street Foundry, Id. 769. But the record shows that this defense was not made. The court had jurisdiction of the subject matter, the oath of amnesty was taken by Griswold after the commencement of the proceeding, and the fact that a good defense existed which was not brought to the notice of the court, did not oust the court of jurisdiction or avoid its proceedings. This objection must also be overruled.

As the only objections urged against the proceedings in the circuit court for the confiscation of the property in question are ineffectual to render the proceedings void, we must hold that plaintiff's title has been divested; that title is now in defendant as shown by the proof. The finding and judgment of the court must be for defendant.

GRISWOLD (DOWELL v.). See Cases Nos. 4,040 and 4,041.

Case No. 5,834.

GRISWOLD v. HILL.

[1 Paine, 483.] [1]

Circuit Court, D. New York. Sept. Term, 1825.

JUDGMENT—ENTRY—PRIOR DEATH OF PARTY.

1. Where a party dies during term, the judgment may be entered in this court as of a day antecedent to his death.

2. But there is this difference, in this respect, between its equity proceedings and those of the English court of chancery, that this court is open only during term, and a decree cannot be entered if the death occurred before the beginning of the term.

3. Where an order for the dismissal of a bill was taken ex parte, the complainant having avowed his intention not to pursue the cause any further; on a motion to vacate the order, on the ground that the defendant died before it was entered; held, that it was not distinguishable, in principle, from the case of death after argument, but before judgment, and that the order might be entered antecedent to the death.

[In equity. Suit by Daniel S. Griswold against Samuel Hill.]

H. W. Warner, for complainant.

H. D. Sedgwick and R. Sedgwick, for defendant.

THOMPSON, Circuit Justice. This is a motion to set aside an order entered in this cause on the 2d day of September, in this present term, dismissing the complainant's bill with costs. The motion is founded on an affidavit stating, that the defendant died before such order was entered. It now appears that Hill died on the first day of this term. By the common law, the death of one of the parties before judgment, abates the suit. There can, therefore, be no doubt but that the order was irregularly entered, and must be set aside. But the question arises, whether the court may not direct the order to be entered as of the first day of the term, and thereby render it regular. I have no doubt, that when a party dies during the term, the court may, in many cases, direct the judgment to be entered as of a day antecedent to the death. This has frequently been done in the English chancery, and also in the court of chancery of this state. These courts are, however, always open, and may, and frequently do, make the judgment or decree relate back to a distant day. This court, both on the law and equity side, is open only during the term. But there is no reason why it should not, whilst it is open, exercise the same power, as to entering its decrees, when a proper case is presented, as is done in the court of chancery in England. This is matter of practice in that court, and which governs the practice of this court, when not provided for by its own rules. See Rules Sup. Ct. U. S. The cases where this practice has been adopted, have usually been, when the death of the party occurred after argument, and whilst the cause stood over for judgment. Davies v. Davies, 9 Ves. 461; Campbell v. Mesier, 4 Johns. Ch. 342. The present case does not, in its circumstances, fall precisely within that rule, although the reason and grounds upon which the practice is founded, are equally applicable. The cause was not argued. The order was taken ex parte; the complainant having avowed his intention not to pursue the cause any further. I am, therefore, inclined to think the circumstances of this case would warrant the court in entering the order for the dismission of the complainant's bill, as of the first day of the term. But it is not deemed advisable to adopt that course in the present instance. The defendant's counsel has produced in court the letters of administration, and prayed that the administrators may be made defendants. To the granting of this application there can be no objection.

The 31st section of the judiciary act of 1789 [1 Stat. 90] declares, "that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, if the cause of action survived, shall have full power to prosecute or defend any such suit or action." Under this act it has been decided in the supreme court of the United States, that the executor or administrator may come in voluntarily and instanter, and be made a party on motion, without a scire facias, and may proceed to trial immediately, if he pleases, if the cause is ready for trial; but may have a continuance if he wishes. This is according to the express provision of the statute, which declares, that the executor or

[1] [Reported by Elijah Paine, Jr., Esq.]

administrator who shall become a party, shall, on motion, be entitled to a continuance until the next term. But no such indulgence is allowed by the act to the opposite party, nor is it reasonable that it should be. His situation is not altered by the substitution of the representatives of the deceased party. And it has accordingly been decided that the opposite party is not entitled to any delay. It is accordingly ordered, that the administrators be made parties, and no continuance being asked for, they have liberty to proceed without delay.

[See Case No. 5,835.]

Case No. 5,835.

GRISWOLD v. HILL.

[1 Paine, 390.] [1]

Circuit Court, D. New York. April Term, 1825.

PRACTICE IN EQUITY—EXCEPTIONS TO ANSWER.

On exceptions to an answer for impertinence and scandal, courts of equity give the answer a liberal consideration, having regard to the nature of the case as made by the bill.

[In equity. Suit by Daniel S. Griswold against Samuel Hill.]

H. D. Sedgwick, for defendant.

H. W. Warner, for complainant.

THOMPSON, Circuit Justice. This case comes before the court on objections to the master's report, upon exceptions taken to the defendant's answer. The general scope and object of the complainant's bill was to revive a partnership entered into between the parties, but which had been dissolved, and the articles cancelled, as is alleged in the bill, upon certain terms and conditions therein set forth. The bill alleges that the partnership had been formed at the particular desire and solicitation of the defendant, and with reference to certain exclusive privileges, which the complainant had applied for and expected to obtain from the Chilian and other South-American governments, and that the partnership would not have been entered into but upon the expectation that such exclusive privileges would have been obtained. That considerable delays and difficulties occurred to discourage and embarrass the complainant in his application; that the defendant wishing to leave Chili, and apprehending that the application would not succeed, became uneasy, and requested that the articles of partnership might be cancelled; and that the complainant, considering the prospect of obtaining the privilege nearly desperate, he at the urgent desire and solicitation of the defendant consented to treat the same as hopeless, and to cancel the articles upon certain terms and conditions, verbally agreed on; one of which was, that if the contemplated grant or exclusive privilege should be allowed by the Chilian government, so that the said partnership might go into effect as originally intended, the complainant might, at his election, have the partnership agreement revived. And the complainant avers, that the articles of agreement were cancelled upon the express conditions stated in the bill, and not otherwise.

The first exception taken to the answer, and which was allowed by the master, related to the reasons for cancelling the articles of partnership. The defendant admits, as stated in the bill, that he considered the prospect of obtaining the contemplated privilege as nearly desperate, and that he believes the complainant so considered it; and that this was one reason why he became extremely desirous of cancelling the articles; but also states, that another and stronger reason operated on his mind, which was "that he had become entirely convinced that any connexion in business with the complainant would be in a high degree inexpedient and unsafe." The exception is taken to the additional reason here assigned for cancelling the articles of partnership. This exception was allowed by the master as both impertinent and scandalous. But the exception cannot in the opinion of the court be sustained on either ground. The answer does not in this respect, go entirely out of the bill, and state what is altogether irrelevant to the case made by the bill. The complainant had alleged that the partnership had been entered into at the particular desire and solicitation of the defendant, and is fairly to be understood as asserting, that the only reason why it did not go into operation, was the failure in procuring from the Chilian government the exclusive privilege contemplated. The answer might not probably have been excepted to for insufficiency, if it had omitted to state the matter excepted to. But courts of equity on this point of matter irrelevant always give the answer a liberal consideration, having regard to the nature of the case as made by the bill; and if there was any other reason which operated with the defendant to wish a dissolution of the partnership, than that which is assigned in the bill, it was not altogether irrelevant for him to set it forth, unless such matter may be considered exceptionable as being scandalous. But the present case cannot be so viewed. It seemed to be considered on the argument, that the answer represented the complainant as a person of such character, that it was unsafe and inexpedient to have any intercourse whatever with him. But such is not the import of the answer; but only that he considered it unsafe and inexpedient to have any connexion with him in business—that is, to continue and carry into operation the partnership which had been entered into. It would be too rigid and illiberal a construction of this answer to charge the defendant with intending to avail himself of it as a vehicle of scandal, and thereby to excite prejudice against the cause of the com-

[1] [Reported by Elijah Paine, Jr., Esq.]

plainant. There is nothing in this part of the answer to warrant an inference that the defendant was governed by any desire wantonly to injure the character or hurt the feelings of the complainant.

The second exception allowed by the master cannot be sustained, for the reasons which have been offered in relation to the first. The bill alleges that the articles of partnership were cancelled upon the express conditions stated in the bill, and not otherwise. The answer denies this allegation, and goes on to set out other conditions required, and upon which the articles were cancelled. This would seem to follow very naturally, if not necessarily, from the allegation in the bill, where the complainant alleges that the partnership was dissolved solely because the Chilian government would not grant the contemplated privilege. It was not irrelevant for the defendant to deny that this was the only reason, and to state what other inducements entered into the transaction; and he accordingly states, "that the complainant required as a condition precedent to cancelling the articles of partnership, that the defendant should give him a certificate in favour of his character," which forms the exceptionable matter. This was certainly not entirely foreign to the subject matter of the bill. He was called upon to confess or deny, whether the articles were cancelled upon the terms and conditions alleged in the bill, and not otherwise; and if other conditions than those stated in the bill were made and required, the defendant could not simply confess or deny the allegation, or give a full answer, without stating what other condition, if any, entered into the consideration for cancelling these articles; and if such answer implies any thing unfavourable to the character of the complainant, it has been called for by the allegation in the bill, and cannot now be made matter of objection on his part.

The next exception allowed by the master, is too unimportant to require much consideration; but the part of the answer embraced in this exception cannot be considered as entirely foreign to the case made by the bill. One object of the bill was to obtain an injunction to stay the proceedings at law upon a bill of exchange drawn by the complainant upon D. S. Dunham in favour of the defendant, at the time the articles of partnership were cancelled; and the bill alleges, that in case the partnership was revived, the complainant considered he was only to be charged with one half the amount of the bill. There having been some delay in commencing a suit upon this bill of exchange, might afford an inference that it was connected with the partnership business, which the defendant had fully and explicitly denied; and to account for the delay, the answer, after stating the time when the bill of exchange was protested for non-acceptance and non-payment, and notice thereof given to the complainant, alleges "that the defendant thereupon apprehended, that the recovery thereof was hopeless, but the sudden death of D. Dunham, (who was the father-in-law of the complainant,) who died intestate, having, as the defendant supposed, caused a favourable change in the pecuniary circumstances of the complainant," a suit was commenced about a year after the prospect, and this is the part of the answer embraced by the exception. But the answer cannot in this respect be rejected as altogether impertinent; it serves to rebut an inference in support of a direct allegation in the bill, that the bill of exchange was connected with the partnership concern, and it certainly is not scandalous to any very aggravated extent when taken altogether, for although it insinuates that the pecuniary situation of the complainant had been questionable, yet that it had been restored by the expectation or receipt of property from the estate of his father-in-law.

The last exception allowed has less plausibility to sustain it than either of the former. The bill, as has been already noticed, alleges, that it was at the election of the complainant to revive the partnership, if he should think proper, in the event of his obtaining from the Chilian government the exclusive privilege contemplated, and as the evidence of his having made such election. The complainant alleges, that he had written a letter to the defendant to that effect. The answer to this allegation, so far as it is excepted to, states, "that the defendant does not believe that the letter was written or transmitted with any intent or view to the formation or renewal of a connexion in business between the complainant and defendant. The complainant having, as the defendant believes, neither funds nor credit to enable him to take part in such a concern." If this offer to revive the partnership was merely colourable, and not made with any real intention of carrying it into effect, it was competent for the defendant to allege and prove it. Such an offer could impose on the defendant no legal or equitable obligation to renew the partnership. The complainant had alleged his right to revive the partnership, and that in such event, only one half the amount of the bill of exchange was to be charged to him, and if the defendant refused to renew the partnership on being duly required so to do, it might afford some equitable grounds for exonerating the complainant from the payment of any more than one-half the bill of exchange then in suit. The defendant had therefore a right to set up, that this letter was not written in good faith, and with a real intention of renewing the partnership, but to evade payment in part of his bill of exchange. The report of the master, therefore, so far as the same allows any exceptions taken to the answer, must be set aside, and all the exceptions disallowed.

[See Case No. 5,834.]

Case No. 5,836.

GRISWOLD et al. ads. HILL.

[2 Paine, 492.] [1]

Circuit Court, D. New York.[2]

ACTION ON JUDGMENT — EFFECT — DETENTION OF DEBTOR IN PRISON—SUSPENSION OF JUDGMENT LIEN—DISCHARGE.

1. The bringing an action on a judgment of this court, and recovering and perfecting judgment thereon in another court, is no satisfaction of the first judgment.

2. So long as the body of the debtor is detained in prison, the creditor cannot resort to the property of the debtor, and the judgment will not be considered a lien as against other creditors.

3. The lien of the judgment is suspended during the imprisonment on the ca. sa.; so that a judgment obtained by another creditor during that time, gains a priority of lien on the debtor's property; or the debtor may sell the property and give to the purchaser a title discharged of the incumbrance of the judgment.

4. Discharge of the debtor from imprisonment, without the consent and against the will of the plaintiff, under a state law, reserving to the creditor certain rights as to future acquired property, will not operate as a satisfaction of the judgment.

5. Where an action is brought on a judgment of this court, and judgment recovered thereon in another court, if the plaintiff be entitled to continue in force his judgment in the latter court, and enforce payment thereon, against the future acquired property of the defendant, satisfaction of the judgment of this court, which is the foundation of the second judgment, will not be entered of record.

[In equity. Suit by Samuel Hill against Daniel S. Griswold and David R. Dunham.]

THOMPSON, Circuit Justice. This is an application for an order that satisfaction of the judgment recovered in this case be entered of record. The motion is made in behalf of John B. Miller, who is represented as proceeding in the court of chancery of this state to foreclose a mortgage on the real estate of Daniel S. Griswold; and stating, by affidavits, as the grounds upon which the application is made, that Henry D. Sedgwick, administrator of Samuel Hill, had brought an action in the court of common pleas for the city and county of New York, upon the judgment recovered in this court, and had obtained a judgment therein; and had issued executions against the bodies of the above-named defendants, upon which they had been arrested and imprisoned, until discharged from imprisonment, under an act of the legislature of this state, entitled "An act to abolish imprisonment for debt in certain cases," passed 7th of April, 1819; and it is contended, on the part of Miller, that this arrest and imprisonment of the defendants is, in judgment of law, a satisfaction of the judgment in this court, and that the same ought to be vacated of record.

The two questions that seem to arise are: 1st. Whether the judgment recovered in the court of common pleas is a satisfaction of the judgment in this court; and if not, then, 2d. Whether the arrest and imprisonment of the bodies of the defendants, on the judgment in the common pleas, is to be considered a satisfaction of the judgment in this court.

The first question admits of no doubt. These judgments are debts of the same degree, and the latter cannot be considered an extinguishment of the former. This is a point too well settled to be now called in question. The case of Mumford v. Stocker, 1 Cow. 178, in the supreme court of this state, is in point, as applied to the question now before the court. It is there held that bringing debt on a judgment, and recovering and perfecting judgment thereon in another court, is no satisfaction of the first, and would not warrant the entry of satisfaction of the former judgment, until the latter was in fact satisfied;[3] and there is no pretence

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [The date is not given. 2 Paine comprises cases from 1827 to 1840, inclusive.]

[3] In an action on a judgment against several, the imprisonment of one of the defendants, on an execution issued on such judgment, is as to him a satisfaction of the debt so long as it continues, and a defence against any ulterior proceedings so far as he is concerned; and is fatal to a joint action against all the defendants. Chapman v. Hatt, 11 Wend. 41; Cooper v. Bigalow, 1 Cow. 56; Stewart v. McGuine, Id. 99; Osterhout v. Roberts, 8 Cow. 43; Sunderland v. Loder, 5 Wend. 58; Jackson v. Benedict, 13 Johns. 534. A satisfaction-piece is not a record; until entered on the roll it does not partake of the nature of a record, nor does the statutory provision on the subject directing the mode of its acknowledgment give it that character or effect. Lownds v. Remsen, 7 Wend. 35. An entry of satisfaction on the docket of judgment is not equivalent to an entry on the roll. Id. An entry on the roll will not be presumed, although a satisfaction-piece be filed, where it is manifest, if done, it would on application be set aside for fraud. Id. Where, on an execution in an action of debt on judgment, sufficient is levied to satisfy the original judgment, the plaintiff must apply the money levied in satisfaction of such judgment, although there be not enough to discharge the costs as well as the debt recovered by the second judgment. Harvey v. Wood, 5 Wend. 221. Where A. has a judgment against B. which he sets off in a suit subsequently brought by B. against him, and a balance is certified in favor of A., for which he takes judgment in the second suit, such set-off is an extinguishment of the first judgment only to an amount equal to that set-off to balance the demand of B. in the second suit, and for the residue A. may issue an execution on the first judgment. Doty v. Russell, Id. 129. The imprisonment of a defendant on a justice's execution is a satisfaction of the judgment while the imprisonment continues; and may be pleaded in bar to an action on a bond given by the defendant and a surety to stay the execution for ninety days. Sunderland v. Loder, Id. 58. Where an execution has been levied upon the property of a defendant, and the levy subsequently abandoned by his request and for his benefit, this will not amount to a satisfaction of the judgment. Ostrander v. Walter, 2 Hill, 329. See Hoyt v. Hudson, 12 Johns. 208; Ontario Bank v. Hallett, 8 Cow. 192. A levy on sufficient personal property to satisfy a judgment, though the execution be returned unsatisfied by the direction of the plaintiff, or the assignee of the judgment, extinguishes the judgment; and a sale of land under a subsequent execution thereon is void,

that the judgment in this court has been paid or in any manner satisfied, unless the arrest and imprisonment of the defendants is, in judgment of law, a satisfaction.

2. Under the second question, it has been contended that taking out a capias ad satisfaciendum, was a selection of remedies, and the arrest and imprisonment of the bodies of the defendants amounted to an absolute discharge of the judgment, so far, at all events, as it might operate as a lien upon the property. It is to be observed that the defendants were not discharged from the arrest and imprisonment under the execution by the consent of the plaintiff. Whatever was done was the act of the law. None of the cases, therefore, to be found in the books, which go to show that where a prisoner in execution is discharged by the consent of the creditor, on giving other security to satisfy the judgment, and such security failing, the judgment cannot be again set up. 1 Tenn. 557; 4 Burrows, 2482; Amb. 79; Hob. 59,—apply to the present case. It cannot surely be pretended, that as soon as the defendant is arrested upon a ca. sa., satisfaction of the judgment on record may be claimed as matter of right. This would be taking away the very foundation and authority upon which the body was held as satisfaction. At law, so long as the body is detained in prison, the creditor cannot resort to the property of the debtor, and the judgment will not be considered a lien as against other creditors. But in an application like the present, this court cannot order a modified satisfaction; that is, it cannot direct the judgment to be satisfied and vacated as to one purpose and continued in force as to another. Satisfaction, if entered at all on record, must be entire, and discharge the judgment as to all purposes. Whenever a question arises in the course of a suit between parties touching the priority of lien, or the legal operation of a discharge like the present, the court can give to it the proper and legal effect, so as to preserve the rights of all parties; but this cannot be done in summary proceedings like the present. The judgment-creditor ought, therefore, to have been made a party to the proceedings in chancery; and the question then decided how far the judgment was to be considered as discharged. Satisfaction of the judgment entered of record in this court might be considered as satisfaction of the judgment in the common pleas, which is founded upon the judgment here; and if so, would take away all remedy hereafter upon that judgment, which is secured to the plaintiff by the act of the legislature of this state

especially if the purchaser at the sale be not a bona fide purchaser. Jackson v. Bowen, 7 Cow. 13. A levy on personal property sufficient to satisfy a fi. fa., is an extinguishment of the judgment on which it issued. Ex parte Lawrence, 4 Cow. 417. The judgment, therefore, ceases to be a lien on real estate, and the judgment-creditor has no right as such to redeem under the act (Laws 43d Sess. c. 184, § 3). Id. If a debtor, for the benefit of all his creditors, gives to trustees a bond for the amount of all his debts, on which a judgment is recovered, and he afterward gives a note to an individual creditor for the amount of his separate debt, such note will be satisfied by such creditor's discharging the debtor from execution on the judgment issued at the request of the creditor, and the assent of the trustees to the discharge will be implied. Furman v. Haskin, 2 Caines, 369. Where a judgment is set off on trial, and allowed against a still larger claim, and judgment is entered in the second action, the judgment so set off is satisfied, and the court will discharge a party imprisoned thereon, and order the entry of satisfaction; but this cannot be done where a case is made, and a motion for new trial is pending in the second cause. Schroeppel v. Jewell, 1 Cow. 208.

Bringing debt upon a judgment, and recovering and perfecting a judgment thereon in another court, is no satisfaction of the first. Mumford v. Stocker, 1 Cow. 178. The second judgment must be satisfied in fact, to warrant a motion for entry of satisfaction upon the record in the first. Id. Adjudged that the attorney of the plaintiff in record has no such power. Jackson v. Bartlett, 8 Johns. 281. S. assigned a certain debt or fund to P. in trust, to pay certain creditors, among whom was G., a judgment-creditor; and S. having been surrendered into the custody of the sheriff by his bail, G. consented to his discharge from prison. In a bill in chancery, filed by certain creditors of S., against him and others, among whom was G., it was alleged that G. had taken S. in execution and discharged him on taking the assignment; and G., in his answer, stated the manner of the discharge, and that he had not been paid, and insisted also on the assignment. It was held, that the allegation in the bill, as to the discharge not being true, and the discharge from prison, on the surrender, being no satisfaction of the debt, and G. not being bound to make an election between the judgment and the assignment, the bill, as against him, ought to be dismissed, with costs. Codwise v. Gelston, 10 Johns. 507. And where G. presented his petition to the chancellor, praying that he might be paid the amount of his judgment out of the moneys arising from the sale of the real estates of S., on which the judgment was a lien; it was held, that he was entitled to the benefit of the fund, and to a priority of satisfaction before the general creditors of S. Id. Where a ca. sa. against a sheriff was delivered to a coroner, who being indebted to the sheriff, gave him a receipt in full for the debt and costs in the ca. sa., and engaged to settle the amount with the plaintiff, and failed to do so; it was held, that admitting the coroner was authorized to receive the debt in money on the ca. sa., yet it must be an actual and absolute payment of so much cash to him for the plaintiff; and that the agreement between the sheriff and coroner was no payment or satisfaction of the debt. Codwise v. Field, 9 Johns. 263. Where the plaintiff resided in a foreign country, and the defendant, in 1810, produced affidavits to show that the judgment which was obtained in 1803, was satisfied, a rule to show cause why a satisfaction should not be entered upon the record was granted, which was directed to be served by delivering a copy to the attorney of the plaintiff on record, and putting up another copy in the clerk's office. Lee v. Brown, 6 Johns. 132. Where an execution has been issued for the penalty of a bond, the court will, on payment of the condition, interest and costs, set aside the execution, and order satisfaction to be entered on the record; although the bond was given to secure a debt larger than the penalty, and there were other sums due from the defendant to the plaintiff. Bergen v. Boerum, 2 Caines, 256. The principle recognized in that case goes to the extent of saying the defendant is discharged. Ontario Bank v. Hallett, 8 Cow. 192. But a levy on suffi-

under which the defendants were discharged from imprisonment. Nothing ought to be done here which would in any manner prejudice the right of the parties under that judgment.

The light in which a discharge from imprisonment, like the present case, is considered in this state, appears from the case of Jackson v. Benedict, 13 Johns. 533, where it is held that the lien of the judgment is suspended during the imprisonment on the ca. sa., so that a judgment obtained by another creditor during that time gains a priority of lien on the debtor's property: or that the debtor might sell his property and give to the purchaser a title discharged of the incumbrance of the judgment. That the taking of the body is a discharge of the judgment, except in the cases provided for by the statute. But it is said this court will not notice the state law on this subject, but will give to this discharge the effect it would have by the common law. This is not correct to the extent it has been urged; the common law knows of no such discharges; and if the debtor is discharged from imprisonment against the will and consent of the creditor under a state law, reserving to him certain rights as to future acquired property, it would be going great lengths in this court to consider it a voluntary discharge of the person, and an entire satisfaction of the judgment. The common pleas ought not to discharge the judgment obtained in that court; this would be in the face of the statute, which declares that the judgment shall remain valid and effectual against any estate which the debtor so discharged might thereafter obtain. And to order satisfaction to be entered of the judgment in this court, which is the foundation of the judgment in the common pleas, and still leave that judgment unsatisfied, would present an incongruity not called for, or to be tolerated. From anything that appears in the affidavits before the court, the land covered by the mortgage is now liable to be sold under the judgment in the common pleas. It is not stated where the land lies, or when the title to it was acquired by Griswold. It may have been so acquired since his discharge from imprisonment, and may lie within the reach of an execution on the common pleas judgment, according to the provisions of the sixth section of the act under which he was discharged. This would, of itself, be sufficient to deny the present motion. But I do not rest the decision upon so narrow a ground, as the real facts in the case may be otherwise; but deny the motion upon more general grounds. That the judg-

cient property to satisfy a judgment and a release of the property, will not operate to release the debtor where he procures the release by his own act; as by pretending that the property is owned by others. Id. A levy, in virtue of an execution upon a judgment obtained as a collateral security for another judgment, is not a collateral satisfaction of the latter. Id. A plaintiff, who has several remedies, may pursue them all until actual satisfaction. Id. The levy on sufficient property upon the collateral security, may protect the surety against further liability; but it is no payment of the original debt; nor is it a sufficient answer to allege that the plaintiffs might have obtained satisfaction after a levy upon the surety's goods, or made the sheriff liable for not doing so. Id. On the collateral security, the plaintiffs might proceed at their election; but were not obliged to hazard litigation for the benefit of the original debtors. Id. A discharge of the debtor from arrest on execution, extinguishes the judgment. Lathrop v. Briggs, 8 Cow. 171.

If a judgment-creditor has received satisfaction of a judgment, but refuses to acknowledge satisfaction, the court, on motion of the debtor, will grant an order for the purpose with costs. Briggs v. Thomson, 20 Johns. 294. Several instruments in writing and under seal, passing between parties at the same time, shall be taken as parts of the same transaction, and make together but one instrument. Thus, where a defendant was, after a judgment, surrendered by his bail, but not charged in execution, and wished to visit his family; and the plaintiff consented, and acknowledged payment of the judgment, under hand and seal, taking a bond from the defendant, of the same date with the discharge, for his return, reciting the surrender and the agreement that he might visit his family, &c.; held, that the two papers should be considered together as one instrument, and were not evidence at all under a plea of payment. Raymond v. Wheeler, 9 Cow. 296. Case lies against the plaintiff and defendant in a judgment for fraudulently setting up the judgment as unsatisfied, when in fact it is paid, causing an execution to be issued thereon, and a sale to be had of land on which the judgment when in force was a lien, where such land, subsequent to the judgment, was conveyed by the defendant and passed into the hands of a third person. Swan v. Saddlemire, 8 Wend. 676. It is not necessary in such action that actual specific damage should be shown; it it appear that the unlawful acts of the defendant occasioned trouble, inconvenience, or expense to the plaintiff, the action is sustained. Id. Where the plaintiff in such action derives his title from one of the defendants, the defendants are not allowed to allege that no interest in the land was conveyed to the plaintiff by the deed under which he claims; nor can they avail themselves of a variance between the judgment and execution. Id. It seems that an execution issued upon a judgment which has been paid and satisfied is absolutely void, and not merely voidable, and that a purchaser under such execution acquires no title. Id. It was held, that trespass would lie against a party or magistrate, who should wantonly and intentionally take out, or issue process, upon a paid judgment; that the justice in such a case would have no jurisdiction of the process; that an execution upon a paid judgment was not a regular process. McGuinty v. Herrick, 5 Wend. 243. A justice who issued a second execution, after the first was satisfied, was held to be a trespasser, though the second execution was issued through the false representation of the plaintiff that the first was lost. Lewis v. Palmer, 6 Wend. 368. It seems that an execution issued upon a judgment which has been satisfied is absolutely void, so that a purchaser under it acquires no title. Swan v. Saddlemire, 8 Wend. 681; Woodcock v. Bennet, 1 Cow. 711; 1 Johns. Ch. 154; 15 Johns. 443; 16 Johns. 571; 18 Johns. 441; Jackson v. Cadwell, 1 Cow. 622; Jackson v. Anderson, 4 Wend. 474. When defendant pays money into court, but the sum is found to be less than was then due, the verdict and judgment should be for the whole of plaintiff's demand, and the defendant would have the benefit of an endorsement on the execution to the extent of the payment; but if the sum paid be found equal to the amount due, verdict should be for defendant. Dakin v. Danning, 7 Hill, 30.

ment in the common pleas was not an extinguishment of the judgment in this court; that the discharge from imprisonment under the ca. sa. being without the consent, and against the will of the plaintiff, and according to the provisions of the state law, did not operate as a satisfaction of the judgment like a voluntary discharge; and that so long as the plaintiff may be entitled to continue in force his judgment in the common pleas, and enforce payment thereof against the future acquired property of the defendants, satisfaction of the judgment in this court, which is the foundation on which that judgment rests, ought not to be entered of record. Motion denied with costs.

Case No. 5,837.

GRISWOLD et al. v. LAWRENCE.

[1 Blatchf. 599.] [1]

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

CUSTOMS DUTIES — APPRAISEMENT AT TIME AND PLACE OF EXPORTATION—PAYMENT UNDER PROTEST.

1. Where goods are imported from the country of their production, they must, under section 16 of the act of August 30, 1842 (5 Stat. 563), for the purpose of fixing their dutiable value, be appraised at their market value in that country at the time of their purchase.

2. Where the importer claimed that certain goods should be appraised at their value abroad at the time of their purchase, and the collector directed them to be appraised at their value at the time of their exportation, they having risen in value in the meantime, and the importer, for the purpose of obtaining possession of the goods, and of avoiding the penalty imposed by section 8 of the act of July 30, 1846 (9 Stat. 43), for an excess by 10 per cent. in the appraised value over the value in the entry, added to the cost of the goods a sum which made their value equal to their value abroad at the time of their exportation, and paid duties on that value under protest: *Held*, that the payment of the duties was not voluntary.

This was an action brought by the plaintiffs [Nathaniel L. and George Griswold] against the defendant [Cornelius W. Lawrence], collector of the port of New-York, to recover back an excess of duties paid upon sugars imported from Manilla in the island of Luzon into that port. The sugars were purchased at Manilla in February and March, 1847; but their shipment was delayed, in consequence of the vessel sent out for the cargo having become disabled by stress of weather, till the month of August in that year. The sugars were the production of the island from which they were shipped to this country. The collector, under instructions from the secretary of the treasury, had directed all goods and merchandize, whether shipped from the country of production or manufacture, or from a country other than that of production or manufacture, to be appraised according to their market value in the principal markets of the country, as the case might be, at the time of the exportation. The goods had risen in value in the market at Manilla between the times of the purchases and the time of shipment, and the plaintiffs, at the time of the entry, to avoid the penalty imposed by section 8 of the act of July 30, 1846 (9 Stat. 43), where the appraised value exceeds by 10 per cent. the value in the entry, added to the cost of the purchases as given in the invoice, a sum which, in the aggregate, made the value of the goods equal to their market value at Manilla at the time of their exportation, and paid the duties on the same. The addition was made and the duties were paid under protest, and to avoid the penalty aforesaid, the plaintiffs claiming that, according to law, they were bound to pay duties only upon the market value of the goods at Manilla at the times of the purchases. This action was then brought. At the trial a verdict was taken for the plaintiffs, subject to the opinion of the court on a case to be made.

Daniel Lord, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

NELSON, Circuit Justice. The question presented in this case involves the true construction of the sixteenth section of the act of August 30, 1842 (5 Stat. 563). The section provides, that the collector shall "cause the actual market value or wholesale price" of the goods, "at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States, &c., to be appraised, estimated, and ascertained, and to such value or price shall be added all costs and charges, &c.: provided, that in all cases where goods, &c., shall have been imported into the United States from a country in which the same have not been manufactured or produced, the foreign value shall be appraised and estimated according to the current market value or wholesale price of similar articles at the principal markets of the country of production or manufacture, at the period of the exportation of said goods, &c., to the United States."

The above extract contains the material parts of the section upon which the question depends; and we must say, that if a different opinion had not been expressed elsewhere, of deserved respect, we could not have entertained a doubt upon the true construction to be given to the law. The language is clear and explicit, and the whole section is obviously drawn with studied care and caution.

The enacting clause provides that, in all cases of goods imported into the United States liable to duties, they shall be appraised according to the market value at the time of purchase in the principal markets of the country from which they have been imported; and it is made the special duty of the appraisers, by all reasonable ways and means in their power, to ascertain the true market

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

value, (any invoice or affidavit to the contrary,) of the goods at the time when purchased; and then follows the exception, that in all cases where the goods shall have been imported from a country other than that of production or manufacture, the value shall be appraised according to the market value of similar articles at the principal markets of the country of production or manufacture at the period of exportation.

The same distinction, in respect to the rule to be adopted in ascertaining the foreign value, is found in the act of March 1, 1823 (3 Stat. 732, § 5), but not in the act of May 19, 1828, or in that of July 14, 1832 (4 Stat. 273, § 8; Id. 591, § 7). The time of purchase was adopted under the latter two acts, whether the goods were imported from the country of production, or from a different country. The rule prescribed in the act of 1823 is again found in the act of 1842, and which regulates the valuation of dutiable articles upon which the duties are assessed under the act of July 30, 1846. The goods, in this case, having been imported from the country in which they were produced, the market value of the article in the foreign country should have been taken, as it stood at the times of the several purchases. We do not perceive how any other construction can be given consistently with the words of the act.

It was urged on the argument, that the payment of the duties in this case was voluntary, inasmuch as the plaintiffs were not compelled to make the addition to the cost of the articles at the time of the entry. We think otherwise. The addition was made and the excessive duties were paid under protest, and to obtain possession of the goods, and to avoid the penalty to which the goods would have been subject under the erroneous rule applied in the appraisal. The verdict having been taken subject to the opinion of the court, there must be a judgment for the plaintiffs.[2]

Case No. 5,838.

GRISWOLD v. MAXWELL.

[3 Blatchf. 145.][1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—DUTIABLE VALUE.

1. Where silks were shipped from China to New York by the way of London: *Held*, that the value of the silks in the country of production, with the expenses of charges, commissions, &c., which accrued prior to their being put on shipboard at the place of exportation, constituted their dutiable value, and that the expense and freight of conveying the silks from China to London, formed no part of such value.

2. The case of Grinnell v. Lawrence [Case No. 5,831], cited and approved.

This action was brought against [Hugh Maxwell] the collector of the port of New York, to recover back duties charged on the freight of a cargo of silks from China to London. The invoice was made up at Shanghae, October 4th, 1850, of silks shipped on board the Peninsular and Oriental Company's steamer, bound for Hong Kong, there to be transshipped by the Peninsular and Oriental Company's steamer to Southampton, thence to New York, consigned to the plaintiff [George Griswold, Jr.]. The freight and expenses to England, $632 12, were added to the invoice, and 30 per cent. duty was charged by the defendant on the value of the goods, and also on the amount of the freight and expenses. The plaintiff paid the whole duty under a protest, in due form, against that imposed on the freight and expenses of shipping the goods to England.

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

BETTS, District Judge. The goods in this case were shipped from China to the United States. The value of the silks in the country of their production, with the expenses of charges, commissions, &c., which accrued prior to their being put on shipboard at the place of exportation, constituted the dutiable basis. The cost of posterior conveyance or transshipment does not enter into the dutiable value of the goods; and it makes no difference if they were subjected to portage across the Isthmus of Suez. The voyage and transportation were continuous, from the port of shipment to the port of destination, and the expense incurred in conveying the cargo to England, is no more a dutiable charge, than is freight from London to the United States. We consider the case to be embraced within the decision in Grinnell v. Lawrence [supra]. Judgment for the plaintiff, the amount to be adjusted at the custom-house.

Case No. 5,839.

GRISWOLD v. The NEVADA.

SHERMAN v. The SAME.

[2 Sawy. 144.][1]

District Court, D. California. Jan. 5, 1872.

ADMIRALTY—STALE DEMANDS BARRED.

Where libels in rem against a vessel were not filed until nearly two years after the cause of action had accrued, the libellants having been, during the whole period, residents of the state and under no disability to sue, and the vessel had made repeated voyages in the interim, and, for a considerable time prior to the filing of libels, had remained constantly within the jurisdiction, and the claimant was a mortgagee, without notice, under a mortgage made to him about nine months after the cause of action accrued, and about fourteen months before suit was brought; *held*, that the demand was stale, and barred by prescription.

[Cited in The Columbia, Case No. 3,036; Fitzgerald v. The H. A. Richmond, Id. 4,839;

[2] The principle of this decision was affirmed by the supreme court in the cases of Greely v. Thompson, 10 How. [51 U. S.] 225, and Maxwell v. Griswold, Id. 242.

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

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

The Bristol, 11 Fed. 162; The Queen of The Pacific, 61 Fed. 215.]

[This was a suit in admiralty by W. N. Griswold against the steamer Nevada, and Charles Sherman against the same.]

E. W. McGraw, T. A. Brown, and Mills, for libellants.

Doyle & Barber, for claimant.

HOFFMAN, District Judge. The libels in these cases, which were tried together by consent, are filed to recover damages for injuries to the libellants, who were passengers in the above vessel, caused by partaking of food which, by reason of the negligence and unskillfulness of the servants of the then owners of the steamer, contained, as is alleged, poisonous ingredients. It is objected by the claimant, that the demand of the libellants, at least so far as it is sought to be enforced in rem, is barred by prescription and by their laches and neglect to assert it within a reasonable time. The voyage, during which the cause of action accrued, was commenced on the eleventh of December, 1867, and terminated on the fifteenth of the same month. The libels were filed on the third of November, 1869.

On the tenth of November, 1868, about nine months after the right of action accrued, and about fourteen months before suit was brought, the North American Steamship Company, the owner of the vessel, executed a mortgage to secure the sum of $250,000, to W. H. Webb, the present owner and claimant. On the tenth of January, 1870, this mortgage was foreclosed, and the vessel sold under a power of sale contained in the mortgage. She brought the sum of $65,000, of which $15,000 was applied to the satisfaction of a prior mortgage. Mr. Webb, therefore, who seems to have been the purchaser, has an unsatisfied claim against the mortgagors for $200,000.

For a considerable time after the completion of the voyage on which the cause of action arose, the vessel continued to make her regular trips between this port and Panama, returning at short and stated intervals within the jurisdiction of the court. She was then laid up at Benicia, where she remained until attached in these suits. At the time of taking the mortgage the claimant had no notice or knowledge of the demands of the libellants, and was not aware that they claimed any lien upon the vessel. Except during the temporary absence of the vessel on her voyages to Panama, no obstacle appears to have existed to the commencement of a suit by the libellants at any time after their arrival in December, 1867. An action at law against the company was instituted by them some time in June, 1869, but failed for want of due service of summons on the defendant.

Although the statute of limitations does not apply to admiralty proceedings, the courts uniformly refuse their aid to enforce stale demands. Whether a demand shall be so considered will depend upon the circumstances of the case, and rests, to a certain extent, in the discretion of the court.

Justice and policy require that the tacit and often secret liens on vessels recognized by the maritime law should be promptly enforced, and that the lien should be considered neglected and abandoned whenever the party claiming it has omitted to sue for any considerable period, during which he has been under no disability, and when the rights of third persons who have become innocent purchasers, or encumbrancers, have intervened.

Maritime liens, unlike those recognized by the common law, are not accompanied by possession. No public register or record is made of them, and great injustice might be done, if these liens could be retained, after the property thus secretly encumbered has been allowed to depart on repeated voyages, or to be transferred to innocent purchasers without any attempt to enforce the lien by the party claiming it. The Nestor [Case No. 10,126]; Packard v. The Louisa [Id. 10,652]. Even the liens of seamen and bottomry-holders, which are regarded by courts of admiralty with so much favor, are held to be lost if not seasonably enforced.

By article 17, liv. 1, tit. 14, of the marine ordinance, the preference of the seamen over all other creditors is confined to their claims for wages for the last voyage. And the same provision is embodied in article 191 of the Code de Commerce. The wages due seamen for previous voyages are not privileged because, says the commentator, they should not have allowed the vessel which they had brought into port to depart without procuring payment of their wages. Rogron's Code de Com. p. 462.

In Packard v. The Louisa [supra] the question when a maritime lien not accompanied by possession will expire, was much discussed, and Mr. Justice Woodbury held that it will continue until the end of the next voyage, and thereafter until the rights of third persons have accrued. The same principle is applied to the lien of the bottomry-holder (The Charles Carter, 4 Cranch [8 U. S.] 327), and in England it would seem that the lien is barred, at least as against subsequent incumbrancers without notice, if the vessel be suffered to depart on a new voyage. The Royal Arch, Swab. 284. In Leland v. The Medora [Case No. 8,237], it was doubted whether a lien on a foreign vessel is not waived by allowing her to depart without any attempt to enforce it, and in The Eliza Jane [Id. 4,363]; it was held that a lien for supplies could not be enforced as against a bona fide purchaser, where the vessel had returned to Boston after the supplies had been furnished, and had been permitted to leave without any effort to enforce the lien. A similar decision was made in The John

Lowe [Id. 7,356], and in Ives v. The Buckeye State [Id. 7,117], it was suggested that upon the Great Lakes where several voyages were made during the season, there is great reason for limiting these tacit liens to the season of navigation, and for not allowing them to extend beyond one year.

The English admiralty reports, as well as our own, contain numerous cases where liens for salvage and for damages by collision have been held to be barred, under circumstances far less strong than the cases at bar. I have found none where, under similar circumstances, the lien has been sustained. In the cases at bar, we have every circumstance to which courts of admiralty look in determining whether a prescription has arisen. First—The libels were not filed until nearly two years after the cause of action accrued, the libellants having been during the whole period residents of this state, and under no disability to sue. Second—The vessel has made repeated voyages in the interim, and for a considerable time prior to the filing of the libels, has remained constantly within the jurisdiction. Third—The rights of an incumbrancer, bona fide, without notice, have intervened. I believe that by no principle or analogy declared in, or to be derived from any adjudged case, would the court be justified, under this state of facts, in enforcing this lien against the vessel in the hands of her present owner. The libel must therefore be dismissed.

GRISWOLD (RIDGWAY TP. v.). See Case No. 11,819.

Case No. 5,840.

GRISWOLD et al. v. UNION MUT. INS. CO.

[3 Blatchf. 231.] [1]

Circuit Court, S. D. New York. Nov. 24, 1854.

INSURANCE—VALUED POLICY—LEX LOCI — OPEN POLICY—GENERAL AVERAGE.

1. The general rule of commercial law is that, as between insurers and insured, a valued policy is to be taken as settling the true value of the subject insured, unless the valuation is shown to be fraudulent or enormously excessive.

2. It is not an ingredient of the contract of insurance that it shall be enforced conformably to the law of the place where it was executed.

3. The case of Lapsley v. United States Ins. Co., 4 Bin. 502, had reference only to an open policy.

4. Where the owner of a vessel was insured on its freight under a valued policy, and there was a jettison of a portion of the cargo, so that the freight on that portion was lost: *Held*, in an action on the policy, that the amount of the recovery was to be computed on the basis of the valuation in the policy, and that the liability of the insurer was not limited by the amount contributed by the insured on a general average adjustment.

[Cited in The Fern Holme, 46 Fed. 120.]

[Cited in Boardman v. Boston Marine Ins. Co., 146 Mass. 453, 16 N. E. 34; Lockwood v. Sangamo Ins. Co., 46 Mo. 77.]

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

This was an action of assumpsit upon a policy of insurance effected, in February, 1848, by the plaintiffs [Nathaniel L. Griswold and others] with the defendants [The Union Mutual Insurance Company of Philadelphia], who were a Pennsylvania corporation. The policy was executed at Philadelphia. The insurance was for $5,000, upon freight on board the ship Helena, on a voyage from New York to Canton, and back to the United States, with liberty to use any northern port in China. Among the perils insured against were jettisons. The defendants pleaded the general issue and payment. The action was tried in October term, 1853. The following facts appeared: In July, 1848, the Helena left Shanghai, a northern port in China, for New York, with a cargo of goods on freight. The plaintiffs were the owners of the ship and of most of the cargo. She met with various disasters, which made it necessary to throw overboard portions of the cargo. The plaintiffs claimed that the defendants were liable, under the policy, for one-sixth of the loss of freight. The declaration averred such loss to be $12,000, and claimed $2,000 from the defendants. The actual freight for the voyage, on the whole cargo, according to the rate specified in the bills of lading, and which were the current market rates at Shanghai, at the time of shipment, amounted to $12,795 31. The actual freight on that part of the cargo which was jettisoned, amounted to $4,949 95; and the freight on the residue of the cargo, which arrived at New York, amounted to $7,845 36. After the arrival of the ship in New York, a statement of the general average of the cargo jettisoned, and of the freight thereon, was prepared, in which the owners of the ship were allowed $4,949 95 for freight on the jettisoned cargo, in contribution, and the contributory sum assessed upon the freight was $1,657 92. That part of the cargo which was not jettisoned arrived, and was delivered at the port of destination, so as to entitle the ship owners to collect the freight thereon specified in the bills of lading. The defendants paid to the plaintiffs $29,886, which they insisted was a full satisfaction of all claim by the plaintiffs on them, on account of said losses. A verdict for the plaintiffs, for $1,500, was taken by consent, subject to the opinion of the court, on a case to be made.

Marshall S. Bidwell, for plaintiffs.
William Kent, for defendants.

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

BETTS, District Judge. The merits of this case depend upon the question, whether the recompense demanded by the plaintiffs for the loss of freight is to be determined by the adjustment stated on the termination of the voyage, or by the valuation fixed in the policy. The general rule of commercial law is,

that, as between insurers and insured, a valued policy is to be taken as setting the true value of the subject insured, unless the valuation is shown to be fraudulently or enormously excessive. This doctrine is laid down by text writers of the highest authority, and is sanctioned by adjudged cases in the United States and in England. 1 Marsh. Ins. (Condy's Ed. 228) 200; 1 Arn. Ins. 18, 309; 3 Kent, Comm. (8th Ed.) 272, 344; Phil. Ins. (3d Ed.) c. 14, arts. 1178, 1183; Lewis v. Rucker, 2 Burrows, 1171, 1172; Marine Ins. Co. v. Hodgson, 6 Cranch [10 U. S.] 206; Watson v. Insurance Co. of North America [Case No. 17,286]; Snell v. Delaware Ins. Co. [Id. 13,137]; De Longuemere v. Phoenix Ins. Co., 10 Johns. 127; De Longuemere v. New York Fire Ins. Co., Id. 201.

If the demand in controversy in this case rested upon a total loss of the freight insured, by direct perils of the sea, the amount recoverable by the plaintiffs would be determined by the valuation in the policy, the goods having been shipped and earning freight without regard to the actual worth of the freight at the port of departure or discharge. That position is conceded upon both sides. But the defence is placed upon what is regarded, by some authorities, as a radical distinction between a loss of freight by means of a jettison of the goods during transportation at sea, and a loss by destruction of the goods through sea perils acting directly on them—a distinction supposed to demand a different rule of compensation as between insurers and insured. Our examination of this case will be chiefly directed to that particular point.

The rule supposed by the defendants to govern this case is stated, in many text writers on insurance law, to be, in substance, that a loss by jettison is one compensated by general average, in the first instance, and not by the underwriters; their liability, under such loss, being to compensate the insured for his average contribution, and not primarily to recompense him for his direct loss from the sea peril. Arn. Ins. 948–950; Abb. Shipp. 354; 3 Kent, Comm. 232. This proposition is by no means universally accepted by text writers, to the extent of excluding the direct liability of the insurers for the jettison loss. 2 Phil. Ins. (3d Ed.) arts. 1348, 1617. And the contrary doctrine is established by the decisions of the courts of this state (Maggrath v. Church, 1 Caines, 196; Vandenheuvel v. United Ins. Co., 1 Johns. 406), and of the circuit court of the United States in the First circuit (Potter v. Providence Washington Ins. Co. [Case No. 11,336]). It is not our purpose to enter into this topic, upon which there is a conflict of decisions between the supreme courts of New York and Pennsylvania (Maggrath v. Church, ut supra; Lapsley v. United States Ins. Co., 4 Bin. 502); because it is essentially one of remedy concerning the method of enforcing remuneration, and does not involve the question of the responsibility of the defendants, or the amount of their liability. Conceding that they stand chargeable to the insured for the loss sustained by the jettison, it is unimportant to the ascertainment of the amount they are subject to pay, whether the action for its recovery be secondarily against them, for an indemnity, because of the average contribution to which the insured have been subjected, or primarily, upon the stipulations of the policy. We regard the defence in this case as resting on the position, that the plaintiffs are entitled to charge the defendants with no more than the contributory amount paid by the plaintiffs in discharge of the average adjustment; and, accordingly, in fixing the rule of recovery, it is essentially immaterial whether that adjustment and contribution be looked to as the foundation of the action, or be applied, in a suit on the policy, as the measure of the loss sustained by the plaintiffs.

We have not been referred to any case in which the facts presented the point for judgment in the aspect in which it comes before us. In Lapsley v. United States Ins. Co., ut supra, chiefly relied upon by the defendants, the reasoning of the court may be claimed to embrace the principles of this defence. But the insurance in that case was by an open policy, and the decisions and dicta referred to in its support had relation also to open policies. And it is to be further observed, that the specific question presented in this case did not arise in that. The controlling point there settled was, that the insured was not entitled to abandon the goods saved and charge the insurers with a total loss. It was also ruled, as to the mode of recovery, that the insured must first apply for the average contribution allotted him, and, in case it was not paid, that he would, after that, have his action against the underwriters for that amount. One consideration applies to that case, and affords ground for upholding it, which does not touch the cardinal feature of this. The amount of loss sustained by the insured, whether it consists in the destruction of a part or of the whole of his goods, must necessarily, on an open policy, be ascertained by means aliunde the policy. A standard of value, is, in such case, furnished by an average adjustment. It matters not that the adjustment may not be universally made upon a common principle of valuation, and that, under one jurisdiction, the prime cost, and, under another, the current price at the time of the loss, or the price at the time and place of shipment or of discharge, may govern the valuation. Jac. Sea Laws, 350, 351; Benecke (London Ed.) 296; 3 Kent, Comm. 335. Still, the adjustment, when fixed, determines the rate of allowance upon which the contribution is to be made. And, doubtless, it also affords the rule upon which the underwriter is chargeable, in satisfaction of that contribution. 2 Arn. Ins. 929. That liability, however,

would be the result of an implied and not an express engagement in respect to the amount of recompense to the insured. The action in the Pennsylvania court did not assume to make the underwriters liable for a sum fixed by positive stipulation, nor did the question as to the effect of a valuation in the policy, in diminishing or increasing the liability of an underwriter, when differing from the adjustment valuation, enter into the discussion or decision of the cause. It is not perceived that there is any distinction, in principle, between that case and the New York case of Maggrath v. Church, ut supra, from which it formally dissents, except on the point as to whether resort must, in the first instance, be had by the insured to the average contributors or their insurers, or whether the remedy may be primarily against the underwriters to the plaintiff, for the totality of the contribution due the plaintiff. This, as already suggested, partakes rather of a question of process than of right. In other respects, the two cases are substantially alike. In each, the plaintiff claimed a right to abandon, and to recover for a total loss; and, in each, the court decided that the case did not authorize an abandonment; and the compensation awarded in each was the sum fixed by general average.

As, in our opinion, it cannot be justly held to be an ingredient of the contract of insurance, that it shall be enforced conformably to the law of the place where it was executed, it is enough, in this instance, that the action brought conforms to the law of the forum in which it is prosecuted; and we are not called upon to determine whether it would be sustainable in the tribunals of Pennsylvania. The defendants having entered their appearance, and put in pleas of non-assumpsit and payment in the cause, we are to assume that the suit has been regularly instituted in this court, and that the plaintiffs are entitled to the same remedy under it, as if the action was in rem, or against non-residents of the state, duly served within this district.

The point upon the merits, then, is—Does the fact that the loss of freight was occasioned by a jettison of the goods, and was made a subject of general average, supersede or suspend the title of the plaintiffs to recompense upon the contract of insurance itself, or supplant that contract by a different obligation of the insurers, to be responsible only for the amount contributed by the insured on such general average? The affirmative of this position is maintained by the defendants, on what is assumed to be the settled law respecting losses resulting from jettison. No case, however, is produced in which that doctrine is directly adjudged in respect to claims under valued policies; and the question is to be answered upon general principles governing the application of the law merchant.

The reasoning in support of the defence is grounded upon the decision in Lapsley v. United States Ins. Co., ut supra, and the cases there referred to. But, as has been already remarked, the decision in that case is limited to its own facts, and determines no more than the method of recompense to be pursued by the insured under an open policy; and, unless that carries a legal implication that the same doctrine governs in cases of valued policies, the Pennsylvania court has not met the question now raised.

An able opinion by the counsel who argued the case for the insurance company in the Pennsylvania court, in support of the decision rendered therein, and of its applicability to the present case, has been produced on this argument, and submitted to us for perusal. He adds to the citations found in the reported case, a reference to 2 Valin, Comm. 654, and to 2 Boulay-Paty, Emerigon. The latter authority is not now accessible to us; but Valin, in the place cited, sheds no light on the present inquiry, because he is discussing the general rule as to the place where the valuation of freight on goods jettisoned is to be ascertained. He evidently regards the rule indicated by him as one to be applied where no method of fixing the value is established between the parties. 2 Valin, Comm. lib. 3, tit. 8, art. 6. We find no intimation, in any part of his Commentaries, that a fixed rule of adjustment was determined by any form of positive law, or that it would be incompetent for the ship-owner and the freighters to appoint a different mode of valuation than the worth of the freight, if it should all be made at the port of destination. Nor do we understand the 62d note of Roccus, relied upon in that argument, and cited in the Pennsylvania decision, to exact the interpretation put upon it in that relation. The question proposed and solved by the note, touches the scope of the obligations of underwriters. By asking if their liability is to secure an indemnity to the assured, and denying it that extent, the writer necessarily assumes that the query applies to open policies, under which usage supplies a measure of damages for want of one ascertained and determined between the parties. This is manifest from the provisions of notes 31 and 32. Roccus there marks the distinction when the goods are not valued in the policy, and when they are so valued. In the latter case, he says—where the goods have been estimated at a certain value, the estimated value must undoubtedly be paid. This view of the distinction is supported by Marshall (book 1, c. 15). Neither writer asserts that a loss by jettison is taken out of that plain and simple principle, and made subject to an arbitrary rule adverse to the agreement and stipulation of the parties.

We feel persuaded that no adjudged case will be found, in which an adjustment of general average is held to nullify the stipulation of the policy in regard to the indemnity

of the insured. The law only recognizes the adjustment as a rule of compensation in case the parties are silent. It does not inhibit their adopting a rule by mutual agreement.

In case of a deterioration or partial loss of property insured, there might be reason for resorting to the estimates in an adjustment, as a proper measure of that loss or damage, although the policy was a valued one, on the ground that the valuation had relation to the totality of the articles, and that, the loss not being total, the usage governing the allowance under general average might very properly supply the rule of damages. This seems to have been the point of view in which the supreme court of Massachusetts accepted the rule under a valued policy. Clark v. United Ins. Co., 7 Mass. 365. And that qualification would seem to apply only where a portion of the thing insured at a fixed valuation is preserved. It does not necessarily include distinct things totally lost, which compose part of a policy. Even this concession of the rule, however, is discountenanced by elementary writers of commanding authority (3 Kent, Comm. 274, and cases cited); and, in the English courts, it has been settled, that the valuation in a policy is to be considered the correct value in settling losses, total or partial (Irving v. Manning, 1 H. L. Cas. 287, 6 Man., G. & S. 391).

We answer, then, to the question raised in this case, whether the computation, in ascertaining the recompense to be made for the destruction of part of the goods, and the consequent loss of freight upon them, is to be on the basis of the average adjustment or of the valuation in the policy, that the latter furnishes the rule which the plaintiffs are entitled to have applied to this case. The advantage acquired by the plaintiffs is fortuitous. It might have resulted wholly to the benefit of the defendants. In forming the compact, both parties must be understood to have contemplated that, if a loss of freight occurred, it might greatly exceed the sum stated, or fall largely below it. They contracted upon that chance; and, as each expected the contingency might result in his favor, the one against whom it turns cannot, with any show of equity, insist upon the court's reframing the bargain by its authority, and, after he has been allowed to enjoy the probability of reaping an advantage from it, coming to his rescue, when the matter closes unpropitiously to his expectations, by adjudging the case as if the agreement had never been made by the parties.

In our opinion, the plaintiffs have a clear legal right to judgment for the amount of their loss, estimated upon the valuation fixed in the policy. The computations on this principle, submitted to the court, have not been objected to by the defendants; and judgment will be entered for the sum therein stated, unless they ask a reference to a commissioner to restate the allowance. Judgment accordingly.

GRISWOLD (UNITED STATES v.). See Case No. 15,266.

GRISWOLD (WILSON v.). See Case No. 17,806.

GROFF (PENN v.). See Case No. 10,932.

GROH, The MICHAEL. See Case No. 9,522.

Case No. 5,841.

GROSJEAN v. PECK, STOW & WILCOX CO. et al.

[11 Blatchf. 54; Merw. Pat. Inv. 342.] [1]

Circuit Court, S. D. New York. March 19, 1873.

PATENTS—VALIDITY—ANTICIPATION—DOUBLE USE.

1. The second claim of the reissued letters patent granted to Florian Grosjean, July 16th, 1867, for an "improvement in spoons and forks," the original patent having been granted to him January 28th, 1862, for an "improvement in sheet-metal spoons," and again reissued to him July 7th, 1863, for an "improvement in sheet-metal spoons," and again reissued to him July 12th, 1864, for an "improvement in spoons and forks," namely, "A sheet-metal handle, having a central corrugation, or hollow ridge, which extends along the narrow part of the handle, and vanishes into the bowl, (or its substitute,) by tapering sidewise and flatwise, substantially as before set forth," is valid.

2. Such claim is not anticipated by the prior use of sheet-metal candle-wick snuffers, such as are described in letters patent granted to O. W. Stow and Augustus Barnes, November 24th, 1857, for an "improvement in candle-snuffers," having a central corrugation.

3. The question of double use, in the employment, in the spoon, of the method of corrugation found in the snuffers, considered.

[This was a bill in equity by Florian Grosjean against the Peck, Stow & Wilcox Company and others, praying for an injunction to restrain the alleged infringement of a patent.]

Keller & Blake, for plaintiff.

Benjamin F. Thurston, for defendants.

BLATCHFORD, District Judge. This suit is founded on reissued letters patent [No. 2,682] granted to the plaintiff, July 16th, 1867, for an "improvement in spoons and forks," the original patent [No. 34,252] having been granted to him January 28th, 1862, for an "improvement in sheet-metal spoons," and reissued to him July 7th, 1863, for an "improvement in sheet-metal spoons," and again reissued to him July 12th, 1864, for an "improvement in spoons and forks." The specification says: "The object of my invention is, to produce, from sheet metal, spoons and similar articles, with handles which have not only the requisite stiffness for practical use, but are, at the same time, of good shape

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 342, contains only a partial report.]

and finish, so that they resemble, in rigidity and appearance, the solid thick handles which are usually found upon silver and plated table-ware. To this end, my invention consists of a sheet-metal handle, having one or more of the following characteristic peculiarities, viz.: First. A central corrugation or hollow ridge, extending along the central part of the narrow portion of the handle, and vanishing or ending in the central part of the broad portion, or palm, of the handle, by tapering sidewise and flatwise, in contradistinction to spreading sidewise to the rim of the said palm. Second. A central corrugation, or hollow ridge, extending along the central part of the narrow portion of the handle, and vanishing or ending in the central part of the bowl, (or the substitute thereof,) by tapering sidewise and flatwise, in contradistinction to spreading sidewise to the rim of the said bowl, or its substitute. Third. Two lateral corrugations, or hollow beads, extending into the palm of the handle, and along the narrow part of the handle, with a space between them, which may be occupied by one or the other of the central hollow ridges above described, or by a central hollow ridge having the terminal peculiarities of both those above described." The spoon is described as shaped out of a blank piece of sheet metal, by swedging it into shape in suitable dies, the bowl being of ordinary shape, the narrow part of the handle having a central corrugation or hollow ridge, which gradually vanishes into the central part of the broad portion, or palm, of the handle, by tapering sidewise and flatwise, and also vanishes into the central part of the bowl in the same manner, and there being formed, on each side of this central corrugation, near the edges of the handle, two other smaller corrugations, or hollow beads. The specification proceeds: "These hollow beads, for good appearance, may continue around the whole edge of the spoon handle, and be united, as represented; and they should extend far enough down into the bowl (where they should also be united), to insure the requisite strength where the handle and bowl unite. This addition of the beads is advantageous, as it greatly increases the strength at the bowl. The outer hollow beads also give a better and handsomer form to the whole spoon. The improvement is obviously applicable to forks formed out of sheet metal, as well as to spoons. It enables spoons and forks, of durability and good shape, to be made in the cheapest manner known. I do not claim mere beads or ornaments formed on the surface of spoon and fork handles made of rolled or cast metal, * * * nor do I claim broadly a corrugated or swedged handle for a spoon or similar article; but what I claim as my invention, and desire to secure by letters patent, is: A sheet-metal handle, having a central corrugation, or hollow ridge, which extends along the narrow part of the said handle, and vanishes into the broad portion or palm thereof, by tapering sidewise and flatwise, substantially as before set forth. I also claim a sheet-metal handle, having a central corrugation, or hollow ridge, which extends along the narrow part of the handle, and vanishes into the bowl (or its substitute), by tapering sidewise and flatwise, substantially as before set forth. I also claim a sheet-metal handle, having two lateral beads, or corrugations, which extend, with a space between them, longitudinally, along the narrow part of the handle, into the palm thereof, substantially as before set forth. I also claim a sheet-metal handle, having the central hollow ridge, combined with the lateral hollow beads, substantially as before set forth."

The defendants Wilcox and Walkley, as agents, in the city of New York, of the defendants the Peck, Stow & Wilcox Company, a Connecticut corporation, have sold, in that city, spoons manufactured by that company, which spoons are made of sheet metal, and have, as one of their characteristics, a corrugation, or hollow ridge, which extends along the central part of the narrow portion of the handle, and does not spread sidewise to the rim of the handle, and vanishes into the central part of the bowl, by tapering therein sidewise and flatwise, and does not spread sidewise therein to the rim of the bowl. Another of the characteristics of such spoons is, that the handle is so applied to the bowl, that the flat surface, or palm, of the metal of the handle corresponds flatwise with the plane of the rim of the bowl. Another of the characteristics of such spoons is, that the central corrugation, in its extension into the bowl, crosses the rim of the bowl, and greatly strengthens the handle at its junction with the bowl, in the direction in which a strain is generally applied to bend the handle. The tendency, during such strain, is to bend in a line at right angles to the length of the handle, at its place of junction with the bowl, and the walls of the corrugation, being very much in the line of direction of the strain, cause the metal to offer a greater resistance to such strain, than it would if the surfaces of the handle, at its place of junction with the bowl, were flat planes. This strengthening is aided by the extension of the corrugation into the bowl. All these features and characteristics of the defendant's spoon are found in the spoon described and shown in the plaintiff's patent, both in arrangement and mode of operation.

The idea of corrugating the handle of a sheet-metal spoon by swedging, in order to stiffen it against strains, was old; and the handle of a spoon was, before the plaintiff's invention, corrugated by a longitudinal ridge, the central line of which lengthwise was the central line of the width of the entire handle, the ridge spreading, on both sides, to the

rim of the handle, and the flanks of the ridge uniting with the rim of the bowl, and the ridge vanishing, after crossing the line of junction of the handle with the bowl, by spreading sidewise, in the bowl, to the rim of the bowl, instead of vanishing into the bowl by tapering therein sidewise and flatwise. In spoons of equal size of handle and bowl, and equal weight, made of equal thickness of metal, the difference in strength between a spoon corrugated like the plaintiff's, and one corrugated in the old form, just described, is greatly in favor of the plaintiff's spoon. The modes of operation of the two systems of corrugation, in resisting strains on the handles at their junction with the bowl, are different. In the plaintiff's spoon, the flanks of the ridge do not unite with the rim of the bowl, but the corrugation runs into the bowl, like a tongue.

The defendants are charged with violating, in making and selling their spoons, the second claim of the plaintiff's patent, and a provisional injunction is asked, to restrain such infringement. There can be no doubt of the great utility of the improvement in question. By the aid of it, spoons and forks of comparatively great strength can be cheaply made, by swedging in dies, out of sheet metal. The only defence set up is, that the improvement covered by the second claim of the plaintiff's patent was before known and used in candle-wick snuffers, made of sheet metal. In 1836, Orson W. Stow and Augustus Barnes, at Southington, Connecticut, made and sold a large number of sheet-metal snuffers, one of which is produced in evidence. The snuffers consist of two pieces only, each cut from sheet metal. One piece forms the bowl piece, and has a bowl closed on five sides, a leg beyond the bowl, a finger ring, and a leg on the finger ring. The other piece forms the wing piece, and has an upright wing, to close the sixth, or open side of the bowl, a finger ring, and a leg on the finger ring. The two pieces cross each other, and are united by, and work on, a pivot. The lower part of the side of the bowl nearest the pivot is cut away far enough to permit the portion of the wing piece immediately adjacent to the wing to pass under such side of the bowl, and thus allow so much of the wing piece as lies between the pivot and the wing to entirely cover so much of the bowl piece as lies between the pivot and the bowl, and so carry the wing into the bowl, to perform the operation of cutting off the wick. The metal which forms the bottom of the bowl is neither wider nor narrower than the width of the metal in the bowl piece, which lies between the pivot and the side of the bowl that is nearest to the pivot. As the snuffers stand on the legs, the bowl piece has a central longitudinal ridge or corrugation, which is concave, as you look down upon it, and extends from the pivot to beyond the nearest side of the bowl, and to nearly half way of the length of the bowl. The distance between the pivot and the side of the bowl nearest to the pivot is not quite as great as the length of the bowl lengthwise of the snuffers. About two-thirds of the length of the corrugation is outside of the bowl, and about one-third of the length of it is inside of the bowl. This corrugation does not extend sidewise to the rim, at any part of its length, on the side which, when the bowl is open, is nearest to the wing. On the other side, the corrugation does extend sidewise to the rim, up to the bowl. The corrugation becomes gradually narrower in width, as it passes on beyond the outside of the bowl, and vanishes, within the bowl, into the metal along which its course has proceeded, by tapering into the same sidewise and flatwise, and not by spreading to a rim, in any direction, within the bowl. As the snuffers stand on the legs, the wing piece has a central, longitudinal ridge or corrugation, which is convex, as you look down upon it, and extends from the pivot to beyond the nearest edge of the wing, and to half way of the length of the wing. The distance between the pivot and the edge of the wing nearest to the pivot, is about the same as the length of the wing lengthwise of the snuffers. About one-third of the length of the corrugation is along the face of the wing, and about two-thirds of the length of it is between the wing and the pivot. This corrugation does not extend sidewise to the rim, at any part of its length. It becomes gradually narrower in width, as it passes on beyond the line of the edge of the wing, and vanishes into the metal along which its course has proceeded, by tapering into the same sidewise and flatwise, and not by spreading to a rim, in any direction. Calling the bottom of the bowl, that side of the bowl which, when the snuffers stand upon the legs, is parallel with the plane of the ground, the flat surface of the metal of the bowl piece, outside of the bowl, corresponds flatwise with the plane of such bottom.

Sheet-metal snuffers, of substantially the same construction, have continued to be made and sold at Southington, in large quantities, and are still made and sold there. From 1857 to the present time, the form has been varied from that of 1836, only by making the length of the corrugation within the bowl about one-fourth of the entire length of the corrugation, and about one-fifth of the length of the bowl, and by making the corrugation in the bowl piece entirely central, so that it does not spread to a rim, on either side, and by not continuing the corrugation in the wing piece any further than to the edge of the wing. On the 24th of November, 1857, letters patent of the United States were granted to O. W. Stow and Augustus Barnes, for an "improvement in candle snuffers." The specification of this patent describes, and the drawings represent, snuffers

constructed like the form of 1857, before mentioned, with the corrugation in the bowl piece extending to within the bowl. The specification states, that "the corrugations give the necessary stiffness to the sheet metal."

Orson W. Stow testifies, that, before the corrugated form of 1856 was made, he and Barnes made a pair of snuffers of plain, uncorrugated sheet metal, for experiment, but found that the metal was not stiff enough to resist the strain which the parts would be likely to encounter in use, especially if a portion of unburned wick should be jammed between the two cutting edges, and that the metal they had used was too expensive; and that they then used thinner metal, and introduced the corrugations referred to. He states, that the object they had in view was to use light stock, and, at the same time, to strengthen the article in the direction in which strains were applied to it.

It is contended, on the part of the defendants, that the strain to which a pair of snuffers is subjected, in use, is especially applied at the junction of the bowl and of the part lying between the bowl and the pivot, and at the junction of the wing and of the part lying between the wing and the pivot, and is occasioned by the interposition of unburned, or not easily cut, wick between the two cutting edges; that the direction of this strain on the bowl piece is in a line more or less perpendicular to the plane of the flat surface of the bowl piece, and would, unless the corrugation crossed the line of junction of the bowl with the part lying between the bowl and the pivot, tend to bend down the bottom plate of the bowl piece at some point between the pivot and the point where the wick is interposed between the cutting edges, and, notably, at the point of junction between the bowl and the part lying between the bowl and the pivot; that such latter part is substantially the same part as the handle of the spoon; that the object, in the snuffers and in the spoon, is, to strengthen a weak place found at such point where the tendency to bend exists; and that the relations, structure, arrangement, and mode of operation, of the parts, including the corrugation, are the same in the snuffers as in the spoon. From these premises the conclusion is maintained, that the plaintiff has only applied to a spoon or fork a means of stiffening which had before been applied to snuffers; and that such application involved no invention, and was a mere double use of a known thing, accompanied by no new or distinctive result, in the spoon or fork, beyond what was developed in the snuffers.

It is obvious, that the bowl piece of the snuffers, with the bowl on it, would not, if used as a spoon, be the plaintiff's spoon; and that the bowl piece of the snuffers, divested of the bowl part, could not be used as a spoon or fork. The use of the plaintiff's spoon is, therefore, not a double use of any part of the snuffers, in the condition in which such part is found, ready to the hand.

It is not contended that the existence of the snuffers suggested to the plaintiff the construction of his spoon, or that the existence of the snuffers suggested to Stow and Barnes, or to any other person, the construction of a spoon like the plaintiff's. The plaintiff invented his spoon without having heard of the snuffers, so far as appears; and it was from his invention, and not from the snuffers, that spoons constructed like the plaintiff's spoon found their way into use. Comparing the plaintiff's spoon with the best form of corrugated spoon, made from sheet metal, which existed before, there are evident marks of thought, skill and design in its structure; and so there are if it be compared with the snuffers. The change and its consequences, from the former sheet-metal spoon, as well as from the snuffers, were considerable and important. A spoon, of sheet metal, with a corrugation, was found in existence, but the species of corrugation was not such as to develop in the spoon the properties and results desired by the plaintiff, as expressed by him in his patent, that is, that the handle should have not only the requisite stiffness for practical use, but should be, at the same time, of good shape and finish, so as to resemble, in rigidity and appearance, the solid, thick handle of a silver or plated spoon, and be capable of being formed of one piece with the bowl of the spoon, by swedging in dies. These properties and results were capable of being derived from applying to the handle of the spoon the species of corrugation suggested by the snuffers. But, this species of corrugation in the snuffers was not applied to what can properly be called a handle, in the snuffers, in the sense in which the part of a spoon which is not the bowl of the spoon is called the handle of the spoon. In the snuffers, the part outside of the line of junction crossed by the corrugation is of equal width with the part inside of such line of junction. In the spoon and fork, the part outside of such line of junction is very much narrower than the part inside of such line of junction. The wide-spread metal outside, in the snuffers, of such line of junction, had to be narrowed in width very considerably, not only absolutely, but so as to be very narrow compared with the width of metal inside of such line of junction; and it is very difficult to say that it did not require experiment and invention to determine, by a practical test, whether it was possible to apply usefully, in the narrow part of the handle of the spoon, the species of corrugation found in the snuffers. It is true, that the object of the use of this species of corrugation in the snuffers was, to resist a strain, and to counteract a tendency to bend or break, and to strengthen weakness; and that the same object exists in the use, in the spoon, of the same species of corrugation. But, the object of every corrugation of thin metal, applied as in the snuff-

ers and the spoon, is to resist strains, and to counteract tendencies to bend or break, and to strengthen weakness. The existence of this common purpose in the corrugations, in the snuffers and in the spoon, does not advance us at all in the solution of the question at issue.

I cannot resist the conclusion, that the new application, in the spoon, of the method of corrugation found in the snuffers is not merely a double use, and that it involves something beyond the mere skill of a constructor, in adapting such method to a new occasion, and that the new occasion or purpose to which such method is applied, in the spoon, is not a mere analogous occasion or purpose to the former occasion or purpose, in the snuffers, to which such method was previously applied. There is a new mode of operation, as well as a new effect, developed, in the spoon, as compared with the snuffers, in applying to the spoon the method of corrugation found therein. The surface of the bottom of the bowl, in the snuffers, is flat with the part outside of the bowl, and the corrugation runs, in its whole length, along a flat plane. But, in the spoon and fork, the corrugation runs through a curving handle on one side of the line of junction, and into a curving part on the other side of such line of junction. The relations to each other of the two parts through which the corrugation extends in the snuffers, is, thus, different from the relations to each other of the two parts through which the corrugation extends in the spoon and fork. A principle of bracing is developed, by the combination of the corrugation with the curvature in the handle, and the reverse curvature in the other part, of the spoon or fork, which introduces a new mode of operation in the combined action of the corrugation and the two curvatures, and produces a new effect, as compared with the mode of operation and the effect found in the snuffers, where no such curvatures exist. The plaintiff's patent extends only to spoons and forks and "similar articles." At the date of the patent, the silver and plated spoons and forks which the plaintiff's articles are, as he states in his patent, designed to imitate, had a defined and understood shape, and embodied two reverse curvatures on the two respective sides of the line of junction between the handle and the part not embraced in the handle. It was to this structure that he applied the species of corrugation referred to. There is nothing that tends to the conclusion that it did not require experiment to ascertain whether such species of corrugation could be successfully applied, by swedging in dies, to articles having such reverse curvatures, and especially to articles with such a narrow part on one side of the line of junction between the two curvatures.

Being entirely satisfied that the second claim of the plaintiff's patent is valid, I must grant the injunction prayed for.

Case No. 5,842.

GROSS v. SIOUX COUNTY.

[2 Dill. 509.] [1]

Circuit Court, N. D. Iowa. 1873.

JURISDICTION—JUDGMENT—SERVICE OF PROCESS UPON A COUNTY CORPORATION.

1. A judgment rendered without jurisdiction over the person sued is void.

2. This rule, illustrated by the case of an action against the county, where the statute required service of process to be made upon the county judge, and the actual service was made upon the chairman of the board of supervisors: *Held*, that a judgment by default against the county without an appearance was void.

3. Whether service upon a county may be made by serving the proper officer when absent from and outside of the county, quaere?

This is an action at law upon a judgment alleged to have been rendered against the defendant in favor of one Lombard by the state district court for Dubuque county, Iowa. The petition is in the usual form, and, after proper averments of citizenship to give this court jurisdiction, alleges that on the 23d day of March, 1869, the district court of the state of Iowa for the county of Dubuque rendered a judgment in favor of Josiah L. Lombard against the county of Sioux for $21,164.22 and costs; that said judgment is in full force, and was, on the 3d day of August, 1871, duly assigned to the plaintiff, who in this action seeks to recover the amount thereof, with interest and costs. The answer sets up various defences, and the case is now before the court on demurrer to the fourth count of the answer. This count sets up, and the exemplified record of the judgment in Dubuque county, exhibited by the plaintiff, shows, that this judgment was rendered by that court by default and without any appearance by the county upon service of the original notice (which is the process for commencing suits in the state courts) made by a private individual outside of the county of Sioux and within the county of Polk, upon the chairman of the board of supervisors of the county of Sioux. The action in the Dubuque court was upon sundry county warrants, in the usual form, by which the treasurer of Sioux county is directed to pay to bearer the amounts therein specified. The original notice was in due form, and was returnable to the Dubuque district court on the 2d day of February, 1869. The return of service thereof is as follows: "State of Iowa, Dubuque county: Benjamin J. Sweet, upon oath, says that he served the within and foregoing notice upon the defendant by reading the same to Miner N. Reamer, who was then and there the chairman of the board of supervisors of said Sioux county, and by delivering to him, the said Reamer, at the same time and place, a true copy of said notice; that said service was so made at the city of Des Moines, in the county of

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

Polk, and state of Iowa, on the 28th day of October, 1868, where the said Reamer was in attendance upon the circuit court of the United States; and I do further depose and say that I am personally cognizant of the fact that said Reamer was then and there chairman of the board of supervisors of said county, and as such was in attendance upon said court, in the interest of said Sioux county. Signed, Benjamin J. Sweet." This return was subscribed and sworn to by Sweet, and upon it and without any appearance by the county, the district court for Dubuque county rendered judgment against the county by default. The fourth count of the answer sets up that service was made as above, and claims that the court had no jurisdiction, and that its judgment (the basis of the present action) is void.

Grant & Smith, for plaintiff.

Joy & Wright, and Withrow, Gatch, & Wright, for defendant.

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

DILLON, Circuit Judge. The plaintiff's assignor brought suit in Dubuque county against the county of Sioux upon its ordinary warrants, payable at its own treasury upon service of process made in Polk county upon the chairman of the board of supervisors of the defendant. The suit was brought in the wrong county, but if the service upon the defendant was sufficient and it did not move to change the venue to the proper county, the judgment would, under the statute of Iowa, be valid. Revision 1860, § 2802.

The only question now before the court is, had the Dubuque district court jurisdiction of the county? If it had, the fourth count of the answer is bad; if it had not, that count presents a good defence, and the demurrer thereto should be overruled. The law then in force respecting the mode of service upon a county was section 2824 of the Revision, which provides: "If a county is defendant, service (of the original notice) may be made on the county judge or clerk of the county court." This section was enacted when the county judge was the fiscal agent of the county and had the general management of its affairs. In 1860 the legislature abolished the system of managing the county affairs by a county judge, and adopted instead thereof the supervisor system. The board of supervisors, consisting of a member from each civil township of the county, transact the business of the county at regular or special meetings, and there were devolved upon the county board of supervisors the jurisdiction and powers of the county judges. Revision 1860, pp. 48–53.

There was no special act changing the mode of making service upon counties until 1870, when section 2824, supra, was amended thus: "If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor." Laws 1870, p. 209. But this enactment was after the rendition of the judgment now before us, and the question must be decided upon section 2824 as it originally stood. And upon reading the acts respecting the board of supervisors, we find no provision substituting the chairman of the board, who is simply its presiding officer, in the place of the county judge, or investing him with the powers or functions of that officer. If service of notice against the county could be made upon the supervisors at all, it must be made upon the board. Previous to the act of 1870, there was, so far as we can discover, no more authority to serve the chairman of the board than any other member of the board. Under these views, the court would have acquired no jurisdiction over the county had the chairman been served with notice within the county.

We are also inclined to the opinion that there was no authority of law to make service upon the chairman of the board when absent from his county. The statute contemplates that personal actions in the state courts shall be brought within the county where the defendant resides, and the official duties of the county officers are to be performed at home. Was it the intention of the legislature that the county judge or the county clerk, or, since 1870, the chairman of the board, or county auditor, could be served with process when away for business or pleasure, hundreds of miles from his official home, the place where he discharges his official duties and exercises his official powers? We doubt it; but it is unnecessary to place our judgment upon this ground or give any positive opinion upon it. See Board of Supervisors v. Young, 31 Ill. 194. Demurrer overruled.

See Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 1872.

Case No. 5,843.

GROSS & P. MANUF'G CO. v. GERHARD.

[8 Reporter, 136; 7 Wkly. Notes Cas. 51; 25 Int. Rev. Rec. 280; 27 Pittsb. Leg. J. 36.]

Circuit Court, E. D. Pennsylvania. March 22, 1879.

PRACTICE IN CIVIL CASES—SECURITY FOR COSTS—INTERPLEADER.

[Where property seized under execution is claimed by a third person, and an interpleader is directed, the claimant has the burden of proof, and is the real as well as the nominal plaintiff in the feigned issue. Therefore he cannot require the plaintiff in execution, though a non-resident, to give security for costs.]

[This was a suit by the Gross & Phillips Manufacturing Company against Gerhard.]

Rule on the defendant in an interpleader issue to enter security for costs. The plaintiff, a non-resident, brought suit and obtained judgment in October, 1878. Execution issued,

and certain goods, consisting of the stock of a lumber yard, were seized as the property of the defendant, but were claimed by defendant's brother. Upon the hearing of the rule for an interpleader, the claimant asked that the defendant in the feigned issue (the original plaintiff) be directed to enter security for costs; but the court (Butler, J.), refused to make such order unless the claimant filed an affidavit disclosing his title, and made the rule absolute. Thereupon the claimant took this rule and filed his affidavit stating that he had purchased the goods from the defendant in the execution on the 7th of August, 1878. A valuable consideration for the purchase was stated. Since the purchase the deponent had been in full, absolute, and exclusive possession of the goods.

Mr. Rich, for the rule.

The nominal defendant is, in fact, the plaintiff, and, being a non-resident, should enter security for costs.

Mr. Mason, contra.

If the facts stated in the affidavit are true, the defendant in the feigned issue would not, in any event, be required to pay costs. Mansley v. Moore, 1 Wkly. Notes Cas. 268. The affidavit shows that the claimant is the actual as well as nominal plaintiff.

BUTLER, District Judge. While it is true that the party who is actually the defendant may, under the rule of court, require security for costs, although nominally he is plaintiff, the facts here disclosed by the affidavit show a case in which the burden of proof is upon the claimant to satisfy the jury that he obtained the goods bona fide, and paid full value for them. He is the actual as well as the nominal plaintiff. Rule discharged.

GROSVENOR (GEAR v.). See Case No. 5,291.

GROSVENOR (SEABURY v.). See Case No. 12,576.

GROTE (DECKER v.). See Case No. 3,726.

GROTENKEMPER (UNITED STATES v.). See Case No. 15,267.

Case No. 5,844.

The GROTIUS.

[1 Gall. 503.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

PRIZE—CUSTODY OF, ON APPEAL—AUTHORITY OF DISTRICT COURT.

1. On an appeal to the circuit court, the property follows the appeal into that court. The Collector, 6 Wheat. [19 U. S.] 194.

[Followed in Davis v. The Seneca, Case No. 3,651. Cited in Folger v. The Robert G. Shaw, Id. 4,899; Wilson v. Bell, 20 Wall. (87 U. S.) 225; The Thomas Fletcher, 24 Fed. 482.]

2. The district court has no authority, after an appeal, to bail or sell the property.

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

In this cause a motion was made to the court to order into its custody the prize property [the Grotius and cargo], which, after a decree in the district court, and an appeal, had been delivered to the claimants [Thomas Sheafe and others] on bail by the court. The motion was made upon the ground, that after the appeal, the district court had no jurisdiction.

Cummings & Sprague, for captors.

STORY, Circuit Justice. I have had occasion to consider this question in other causes. There can be no doubt, that wherever the property does not follow the cause into the appellate court, the court, in whose custody the property remains, may make any order respecting it, which circumstances may require, in the same manner as if the cause were still pending there. Such court may, therefore, sitting as an admiralty court, order a sale, or a delivery on bail, according to the course and usage in maritime causes. But where the property follows the cause into the appellate court, I take it to be clear, that by the appeal, all jurisdiction is gone from the inferior court. The property either goes into the appellate court at the same time as the cause, or not at all. Upon any other construction, great mischiefs would arise. No other point of time could be legally fixed, at which the authority of the inferior court would cease; and a conflict of jurisdictions, as to the disposal of the property, might present great difficulties and embarrassments. The appellate court might award an acquittal or condemnation, and proceed to execute its decrees, at the same time that the inferior court might be subjecting it to its interlocutory orders. The vice-admiralty courts of Great Britain, sitting in a different jurisdiction from the appellate courts, have generally exercised authority over the property after an appeal, upon the ground that the appeal does not remove the property from their custody. Whatever may have been the original source of this authority, whether assumed as an incident to the admiralty jurisdiction or not, it now stands upon the express provisions of statutes. In all probability, it was engrafted into the original constitution of those courts, or assumed as a resulting power from the appellate court sitting within another jurisdiction, or from the limited authorities exercised by the latter; and I take it to be the established course, to remit the decree of the appellate court to the inferior court for execution, unless in special cases regulated by statute. So also in causes carried by appeal from the high court of admiralty to the lords commissioners of appeal

[1] [Reported by John Gallison, Esq.]

in prize causes in Great Britain, it is understood to be the general course, to remit the final decree for execution in the inferior court. The property, therefore, is deemed still in the possession of the inferior court, and consequently it may, pending the appeal, make any order for the delivery or sale of it. On examining the act of 24th of September, 1789, c. 20 [1 Stat. 73], organizing the courts of the United States, it will be found, that on appeals from the circuit to the supreme court, the final decree of the latter is directed to be remanded to the former for execution. It results, therefore, that the property does not follow the cause into the supreme court, but remains to await the final decree in the circuit court. But the provisions are different as to the district court. On appeals from the district to the circuit court, no authority is given to remand the cause to the former for execution, where the appeal is pursued, but on the contrary, the provision of the 24th section would seem unavoidably to require, that the circuit court should execute its own decrees; and if any doubt should exist, as to this construction, that doubt would be put entirely at rest by the uniform practice, which has obtained ever since the first organization of this court. How can such execution be done, unless the property or its substitute, affected by the decree, is in the legal custody and control of the court? Besides, this court sits within the same judicial district, as the district court. The marshal, who has the custody of captured property, and the clerk, with whom may be deposited its proceeds, are officers of this, as well as of the district court. There is therefore no difficulty occasioned by any supposed transfer of the custody of the property by the appeal.

On the whole, I am satisfied, that after an appeal, the property is removed from the legal custody of the district court, and is no longer subjected to its interlocutory orders. There may, and I fear there will, grow inconveniences out of this decision, but it will be for the legislature to remove them, by giving authority to either of the judges of this court, in vacation, to make any interlocutory orders respecting property in its custody. At all events, I do not feel at liberty to reject the obvious meaning of the law, on account of mischiefs, which a court may lament, but has no authority to remedy. In the present case, however, circumstances of a peculiar nature will induce me to leave the property where the decision of the district court has deposited it. Motion rejected.

[NOTE. In the district court the ship had been condemned to the United States, and in the circuit court this decree was affirmed. An appeal was taken by the claimants to the supreme court, where, in an opinion by Mr. Justice Washington, an order was made for further proof upon the facts concerning the validity of capture. 8 Cranch (12 U. S.) 456. Upon the second argument an opinion was delivered by the same justice,—9 Cranch (13 U. S.) 368,—in which the decree of the circuit court condemning the ship, etc., to the United States was reversed, and it was ordered that the said ship be condemned as lawful prize to the captors.]

GROVE (CAVENDER v.). See Case No. 2,530.

GROVE (RANSDALE v.). See Case No. 11,570.

GROVER v. CLINTON. See Case No. 5,845.

Case No. 5,845.

GROVER & BAKER SEWING MACH. CO. v. CLINTON et al.

[5 Biss. 324; 8 N. B. R. 312; 6 Chi. Leg. News, 33; 18 Int. Rev. Rec. 166; 21 Pittsb. Leg. J. 34.] [1]

Circuit Court, W. D. Wisconsin. June, 1873.

FIDUCIARY DEBT—COLLECTION BY AGENT—ACT OF 1841—MINGLING FUNDS—CONVERSION.

1. Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal, is not a debt created in a "fiduciary character" within the meaning of the bankrupt act.

[Cited in Keime v. Graff, Case No. 7,650; Zeperink v. Card, 11 Fed. 296.]

[Cited in Woodward v. Towne, 127 Mass. 42; Gibson v. Gorman, 44 N. J. Law, 328.]

2. A bankrupt is not liable to arrest on such a debt, and it is discharged in bankruptcy.

[Cited in Re Smith, Case No. 12,976.]

3. The words "fiduciary character," in the act of 1867 [14 Stat. 517], are essentially the same as "any other fiduciary character," in the act of 1841.

[Cited in Hennequin v. Clews, 77 N. Y. 431.]

4. Decisions under the bankrupt act of 1841 [5 Stat. 440], considered and approved. In re Kimball [Case No. 7,768], disapproved.

5. It seems, that when an agent is to account monthly with his principal, a court might infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself an absolute debtor for that amount, and if authority so to do may be implied from the course of dealing, the agent would be exempted from special liability for a conversion of the money.

This was an action of assumpsit, by the Grover & Baker Sewing Machine Company, against A. T. Clinton, R. C. Douglass and E. D. Loomis, their agents in La Crosse, to recover a balance of one thousand six hundred and thirty dollars and seventy-one cents. Since the 1st of April, 1872, defendants, who were merchants at La Crosse, had been the plaintiff's agents in the sale of sewing machines, receiving a commission of thirty-five per cent. of the retail price, and accounting and paying over the balance of sales monthly. The defendants, prior to the commencement of this suit, had been adjudicated bankrupts in the district court; but the plaintiffs, assuming that they were liable to arrest under the state statute, procured an

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 18 Int. Rev. Rec. 166, contains only a partial report.]

order for their arrest from the circuit court in this cause, in accordance with the state practice, by virtue of which they were arrested and held to bail. This was a motion by the defendants to be discharged from arrest on the ground that, under the bankrupt act, they were exempt from arrest under the cause of action set forth in the complaint.

Carpenter & Murphey, for plaintiff, cited In re Seymour [Case No. 12,684]; In re Kimball [Id. 7,768]; same case on review [Id. 7,769]. The transaction is, under the statute of Wisconsin, a crime for which the defendants are liable to indictment as for larceny. Rev. St. (Taylor's Ed.) c. 165, § 30. And it cannot be said that a transaction, thus declared to be crime, is a mere matter of contract between the parties.

S. U. Pinney, Wing & Prentiss, and Cameron & Losey, for defendants.

Before DAVIS, Circuit Justice, and HOPKINS, District Judge.

HOPKINS, District Judge. It seemed to be taken for granted, on the argument, that the state statute authorized an arrest upon such a state of facts. Taylor's St. p. 1452. That question may not be quite as clear as claimed. The state statute, however, is very much broader than the bankrupt act, and allows arrests in all actions of tort, and for money received and misapplied by an agent, factor or broker. In assuming the liability of the defendants to arrest under the state laws, it is doubtful whether due importance was given to the fact, which appears undisputed in this case, that the proceeds were only to be paid over monthly. Such a course of dealing might authorize a court to infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself a debtor for the amount; and if an authority to do so might be fairly implied, the agent would not be liable for wrongfully converting the money, within the meaning even of the state statute.

It is, undoubtedly, the duty of an agent to keep the money collected for his principal, to whom it belongs; and, if in the absence of an authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully uses it for his own benefit and in his own business, he is liable to an action of trover and to the legal consequences of such an action. Cotton v. Sharpstein, 14 Wis. 226. Whether the court ought not, in a case like this, to presume a consent or acquiescence of the principal to such use of the funds by the agent, as to exempt him from the more rigorous remedies in actions for torts, we do not decide, but prefer to place our decision upon the ground upon which the case was argued, that is, the right to arrest in such a case under the bankrupt act, during the pendency of the bankrupt proceedings.

The twenty-sixth section of the bankrupt act exempts the bankrupt from arrest, during the pendency of the proceedings, upon all debts or claims from which his discharge would release him. Section 33 declares "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged."

The question depends upon the meaning of the phrase "fiduciary character." It does not mean, certainly, demands arising out of torts, such as trespass or trover, for section 19 allows demands "for goods or chattels wrongfully taken, converted or withheld," to be proven, and such demands are released by the discharge, so that something more and different was meant than a debt or demand originating in a tort. A demand for a wrongful conversion of money ought not, it would seem, upon principle, to render a party liable to arrest any more than a wrongful conversion of goods and chattels.

But it is unnecessary to consider the question abstractly, for the same phrase substantially was used in the act of 1841, and the supreme court of the United States in Chapman v. Forsyth, 2 How. [43 U. S.] 202, construed it as not including cases of this character, but as having reference to special or technical trusts, as distinguished from such as the law implies from the contract of the parties. And the court there very properly observe that if construed to include cases of implied trust, but few debts would remain upon which the bankrupt act would operate.

In concluding the opinion, they say that "a factor who owes his principal money, received on the sale of his goods, is not a fiduciary debtor within the meaning of the act." And if a "factor" is not a "fiduciary debtor," he cannot be said to have acted in a "fiduciary character" in relation to the matter out of which the debt arose; and if that is true of factors, it must be equally so of other agents clothed with similar powers; they cannot be regarded either as fiduciary debtors, or held liable in that character, or be denied the benefit of the discharge under the act. These defendants were, by the express terms of their agreement and their course of dealing, authorized to carry the money received into account, and were to report sales and pay over balance only monthly.

It is true, in the case above cited, some stress is laid upon the association of the words with an enumeration of certain well-defined trusts, as having some bearing upon the interpretation; but such association does not seem to have been regarded as controlling. Is there any substantial difference between the act of 1841 and the present act? We think not. In our opinion the phrase "or any other fiduciary capacity," in that act, is as comprehensive as the words "or while acting in any fiduciary character," used in the act of 1867. We are unable to discover any material difference between them. The omission of the words, "executor, administrator, guardian or trustee," does not necessarily change the

meaning of the phrase "fiduciary character" or capacity. And as that language had been construed by the supreme court as not to include cases of this kind, when the present act was passed we think congress must be presumed to have accepted that construction and to have used the phrase in the sense given to it by the decision of the court above-mentioned. Such is the universal rule for interpreting re-enacted statutes.

The supreme court of Massachusetts, in Cronan v. Cotting, 104 Mass. 245, in a well-considered opinion, have held that the act of 1867 meant the same, and should receive the same construction as that given to the act of 1841, in Chapman v. Forsyth, supra, that the slight change in the phraseology did not warrant a different construction. To give to the act the comprehensive meaning contended for by the plaintiff's counsel, would be to except from its operation a very large and important branch of commercial transactions, and give to manufacturers and others who adopt the mode of selling their manufactured articles through agents, as was done in this case, and to the owners of property (almost necessarily) consigned to commission men and factors for sale, a very great and decided advantage over merchants and others engaged in the ordinary modes of conducting commercial pursuits, and open the door for all kinds of shifts and devices, on the part of merchants as well as manufacturers, to evade the operation of the bankrupt law, alike discreditable to the parties, and detrimental to the interests of trade and commerce.

We are aware that the district court of the Southern district of New York, in Re Kimball [Case No. 7,768], has given a different construction to the section of the bankrupt act now under consideration, and held that a commission merchant, who received property from a country dealer to sell and remit the proceeds, after deducting his commission for selling, was liable to arrest in an action for not paying the proceeds, and that such decision was affirmed by the circuit court in Re Kimball [Id. 7,769], Justice Nelson giving the opinion.

But the reasons assigned by those learned judges fail to satisfy us of the correctness of their conclusions. We cannot see the difference between the present act and the act of 1841, which they refer to, and upon which they base their opinions and reject the decision of Chapman v. Forsyth, above-mentioned. We do not believe that congress intended, by the slight and insignificant change in the phraseology in the present act, to alter the defined meaning and judicial construction given to the act of 1841, and hence regard the decision under that act as binding upon the courts in construing the present act. We think, therefore, and for the reasons above stated, that the defendant's motion should be granted, and direct that they be discharged from arrest, and that the order therefor be vacated and set aside.

For a general discussion of the position of a factor under this 33d section, consult the essay in 7 Am. Law Rev. 32, "Are our factors merchants or trustee?"

GROVER & BAKER SEWING MACH. CO. (COPLEY v.). See Case No. 3,213.

GROVER & BAKER SEWING MACH. CO. (FLORENCE SEWING MACH. CO. v.). See Case No. 4,883.

Case No. 5,846.

GROVER & BAKER SEWING MACH. CO. v. SLOAT et al.

[2 Fish. Pat. Cas. 112.] [1]

Circuit Court, S. D. New York. Aug., 1860.

PATENTS—SUIT BY LICENSEES — EVIDENCE FIRST OFFERED AT HEARING—CORPORATIONS—CONSTRUCTION OF CHARTER.

1. The complainants were a corporation under the laws of Massachusetts. *Held*, that as the right to manufacture machines is general and not confined to the limits of Massachusetts by the charter, and as there is no prohibition upon it by the laws of New York, the complainants may properly use the invention in New York.

2. Mere licensees have no interest capable of affording the foundation of a suit in the name of such licensees.

[Cited in Blair v. Lippincott Glass Co., 52 Fed. 227.]

3. Where a patent was offered in evidence at the hearing which was not introduced before the examiner, *held*, that as the other party had had no opportunity for explanation, the proof could not be received or considered.

This was a bill in equity filed [by the Grover & Baker Sewing Machine Company] to restrain the defendants [George B. Sloat and others] from infringing letters patent [No. 12,116] granted to W. P. N. Fitzgerald, as assignee of the inventor, Allen B. Wilson, December 19, 1854, for an "improvement in sewing machines," which was an improvement in the feeding device, also invented by Wilson, and patented November 12, 1850 [Patent No. 7,776], which is more particularly described in the case of Potter v. Wilson [Case No. 11,342]. That device consisted of a roughened bar having two motions only, forward and backward. The improvement described in the present patent was substantially the same, except that four motions were given to the feeding bar instead of two. The roughened feeding surface moving forward with the cloth, then dropping below it, moving backward beneath the table, and rising again to seize the material to advance it for another stitch. The claims of the patent were as follows: "The device in the sewing machine for feeding the cloth along, consisting of bar K furnished with points or notches, having a vertical or up and down motion for fastening the cloth upon, and releasing it from said bar by striking it against a plate, or spring F, and a lateral

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

motion, or motion forward and back, for feeding the cloth along after each stitch, substantially as set forth."

Geo. Gifford and E. W. Stoughton, for complainants.

Blatchford, Seward & Griswold, for defendants.

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

NELSON, Circuit Justice. These suits are founded upon letters patent granted to W. P. N. Fitzgerald, dated December 19, 1854, as assignee, upon the invention and application of A. B. Wilson. The invention consists of an improvement of the feed motion of Wilson, embraced in his reissued patents, Nos. 346 and 414. The surface, moving the cloth by its intermittent motion to the needle, is caused to drop from the cloth, in its return to again seize it, and advance it for another stitch. The effect is to free the cloth from the surface in its return, with a view to again advance it.

The novelty of this improvement is disputed by the defendants. The proof carries back this invention by Wilson, that is, his conception of the idea and embodiment into a model, to April or May, 1850; and it was introduced into a working machine as early as 1852. The only improvement of the kind seriously claimed by the defense to be earlier than Wilson's is that of Leander W. Langdon. We have had occasion to examine the claims of this person, generally, as to the date of his invention of the feed motion in sewing machines, in a case between Potter & Wheeler against these parties, and to express our opinion on the subject. In respect to this particular improvement, it is quite clear, upon the proofs, that Langdon never embodied it into a machine till after the year 1852, and after he had seen it in one of A. B. Wilson's machines.

Several objections have been taken in this suit by the counsel for the defendants, independently of the question upon the novelty of the invention.

I. It is insisted that the plaintiffs, by their charter in the state of Massachusetts, are incapable of using the invention in New York, inasmuch as the charter confines their operations to the city of Boston and county of Suffolk, in that state. But we do not so construe this charter. Although a Massachusetts corporation, the right to manufacture the machines is general, and not confined to the limits of that state, and there is no prohibition upon it by the laws of New York. [Bank of Augusta v. Earle] 13 Pet. [38 U. S.] 519.

II. It is objected that the Wheeler & Wilson Manufacturing Company should have been made parties. This objection is founded upon a clause in the assignment of Fitzgerald, the patentee, to the plaintiffs, which is as follows: "Subject, however, to an assignment this day made by me, the said Fitzgerald, of the right to use said invention, concurrently with the said Grover, Baker & Co., unto the Wheeler & Wilson Manufacturing Company, to which, for the terms therein, reference is made." The answer to the objection is, that the Wheeler & Wilson Manufacturing Company are only licensees according to the recital under the patent, and therefore have no interest capable of affording the foundation of a suit.

III. The next objection is, that the Fitzgerald patent recites that "the operative parts of this machine, and its construction, are substantially the same as those described in letters patent,[2] bearing date June 15, 1852, granted to N. Wheeler, A. B. Wilson, A. Warren, and G. P. Woodruff." The defendants claimed the right on the hearing, to produce the patent of June 15, 1852, and to show, from the recitals in it, that the improvement in question had been assigned by Wilson to the four persons above mentioned. Hence, that Wilson had only one-fourth of the invention at the time he assigned to Fitzgerald, and that he acquired only this interest, and could convey no greater interest to the plaintiff.

This objection was not taken in the answers of the defendants, nor was it the subject of examination or inquiry before the examiner. As the patent of 1852 was not produced by the defendants before him, nor the facts stated in the recital referred to and relied on, the plaintiffs have had no opportunity for explanation; and even if the position of the counsel is well founded, it is impossible so to determine upon the proofs before us. The objection comes too late, as well as the production of the patent of 1852.

IV. It is further insisted that a device, described in a caveat filed by Wm. H. Johnson, November, 1848, and in a patent issued to him March 7, 1854, contained the principle of this improvement of Wilson. But it is only necessary to read the description, and examine the model of this machine, to see that the device has no resemblance to that of Wilson's in the improvement in question. Without further pursuing the examination in these cases, we are satisfied the plaintiffs are entitled to a decree for the infringement, and for injunctions, and that reference be made to a master to take an account.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

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[2] [No. 9,041.]

Case No. 5,847.

GROVER & BAKER SEWING MACH. CO. v. WILLIAMS et al.

[2 Fish. Pat. Cas. 133.] [1]

District Court, D. Massachusetts. Dec., 1860.

PATENTS—PRELIMINARY INJUNCTION—PRIMA FACIE CASE—PRIOR SUITS AND JUDGMENTS—REISSUE.

1. On the hearing of a motion for a preliminary injunction, it is not sufficient for a plaintiff, in order to make out a prima facie case, merely to produce his patent.

2. The prima facie right under the patent must be strengthened, in one of two ways, by a judgment or decree after a judicial investigation; or by exclusive possession for some time, or, in other words, by the acquiescence of the public in the claim which is set up, under the patent, to a monopoly.

[Cited in Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 144; Corbin Cabinet Lock Co. v. Yale & Towne Manuf'g Co., 58 Fed. 564.]

[Cited in Carpenter v. Dick, 41 Ohio St. 294.]

3. Where an injunction is sought upon the ground that suits have been brought upon the patent and judgment obtained without resistance, and it appears that several patents were sued upon in the same action, that fact must diminish the force of the presumption that the defendant submitted because of his belief of the validity of the patent, to restrain the infringement of which the injunction is sought.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

4. It would not necessarily follow, because there were certain persons carrying on an art or manufacture at their own manufacturing establishment, and others did not enter into competition with them, that that abstaining from competition was owing to the belief that they had the exclusive right.

5. If a prejudice existed against the use of the patented article, it could not be until the patentee had succeeded by the expenditure of time, labor, and money in overcoming that prejudice, and in introducing the article into general demand, that others would feel a desire to participate in the manufacture.

6. If the manufacturer held several patents under which he was claiming an exclusive right, the fact that the public abstained from interfering with his monopoly, would not prove that they supposed them all to be equally valid, or enforce a presumption, from that source, of the validity of any particular one of them.

7. If one of those patents had already been sustained, and the plaintiff was entrenched behind it, it could hardly be said that the public abstained from making his machine because they believed in the validity of other patents held by him.

8. Undoubtedly there may be cases in which an original patent relates to and covers palpably the same thing that is in the reissued patent; and if it does, and the public have acquiesced in the claim made in the original patent, it is evidence to show that they believe that the patentee had an exclusive right to it.

9. But, if the original patent did not claim the same thing as the reissue, and therefore the public had no notice that it was the patented invention, or that the patentee claimed it, or had any exclusive right to it, then the acquiescence in the original patent can not be construed as acquiescence in the reissue.

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

This was a motion [by the Grover & Baker Sewing Machine Company against Charles W. Williams and others] for a provisional injunction to restrain the infringement of letters patent [No. 7,931], for an improvement in sewing machines granted to William O. Grover and William E. Baker, February 11, 1851, reissued June 15, 1858 [No. 568], and assigned to complainants. The claims of the reissued patent were as follows: "First. A mechanism for making a stitch substantially such as is described, and consisting of an eye-pointed perforating instrument and a non-perforating eye-pointed instrument, operating substantially as specified. Second. A stationary table or support for the material to be sewed, substantially such as specified, and performing the duties, substantially as set forth; and, Third. A feed, in which the cloth is grasped between two surfaces without being attached to either of them, substantially in the manner and for the purpose set forth; meaning to claim as of our invention none of these elements severally or apart from the others, but only the three in combination." The facts upon which the injunction was asked and denied are sufficiently set forth in the opinion.

S. J. Gordon, Causten Browne, and G. T. Curtis, for complainants.

A. C. Washburne, for defendants.

SPRAGUE, District Judge. This is a motion for a preliminary injunction to restrain the defendants from making a certain kind of sewing machine, to which the plaintiffs claim the exclusive right by virtue of a patent. This motion is heard in a summary way upon ex parte affidavits, which is not the most satisfactory mode of investigating the rights of parties when in contestation. A summary hearing is had upon a necessity more or less urgent, for the immediate interposition of the court; and it is presumed that there is not time for that full and thorough investigation which is to be made upon the final hearing, where the witnesses can be subjected to a cross-examination, and the process of the court may be used to compel the attendance of the witnesses and the production of evidence. In such a hearing, it is not sufficient for a plaintiff, in order to make out a prima facie case, merely to produce his patent. The court will not, upon the mere production of a patent, entertain this motion for a preliminary injunction.

The prima facie right under the patent must be strengthened; and that is done in one of two ways: by a judgment or decree after a judicial investigation; or by exclusive possession for some time, or, in other words, by the acquiescence of the public in the claims which the plaintiff has set up under his patent to a monopoly. In this instance there has been no judicial investigation. There have been cases—one in this court, at law, and three cases in Pennsylva-

nia, in equity, in which the defendants have, by an arrangement with the plaintiffs, submitted, and a judgment and decree have been given against them—which I may, perhaps, advert to hereafter; but no case has been presented where the judicial mind has been called to the investigation of this subject, and to determine upon such investigation, the validity or invalidity of the plaintiffs' claim. The plaintiffs therefore, rely mainly at least—or I might say, in the view which I take of it, entirely—upon exclusive possession—acquiescence by the public in the claim set up under this patent: and we are called upon, therefore, to examine with some care the evidence of such acquiescence.

Acquiescence is taken as evidence of the plaintiffs' right, and may in some cases in a great degree strengthen the presumption created by the patent itself. If a party set up an exclusive right to the manufacture and use of an article which others are desirous of manufacturing or using, and it would manifestly be for their interest to do so, and they would do so, did they not think themselves prohibited by the patent right of another; then, their acquiescence, their abstaining from making that which it is morally certain they would do, but for such patent, shows the conviction of those who are interested adversely to it—and who, from being interested in it, may be presumed to have knowledge on the subject—shows that they are convinced of the patentee's right, and that they have sacrificed their interest to that conviction. But if there be no adverse interest, no person, who would be desirous of using it, whether it were patented or not, then their not using it can not afford a presumption of the right, and would not strengthen it.

In the present case, I do not understand that it is alleged that there has been an acquiescence since the issue of 1858. On the contrary, the evidence furnished by the complainants themselves, and particularly by Mr. Potter's affidavit, shows very clearly and very strongly, I think, that there has been no acquiescence since that reissue. That reissue is dated June, 1858. Mr. Potter says that since that time, up to the date when he gave his affidavit, violations had been very numerous; that he had before him thirty circulars of persons who make and manufacture these machines; and he adds further, that not one in fifty of these manufacturers has pecuniary ability to respond; and that, in fact, the country is flooded with spurious machines greatly to the injury of the plaintiffs. He says that these violations began in the summer of 1858, the patent was granted in June, 1858, and I did not understand the learned counsel who closed this case—or, in fact, either of the counsel for the plaintiffs—as relying at all upon any exclusive possession or acquiescence under the reissued patent.

The suits to which I have referred were brought under that reissued patent, the suit at law in this court, and the three suits in equity in Pennsylvania, and the evidence is that those persons submitted to the reissued patent, and the claim that was in it, and that, under some arrangement or settlement that was made between the parties, judgment was rendered here, and decrees were rendered in Pennsylvania. Those suits were entered, I believe, in the October term, 1858. Now, submission in three cases out of numerous cases of infringement, can not show a general acquiescence under the reissue, even if those suits had been founded upon the reissued patent alone, though they were not; and the fact that those suits were founded upon other patents must diminish the force of the submission to this patent, because in the agreement that the judgment should be entered and the decrees rendered, there is no distinction made between patents.

It is not said that it was on account of this patent that judgment was submitted to. Now, in the suit at law here, there were three other patents counted upon; and it may have been any one of these patents that was really the cause of the parties submitting, or it may have been more than one, or it may have been all; we do not know which. So in Pennsylvania. In two of the suits, I think, there were two other patents, and in the remaining suit one other patent, besides this, to which the same observations may apply. I can not consider, therefore, that there is any such evidence of exclusive possession or acquiescence under the reissued patent, as can be said to strengthen the presumption of right in the plaintiffs to that patent. It would seem rather the contrary—that it has been contested and disputed, practically, by numerous persons making the machine from the time almost of that reissue.

The plaintiffs, then, must rely, as they do rely, upon acquiescence under the original patent, which was granted on February 11, 1851, and it becomes necessary for the court, therefore, to examine the evidence applicable to that period of time.

Now, it is to be remarked, that the plaintiffs claim here an acquiescence by the public in refraining from manufacturing the Grover & Baker Sewing Machine. It is not acquiescence by taking licenses from them, and paying them a sum of money; that has not been their course. They have neither licensed nor offered to license, as I understand, but have their own manufacturing establishment, where they manufacture machines under their patents and others. From 1851 to 1858, others did not interfere—did not manufacture the articles; and it is upon this abstinence that the plaintiffs rely as giving exclusive possession—and showing general—I may say universal—acquiescence, on the part of the public in their claims. Now, the strength of that acquiescence, in the first place, it is to be observed, depends upon what would be the apparent interest of the public to manufacture if the plaintiffs had not the exclusive right

which they claim. If they had paid for licenses, that would be a palpable and manifest sacrifice of their interests to their conviction of the plaintiffs' right, because it shows a desire to make the machine, and abstaining from it, paying the plaintiffs, and thus making a pecuniary sacrifice for the sake of getting the right from the plaintiffs. But it would not necessarily follow, because there were certain persons carrying on an art or manufacture at their own manufacturing establishment, and others did not enter into competition with them, that that abstaining from competition was owing to the belief that they had the exclusive right. It may be so, and it may not be. Persons set up the manufacture of a new article: others may not enter into competition, because they do not believe it for their interest; they may not believe it to be profitable; and in that case, there would be no evidence that they believed they were excluded from it by a monopoly in possession of those persons.

In the present case, Mr. Potter testifies that he came in as a partner in the concern of Grover & Baker in 1852. It seems, by his statement, that they began the manufacture of these machines shortly before the issue of that patent. The manufacture commenced in 1850; the patent was issued in February, 1851; he became a partner in 1852; and speaking, therefore, of what he knew as a partner, he says there was a prejudice against this machine which it required labor, time, and expense to overcome, before it could be introduced. While that prejudice existed, and it was not introduced as an article of demand to the public, it could hardly be supposed that others would feel the temptation of interest to enter into competition with them in the manufacture. It would not be until they had succeeded by the expenditure of labor, and time and money in overcoming that prejudice, and introducing it as an article of general demand that others would feel a desire to participate in the manufacture. When that time was reached is not stated in the affidavit, and therefore we can not say. So far, it goes to show that there was a period when it can not be readily supposed that others abstained from manufacturing merely from apprehension that the plaintiffs had an exclusive right, because they might then well suppose it would not be a profitable undertaking.

But, then, coming to the position which the plaintiffs hold, under what exclusive right did they carry on this manufacture? In the first place, they had this patent of 1851. They then had a patent granted to themselves for the circular needle to be used in their machines in 1852. They held another patent for the mechanism for making the stitch, granted to William G. Bates originally, which bore date February, 1853, and was purchased by them at that time, or, it is said, taken out by Bates in trust for them. They had, also, the Fitzgerald patent, which issued I believe in 1854.

They held those patents. Those were patents under which the plaintiffs were proceeding to manufacture their sewing machines, claiming the exclusive right under those patents, and under all of those patents. The public abstained from making that machine, and it is said that they abstained because they believed in the exclusive right of the plaintiffs under the patent of 1851. But if they had an exclusive right under either of the other patents, valid under the law, the public were barred effectually by the law from making this sewing machine; because one valid patent is as effectual a barrier in law as four, covering the same thing, to prevent another person's making it: that is, it would be a wrong, a violation of law, subjecting them to damages, and subjecting them to be stopped by an injunction of the court. Now, if they abstained from making it because they believed the plaintiffs had an exclusive right to that manufacture, yet there is nothing here to show whether they believed that the exclusive right was because of one of those patents, or all of them, or more than one, and, if of one, of which? How can it be said, then, that it is shown by the plaintiffs that the public abstained from making it because they believed in the validity of the patent of 1851, when, if they believed in the validity of the patent of 1852, or 1853, or 1854, they were equally prevented from interfering with the plaintiffs' manufacture? The most that can be said, is, that they may have abstained from their apprehension of the patent of 1851, or they may not. They may have abstained from their apprehension of the validity of either of the other patents. Now, it is incumbent upon the plaintiffs affirmatively to show that their acquiescence was under the patent of 1851; and when they show that they acquiesced either under that or under some one or all of the three others, it can hardly be said that they have affirmatively shown that they acquiesced in the patent of 1851. That difficulty, I think, exists in relation to these patents.

Thus far I have put these patents upon the same ground, as if they presented to the public an equal bar against their entering into this business. I think, however, that is presenting it rather stronger for the plaintiffs than the testimony would warrant. It appears from the plate that was produced by the plaintiffs, that these four patents—as also Mr. Howe's patent, to which I shall advert hereafter—are engraved on each of these machines, as the patents under which it is made. If the public interested in ascertaining what was the extent of the plaintiffs' right, had gone to the proper source of information, the patent office at Washington, to learn whether any or all of those patents were valid, and whether, therefore, they were excluded by law from entering into competition with them in this manufacture; they would have found that in 1852, the patentees surrendered this patent of 1851, and made a

declaration in writing that it was inoperative, for defects and applied for a reissue for that cause. They would have found, that while that application for a reissue was pending, William H. Johnson made application for a patent for the same thing, and thereupon an interference was declared, a trial had, a decision rendered in favor of Johnson, a patent granted upon his application in the name of Bates, and the plaintiffs' application for a reissue denied. That would all appear by the records of the patent office, and it would further appear that, upon application of the plaintiffs, their patent of 1851 was returned to them; and in that condition the records stand and the facts remain until 1858. If, therefore, any time between the period when that surrender was made, and 1858, a party had gone to the patent office, he would have found, as to this particular patent, a written declaration by the patentee himself that it was inoperative, and application for a reissue refused, and that, after the trial for an interference, a patent for the same thing for which they asked a reissue was granted to another person, the plaintiffs taking that by assignment to them and afterward going on under that patent, claiming it as valid. I think, therefore, that there being nothing on the files of the patent office, or elsewhere, so far as we know, up to 1856, to invalidate the other patents, if the public had investigated the matter, they could hardly have supposed that the barrier was as great from that patent of 1851, as from either of the other patents, because the patentee had declared that to be inoperative and desired a reissue, and that is not proved of either of the other patents. It was weaker, then, as a protection than either of the other patents, as it would have appeared, I think, to any person, who was investigating the claims of the patentee. Nothing has been shown here to invalidate the patent of 1852 for the circular needle, or the Fitzgerald patent of 1854—nothing to show that they are not valid patents.

The patent for the particular stitch—the Grover & Baker stitch—for which they asked a reissue, and for which Johnson obtained a patent, which they purchased, was believed to be valid in this country until 1856. It was then found that there had been a prior patent for the mechanism of that stitch granted to Fisher & Gibbons in England, some years before. But Johnson, the inventor of the mechanism of this stitch, and who says that he had been in the business of inventing and investigating machines, and especially sewing machines, and machinery for years; Johnson says that he never heard of Fisher & Gibbons, or any one that would interfere with his claim, until 1856; and there is no evidence that anybody had heard of it in this country before. Therefore, up to that time, there is no evidence but that everybody thought that patent was valid, and might well exclude everybody from going into the manufacture of this article. After that time the patent for the feed granted to Fitzgerald, as well as the circular needle, was supposed to be valid: And are now supposed to be valid. At any rate, there is nothing in this case to create any doubt of it. There would, therefore, be less presumption, perhaps, of acquiescence in the patent of 1851, than in respect to either of the other patents that the plaintiffs hold, for the reasons that I have stated.

But the difficulty the plaintiffs have to encounter does not stop here. In addition to these patents they have a license from Mr. Howe, and that also is put upon the plate which is attached to each of these machines, as information to the public that they manufacture under that; and by the contract with Mr. Howe, to whom the plaintiffs have paid large sums of money—over $100,000 for the benefit of the contract or obligation that Howe entered into with them—by that contract with Howe, he was bound not to license anybody under his patents who was infringing any of the patents held by the plaintiffs (I understand that to have been one of the covenants in the agreement); and further, that he would prosecute persons who should infringe his (Howe's) patent, when such infringement was prejudicial to the plaintiffs. Upon that obligation they relied, and as they set forth have invoked the aid of Mr. Howe, instituted a suit which was heard upon an application for a preliminary injunction in March, and the fact that Howe, for their protection, as I understand, was proceeding in that suit is assigned as a reason why these plaintiffs should not earlier commence this bill in equity. They had then the protection of this overshadowing patent of Howe, covering so large a proportion of the sewing machines now in use—they had that protection against infringers upon their manufacture, and no person could make one of the Grover & Baker machines, as it is stated, I think, in the affidavit of Potter, or in the bill, without violating the Howe patent. They paid to Howe large sums of money to authorize them to make it. It stood thus, then, that no man could make the article they were manufacturing without violating the Howe patent, and if any one did make an article in violation of any one of their patents, Howe was bound to prosecute him under his patent; bound not only to refuse to license but to prosecute. If, therefore, the public did not believe that any one of the patents held by the plaintiffs was valid, if they believed that Howe's was valid, and if they believed what the plaintiffs assert to be true, that they could not make the Grover & Baker machine without violating the Howe patent, they could not enter into competition; they were effectually excluded by the validity of the Howe patent when they could not make machines without violating that patent; and the plaintiffs being entrenched behind the Howe patent, it can hardly be said that the public ab-

stained from making their machine because they believed in the validity of any of the patents which the plaintiffs had, for they may have abstained because they were afraid of interfering with Howe's patent. Much less can it be said that they abstained because they believed in the validity of the patent of 1851. I think, therefore, that taking all this evidence into view, of the actual position which the plaintiffs held, it would be difficult to say that the plaintiffs' patent is materially strengthened by any proofs of exclusive possession, even if the original patent had set forth exactly the claim which is now set forth in the reissued patent.

But it is contended by the respondent's counsel, that the original patent does not secure to the plaintiffs that which is described in the reissued patent: that the original patent was for the mechanism for making the stitch; that the reissued patent is for a combination of the three elements in the sewing machine which, for brevity's sake, I will say, are: the mechanism for feeding the cloth, the mechanism for making the stitch, the mechanism for feeding the cloth (the feed), and the table or platform; and it is contended by the respondent that the combination, and only that combination, is secured to the plaintiffs by the reissued patents; whereas, by the original patent, it was only an element of that combination that was secured to the plaintiffs.

This construction, however, is controverted by the plaintiffs' counsel who insist that the original patent embraced the combinations claimed in the reissue. This question I have no occasion to decide. But the existence of such a question of construction has some weight against this motion. If the view taken by the respondent's counsel is correct, then, if the plaintiffs had held only the original patent of 1851, and had had no protection from the Howe patent, and none of the other difficulties were in their way that I have named, the most that it can be presumed the public acquiesced in was the claim that the plaintiffs had set up, and was secured to them by their patent, that is, to the mechanism for making the Grover & Baker stitch.

With respect to the case of Orr v. Badger [Case No. 10,587], which has been cited here, that only goes to this extent, that there may be cases in which acquiescence in the original patent is evidence of acquiescence in the reissued patent, and that that was one of these cases. That is the whole extent, I think, of that authority. In that case, the court says: "In this case, the evidence of acquiescence, under the original patent, is evidence of acquiescence under the reissue." What the circumstances of that case were are not detailed in the report, and we are not, therefore, able to say what the facts were upon which the court acted in giving that decision. Who made that report I do not know, but he has not gone into a full statement of the facts. Undoubtedly there may be cases in which the original patent relates to and covers probably the same thing that is in the reissued patent; and if it does, and the public have acquiesced in the claim made in the original patent for the same thing that is claimed in the reissued patent, it is evidence to show that they believe that the patentee had an exclusive right to it. But if the original patent did not claim the same thing, and, therefore, the public had no notice that it was the patentee's invention, and, if it was his invention, had no notice that he claimed it—or, at all events, that he had any exclusive right to it—then the acquiescence in the original patent can not be construed as acquiescence in that which he did not then claim, but which sometime afterward he did.

Now, as to this combination—assume that it was set forth in the original patent, and assume that it was so set forth that the party might have claimed it if he had seen fit, still it was by no means clear that he claimed it; apparently his patent did not cover it, and, therefore, the public can not be said to have abstained from it.

Under these circumstances, I think it can not be said that the court is called upon, under the general rules which govern this class of inquiries—summary inquiries—to go into the merits of the case, and certainly not to grant an injunction, if, upon the merits there are substantial doubts either as to the validity of the plaintiffs' right, or as to the alleged infringement by the defendants. And I can not but entertain such doubts. Various questions have been raised. In their answer, the defendants deny that they infringe—they deny that the plaintiffs are assignees of the patent of 1851. In the next place, they deny that if they were the assignees the patent was valid, and this upon several grounds: 1st. That the patentees were not the first inventors. 2d. That if they were the first inventors, they have not made such a description of their invention as will enable one skilled in the art to manufacture an operative machine. 3d. That they surrendered their patent in 1852, and that from 1851 to 1858 they did not claim what they now claim; during all which time they were making the sewing machine—and the defendants contend that that is an abandonment to the public, and that the question of abandonment is one for a jury. Some of these points, I think, are by no means free from doubt and difficulty. I can not but have some impressions respecting them, but I abstain from the expression of any views I may entertain, because there will doubtless be a future and final hearing, either at law or in equity, of all the questions involved. The motion for injunction must be denied.

GROVERMAN (DARLINGTON v.). See Case No. 3,576.

GROVERMAN (WISE v.). See Case No. 17,910.

Case No. 5,848.

GROW v. BALLARD et al.

[2 N. B. R. 194 (Quarto, 69);[1] 1 Am. Law T. Rep. Bankr. 111.]

District Court, D. California. Oct., 1868.

BANKRUPTCY—ASSIGNMENT BY INSOLVENT—EXEMPTION.

An assignment by an insolvent of all his property for the benefit of preferred creditors is an act of bankruptcy. Where property of an insolvent was assigned to the creditors with fraudulent preference, *held*, in an action brought by the assignee in bankruptcy to recover said property, that the value of property exempt from execution must be deducted, and judgment entered up for remainder.

[Cited in Graham v. Stark, Case No. 5,676; Re Marter, Id. 9,143.]

HOFFMAN, District Judge. This is an action by the assignee in bankruptcy to recover the value of certain goods, alleged to have been conveyed by the bankrupt to the defendants, contrary to the provisions of the bankrupt act. The bankrupt had, in the year 1866 and 1867, become indebted to the defendants, commission merchants in this city, for advances made to enable him to carry on his farming operations. To secure these advances he had executed two promissory notes, and had also consigned to them his crop to be applied in satisfaction of notes. After the crop had been sold the bankrupt gave an order on the defendants for the sum of —— dollars. It happened that the partner with whom the business had chiefly been conducted was out of town when the order was presented. The other partner, forgetting for the moment the existence of the notes, merely referred to his accounts of the sales of the crop, and finding there was a balance still due the bankrupt, sufficient to meet the order, paid it. The next morning he discovered his mistake, and at once demanded a return of the money. This was refused by the party who had received it, and the bankrupt, at a demand of the creditor, thereupon executed an assignment or bill of sale of all his property, even including farming utensils and other property exempt from execution.

The question presented is: Is the transfer void under the bankrupt law? Under the bankrupt act of 1841 [5 Stat. 440], the general rule was that a transfer was not void as a fraudulent preference where it was not voluntary, but was procured by the pressure of the creditor, or by measures taken by him for the enforcement of his debt. 3 Hil. Bankr. 342; 2 Smith, Merc. Law, 481. Even if an act of bankruptcy be contemplated, yet if at the instance, and on the application of the creditor, he makes payment or assigns property, such payment or assignment is valid as against the assignees of the bankrupt. (Spencer, J.) Phoenix v. Ingraham, 5 Johns. 428; Ashby v. Steere [Case No. 576]. The authorities, however, were not unanimous, for in Atkinson v. Farmer's Bank [Id. 609], it was held that a preference, in contemplation of bankruptcy, is no less an act of bankruptcy because he yielded to the threats and coercion of the creditor. But it seems to have been unquestioned that an assignment to a creditor, with notice of an act of bankruptcy already committed, is as void under the English as our own bankrupt laws, and the title of the assignee in bankruptcy related back to the date of the act of bankruptcy. In Shawhan v. Wherritt, 7 How. [48 U. S.] 641, it was held by the supreme court of the United States that a lien acquired by decree of a state court, in a suit instituted after the notice of an act of bankruptcy committed by a merchant, was invalid, and the party who had received property of the bankrupt, or its proceeds, under such decree must account to the assignee therefor.

Both in England and America it is held that a general assignment by an insolvent of all his property for the benefit of preferred creditors, is an act of bankruptcy, though made without moral fraud and under the importunity of creditors. Ex parte Breneman [Case No. 1,830]. In Worseley v. de Mattos, Lord Mansfield observes: "A conveyance of a part may be public, fair and honest, but a conveyance of all must either be fraudulently kept secret or produce an immediate absolute bankruptcy." 1 Burrows, 467, 468. And in Wilson v. Day, 2 Burrows, 827, the same judge says: "This deed is an act of bankruptcy itself. It defeats the whole bankrupt law; nothing remains for the creditors in any shape, but his whole estate is put into the hands of his own trustees; therefore, of course, he is a bankrupt the moment he has executed the deed, for there is nothing at all left for his creditors. See Avery & H. Bankr. Law, 261, and cases cited. See, too, 7 East, 138; 1 W. Bl. 441; 7 Scott, N. R. 900. Even an assignment by trustees of one's whole estate for the purpose of equal distribution among all the creditors would, under our recent act, be held void, for it would be an attempt to substitute the trustee selected by the bankrupt for the assignee contemplated by the act, and the conveyance would be made with a view to prevent the property from coming to the assignee in bankruptcy, and to prevent the same from being distributed under the bankrupt act." 4 East, 230; 17 Ves. 139; Cowp. 123; 3 Esp. 229; 3 Scott, N. R. 245.

In the case at bar the insolvency of the debtor was, of course, known to the creditor, who procured a transfer to himself of the whole estate of the debtor. This, under the authorities above cited, was an act of bankruptcy per se, and was invalid under the English law, or under the act 1841. It was therefore, necessarily invalid under the act of 1867 [14 Stat. 517], which is far more stringent in its provisions, and seems framed to deprive an insolvent debtor of any right to give a preference or to do any act which will prevent

[1] [Reprinted from 2 N. B. R. 194 (Quarto, 69), by permission.]

the equal distribution of his property among all his creditors. Among the property transferred were several articles exempt from levy and sale on execution. As to these there could have been no intent to prevent them from coming "to the assignee or being distributed under the act," or any "design to hinder, delay, or impede the operation of the act," to give to one creditor what was the property of all. Being exempt from execution, they could not pass to the assignee, nor could their proceeds be distributed as assets, nor could any creditor have any claim to or interest in them. The value of these articles must, therefore, be deducted, but for the value of the remainder of the property a judgment must be entered.

Case No. 5,849.

GRUBB v. BAYARD.

[2 Wall. Jr. 81.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1851.

COVENANT — LICENSE, OR PRIVILEGE AS DISTINGUISHED FROM GRANT—INDIVISIBILITY, EXTENT, AND EXCLUSIVENESS OF PRIVILEGE OR GRANT.

1. Where one owning a large tract of land, grants, bargains and sells part of it, and for himself, his heirs, executors, and administrators, covenants, promises, grants, and agrees, with the grantee, his heirs and assigns, that he and they may dig, take and carry away all iron ore to be found within the ungranted part of the tract, paying so much a ton, this is not a grant of the ore, but of a right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised.

[Cited in Caldwell v. Fulton, 31 Pa. St. 482; Funk v. Haldeman, 53 Pa. St. 234; Carnahan v. Brown, 60 Pa. St. 25; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 308; Massot v. Moses, 3 S. C. 168; Wheeler v. West, 71 Cal. 126, 11 Pac. 873; Hartford Iron Min. Co. v. Cambria Min. Co., 93 Mich. 93, 53 N. W. 5; Silsby v. Trotter, 29 N. J. Eq. 233.]

2. The right is without stint, but is not exclusive of the owner of the soil.

[Cited in Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 246.]

3. It is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil.

David Foree, by deed of indenture made in 1769, reciting his title to 302 acres of land, grants, bargains and sells 20 acres of it which are described, to William Bennet; leaving 282 acres still his own property, in regard to which the indenture contained the following covenant: "And the aforesaid David, for himself, his heirs, executors and administrators, doth covenant, promise, grant and agree to and with the aforesaid William, his heirs and assigns, that he, the said William, his heirs and assigns, shall and may, from time to time, and all time hereafter, dig, take and carry away all iron ore to be found within the bounds of the said David's tract of land containing 282 acres, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of six pence, Pennsylvania currency, per ton, for every ton taken from the premises of 282 acres aforesaid." The deed was a technically and well drawn instrument containing all the formal or orderly parts of a deed enumerated by Lord Coke (Co. Litt. 6a); and the covenant above quoted followed after the habendum and tenendum. Bennet being dead, the plaintiff purchased the interests of ninety-four of ninety-nine of his representatives, and the defendant having become owner of the 282 acres reserved, and having taken away many thousand tons of iron ore, this action on the case was brought by the plaintiff against him. It was admitted that the ore taken by the defendant was found, mined and dug by himself or his servants: and it appeared that neither Bennet nor his heirs, nor the plaintiff had ever had actual possession, use, occupation or enjoyment of the right granted by the deed of 1769, nor been in any way hindered in the enjoyment of it otherwise than by the defendant's taking ore in the manner just stated. The declaration which contained numerous counts, founded the plaintiff's right to recover on his being "lawfully possessed of a certain right and privilege to dig, take, and carry away iron ore to be found within the bounds of a certain tract of land to the exclusion of the defendant," or as being "lawfully possessed of a certain exclusive right or several privilege to dig, take and carry away iron ore to be found within the bounds of a certain tract of land;" and charged the defendant with unjustly hindering and preventing the plaintiff from digging, taking away the iron ore to be found within the bounds of the tract, and also wrongfully taking large quantities of ore from said tract, &c. All the counts asserted in some form a right which was several or exclusive in the plaintiff: none of them representing him as a tenant in common with others: and none of them alleging a "surcharge" by defendant. The plea was "Not guilty": there being no plea of any sort in abatement for the nonjoinder of the remaining representatives of Bennet, whose rights the plaintiff had not acquired. Upon these facts, a verdict having been given for the defendant, the following questions came before the court on a motion for a new trial:

I. What was the nature of the right granted by Foree to Bennet?

II. Was this right—whatever it was—exclusive? so making it unlawful for the owner of the land to dig in it for ore, as well as the assignee of Bennet.

III. Was this right divisible or susceptible of apportionment; so that the plaintiff having but 94-99ths of it could maintain this action?

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

Thomas Sergeant and Mr. Mallery, for plaintiff.

Dallas and Penrose, for defendant.

In Favour of a New Trial. The meaning and effect of the words quoted from the deed, have in some degree been settled by the supreme court of Pennsylvania in a case (Grub v. Guilford, 4 Watts, 223, 246) where this same deed was under consideration, although the point here raised was not the one in that case. Judge Rogers there speaking of this deed, said: "It is a grant of twenty acres of land in fee simple, and also a grant of an incorporeal hereditament, for a distinct and different consideration in the remaining part of the tract of two hundred and eighty-two acres. The right to raise ore is an incorporeal hereditament, granted for a valuable consideration, and is not, as has been contended, a license revocable at the will of the parties." The grant makes an estate in the land.

Then the grant is exclusive. Bennet, his heirs and assigns, may "dig, take and carry away all iron to be found" within the two hundred and eighty-two acres. These words are essentially different from those in Lord Mountjoy's Case which will be relied on by the other side. How can one man dig, take and carry away "all iron,"—not which he may find,—but which is "to be found" within a certain tract, consistently with the same right in another man to dig, take and carry all or any of it away? If one man grants to another a right to put in his cattle on a certain field to depasture the whole field and eat up all the grass on it, could he himself afterward depasture the field with his cattle? and if not enough for the cattle of both parties, bring an action against the other for surcharging the common?

IV. The grant is susceptible of apportionment, or if not, whatever objection can be raised from the want of the 5-99ths not acquired, can be raised only by plea in abatement. The evidence shows that the plaintiff has 94-99ths: he holds in common with those who hold the remaining 5-99ths: and tenants in common may sue severally. Any objection to their doing so must be taken by abatement.

Against a New Trial. The declaration asserts an exclusive right in an entire thing. The evidence shows a right to 94-99ths only, of the thing. But it is a thing which is not divisible. If it were divisible, the same party might be harassed by infinite actions. It is not a question of pleading or parties, but one of title. The title laid varies from that proved. No title is proved.

II. The language is that of a personal covenant, not of a grant at all. It does not bind the grantor's heirs and assigns, but his heirs, executors and administrators. It is not in the granting part of the deed; but in the place where, as a covenant, it ought to be. The grant was complete: the habendum and tenendum had been declared, and this part follows both. It is a license to go on the soil, to dig and take away all the ore he can find, and it is nothing more. In Doe v. Wood, 2 Barn. & Ald. 724, 74, in the K. B., 1819, the owner of land granted for twenty-one years to A. and "his partners, fellow-adventurers, executors, administrators and assigns, free liberty, license, power and authority to dig, work, mine and search for tin, tin-ore, &c., and all other metals and minerals whatsoever," within certain limits: and the same "there found" to raise and dispose of, subject to certain reservations; and within the limits to make such adits, shafts, &c., and to erect such sheds, engines, and buildings as they should from time to time think necessary or convenient, together with the use of all such water and water-courses within the limits as were not already granted to others, &c. Excepting to the grantor, his heirs and assigns free liberty of driving any new adit from any adit driven or to be driven "within the lands thereby granted," and of entering into and driving such new adits through the same into any other lands of the grantor. The indenture contained a covenant for payment of an eighth share of the ore, and a proviso that on failure the grantor, his heirs and assigns might re-enter "upon the lands," to "have again, repossess and enjoy them." On ejectment brought by A., the grantee, the question arose whether the deed operated as a license only, or as an actual demise of the metals, and conveyed a legal estate in them during the term as a chattel real. Chief Justice Abbott relied much on the fact, that the deed, though inaccurate, was a regular, formal deed. The granting part, whose office it is "to comprehend the certainty of the tenements to be conveyed," did not purpose to lease the lands, and though a subsequent part of the instrument spoke of the lands as granted, yet these being among "covenants" or "clauses," the expressions were to be attributed either "to want of care and caution in the preparation of the deed," or if not, could "have no further effect than to show that the grantor who used them, supposed that the soil or minerals and not a mere liberty or privilege passed by his deed." Muskett v. Hill, 5 Bing. N. C. 694, 708, 712, decided in the C. P. after this case, will be cited to destroy its value; but in that case there was "an express proviso in the original grant, that the licenses and authorities should be assignable by deed;" a fact which the court speaks of as "not unworthy of observation."

III. The right in the grantee, whether license, privilege or grant, is not exclusive of the owner of the soil. Being but a right to all the ore the grantee can find, dig and take away, it is consistent with the owner's right to such ore as he can find, dig and take away. It is like a common sans nombre. There is no allegation or proof, that the de-

fendant has surcharged by digging more than he ought. Indeed the right laid would be inconsistent with such allegation or proof. The declaration lays throughout an exclusive or several right.

IV. But this whole case has been settled by the English courts in Lord Mountjoy's Case, so long ago as the reign of Elizabeth. It is in all particulars our case, and being so, and not to be departed from without overturning what has been established law for near three centuries, we press it as conclusive. The case is well reported by Anderson, C. J. (And. 307), of the common pleas, one of the judges who decided it, and who quotes the words of the deed. It is reported also by Leonard (4 Leon. 147), and by Lord Coke (Co. Litt. 164b), who was Lord Mountjoy's counsel; and in the book called Godbolt's Reports (Godb. 17, 18), there is a report of it by some one, who seems to have been present at the decision. It is also reported by Moore (Moore, 174), as Coke stated it in the exchequer soon after the decision. The case therefore is well vouched. It was in the 25th of Elizabeth, "the Augustan age of our old common law learning:" and it was thoroughly considered. It first arose before the privy council, and was referred by them for a certificate of opinion to Chief Justice Anderson, and Judge (afterwards Chief Baron) Peryam, who returned a certificate of opinion in writing, which we have in Anderson. They say that they "divers times conferred thereof not only between ourselves, but with some other justices," who were Chief Justice Wray, of the K. B., Chief Baron Manwood, "et autres," including, as appears from Godbolt, the lord chancellor. On certain points referred by the privy council, they and the "others that conferred," were "very doubtful and cannot agree." On others they were of one opinion. Lord Coke thus reports the decision. "The Lord Mountjoy, seised of the mannor of Canford in fee, did by deed indented and inrolled, bargaine and sell the same to Browne in fee, in which indenture this clause was contained. Provided always, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heires and assignes, that the Lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were great wasts) parcell of the said mannor, and to dig turfe also for the making of allome. And in this case three poynts were resolved by all the judges. First, that this did amount to a grant of an interest and inheritance to the Lord Mountjoy, to digge, &c. Secondly, that notwithstanding this grant Browne, his heires and assignes might dig also, and like to the case of common sauns nombre. Thirdly, that the Lord Mountjoy might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the Lord Mountjoy, &c., assigne his interest in any part of the wast to one or more, for that might worke a prejudice and a surcharge to the tenant of the land." Anderson, it is true, takes no notice in his certificate of the point of indivisibility, nor does he state it as a question referred from the council. But Godbolt and Leonard each confirm Lord Coke, by stating expressly that the court held, that the Lord Mountjoy could not divide the interest, viz., "to grant to one to dig within a parcel of the said waste." Anderson gives the words of the deed which much resembles ours. Lord Mountjoy "did license and authorize Richard Leycole for and during the term of 31 years next, to search, open, dig, cast up and work for all manner of mines, minerals, mettals, liquors and commodities whatsoever in any of the mines, minerals and possessions whatsoever, of the said mannor," and the same to convert to his use during the said term, yielding therefor yearly to the Lord Mountjoy the full moiety or one half, &c.

Grubb v. Guilford, cited on the other side, is no adjudication on the point before us. That case decided that the right in the 282 acres is not appurtenant to the 20 acres conveyed, so as to pass by a sheriff's sale of the latter.

Reply. Muskett v. Hill destroys Doe v. Wood. In the former case the court say, that the indenture in Doe v. Wood does not differ substantially from the one before them. They yet declare that the latter operates not merely as a license, but as a grant; a doctrine in which they show that older cases confirm them. Thomas v. Sorrell, Vaughan, 351; Palmer's Case, 4 Rep. [Coke] 75; Cro. Eliz. 819, under the name of Basset v. Maynard; Grantham v. Hawley, Hob. 132. The indivisibility of the grant is supposed to be decided by Lord Mountjoy's Case. Anderson is the only reporter, who had, certainly, any personal knowledge of that case. He reports it particularly, but makes no mention of the point of indivisibility. His report shows that it did not arise at all. Leonard's Reports and the book called Godbolt were both published by the same person, one Hughes, and the reports of this case are probably copied one from the other; or probably, as appears in Godbolt, both from Coke himself, who was counsel of Lord Mountjoy. Coke does not report the case at all. He merely states it in commenting on Littleton, and many years after the judgment was given. In respect to the exclusiveness of the grant, the language of the deed in Lord Mountjoy's Case is essentially different from that here. "To dig, take and carry away all iron ore to be found," is a different thing from to "search, open, dig, cast up and work for all manner of mines, &c., and the same to convert to his own use," &c. The first gives all ore of a certain kind: the second as much as he can find of all manner of ore.

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

(May 13, 1851.)

KANE, District Judge. Is there anything in the deed which asserts, that Foree intended to do more than enter into the ordinary covenant that, so long as there was iron ore on the 282 acres, Bennet and his assigns might work it if they chose, on paying a certain price per ton? I find the legal and apt phraseology in which a lawyer might embody such a covenant, and nothing more. The indenture in the case of Doe v. Wood, quoted at the bar, seems to me to resemble the grant of an exclusive incorporeal hereditament, much more than the covenant before us. It was contended in that case, that it should be regarded as a lease, and there was much in the words that gave countenance to such an interpretation. Thus it was argued, that the "full and free liberty to dig all metals and minerals, throughout the demised lands," was tantamount to a sole grant of all the minerals, since two individuals could not both have full liberty so to dig; that the exclusive right which was engaged for to the adits or shafts, amounted to an exclusive right to the ore, for the ore could not be got out except by the adits; that the right to erect sheds, to make water-courses, and use all the water on the land, showed that an interest passed in the soil; that the limited powers which were reserved to the lessor pending the term of passing through the mines for the purpose of working other mines adjacent; and still more the right of re-entry, in case of breach, which was specially set out in the deed,—all assume that while the term continued the grantee had an estate; and that this was supported by the language in many parts of the instrument, which spoke of the "land hereby granted," the "ground and premises hereby granted," the "land or ground hereby granted," &c. The court was of opinion that the indenture amounted only to a license to dig and work; and Chief Justice Abbott, while he admitted that formal words of demise were not necessary to pass such an interest in the soil as was claimed, added that, whatever doubts the expressions referred to might cast, they were not sufficient to vary the construction of the granting words, which of themselves were not of doubtful import, and that they could not operate to extend the grant, by converting the things granted from chattels personal, when gotten into a chattel real previously to their being gotten. 2 Barn. & Ald. 740, 741. The case in Bingham, which the plaintiff's counsel refer to as destroying the value of Doe v. Wood, was a case of mutual and well-guarded covenants, which not only authorized the licensees to raise ore, paying therefor a certain toll, but also bound them to do so with a prescribed degree of energy and effect under penalty of a forfeiture —a circumstance of much importance in determining the intent of the parties; besides which, they must have contemplated the grant of an assignable interest, for they had covenanted that the license might be assigned by deed.

II. But regarding Foree's covenant as an operative grant, what is the right that the plaintiff could claim under it? He says that it is not a right of common, but a right that excludes the owner of the soil. I think he is wrong in this. I should rather call it a right of common, even though it excluded the owner of the soil; that is to say so far as the policy of the law permits him to be excluded. Common is a right or privilege, says Sir Matthew Hale (Abr. tit. "Common"), which one or more persons claim to take and use in the natural produce of another man's land. It may therefore be exclusive, or rather sole; for the grant, or the prescription or custom, may be in favour of one man only. But it can never exclude the lord of the soil from his reasonable participation. In Procter v. Mallorie, 1 Rolle, Abr. 365, Coke, J., says—"Notwithstanding a grant of common sans nombre the lord may common with the grantee; and moreover the grantee must use the common with a reasonable number." And the reporter adds—"This was agreed to by the lord chancellor." And in two cases in the Year Books, which I cite from Rolle's Abridgment (title A, "Common," pl. 2, and title 1, "Common sans Nombre," pl. 5), the same position is affirmed. The owner of the soil, it is there said, hath such an interest in the soil, that though he grant a right of common sans nombre, yet the grantee cannot use the common with so many cattle, that the owner cannot have common enough for his own cattle. And Coke adds (Co. Litt. 122a), that "a custom or prescription totally to exclude the owner of the soil is unreasonable, and void as against law; because it was implied in the first grant that the owner of the soil should have common also." One of the points agreed in the Case of Lord Mountjoy, was based upon this doctrine; where it is said, that notwithstanding the grant of the right to dig, &c., to the Lord Mountjoy, the grantor, his heirs and assigns, owners of the soil, might dig there also; "like to the case of common sans nombre." And the same is relied upon as undoubted law by Lord Ellenborough, in Chetham v. Williamson, 4 East, 469. In truth the only exception to its application that I have found contended for in the books, is in the case of a free fishery, mooted in a case in 2 Salk. 637 (Smith v. Kemp), and discussed in Mr. Hargrave's note on Co. Litt. 122.

III. But would such a hereditament as the plaintiff claims to have, be susceptible of apportionment? He claims that it is a right in gross; I have given my reason already for regarding it as a right in common. A right of common in gross sans nombre. Can such a right be apportioned?

The leading case upon this question, is that of Lord Mountjoy, stated in the argument of the counsel, and just now referred to by

me. This case throughout, bears on the question before us. It denies that the grantee of a right to mine, can either assign his right to a third person for a part of the tract, or so assign an undivided interest in his right for the whole tract, as to confer on the assignee a several right to mine; and by the reason which it gives for a continuing right to mine, in the grantor, notwithstanding his grant to another, it shows that the case would not differ, whether the original mining grant were or were not in its terms exclusive, for it refers to the analogy of a common sans nombre, in which, as we have seen, the owner of the soil cannot be excluded, but may complain that he is surcharged, even against his own grantee, of common unlimited. In other words, the case decides that a right in gross to mine, whether in terms exclusive or not, is essentially integral, and not susceptible of apportionment. And this may be the meaning of Treby, C. J., where he says (Weekley v. Wildman, 1 Ld. Raym. 407), "Although a common sans nombre may be granted at this day, yet such grantee cannot grant it over." And a similar explanation may perhaps reconcile the opinion expressed in Shep. Touch. p. 238, to the same effect with the remark of Treby, and the case in the Year Book, 18 Edw. IV. 84, which the annotators cite as in opposition to their text. The incorporeal hereditament may well be assignable, and yet not apportionable. The assignment may have legal effect, but if it be to more than one, the assignees take together an indivisible entirety. Such I apprehend to be clearly the law laid down in Lord Mountjoy's Case, and I have no reason to suppose that the law of England is different at this day. To the same effect is Layman v. Abeel, in New York (16 Johns. 30), the points decided in which are well condensed in the syllabus. "The grantee in fee of a right of common in gross and without number, may alien it, and it descends to his heirs, but it cannot be aliened in such a way as to give the entire right to several persons, to be enjoyed by each separately; and where it descends to several persons, as tenants, in common, or parceners, it seems that it cannot be divided between them, but that there must be a joint enjoyment of it; nor can one of the tenants alone convey a right in the common, but they may jointly alien their rights." The same principle is carried out in Van Rensselaer v. Radcliff, 10 Wend. 639, where Chief Justice Savage decides that "common of estovers, if divided by the act of the party, is extinguished; if by descent cast must be exercised by the heirs jointly." The extinguishment of the right by an assignment of it in part is, I suppose, deduced from this consideration, that the right being essentially an entire one, and the whole neither passing to the assignee nor continuing in the assignor, it remains no longer in any one. And all this is in harmony with the ancient law of qualified and incorporeal hereditaments. Thus a condition may not be apportioned; but is determined by license as to part. Dumpor's Case, 4 Rep. [Coke] 119b; 1 Smith, Lead. Cas. 85. And a right of way in gross doth not pass to several by assignment; and though a rent charge may be apportioned, as by an apportionment of the soil, in respect to which it is reserved, or so far at least, that parceners may take it (Co. Litt. 164a, 165b), or a rent service, for it is to the advantage of the lord (Doe v. Meyler, 2 Maule & S. 276), as parceners may also take a corody certain, or an advowson, or a right of mill certain; yet this is only where the division of the inheritance would not prejudice another, for in the case of estovers or corody uncertain, or piscary or turbary sans nombre, there can be no apportionment; and the reason why parceners take in such case at all, seems to be, that they make but one heir in law, and therefore they must join in actions real, and if disseised, in one assize. Co. Litt. 164a. As they must also join, (and so must tenants in common, qua parceners under our American statutes of descent,) when damages are to be recovered for a tort done to their lands. Daniels v. Daniels, 7 Mass. 137. I take, then, the law to be, that if an incorporeal hereditament passed by the words of Foree's covenant to Bennet, it was one not susceptible of apportionment; that it passed by his death to his heirs jointly, and can only be enjoyed by them jointly, and as one tenant; that the assignees of the heirs stand in no better plight than the heirs themselves, and can have no separate enjoyment of the mining right, and that neither heirs nor assigns, nor both, can claim to exclude the heirs and assigns of Foree, owners of the soil, from a right to dig ore in common with them.

3. There remains the third inquiry, Can this suit be maintained, on proof of an apportioned interest, the defendant not having pleaded an abatement? The plaintiff claims not as a tenant in common with others, but as the exclusive owner of a several right; and he cannot now turn round, and asserting a tenancy in common instead, exclude the defence from showing that he does not legally represent the interests which on this amended view of his title should have united in the institution of the suit. The right which he asserted was an exclusive one in himself, according to some of the counts, and one that excluded the defendant according to the others. And in one form or the other, it was the basis of his suit. The case fails unless his proofs support this exclusiveness of claim.

(May 13, 1851.)

GRIER, Circuit Justice. Assuming, for the argument, the plaintiff to be the assignee of the whole right which was vested in Bennet, and that it is a grant upon sufficient consideration, let us inquire, what is granted? Not the iron ore. This the plaintiff properly admits in his declaration, where he defines his interest under the deed, as a "right and privilege to dig, take, and carry away iron ore to

be found" in the land of defendant. If it had been a grant of an absolute property in all the iron ore in the tract, the deed would have been insufficient to confer title without livery of seisin, and the statute of limitations a bar to the claim. A right or privilege to dig and carry ore from the land of another, is an incorporeal hereditament,—a right to be exercised on the land of another. It is a license irrevocable, when granted on sufficient consideration. It may be demised for years or granted in fee: it is assignable. The grantee or assignee of such a license, right or privilege to be exercised in the land of another, has no such title to the ore that he can support trover against the owner of the land for ore or coal raised by him. Chetham v. Williamson, 4 East, 476. On this subject I may adopt the words of Lord Tenterden in one of the cases relating to mines, quoted at the bar (Doe v. Wood, 2 Barn. & Ald. 724, 738): "This indenture in its granting part does not purport to demise the land or the metals or the minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed when the intent is to demise the land or metals or minerals. But the purport of the granting part of this indenture is to grant for the term therein mentioned, (here in fee,) a liberty, license, power, and authority to dig, work, mine and search for metals, minerals, in and throughout the lands described, and to dispose of the ore, &c. that should be found within the term, to the use of the grantee, &c. Instead, therefore, of parting with or granting all the ore that was then existing on the land, its words import a grant of such parts thereof as should, upon the license or power given to search and get, be found within the described limits; which is nothing more than a grant of a license to search and get, (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest."

2. Is the right granted, one that is exclusive of the owner of the soil? Much stress has been laid upon the word "all" in this grant, as having the effect of making it exclusive. But so important a restriction cannot be deduced from so equivocal an expression. The deed has been drawn by a very able conveyancer. He seems to have had Lord Mountjoy's Case in his mind at the time. He employs none of the apt and well known terms or phraseology to indicate an intention of giving an exclusive right as against the grantor himself. The grant of a right to dig, take and carry away "all" iron ore to be found within the bounds, &c. shows the extent of the license, but not its exclusiveness. The grantee may dig, take, &c. of any or all the ore he can find on the land, but he has no exclusive right in any of it till he finds it and digs it. It is a right without stint as to quantity, and Lord Mountjoy's Case likens it to the grant of a right of common sans nombre which does not exclude the owner. This is a point decided in Lord Mountjoy's Case as reported by Coke, Leonard and Godbolt.

3. Did the evidences given by the plaintiff support the allegation that he was possessed of the exclusive right to dig, &c., assuming that the deed in question conferred an exclusive right on Bennet to dig, take, and carry away the iron ore on this tract of land? The right, license or liberty granted to Bennet is in its nature one and indivisible. Unless the plaintiff is clothed with the whole he has nothing. As for other things indivisible, it may be held by one or more as joint tenants. But they hold per my et per tout, (not as Blackstone has erroneously interpreted it, "by the half or moiety and by all,") but "by nothing and by all" (7 Man. & S. 452, in note), or, in the language of Bracton, "Quilibit totum habet et nihil habet, scilicet totum in communi et nihil separatim per se." As a right to be exercised in the land of another it is an indivisible unit. Whether the plaintiff has 1-99th or 94-99ths makes no difference. If he has not the whole he has nothing. It is a question of title and not of pleading. The Case of Lord Mountjoy is conclusive on this point also. New trial refused.

On a subsequent day the following opinion totius curiae signed by both judges, was pronounced by

(Sept. 8, 1851.)

GRIER, Circuit Justice. As the opinions heretofore delivered by the respective members of this court on the questions argued on the motion for a new trial may possibly be construed as arriving at the same result by a different course of reasoning; and may be considered as deciding the present motion only, without any definite opinion of the whole court, as to the nature or construction of the covenant in the deed of 1769, we state the following propositions as ruled by the whole court, in which we agree; without repeating the authorities or all the reasons which might be urged in support of them; and for which we refer to our several opinions as delivered.

1st. For the purposes of the present decision we assume that the covenant in question contains a grant in fee to Bennet and his heirs for a sufficient consideration to be paid.

2nd. We decide, that the thing granted is not the iron ore contained in the land of defendant; but an incorporeal hereditament, a right or license or liberty, well described in the plaintiff's declaration as "a right and privilege to dig, take and carry away" all or any iron ore to be found in the land of defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee.

3rd. That until the grantee or his assigns exercised this privilege by digging, taking,

&c., iron ore found in the land, they had no property in the ore that would support an action of trover for the same.

4th. That the effect of the word "all" in this grant is not to give an exclusive right as against the grantor. It describes the extent to which the license may be exercised, not its exclusiveness. It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross sans nombre, which does not exclude the lord or owner of the land out of which it is granted.

5th. That such a right is indivisible, and unless the plaintiff as assignee is clothed with the whole, he has nothing, and cannot support this suit as against the owner of the land.

6th. And lastly: That the Case of Lord Mountjoy as reported by several authoritative reporters, and among them, by Lord Coke in his Commentary, is directly in point on both parts of the case, and rules it. Its authority has never been questioned; and the application of its doctrines to this case results in a conclusion which accords with our reason, and our sense of justice.

Case No. 5,849a.

GRUBB v. CLAYTON.

[Brunner, Col. Cas. 30;[1] 2 Hayw. (N. C.) 378.]

Circuit Court, D. North Carolina. 1805.

DISMISSAL OF ACTION—EFFECT OF—LIMITATION TO ACTION BY CREDITOR OF DECEASED PERSON.

1. A dismissal of a bill, except upon the merits, is no bar to a subsequent bill for the same cause.

2. If there be no administrator of a deceased creditor to bring suit, the act of 1789 requiring creditors in the state to bring their actions within three years cannot operate as a bar.

At law.

PER CURIAM. This cause was instituted formerly in Wilmington superior court. The act of 1715 was pleaded, and thereupon a case was made and stated for the court of conference, who decided that the said Act 1715, c. 48, § 9, was in force. The plaintiff's counsel then replied to the plea, and after the replication the whole bill was dismissed on their motion; that is to say, on the motion of the plaintiff's counsel. The suit was then instituted in this court, and the defendant's counsel have pleaded the former dismission in bar. We are of opinion that was not a dismission upon the merits considered of and decided by the court, and therefore that the plea in bar is not good. There is also another plea in bar, namely, Act 1789, c. 23, § 4, by which it appears that this suit was not commenced within three years from the qualification of the executors, though there was an administrator of Grubb in England. Now as there was no administrator in this country, there was no person in being who could demand the debt, of course no creditor to be barred. The words of the act are: "The creditors of any person deceased, if they reside without the limits of this state, shall within three years from the qualification of the executor or administrator, exhibit and make demand," etc., "and if any creditor shall hereafter fail to demand and bring suit for the recovery," etc., "he shall forever be debarred," etc. The plaintiff, therefore, is not within the body of the act. We need not consider whether an exception shall be allowed of, which is not expressly mentioned in the act.

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

Case No. 5,850.

GRUNDY v. YOUNG.

[1 Cranch, C. C. 443.][1]

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

ERROR—SUPERSEDEAS—INJUNCTION.

Motion for judgment on a forthcoming bond given on the original judgment, which had been enjoined. The injunction was dissolved on the 29th of April, 1807. The writ of error was taken out on the 14th of May, 1807. THE COURT rose on the 30th of April, 1807.

Judgment on the bond and execution awarded; the writ of error to the decree of dissolution being no supersedeas to the original judgment at law.

[NOTE. Case No. 5,851 was an action of debt upon the injunction bond. In 6 Cranch (10 U. S.) 51, the appeal from the interlocutory decree dissolving the injunction was dismissed in an opinion by Chief Justice Marshall. The bill in equity seeking to obtain relief from the judgment was dismissed by the circuit court upon final hearing, and the complainant appealed to the supreme court (7 Cranch [11 U. S.] 548), which, in an opinion by Mr. Justice Livingston, affirmed the decree.]

Case No. 5,851.

GRUNDY v. YOUNG.

[2 Cranch, C. C. 114.][1]

Circuit Court, District of Columbia. Nov. Term, 1815.

INTEREST—ON JUDGMENT DELAYED BY INJUNCTION.

A plaintiff at law, (in Alexandria, D. C.,) after dissolution of injunction, having taken out his execution, and obtained satisfaction of his judgment at law, cannot, in an action upon the injunction bond, recover the interest which accrued upon his judgment while he was delayed by the injunction.

Debt upon an injunction bond, to recover interest on a judgment at law during the pendency of the injunction. The condition of the bond was, that the complainant should pay "all money, and tobacco, and costs due,

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

or to become due to the plaintiff in the action at law, and also such costs as shall be awarded against him, in case the injunction shall be dissolved." Grundy, the plaintiff at law, after the dissolution of the injunction, took out an execution upon his judgment and obtained satisfaction.

[Grundy recovered judgment at law against Young, who filed a bill in the circuit court of the District of Columbia to be relieved therefrom. An interlocutory decree was passed dissolving the injunction. On appeal therefrom the supreme court (per Mr. Chief Justice Marshall) held "no appeal or writ of error would lie to an interlocutory decree dissolving an injunction." 6 Cranch (10 U. S.) 51. Upon final hearing the bill was dismissed. Case No. 5,850, affirmed on appeal 7 Cranch (11 U. S.) 548. Grundy then satisfied his judgment by execution, and brought this suit upon the injunction bond.]

THE COURT (nem. con.) instructed the jury that the plaintiff cannot, upon this bond, recover interest upon the judgment at law, after having received full satisfaction of that judgment, under his execution.

Case No. 5,852.

GRUNNINGER v. PHILPOT et al.

[5 Biss. 82.] [1]

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

PLEADING FAILURE OF CONSIDERATION — PARTIAL FAILURE—FRAUDULENT REPRESENTATIONS.

1. In this defense to a note the plea should allege distinctly and with precision the actual consideration, and that there never was any other.

2. The plea should set up to what extent and wherein there has been a failure.

3. Fraudulent representations should be fully stated, with all necessary incidents of time and circumstance, and also that the party entered into the contract and gave the note relying upon such representations.

[This was an action on a promissory note, brought by Alice B. Grunninger, as executrix, against Brian Philpot and others. Plaintiff demurs to the pleas.]

O. K. A. Hutchinson, for plaintiff.

Gookins & Roberts and John G. Rogers, for defendants.

DRUMMOND, District Judge. I think that these pleas should be amended.

The history of the case, as stated in the pleas, seems to be that several persons agreed to form a joint stock company, the capital of which was to consist of various oil wells which they were to run; that the deceased, whom the present executrix represents, agreed to be a party to this arrangement and transfer certain portions of his interest which he had in the oil wells and oil lands, etc., to this company; and that as a part of the consideration of his entering into this agreement the note, which is the subject matter of this suit, was given by these defendants. The allegations set forth in the pleas are that the consideration has failed in whole or in part; also that there were some misrepresentations made by Mr. Grunninger.

The question is whether the account is presented with that distinctness and precision which the rules of pleading require in order to constitute a defense; and in looking over the pleas, to which the demurrer has been interposed, viz., the 3d, 4th, 5th, 6th and 7th pleas, it has struck me that they are wanting in that precision of language and distinctness of averment that are necessary. I will state, in the first place, what I understand to be the rule in such cases. When the defense is the failure of consideration to an action on a promissory note, either in whole or in part, the plea should allege distinctly and with precision what was the consideration for which the note was given, and that there was no other consideration. Where the plea alleges a total failure of consideration, it should also state that the consideration has failed, and should set forth in what respect, and where the plea alleges a partial failure of consideration it should set forth to what extent there has been a partial failure and wherein; not that as to the amount it is absolutely necessary that the proof should correspond with the plea in that respect, but the court should see from the averment in the plea to what extent there has been a failure of the consideration where a partial failure of consideration is relied upon. Where fraudulent representations are relied upon it must appear what they were, with all the necessary incidents of time and circumstance, and also that the party, relying upon the representations that were made, entered into the contract and gave the note, also of course alleging, as in the other case, what was the consideration, and the only consideration, of the note.

The third plea does not distinctly set forth what was the only consideration of the note, and it also sets forth that there was some fraud and deceit practiced by Mr. Grunninger; "that if they would purchase from him a certain interest which he pretended to have in certain oil lands situated in the county of Venango, Pa., for a certain price, he would become a party to the enterprise which is referred to in the second plea, upon the terms proposed in a writing obligatory," —which writing obligatory, by the way, is not very distinctly set forth. "And thereupon the said defendants executed to the said Lawrence Grunninger the said promissory note in the said first and second counts in said plaintiff's declaration mentioned." There is no statement here as to what was the only consideration upon which that note was given. What was the consideration? Why the note was executed is one thing. There may

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

have been a great many motives for the execution of the note; what is the consideration of the note is another thing, and it must be distinctly and substantially set forth. As has been suggested, there may be a bona fide debt due from one party to another which may be an open book account or in any other form, and from various motives the debtor may give a note. Now why he gave the note may be because the man asked him under particular circumstances, or at a particular time; but the consideration of the note would be an entirely different thing; it might be goods sold and delivered; or for land sold; or for any other good consideration.

The remaining pleas are all I think liable to the criticism of want of precision, in this respect, that they allege that Grunninger would pay into and contribute toward the assets of the company which was to be formed certain property; that Grunninger executed a certain writing; and that, to secure the payment of the sum of $3,000, so agreed to be paid by the defendants, the promissory note was given. And they allege that although the company was duly and within a reasonable time formed and incorporated, as proposed in the agreement, "yet that said Lawrence Grunninger did not nor would contribute toward the assets nor pay into the property of said company the property in said writing obligatory mentioned, but wholly refused so to do." It does not distinctly appear to what extent or in what respect there was a failure to comply with the obligation on the part of Grunninger as entered into by him, nor is the consideration for which the note was given set forth with that distinctness that I think is necessary.

I think the same objection exists to all the pleas. Where profert is made of an instrument in writing, and a question is made on that writing, it ought to be presented to the court, so that the court can see it. Demurrer sustained to the 3d, 4th, 5th, 6th and 7th pleas, with leave to amend.

[NOTE. Judgment was rendered for the plaintiff on final hearing. The case was then taken to the supreme court by writ of error, where the judgment of the circuit court was affirmed in an opinion by Mr. Justice Strong, who held that the consideration for the note sued upon was a past transaction, though the motive for its execution may have arisen later. 14 Wall. (81 U. S.) 570.]

Case No. 5,853.

GRUNNINGER v. PHILPOT et al.

[5 Biss. 104.] [1]

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

RECEIVING DEPOSITIONS TAKEN IN STATE COURT —PARTY OBJECTING.

1. It is proper practice for the federal court, upon application before the trial, to allow depositions taken in a suit between the same parties for the same cause of action, to be filed as evidence.

[Cited in The John H. Starin, Case No. 7,351.]

2. A party objecting should show affirmatively that there was mistake, misapprehension, or other good cause why they should not be received.

3. In doubtful cases, it is better, ordinarily, to admit than to exclude evidence.

The same defendants [Bryan Philpot and others] were sued by this plaintiff [Alice B. Grunninger] in the superior court of Chicago on the same cause of action. That suit was dismissed at plaintiff's cost, by plaintiff's attorney, he not being ready for trial. Suit being instituted in this court, and the cause being reached upon the call of the docket for trial, it is submitted by defendants whether the depositions taken and filed in the cause in the superior court can be used in this case.

Hutchinson & Luff, for plaintiff.

Gookins & Roberts, for defendants.

DRUMMOND, District Judge. The practice that has been pursued heretofore in relation to depositions of this kind, has been for the party, before the trial, to make application to the court for leave to read the depositions taken in the former suit, and that leave, has I believe, in all cases been given. The question, I think, has never been distinctly presented and argued at length as to the admissibility of this kind of testimony, but it has generally been considered as competent for the court, in its discretion, to allow it to be read, on the ground that the parties are the same, the suit the same, and both parties have had the opportunity of examining and cross-examining the witnesses; therefore, all the usual tests of truth have been applied, and it is presumed that the testimony and statements of the witnesses are correctly set forth in the depositions. At the same time, I can easily imagine that cases may arise where it would be improper for the court to allow depositions taken in this way to be used on the trial of another cause; as, for example, where, owing to misapprehension, misinformation, or mistake, or from any cause operating upon a party or his counsel, a witness was not interrogated or cross-examined as to certain facts. In such a case, it might not promote justice to allow the deposition to be read. But the inclination of my mind is, that where a deposition was regularly taken and cross-examination permitted, the deposition can be read; and I think it would be incumbent on the party objecting, to show, upon the application, which should be made to the court in the first instance for leave to read the depositions, why they should not be read, giving some good and substantial reason.

It is a very close question, I admit, under the authorities, but while they are somewhat in conflict, still, in doubtful cases, I am always inclined in favor of the admissibility of the testimony. I think, in all cases of doubt, it is better to admit than to exclude evidence. It ought to appear clearly that the evidence is

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

incompetent in order that it should be excluded; therefore, I should feel inclined, in this case, to admit this testimony, unless it is made to appear to the court in some way that it would be prejudicial to the rights of one of the parties for the court to receive it.

The depositions will be allowed to be read unless special reason is shown to the contrary.

[See Case No. 5,852.]

GRUSH (UNITED STATES v.). See Case No. 15,268.

Case No. 5,854.

GRUTACAP v. WOULLUISE.

[2 McLean, 581.] [1]

Circuit Court, D. Michigan. Oct. Term, 1841.

BILLS AND NOTES—RATE OF EXCHANGE.

On a promissory note given in New York, payable at Detroit, with the current rate of exchange on New York, the rate of exchange may be recovered.

[Cited in Leggett v. Jones, 10 Wis. 36; Seaton v. Scovill, 18 Kan. 436.]

At law.

Atterbury & Pitts, for plaintiff.

OPINION OF THE COURT. This action was brought on a promissory note, dated New York, payable at the Detroit City Bank, for $1,232, with the current rate of exchange, on the city of New York, to be added thereto. In the declaration, there was an averment of the current rate of exchange, when the note became due. The court think the difference in exchange, between Detroit and New York, may be recovered on this note; and, unless the parties shall agree on the amount, the question will be referred to a jury.

GUARDIAN LIFE INS. CO. (LEE v.). See Case No. 8,190.

GUARDIAN MUT. LIFE INS. CO. (EISNER v.). See Case No. 4,323.

GUDERYALEN v. The F. W. GIFFORD. See Case No. 5,166.

GUERARD (GIRARD FIRE INS. CO. v.). See Case No. 5,461.

Case No. 5,855.

GUERNSEY v. BURLINGTON.

[4 Dill. 372.] [2]

Circuit Court, D. Kansas. 1877.

INTERNAL IMPROVEMENT BONDS—BONDS TO AID ERECTION OF WATER-MILL.

Negotiable bonds made by the defendant township, under legislative authority, reciting that they are issued "for the purpose of aiding internal improvements in said township," are valid in the hands of a holder for value, although they may have been in fact issued to aid in the improvement of a water-power and the erection of a water-mill owned by private persons.

This is an action [by George A. Guernsey] upon bonds and coupons. The following is a copy of one of the bonds:

"United States of America.

"$500.00. Bond of Burlington Township. No. 9.

"County of Coffey, State of Kansas.

"Burlington township, in the county of Coffey, state of Kansas, promises to pay D. Cross & Sons or order the sum of five hundred dollars, on the 5th day of March, A. D. 1874, and interest thereon at the rate of ten per cent per annum, payable annually, upon presentation of the coupons therefor hereto attached; both principal and interest payable at the banking house of Bates & Brown, in the city of New York.

"This bond is one of an issue of ten thousand dollars, made for the purpose of aiding internal improvements in said township, and in pursuance of an act of the legislature of the state of Kansas, entitled 'An act to authorize Burlington township, in the county of Coffey, to issue bonds,' which act became a law on the 2d day of March, A. D. 1871.

"In testimony whereof, the township trustee, clerk, and treasurer have caused this bond to be issued, duly signed, attested and countersigned, this 5th day of March, A. D. 1871. Charles Morse, Trustee.

"Countersigned: H. L. Jarboe, Treasurer.

"Attest: G. N. McConnell, Clerk."

This bond is endorsed, "David Cross & Sons."

The first section of the act recited in the bond is as follows: "Section 1. That the trustee, treasurer, and clerk of Burlington township, in the county of Coffey (or any two of them); be and they are hereby authorized and directed to issue the bonds of said township to the amount, to the persons, for the purposes, and upon the terms and conditions named in the order and proclamation of said township officers in calling said election of January 11, A. D. 1871, notwithstanding any irregularities or want of authority in law for making the orders and calling the election aforesaid, or whether the said orders and election have been in compliance with the laws of Kansas or not. Said bonds to be payable at such place as may be designated on their face." The other sections provide for levying and collecting a tax to pay the bonds. This act went into effect March 2, 1871.

The question submitted to the electors on the said 11th day of January, 1871, referred to in said act, was whether the township of Burlington, for the purpose of aiding D. Cross & Sons in the improvement of their water-power and mill privileges at or near the town of Burlington, and the putting in operation a flouring mill at or near said town, will issue the bonds of the township to D.

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

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

Cross & Sons to the amount of $10,000, payable in one, two, three, four, and five years, with ten per cent interest, on condition, 1st, that the legislature, at the regular session in 1871, shall authorize the issue of said bonds; and, 2d, that Cross & Sons shall execute and secure to the said township five notes for $2,000 each, payable in one, two, three, four, and five years, saying nothing about interest. The proposition carried by a large majority, January 11, 1871. Afterwards the act recited in the bonds in suit was passed. On February 27, 1871, Cross & Sons executed the five notes to the township, and secured the same by a mortgage on the mill and mill property, and thereupon, March 5, 1871, the bonds in suit were issued and negotiated. The said Cross & Sons paid the first two notes to the township and no more, and the township applied the amount in payment of part of its bonds. The answer alleges that the said mill is situate upon the Neosho river, and is operated by water-power obtained by means of a dam erected and maintained by said Cross & Sons, under chapter 66 of the general statutes of Kansas, approved February 6, 1867; that the owners of said mill ground all grain brought to it; but, other than the transaction herein set forth, said township has no interest in the mill and no control over the same. The second count of the answer alleges the foregoing facts, but does not allege any actual notice thereof to the plaintiff. The case was submitted to the court on a demurrer to the second count of the answer. The demurrer was on the ground that the facts stated in the second count of the answer constituted no defence to an action on the bonds in the hands of a holder for value before due, which the plaintiff, in his petition, alleged himself to be.

A. L. Williams, for plaintiff.
A. M. F. Randolph, for defendant.

DILLON, Circuit Judge. The bond recites that it is made and issued "for the purpose of aiding internal improvements (not stating what) in said township," and "in pursuance of the act entitled 'An act to enable Burlington township to issue bonds,' which became a law on the 2d day of March, 1871." The act here referred to does not state on its face the purpose or object of the bonds which it authorizes and directs to be issued. This can only be learned by reference "to the orders and proclamation of the said township officers in calling the said election of January 11, 1871." In its circumstances, in this regard, the case is peculiar, and I am not clear that the purchaser is bound to take notice of the order and proclamation. Inasmuch as the bond states that it is issued to aid "internal improvements in the township," and as the general legislation of the state shows that "internal improvements" mean such public improvements as may legitimately be aided by taxation, I am inclined to think that the purchaser may assume, without inquiry, aliunde the bond and legislative act, that the bond is within the competency of the legislature to authorize. Gen. St. Kan. 526. If this is so, it is clear that the answer, which does not charge actual notice to the plaintiff, contains no defence to the action. It may also be remarked that the legislature of Kansas authorizes in favor of water-mills the exercise of the power of eminent domain. Gen. St. Kan. 576. There is a line of decisions, perhaps exceptional in character and open to some doubt as to their present soundness, which sustains the validity of such legislation. Cooley, Const. Lim. 534, 536. It seems quite probable, from the reasoning of the supreme court of Kansas in Leavenworth Co. v. Miller, 7 Kan. 523 et seq., that that court would sustain the validity of a legislative act authorizing compulsory aid to erect and maintain a water-mill. In that case the court says "no instance can be shown where the government may aid a thing by the power of eminent domain where it cannot also aid it by taxation." Id. 527.

Since the foregoing was written, the supreme court of the United States has decided the case of Burlington v. Beasley (October term, 1876) 94 U. S. 310, holding that bonds issued under the act of 1872 (Laws [of Kansas, p. 110] c. 68), to aid in the erection of a steam custom grist-mill, not situated on a water-course, or operated by water-power, were valid, and such mills were "works of internal improvements" within the meaning of the act. That decision, in effect, determines this case, for it is clear that if steam custom grist-mills may be lawfully aided by taxation, then such mills operated by water-power may be similarly aided. If there is any distinction between the two classes of mills in this regard, under the line of decisions before adverted to, the distinction is in favor of mills operated by water-power. Our judgment is that the second count of the answer is insufficient. Judgment accordingly.

No further answer was made, and the plaintiff had judgment.

GUERRERO (UNITED STATES v.). See Case No. 15,269.

GUEST, The MARY ANN. See Cases Nos. 9,196 and 9,197.

GUGENHEIM (BARRY v.). See Case No. 1,061.

GUGENHEIM (PENNSYLVANIA SALT MANUF'G CO. v.). See Case No. 10,954.

Case No. 5,856.

GUIBERT et al. v. The GEORGE BELL.

[3 Hughes, 468.] [1]

District Court, D. Maryland. March, 1879.

SHIPPING—RULES OF NAVIGATION—SAILING IN FOG—FAULTS.

1. The statutory rules of navigation, as to fog-bells and fog-horns, must not be construed to excuse the faults of bad seamanship.

2. A vessel must not sail in a fog with too much canvas to allow of prompt manoeuvring to avoid collision with craft lying at anchor.

3. The presumption of fault is conclusive against vessels sailing with too much canvas in a fog in fishing waters, and colliding with vessels at anchor, where there is no vis major.

[Libel by Nathaniel Guibert & Sons against the British ship George Bell, for collision.]

Brown & Brune, for libellants.
Brown & Smith, for respondents.

HUGHES, District Judge. This is a libel of a British ship by citizens of the French Republic, for damages sustained from a collision on the high seas. It is a case purely international, and is to be determined by the principles of general law applicable to torts in admiralty. France and England, as well as the United States and all maritime states of any repute, have adopted, as a part of the general admiralty law, a well-known series of rules of navigation for the prevention of collisions at sea. The regulations thus generally adopted had been first promulgated by act of the British parliament in 1862. Though statutory, they are an international code, obligatory upon all mariners, which the admiralty courts of the world are bound to enforce. Before stating such of these rules as govern the present case, I will set out the leading facts of the collision which is the subject of this libel, as I have gathered them from the voluminous, and in many respects conflicting testimony which has been read at bar from depositions taken on either side. The French brig Briha, a fishing vessel of 130 tons, was anchored on the Grand Bank of Newfoundland, latitude 45° 54', longitude 52° 43', on the 9th of August last, with a crew of twenty-one men. At half-past five o'clock on that morning, one hour after sunrise, she was run into by the British ship George Bell of 1100 tons, and sunk with all the effects on board, and the loss of two of her crew. At half after four she had sent out her two fishing boats, each with seven men, on their daily duty of examining the lines which were used in their business, and which were attached to buoys set at distances of half a mile to a mile or more on each side of the vessel. Seven men remained on the brig, among whom was the captain. These were all on deck after the departure of the boats. There was a breeze from the southwest, and the brig at anchor was heading to that point. There was a pretty heavy fog, but it was not so dense as to prevent an object as large as the brig from being seen at a distance of three hundred yards or more, an hour after sunrise. At a moment five to ten minutes before half-past five, the men on deck of the brig saw in the direction of the sun, a ship, apparently under full sail, heading N. by W., making directly towards them. Under the master's direction, one of them rang the bell, and another began to blow the fog-horn, to give warning to the ship. She seemed to pay no attention to these signals, took down no sail, and made no manoeuvre to change her course; but came on bearing right across the brig. She was on the port tack and close-hauled within six or seven points of the wind. The men on the brig became more and more alarmed, blew the horn, and rang the bell repeatedly, and in addition shouted and gesticulated with all their might. But the ship came steadily on without changing her course or slacking her speed until within a few yards of the brig, when she paid off to the starboard, thereby, instead of striking the brig amidships, striking her on her port-quarter at an angle of about forty-five degrees. The collision was at half-past five, an hour after sunrise. The brig foundered and sank in the course of twenty or thirty minutes, carrying down all she had on board, including the men's clothing. The ship passed on for half a mile, or a mile or more, and then hove to. A raft was constructed by the men on board the brig, on which all saved themselves but two. These two were drowned and lost. The rest of the crew were taken up by the colliding vessel, which proved to be the British ship George Bell, and by another vessel which was passing near, and which proved to be the British ship St. George. When the George Bell struck the brig, her master did not suppose any serious damage had been done; and his ship passed on for some distance until the brig was left out of sight. But just then there was a sudden lifting of the fog, when the master of the ship, discovering that the brig was in distress, hove his vessel to, and sent assistance.

Such are the leading facts of the case. It was a collision in the open sea, in daylight, by a ship under full sail, with a vessel at anchor. Prima facie, the ship is liable for the damages; but the defence set up by the respondent is: (1) Fault on the part of the brig in not having rung her bell before the collision, as required by rule 10 of the British regulations (our American rule 15) of vessels at anchor in a fog; and (2) inevitable accident, in that the ship had not timely warning from the brig's fog-bell of the brig's position.

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

I will first state the law applicable to such cases as this. It is well settled by the courts, that where a collision happens between a vessel under way and another at anchor, the presumption of fault is against the vessel in motion, and that the burden is upon her of proving fault in the other vessel. Bill v. Smith, 39 Conn. 206; Pars. Mar. Law, 201; The Lady Franklin [Case No. 7,984], and numerous cases, English and American, there cited. In the case of The Granite State, 3 Wall. [70 U. S.] 310, the supreme court of the United States go as far as to say, nem. con., that where there is no vis major, the fact of collision with a stationary vessel is conclusive evidence of fault on the part of the moving vessel, and this is undoubtedly the law whenever the stationary vessel is where she has a right to be. It is true that rule 10 (our rule 15) requires vessels at anchor in a fog to ring their bells every five minutes; but it is also true that if the failure to do so, in any particular case, is not proved by the moving vessel to have "contributed" to, that is, to have been the cause of the accident, then the moving vessel is liable, notwithstanding the failure. The rule of navigation in question is a general command to mariners emanating from the law-making power, and not a judicial determination in advance for every case of actual liability. Indeed, section 29 of the British merchant shipping amendment of 1862, requires, by necessary implication, that in case of collision, it shall be proved that the accident was in fact occasioned by the non-observance of the appropriate regulations, in order to fix liability upon the vessel not observing the rule. Moreover rule 20 provides that the statutory regulations shall not be construed as exonerating any vessel from the consequences of any neglect of any precautions which may be required by the ordinary practice of seamen or by the special circumstances of each case. And the supreme court of the United States in the case of The Grace Girdler, 7 Wall. [74 U. S.] 203, say, that the statutory rules of navigation shall not be construed to excuse the fault of bad seamanship, or warrant the neglect of any proper precautions by a vessel moving under circumstances requiring such precautions to be taken. Nay, more, rule 19 (our rule 24) authorizes the non-observance and violation of any particular rule where such departure is rendered necessary to avoid immediate danger.

In the light of the law thus explained, the case at bar depends upon two questions, viz.: (1) Did the brig neglect to ring her fog-bell as required by rule 10; and, if so, did that neglect in great or less degree cause the collision? and, (2) if not, did the collision occur in consequence of faulty management on the part of the ship, or by inevitable accident?

The weight of the evidence in this cause is to the effect that the night preceding the collision had been foggy and that the fog continued for more than an hour after sunrise. It was, therefore, the duty of the brig to ring her fog-bell every five minutes during the night and up to the time of the collision. I do not think she is proved to have done so during the night; but it is proved that she did so during the time the George Bell was within hearing of her bell. The ship was to windward of her, and it is proved that a bell in those waters does not sound as far to the windward as a horn. The brig's bell was sounded full five minutes before the collision; it was repeatedly sounded during the period of five minutes. The weight of evidence is to the effect that the ship was moving at the rate of five knots an hour, which was a rate that would place the ship seven hundred and thirty-three yards from the brig at the time she was first seen and the fog-bell was first rung. The ship being to windward, the brig's bell could not, according to the evidence, have been heard before that moment from the ship; and, therefore, so far as the ship could be affected, the ringing of the bell from that moment was in time to place the brig in compliance with rule 10. The brig did more than thus comply with that rule. She used the horn vigorously. She also, by the shouts and gesticulations of all on board, did everything in her power to warn off the ship. I hold, therefore, that for all the purposes of this case, the brig, even though she might have been technically in fault as to the night ringing, was not actually in fault as to ringing the bell in connection with this collision. As to this she gave warning to the colliding ship, not only by compliance with rule 10, but also in the most effectual modes which were at her command.

We come therefore to the crucial question in this case, namely, whether the accident was inevitable, or due to fault on the part of the ship. The accident occurred in the daytime. There was a pretty heavy fog. All the testimony of the brig's crew, and the testimony of some of the ship's crew, goes to prove that the two vessels were visible to each other for a period of five minutes before the collision. Captain Allen, of the ship, himself testifies that after passing by the brig, after the collision, he could see her through the fog for five or ten minutes before she became obscured from sight. He himself thereby confirms the brig's witnesses in their statement that the ship, before the collision, was seen for five minutes by the brig's crew. I know that he also says the brig was only a few ship's lengths off from him when he lost sight of her five to ten minutes after the collision, but I cannot believe she was that near, for his vessel continued in motion under considerable headway and canvas, and was but little less susceptible of being checked in her course just after the collision than she had been just before that event. He must have gone several hundred yards beyond the brig before she ceased to

be visible in the fog, and before he hove to, "half a mile to a mile and a half" off. The testimony of three of the men who were on the ship's deck, Jacobson, Jepson, and Gibbons, is virtually to the effect that there was as much as five minutes of time between the moment when the two vessels became visible to each other and the moment of collision. Jepson says expressly that he heard the brig's bell ringing three to five minutes before the collision. I need not collate the declarations of the several witnesses on this point. True, on the other hand, there is testimony of other witnesses, who gave it as their opinion that in that fog, on that morning, objects could be seen only at such and such distances, which were very short. But this conjectural testimony is worth nothing against that of witnesses who state as a fact that they actually saw these vessels five to ten minutes before and after the accident. We are bound to act upon evidence of facts, and cannot safely trust to conjectures or vague and varying surmises. I feel bound to conclude on the whole that the vessels were visible to each other a full period of five minutes before the collision.

I am warranted by the evidence in assuming, further, that the ship was running at the rate of five miles an hour, for that is the teaching of the evidence, carefully sifted and weighed. Even if she had been running at as low a rate of speed as three miles an hour, she would have been four hundred and sixty yards distant from the brig at a moment five minutes before the collision. The ship was sailing close to the wind on the port tack, with all sails set except the maintopsails and the royals. There was a good breeze. The ship was in ballast, and it is hardly probable that with as much canvas as she had spread, she was moving at a much slower rate than five miles per hour. The St. George was going at the rate of three to four miles near by, with much less sail, namely, her two jibs, her mainsail, her topsails, and topgallant-sails, only. The case with the George Bell seems to me, therefore, to be this: The brig was lying broadside in her course, showing six feet above water, her sides painted black, with a white band four inches wide just under the rail, at a distance hardly less than three hundred yards, and probably as much as seven hundred yards from where the ship could have first seen her. This could have been five minutes before the moment at which the ship's speed would have brought her into collision, if her lookout had been in place. The ship was sailing at probably five miles an hour, with nearly all sails set. Such was the situation, and the question which presents itself is, whether the collision that occurred under such circumstances was the result of inevitable accident, or whether it was the result of faulty management or non-management on the part of the ship. I cannot believe that the accident was inevitable. I am obliged to conclude from all the evidence that the ship could easily have avoided the brig but for inexcusable delay and negligence in taking the measures necessary in the emergency.

There has been much discussion by the courts as to the rate of speed at which vessels may move over grounds where others are likely to be at anchor, in the nighttime, or during a fog. I think the result of the decisions is, that it is incumbent upon navigators in such circumstances to move with caution and to keep their ships in trim and condition to be easily controlled and readily manoeuvred to meet any emergency that may be probable or liable to arise. The speed at which they are moving is not more important than this tactical condition of the ship. Some of the decisions on this point are those of The Frank, 2 Quebec Law R. 301; The Pepperell, Swab. 12; The Juliet Erskine, 6 Notes Cas. 633; The Europa, 14 Jurist, 627; The Virgil, 2 W. Rob. Adm. 201; The Thomas Martin [Case No. 13,926]; Amoskeag Manuf'g Co. v. John Adams [Id. 338]; and others.

Was the George Bell in the manageable condition which has been indicated, in sailing over the fishing-ground in which she ran down the Briha? I thing not. The St. George was sailing in the same waters, in the same fog, at the same time. Her master said in his evidence: "I was moving between three and four knots an hour, and had been going so since 2 a. m. It is my custom not to spread canvas in a fog when I am not on deck. On this occasion it was on account of the fog that I did not care to have more sail on. I had on two jibs and a stay-sail, topsails, and topgallant-sails. I was on deck from 6 p. m. till 3 a. m.; then went below, but did not go to bed. At 4 a. m. I went up and had a look at the weather. I went on deck again at a quarter to 6 a. m."

It is from this evidence of an accomplished mariner and thorough seaman that we may learn what was prudent to be done by a ship moving in those waters, in that fog, on that night and morning; and it confirms me in the belief that the master of the other ship, the colliding ship George Bell was not justifiable in spreading so much canvas as he had out on that occasion. The fact that his main and mizzen sails were spread, rendered his ship less responsive to the helm than it should have been when the helm was finally put hard aport. I doubt if that was the proper thing to do with the helm on the occasion, and I believe that that manoeuvre insured the collision, and justifies the principle of rule 19 (our rule 24), which authorizes a disobedience of express rules when "necessary to avoid immediate danger." I conclude that the ship was in fault in moving under too much canvas in the unmanageable condition in which she was at the time

of the collision. I do not think that the rate of speed under which a vessel is moving under such circumstances is to be so much considered as whether she is so trimmed and conditioned as to be readily manageable in case of an emergency. Nor was the master of the colliding ship otherwise as cautious and careful as the occasion required. He had turned in at 11 p. m., and was not again on deck until just before the moment of the collision, when it was too late for him to control his vessel. Yet, though the ship was at all the disadvantage which has been described, she could still have avoided the brig if proper measures had been taken to that end. If the lookout was at his post at the time the brig first became visible, he failed to do his duty. It seems from the second mate's testimony that five to eight minutes before the collision the lookout had gone below deck to get his coffee, and it is probable that when the men on the brig first saw the ship and rang their fog-bell, the ship's lookout was not at his post at all. And, if we are to believe Gibbons, whose testimony seems intelligent and consistent, the second mate, who was the officer of the watch on deck, was also at that time in the carpenter's shop at work at some job. These were the only witnesses that gave testimony who could have seen the brig from their positions on deck if they had been in place; for the helmsman was shut off from sight of the brig by the height of the unladen ship. These statements in the evidence establish the belief in my mind, that when the two vessels first became visible to each other there was no lookout in place on the ship's deck; and that after the lookout got to his place, and reported "a vessel under the lee bow," several minutes elapsed before the officer of the watch was in place to give the proper orders. The lookout's lusty blowing of his fog-horn "many times" during that important interval could accomplish no object but to summon the officer from the carpenter's shop, and seemed to be slow in effecting that; for no orders were given by this officer until just before the collision, when they were too late to be effectual for aught but causing the ship to strike the brig a glancing blow on the port-quarter instead of a direct blow amidships.

The collision ought not to have happened. I think the ship was in fault in no measures having been taken in time by those on her deck to avoid the accident. I think she was in fault in being under too much sail for those waters at that time, and in having her canvas spread in such a manner as to render her unmanageable in such a sudden emergency as was likely to arise at that time and place of the collision. I will sign a decree for the libellants.

[NOTE. Reference was made to a master to ascertain the damages. The case was heard on exceptions to the master's report as to the valuation of the vessel, outfit, and cargo, and the report was in general confirmed. 3 Fed. 581.]

Case No. 5,857.

GUIDET v. BARBER.

[5 O. G. 149; Merw. Pat. Inv. 245.][1]

Circuit Court, D. New Jersey. Dec. 30, 1873.

PATENTS — REISSUE — INFRINGEMENT — WANT OF NOVELTY—PATENTABILITY—STONE BLOCK PAVEMENTS.

1. It is to be presumed that a reissue is for the same invention as the original patent; and it is for the defendant to show that it is not.

2. In an action upon a patent, if it is alleged by way of defense that the supposed invention is not new, that should be set up in the plea or answer; otherwise the evidence in support of the defense is not admissible.

3. But it is not necessary to set forth in the pleadings that the subject of the invention is not patentable in its character; it may be shown under the general issue.

4. A pavement composed of stone blocks of which the ends lying in the line of travel are smooth and fit closely together, while the sides lying across the street are rough, so that spaces are left between them in which the horses' feet may take hold, is a proper subject for a patent.

[In equity. Suit by Charles Guidet against Samuel Barber for the alleged infringement of reissued letters patent No. 4,106, granted to the complainant, August 23, 1870. The original patent, No. 85,814, was granted to said Guidet, January 12, 1869.]

Edmonds & Field and George Harding, for complainant.

George Foske, for defendant.

NIXON, District Judge. This bill is filed by the complainant for an injunction and an account for the infringement of reissued letters patent [No. 4,106] granted to complainant August 23, 1870, for "improvement in stone pavement." The single claim in the reissue is for "a pavement composed of stone blocks made in the form of parallelopipeds, having their narrow ends or edges cut smooth and their broad sides purposely cut rugged or uneven, when the blocks are arranged with their rugged surfaces transversely to the street, substantially as described."

The answer to the defendant alleges—(1) That the reissue to the complainant was fraudulent and void, because the surrender was not made for the purpose of correcting any errors or imperfections in the description or specification of the original patent, but to cover and claim as complainant's invention many things in the art known and used long prior to his alleged invention or discovery, and because the said reissued letters patent covered and included many things, of which the complainant was not the original and first inventor, and which were not described or claimed in the original letters patent. As it is the duty of the commissioner of patents to see that the reissue does not cover more than the original patent, the presumption of law always is that the reissue is for the same

[1] [Merw. Pat. Inv. 245, contains only a partial report.]

invention until the contrary is shown. No attempt is made by the defendant, upon whom the burden rests to prove the allegation of fraud in the reissue, and the court can hardly be expected to presume it. Section 53, Act July 8, 1870 [16 Stat. 198]. Jodan v. Dobson [Case No. 7,519]; 404 Curt. Pat. § 281.

(2) The defendant also alleges prior use, and abandonment to the public by the complainant; but he gives no notice and offers no evidence to sustain the charges. The only matter put in issue by the answer and the proof is the question of infringement. The defendant denies the allegations of the bill in this respect, and the burden is upon the complainant to show it.

The laying of a stone-pavement on South Broad street, facing Lincoln Park, in the city of Newark, is admitted by the defendant, and the expert witness, J. Boyd Eliot, is called to testify in reference to its construction. He states that he has made an examination of said pavement; that he understands the principle of its construction, and that it corresponds substantially with the invention described in the complainant's reissued letters patent.

(1) Because it is composed of blocks of stone made in the form shown and described in the said patent, consisting of parallelopipeds or solid figures, whose sides are parallelograms; said blocks being provided with ends or edges formed sufficiently smooth that when they are abutted together in position to form a pavement, the joints or seams between the said blocks are closed, or substantially so, in a longitudinal direction or parallel with the sides of the street, or in the direction of the line of travel along the street, so that the wheels of the vehicles passing over it will meet with a comparatively smooth surface, or be prevented from sinking into crevices or openings between said blocks.

(2) Because said blocks are so selected and laid with their broad sides abutting against each other as to produce open joints in a direction transversely to the street, in such a manner that a firm foothold is provided for the draft-animal traveling along the street, substantially as described in the said patent. He expresses the opinion that the combination of these blocks of stone to form a pavement is of such a character as to perform the functions set forth in the complainant's reissued patent, and the advantages to be gained in the formation of such a pavement, recited in said patent, exist to a substantial degree in the pavement constructed and laid by the defendant.

This testimony stands without material contradiction, and there must be a decree against the defendant, unless it should appear upon further examination that the invention of the complainant is not in fact a patentable subject.

The counsel for the defendant upon the argument took the ground that there was nothing patentable in the complainant's alleged invention. It was objected in reply that, as no such defense was set up in the answer it was then too late to urge it. Whether the objection of the complainant is valid and sufficient depends upon what the counsel of the defendant meant by affirming that the invention was not patentable. If he meant that it was not on the ground of a want of novelty the objection was well taken, for such a defense falls under the 61st section of the patent act, and should be specified. But if he meant that the invention was not a patentable subject—i. e., did not come within the description of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof not known or used before the application" for the patent as required by the 24th section—such a defense is authorized by the general pleadings, because the bill of complaint necessarily imports that the patentee has invented a patentable subject. Assuming, therefore, that he meant the latter, the remaining question is whether the improvement claimed by the complainant is an improvement in "any new and useful art." The patentee, in the specification of his letters patent, describes his invention as relating to a pavement composed of stone blocks, which are made in the form of parallelopipeds, and the surfaces of which are so prepared that the blocks, when placed together, will form close joints in the direction parallel with the sides of the streets or in a longitudinal direction, while the joints running transversely to the street remain open at the top, and thereby a pavement is obtained which offers a good foothold for the draft animals, and at the same time a smooth surface for the wheels passing over the same. The edges of the blocks adjacent to the transverse open joints are to be chamfered off so as to insure a good foothold for the draft animals. To exhibit its superiority over other forms of stone pavement, he further states that if a street is paved with truncated pyramids; as used in the Russ or Belgian pavement, close joints are formed at the surface of the pavement, both in a longitudinal and transverse direction, and said surface offers no foothold to the draft animals passing over the same; but by placing a series of blocks together, as exhibited in Fig. 2 of this reissue, close joints are formed in a longitudinal direction, and open joints in a transverse direction, and a stone pavement is obtained which offers a firm foothold to the draft animals, while it presents a comparatively smooth surface to the wheels of vehicles passing over it, and at the same time each block is firmly retained in position by the adjoining blocks, without requiring any intermediate layers of stone or other material. Such an improvement in the mode of constructing a stone pavement is a patentable invention,

and must be held to be new in the absence of proof to the contrary from the defendant, and it is doubtless useful in the sense in which that term is used in the act, to what degree or extent is wholly unimportant, as it is not a question in the case. Let there be a decree for the complainant for an injunction and an account.

[For other cases involving this patent, see Guidet v. Brooklyn, Case No. 5,858; Id., 105 U. S. 550; Guidet v. Palmer, Case No. 5,859.]

Case No. 5,858.

GUIDET v. BROOKLYN.

[3 Ban. & A. 291;[1] 13 O. G. 773.]

Circuit Court, E. D. New York. May 15, 1878.[2]

PATENTS—NOVELTY.

Letters patent No. 58,407, dated October 2, 1866, granted to Charles Guidet for Belgian pavement: *Held*, to be invalid for want of novelty.

[See note at end of case.]

[This was a bill in equity by Charles Guidet for the alleged infringement of reissued letters patent No. 4,106, granted to the complainant, August 23, 1870, the original patent having been dated January 12, 1869.]

G. Harding and W. H. Field, for complainant.

G. Gifford, W. C. De Witt, and W. C. Witter, for defendant.

BLATCHFORD, Circuit Judge. I think the evidence shows that the pavements which were laid down in Rochester and Buffalo, prior to the date of the plaintiff's alleged invention of what is covered by the claim of his patent, contained the substance and principle of the pavements laid down by the defendant, and alleged to infringe such claim, as respects all the points of such infringement. Whatever difference there is, is one of degree, finish and quality of stone, and not of structure or principle of arrangement, either as respects the stone blocks themselves or the pavement composed of them. The bill is dismissed with costs.

[NOTE. The syllabus of this case states that patent No. 58,407, granted October 2, 1866, is void for want of novelty. From the decree dismissing the bill an appeal was taken to the supreme court. The transcript of record filed in the office of the clerk of the supreme court contains a copy of Judge Blatchford's opinion, given above, and also shows, by the decree and other papers filed, that the suit was for the infringement of reissued letters patent No. 4,106, granted August 23, 1870, to Charles Guidet, original patent having been granted January 12, 1869. The decree dismissing the bill was affirmed, Mr. Chief Justice Waite delivering the opinion, upon the ground that the evidence shows clearly that pavements made of blocks of stone, broken into the form of parallelopipeds, and set on edge with the ends parallel to the street and the other sides across it, were in use long before the day of Guidet's invention. He simply carried forward the old idea, doing what had substantially been done before, but with better results. The change was only in degree, and, consequently, not patentable. Hence it was held that the reissued patent could not be sustained. 105 U. S. 550.]

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

[2] [Affirmed in 105 U. S. 550.]

Case No. 5,859.

GUIDET v. PALMER et al.

[10 Blatchf. 217; 6 Fish. Pat. Cas. 82.][1]

Circuit Court, E. D. New York. Nov. 19, 1872.

PATENTS — VALIDITY — PUBLIC ACQUIESCENCE—LAPSE OF TIME—PRESUMPTIONS—PROVISIONAL INJUNCTION.

1. Mere lapse of time is not sufficient to show public acquiescence in a patent; but the acquiescence must be attended with circumstances indicating that such acquiescence would not have occurred if any fair doubt had existed as to the validity of the patent.

2. The plaintiff had a patent for a pavement, and had been employed to lay some fourteen miles of it by the authorities of the cities of New York and Brooklyn, during the past four years. No other acquiescence was shown: *Held*, that that was insufficient to raise a presumption in favor of the validity of the patent.

[Cited in Corbin Cabinet Lock Co. v. Yale & Towne Manuf'g Co., 58 Fed. 565.]

3. Facts stated, which warranted the refusal of a provisional injunction to restrain the infringement of a patent, where the public interest was concerned.

Motion for preliminary injunction. Suit brought [by Charles Guidet against Lorin Palmer and others, composing the department of city works of the city of Brooklyn], upon letters patent [No. 85,814], for an "improvement in pavements," granted to complainant [Jan. 12, 1869], and reissued to him, August 23, 1870 [No. 4,106]. The circumstances of the case, and the nature of the questions involved, sufficiently appear in the opinion of the court.

George Harding and Benjamin F. Tracy, for plaintiff.

William C. De Witt, for defendants.

BENEDICT, District Judge. This case comes before me upon a motion which has been treated by counsel on both sides as a motion for a temporary injunction to restrain the department of city works of the city of Brooklyn, from executing, on behalf of the city of Brooklyn, a contract for repaving Henry street in accordance with certain specifications on file in the office of the department, which contract the department has advertised as open for proposals. A pavement laid in accordance with such specifications will, as the plaintiff insists, be an infringe-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and the opinion are from 10 Blatchf. 217, and the statement is from 6 Fish. Pat. Cas. 82.]

ment upon a patent issued to him, and known as reissue No. 4,106, granted August 23d, 1870.

The rules by which the courts of the United States are governed in applications of this class are well settled, and need not be re-stated here. The first question arising upon such a motion, where, as in this case, the patent in question has never been adjudged valid in any action, is, whether the plaintiff shows such a public acquiescence in his claim as raises a presumption in favor of the validity of his patent. The bill avers an undisturbed possession, use, and enjoyment of the exclusive privileges described in the patent, and the affidavits show that the plaintiff has been employed to lay some fourteen miles of his pavement in the cities of New York and Brooklyn, during the past four years. No other instances of a recognition of his claim are stated, nor have any licenses to use the plaintiff's pavement been granted by him, it being his plan to derive advantage from his patent by laying his pavement himself, as he is prepared to do. In determining whether these facts are sufficient to show such a public recognition of the plaintiff's claim, as the law demands, it is to be considered, that mere lapse of time is not sufficient. The acquiescence in the patent must be attended with circumstances indicating that such acquiescence would not have occurred, if any fair doubt had existed as to the validity of the patent. The nature of this plaintiff's invention, and the circumstances under which he has been employed to lay it down, become, therefore, important; and it is to be noticed, that the patent is for a heavy stone pavement, required only on the great thoroughfares of large cities. No private persons can be supposed to have had occasion to consider the plaintiff's claim. Of the cities likely to use such a pavement, so far as the papers before me show, none have dealt with the plaintiff except New York and Brooklyn, and, in those cities, the plaintiff's employment has occurred within the past four years. Under how many contracts with those cities the pavement has been laid, is not stated, nor whether, in the instances referred to, the plaintiff obtained the contracts by private award, or as the sole, or a competing, bidder for contracts publicly advertised. The price paid to the plaintiff exceeds, by some thirty-four per cent., the price at which other parties have offered to lay down the pavement called for by the specifications here in question. I am to say, therefore, whether the fact that persons in authority in the cities of New York and Brooklyn, during the past four years, have, in these instances, employed the plaintiff, at his price, to lay his pavement, warrants the conclusion that the validity of his patent is free from reasonable doubt. To my mind, such action of the authorities of these two cities, within the period referred to, does not lead to such a conclusion, and is wholly insufficient to raise a presumption in favor of the validity of the patent. For aught that appears, the plaintiff was the only bidder in the cases where he was employed, or he may then have been the lowest bidder, or the necessities of the department may then have been such as to make his employment a necessity, without any reference to his patent; and, even if his claim had, in these instances, been distinctly recognized by the authorities, that would not work as an estoppel on the city, nor require me to presume that the validity of the patent is free from doubt. The absence of facts sufficient to raise that presumption, in this case, must be held fatal to the present application.

Furthermore, it appears that Henry street can be paved, under bids received for the proposed contract, at a price less, by some $8,000, than the price charged by the plaintiff for his pavement; and specifications laid before me by the plaintiff, on this motion, contain a provision, whereby the contractors for Henry street will be liable to save the city harmless from any claim of the plaintiff arising out of the laying of the pavement proposed. It is manifest, therefore, that, if the injunction now asked for be granted, the city will be compelled to pay for the Henry street pavement some $8,000 more than it can be procured for under the contract proposed, while, if the injunction be denied, no loss will come either to the plaintiff or the city, because the city of Brooklyn is always to be found, and will always be able to respond to the plaintiff in any damages which he may become entitled to claim by reason of any infringement of his patent, while the contractors must, in turn, respond to the city for any sum so recovered. Such a result of an injunction is sufficient to require its refusal, in a case like this, where the public interest is concerned. The motion is, therefore, denied.

[For other cases involving this patent, see note to Guidet v. Barber, Case No. 5,857.]

Case No. 5,860.

In re GUILD.

[1 Woodb. & M. 29.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

BANKRUPTCY—COSTS ON APPEAL.

1. If creditors object to the discharge of a bankrupt, and obtain a verdict against it in the district court, and on appeal here a verdict is rendered for the bankrupt, on new evidence, filed in a new examination and disclosure allowed to him on leave, costs are not allowed to either party.

[Cited in Re Holgate, Case No. 6,601.]

2. In such cases, usually, it is equitable to give costs on each verdict to the prevailing party in each; but not to the party last recovering, unless it was on the same evidence, and unless he was able to pay costs, if losing the verdict.

[Cited in Re George, Case No. 5,326.]

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

The bankrupt in this case [Moses Guild]

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

moves for costs to be allowed him against Earle, a creditor, who had opposed his discharge. It appeared, that in the district court, on a trial of the facts in issue, relating to his discharge, a verdict was returned against Guild; but on appeal here and another trial had, he was discharged. The motion was for costs in both trials.

C. M. Ellis, for bankrupt.
Mr. Bradley, for creditor.

WOODBURY, Circuit Justice. By the 25th rule of the district court for Massachusetts, in cases of costs in bankruptcy, it is provided that they are to be paid "according as the court shall finally award and direct in each particular case—taking into consideration all the circumstances and equities thereof." The power to be exercised in this case is, therefore, very broad; but should be regulated, in some respects, by what is deemed equitable elsewhere under like circumstances and systems. In England, costs are very seldom to be paid by a bankrupt. Eden, Bankr. 461. Probably the practice rests there on his supposed inability, after a surrender of his effects, to discharge any considerable amount of costs. Here, by our rules, also, he is not named expressly as one of the persons liable in certain events to pay costs. It seems to me, therefore, that he should not, as a matter of course, be subjected to pay costs where an issue is found against him, but only in extreme cases of negligence or fraud, or other injurious misbehavior, and then with much caution, if he is really a bankrupt. But as to creditors, the rule is less stringent, as they are able to pay costs, and are named twice in the rules as subject to costs. And in England, a creditor failing to establish an objection to the discharge of a bankrupt, is generally taxed with costs. Mont. Bankr. 358.

What, then, are the peculiarities in this case, which render it equitable to give or withhold costs, either as to the bankrupt or creditors? It appears, that the issue below, after a full hearing, was found against the bankrupt, and for the creditor. Now, on that finding alone, costs would often go against the bankrupt. But the verdict was reversed in this court. If the first finding had been reversed on the last trial on like evidence and explanations, the last finding would be proof, of some strength, that the first verdict was erroneous, and consequently that the bankrupt, so far from being liable in the first case, should be entitled to costs in both cases against the creditor objecting to his discharge. Such is the claim set up by the present motion. But, at the same time, the case shows, that there was strong probable cause at the first trial for the creditor to object to the bankrupt's discharge. The explanations by him had then been very general and imperfect as to a large amount of property; and in the interval, before the second trial, he obtained leave to make new explanations, and to furnish new evidence in favor of his discharge that was very material. It appears, further, that the case was contested as doubtful at the last trial, even after the new explanations and evidence. Hence, I think, there is no equity in allowing him costs on the first trial, and I exonerate him from liability to pay costs in that case, only on the grounds of his general exemption from liability except in extreme cases, coupled with the circumstance, that the last finding in his favor rebuts, on the whole, any designed or corrupt concealment of property, or any fraud in making such imperfect disclosures and proof as were offered by him in the court below on the first trial.

In respect to the trial in this court, where a verdict was returned in favor of the bankrupt, costs would be allowed of course in his favor, and against the creditor, if there had been no kind of misconduct on his part, which naturally induced the creditor to object to his discharge. 1 Rose, 376, in case of the Bank of Scotland, cited in 1 Mont. Bankr. 358. But here there had been an omission to disclose very material explanations and facts. He had, also, been indulged in a new examination, and on terms as to costs, to be afterwards settled. It had become necessary for him to ask indulgence to make new explanations, by having a new and fuller examination. Beside this, important circumstances were introduced at the second trial, which had before been overlooked or suppressed. The whole of this amounted to such misconduct on his part, as in England would probably have prevented the allowance of costs, even on the dismission of a petition praying a stay of a certificate of bankruptcy. Note in Rose, before cited. The whole case, likewise, as tried in this court, having, as before suggested, been one to the last moment very questionable on the merits; and the course of the bankrupt, in not going into more explanatory details, having been procrastinating and reluctant, and in the management of his estate, of doubtful fairness, I think, that the cost since incurred has, in an equitable view, resulted quite as much or more from his own misbehavior, than from any thing culpable in the course pursued by his creditors. Consequently, if no costs in either trial are allowed, either to the bankrupt or the creditors, they will be left in a condition not apparently contrary to equity. Such was the conclusion in Alfonso v. U. S. [Case No. 188].

We are the more confirmed in the justice of this conclusion, as it accords not only with what seems equitable, but with the legal course in some states, in analogous cases. Thus, in New Hampshire, on a review, though the verdict be different from what it was on the first trial, the costs in that trial are not disturbed, either by allowing them to the party now recovering, or by paying back to him what has been collected from him. Where a cause is open to be tried on

new testimony, letting the costs follow the verdict, as it may be in each trial, is not inequitable, and would lead to much the same result in the present case, as that we propose. The only difference would be where the amounts by the different trials were not alike. But even then, if here, those on the last trial were granted, the bankrupt might not equitably be entitled to claim the balance, as his new examination, by which he has been enabled to prevail on the last trial, was granted on terms, which ought probably to cover all the excess. Again, if the balance should, in this or any other case, happen to be in favor of the creditor, requiring a bankrupt to pay that balance might subject him to much inconvenience, amidst his destitution and embarrassments.

It is better, then, as a general principle, in the case of bankrupts, that the rule should be, where the verdicts are different ways, neither should pay costs, than that each should pay them, where he is the unsuccessful party. And the more especially is it just, when the first verdict was against the bankrupt, and the last one is for him on new evidence, which he has been allowed to furnish by a new disclosure, that the bankrupt should not be allowed to profit by this, so as to tax the creditors for what, in the first case, was the consequence of his own fault, and, in the last case, the consequence of a favor granted to him only on terms, and which terms may well be a limitation of his obtaining costs thereby. In the common pleas, in England, if a new trial has been granted, and the verdict is the same way, though costs of both are allowed, yet they are not to the party recovering the last verdict, where he lost the first one. Tidd, Pr. "New Trial"; 1 East, 111, 114, note; 1 H. Bl. 641; Lickbarrow v. Mason, 6 Term R. 131; Brown v. Clarke, 12 Mees. & W. 25; 1 Dowl. & L. 409. Under all the circumstances of the present case, then, and considering the pecuniary wants of bankrupts, the just, best, and least embarrassing rule is, for neither party to pay costs. Motion refused.

GUILD (SAWIN v.). See Case No. 12,391.

GUILD (WOODMAN PEBBLING MACH. Co. v.). See Case No. 17,981.

Case No. 5,861.

GUILLOU v. FONTAIN.

[32 Leg. Int. 362; 21 Int. Rev. Rec. 348; 2 Am. Law T. Rep. (N. S.) 502; 1 N. Y. Wkly. Dig. 269; 8 Chi. Leg. News, 25; 23 Pittsb. Leg. J. 33; 7 Leg. Gaz. 321.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 4, 1875.

FOREIGN ATTACHMENT IN PENNSYLVANIA.

The federal courts in this district have the power to issue writs of foreign attachment according to the laws of the state of Pennsylvania.

[In error to the district court of the United States for the Eastern district of Pennsylvania.]

[2] [This was an action of debt, commenced by the plaintiff in error [Guillou, assignee in bankruptcy of Charles Vezin], in June, 1873, by process of foreign attachment, in the district court of the United States, for the Eastern district of Pennsylvania. The attachment was served on July 1, 1873, upon the property of the defendant in error, in the hands of the garnishees, as endorsed upon the writ; and on the 23d day of July following, the plaintiff filed his declaration, setting forth that on the 18th day of October, A. D. 1869, a limited partnership was formed, under the provisions of the acts of assembly of the commonwealth of Pennsylvania in such case made and provided, between the said defendant, as special partner, and Charles Vezin, as general partner, for the transaction of the business of the importation and sale of gloves, under the firm name of Chas. Vezin and Co., for a term to commence on the 18th day of October, A. D. 1869, and to terminate on the 18th day of October, A. D. 1872, the amount of the capital contributed by the said special partner being fifty thousand dollars in cash. That afterwards, at various specified times, and while the said limited partnership continued and was in existence, portions of said capital so contributed by said special partner to the common stock of said firm were withdrawn by and paid to the said defendant as and in the name of interest on the said capital, amounting together to the sum of five thousand seven hundred and eighty-two seventy-seven one-hundredth dollars. That by such payment of interest to the said special partner, the defendant in this action, the original capital has been reduced by an amount of five thousand seven hundred and eighty-two seventy-seven one-hundredth dollars. That afterwards, to wit, on the 29th day of November, A. D. 1871, the said Charles Vezin, trading as Charles Vezin and Co., was, on creditors' petitions filed in the said court, duly adjudicated a bankrupt; and this plaintiff was afterwards, to wit, on the 22d day of January, A. D. 1872, duly appointed assignee, and an assignment by instrument of writing under the hand of Edwin T. Chase, Esq., one of the registers in bankruptcy of said court, bearing date January 22, A. D. 1872 (here shown to the court), assigning and conveying to this plaintiff all the estate real and personal of the said Charles Vezin, bankrupt, with all his deeds, books, and papers relating thereto, was duly made and delivered to this plaintiff. By means and reason whereof an action has accrued to this plaintiff to demand, and have of and from the said defendant the sum of five thousand seven hundred and eighty-two seventy-seven one-hundredth dollars above demanded. The defendant [William Fontain] failing to appear, a motion was made at the third term of the court ensuing the execution of the writ, for judgment for such default,

[1] [Reprinted from 32 Leg. Int. 362, by permission. 1 N. Y. Wkly. Dig. 269, contains only a partial report.]

[2] [From 21 Int. Rev. Rec. 348.]

which was refused; the court, Cadwalader, J., saying, "that if the jurisdiction which the first section of the act of congress of the 2d of March, A. D. 1867 [14 Stat. 517], to establish a uniform system of bankruptcy throughout the United States, confers upon this court, of suits for collection of assets of the bankrupt, enables the assignee in bankruptcy to proceed as plaintiff in such a suit by way of foreign attachment, in any case the demand of the present plaintiff, as appears from his declaration, is not such as to sustain a proceeding by foreign attachment." The case was then removed to the circuit court upon a writ of error; the assignment of error being the refusal of the court below to grant judgment against the defendant for default of an appearance.][2]

J. C. Longstreth, for plaintiff.

McKENNAN, Circuit Judge. As far back as 1809, at least, it was the practice in the federal courts, in this district, to issue writs of foreign attachment according to the laws of the state of Pennsylvania. Fisher v. Consequa [Case No. 4,816], and Toland v. Sprague, 12 Pet. [37 U. S.] 300, are proofs of the existence of this practice. In some, only, of the United States circuits did this practice prevail, while in others its legality was denied. But in Toland v. Sprague a majority of the supreme court held, that, in the courts of the United States, the right to attach property to compel the appearance of persons can be properly used only in cases in which such persons are amenable to the process of the court, in personam. The question was certainly presented in the case, and although it was not necessary to the judgment to decide it, as was held by the four dissenting judges, yet the case must be considered as deciding that the federal courts, under the law as it then stood, had no authority to proceed by foreign attachment, as it was regulated by the laws of Pennsylvania. But, doubtless, in view of this decision, the act of congress of June 6, 1872, greatly enlarges the authority of the federal courts in the employment of remedies. By the sixth section of that act (Rev. St. § 915), it is enacted that "in common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof." The federal courts in this state are thus invested with undoubted authority to proceed against non-resident persons by attachment of their property, as may be done by the laws of the state. Was the plaintiff, then, entitled to an allowance of his motion for judgment against the defendant for default of appearance? It was denied by the court below, for the reason that the cause of action, as appears from the declaration, would not support a proceeding by foreign attachment. The action is debt, and the declaration avers that a limited partnership was formed between Charles Vezin and the defendant, to the capital of which the defendant contributed $50,000 as a special partner; that during the continuance of the term, at certain times stated, the defendant withdrew from the capital contributed by him specific sums of money, as and in the name of interest on the said capital, whereby the original capital was reduced by the amounts so received by him; and the demand is to recover from the defendant these several sums as received by him in violation of law.

The suit is brought to enforce a statutory liability claimed to be imposed upon the special partner, under the circumstances stated in the declaration. By the statute (Brightly's Purd. Dig. 937), it is enacted "that if it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital with interest." The liability to restore is complete, if the payments to a special partner reduces the capital, and he may be compelled to repay the deficiency in his share of the capital thus caused by an appropriate action.

Is a foreign attachment then an allowable method in Pennsylvania of commencing such action? Any demand arising ex contractu which is susceptible of ascertainment by a definite standard may be the foundation of a foreign attachment. In Strock v. Little, 9 Wright [45 Pa. St.] 418, Mr. Justice Woodward, says: "Under our statutes, which being remedial, are to be liberally construed, foreign attachments may issue in all actions, sounding in contract, where the plaintiff can swear to the amount claimed, or the court, upon a rule to show cause of action, can get at the sum in controversy with sufficient accuracy to fix the amount of bail which the defendant is to give to dissolve the attachment." This is the settled construction of the Pennsylvania statutes, and the demand in this case is fully within it. It is a determinate and certain sum, received under circumstances, stated in the declaration, which imposed upon the defendant a statutory obligation to repay it, and for the recovery of which an action ex contractu is the appropriate remedy. The motion of the plaintiff in error for judgment for default of appearance by the defendant ought, therefore, to have been granted, and the cause is remanded to the district court, with directions to allow said motion and to enter judgment accordingly.

[2] [From 21 Int. Rev. Rec. 348.]

Case No. 5,862.

GUINET'S CASE.

[See Case No. 15,270.]

GUINET (UNITED STATES v.). See Case No. 15,270.

Case No. 5,863.

GUION v. M'CULLOUGH et al.

[Brunner, Col. Cas. 1;[1] 2 Mart. N. C. 78.]

Circuit Court, D. North Carolina. June, 1791.

WRIT IN ACTION OF DEBT—FORM.

A writ in debt "that they answer unto him of a plea of debt of one thousand dollars," *held* good on a demurrer to a plea in abatement that the writ did not run in the debet and detinet.

Action on a bond. The writ was filled up, "that they answer unto him of a plea of debt of one thousand dollars" (the penalty of the bond): plea in abatement because the writ did not run in the usual form, "in the debet and detinet": general demurrer.

Mr. Graham, for plaintiff.

Mr. Slade, for defendants.

IREDELL, Circuit Justice, and SITGREAVES, District Judge, notwithstanding the pointed authority produced by Slade, overruled the plea. They held the writ was deemed sufficient because it agreed with the ac etiam clauses inserted in actions of debt in the bill of Middlesex, according to the English practice. Page v. Farmer, 2 Murph. 288, 1 N. C. Repos. 278.

Case No. 5,864.

The GUISBOROUGH.

[8 Ben. 407.][2]

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

LIEN—ADVANCES—FOREIGN VESSEL—MORTGAGEES IN POSSESSION.

P., the owner of a British vessel, having agreed to sell her to American citizens, executed and delivered mortgages to them, it being part of the agreement that the title to her should remain in P. The mortgagees took possession of her and ran her, one of them becoming master, and obtained advances for her, in the port where they resided, from M., who had knowledge of the true relation of the mortgagees to the vessel: *Held*, that the vessel in the hands of the mortgagees was not a foreign vessel, and that M., had no lien upon her for his advances.

[Cited in The Rapid Transit, 11 Fed. 330.]

This was a libel by the firm of B. F. Metcalf & Co., of New York City, to recover the amount of advances made by them for the brig Guisborough, on the order of her master, Enos, in the port of New York, in the year 1873. The libellants alleged that the brig was a British vessel and that the advances were made on her credit. Joseph S. Enos and Edward F. Cullen appeared as claimants of the vessel and, by their answer, alleged that, at the time the advances were made, she was the property of the claimants, who were residents of New York and American citizens, and that the advances were not a lien on the brig, but were furnished on the personal credit of the claimants. It appeared in evidence, that, in 1872, one Potter, a British subject, agreed to sell the vessel to the claimants and two others, also American citizens and residents of Brooklyn. In pursuance of this agreement they paid Potter the price, and he gave them mortgages on the vessel to more than her full value, and a power of attorney to control the vessel, it being a part of the agreement that the title to the brig, "as a British vessel, was to stand in Potter." The mortgagees then took possession of the vessel. Enos was appointed master of her, and they ran the vessel as they pleased. The other parties afterwards transferred their interest to the present claimants, and, while the vessel was running in this way, the libellants made the advances which they sought to recover.

R. D. Benedict and W. W. Goodrich, for libellants.

Beebe, Wilcox & Hobbs, for claimants.

BLATCHFORD, District Judge. Although the legal, registered title to the vessel was in a British owner, yet the mortgagees were the equitable and beneficial owners of the vessel and were mortgagees in possession, exercising ownership over the vessel and dealing with her as their own property. They paid to Potter the money which they paid to him, not as lenders of such money on mortgage, but as purchasers of the vessel. They paid him $4,800 as the purchase price of the vessel, while the amounts which purported to be secured by the five mortgages made a total sum of $9,000. They took the mortgages to protect their interests as purchasers. In their hands, as purchasers of her, she was not a foreign vessel. It is clear, from the evidence of Benjamin F. Metcalf, one of the libellants, that he was aware, from his first knowledge of the connection of the mortgagees with the vessel, that they had taken the control of her as owners and purchasers, and had taken the mortgages, not as evidences of money loaned, but to protect their interest as purchasers and their control as owners, and that their possession of the vessel was a possession of ownership, and not to secure money loaned. Under these circumstances, no lien on the vessel arose out of any of the transactions of the libellants with the mortgagees or with the master of the vessel, and the libel must be dismissed, with costs.

Case No. 5,865.

GULICK'S EX'RS v. McIVER.

[3 Cranch, C. C. 650.][1]

Circuit Court, District of Columbia. Nov. Term, 1829.

BANKRUPTCY—AUTHORITY OF COMMISSIONERS—ACT OF 1800.

An assignee under the bankrupt law of 1800 [2 Stat. 19] cannot deny the authority of the

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

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

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

commissioners under whom he received the property of the bankrupt.

This suit was brought to recover a dividend of the property of Josiah Watson, a bankrupt, which had been declared by the commissioners. The defendant [Watson's assignee] demurred to the evidence; which, among other things, stated that Jonah Thompson, one of the commissioners under the bankrupt act of 1800, who declared the dividends, was himself a creditor of Watson.

Mr. Swann, for defendant, contended that Mr. Thompson was incompetent to act as a commissioner, by reason of his interest.

Mr. Taylor, contra. Mr. McIver cannot deny the authority of the commissioners under whom he has received the property of the bankrupt. He claims to hold under their assignment.

THE COURT (nem. con.) rendered judgment for the plaintiff on the demurrer.

Case No. 5,866.

GULLAT et al. v. TUCKER.

[2 Cranch, C. C. 33.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

PARTNERSHIP — LIABILITY FOR DEBTS OF COPARTNER.

A copartnership is not chargeable for goods sold to one of the partners for his separate use, although he ordered them to be charged to the firm, if the vendor knew, at the time of sale, that they were for the sole use of that partner.

Assumpsit, for balance of account. The defendant had charged the firm of Gullat & Scott, who were bakers, with groceries delivered to G. and originally charged to G. in the books of Tucker, but were got by G. and ordered by him to be charged to the partnership account.

THE COURT instructed the jury that, if they believed from the evidence that Tucker, at the time he sold and delivered the groceries to Gullat, knew that they were for his separate use, he had no right to charge them to the firm without the assent of Scott. It would be a collusion. Bond v. Gibson, 1 Camp. 185.

Case No. 5,867.

GUM v. EQUITABLE TRUST CO. et al.

[1 McCrary, 51.] [2]

Circuit Court, D. Iowa. Oct., 1873.

UNRECORDED DEED—POSSESSION—NOTICE — MISTAKE OF TRACT—ESTOPPEL—AGENCY —SALE AGENT.

1. Complainant purchased certain land from B. and took a conveyance which he neglected to place on record. B. subsequently made a mortgage to respondents upon other lands, and by mistake included in said mortgage the land previously sold to complainant. The respondents claimed the land under the mortgage. *Held*, that they were not bona fide purchasers without notice, since the complainant was in the actual open, notorious, adverse possession of the land when the mortgage was executed. Actual possession is constructive notice to all the world.

2. B., in order to obtain a loan of $3,000 from respondents, proposed to secure them by deed of trust on his home farm. In his application for the loan and in the appraisement which accompanied the same, the land which complainant had previously purchased from B. was by mistake included with the farm. The complainant was one of the appraisers of the land and signed the writter appraisement, supposing it related to the farm only, and ignorant of the fact that his own land was included. *Held*, that he was not estopped.

3. A mere appraiser of land, serving gratuitously for the benefit of others, without any interest of his own involved, is not to suffer by reason of an innocent mistake respecting the description of the land. Estoppel in such a case can proceed only upon the ground of fraud or gross negligence.

4. It is not always necessary that a sale agent should be known to his principal, or in any way recognized by him, in order to bind the latter. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent, to employ sale agents, and, when this is the case, the principal is bound by the acts of the sale agent whether the sale agent be known to him personally or not.

In equity.

J. C. Coad and Trimble & Carruthers, for plaintiff.

Brown & Dudley, for defendants.

LOVE, District Judge. This bill is brought to cancel a certain trust deed executed by William and Nancy Beard to said Jonathan Edwards, trustee, to secure the payment to said Edwards' co-defendant the sum of $3,000, so far as said trust deed embraces certain lands described in the bill and claimed as the property of this complainant. The evidence clearly shows that about the year 1865 William Beard, who was the father of Sarah E. Gum, the wife of this complainant, sold to said William Gum the following lands and tenements in Davis county, Iowa, viz.: The W. ½ of N. W. ¼ of section 8, and the S. W. ¼ of S. W. ¼ of section 5, in township 68, range 15; and that said William Beard about the same time gave to said Sarah E. forty acres of land adjoining the above described, as follows: The N. W. ¼ of the S. W. ¼ of section 8, same township and range. The sale to William Gum was a full and valuable consideration, which was paid by said Gum. Said William and Sarah E. Gum took possession of the land and made valuable improvements upon it. They have had the open uninterrupted and adverse occupancy of the land for about twelve years, from the year 1865 to the time of the bringing of the suit. They are illiterate and ignorant people. No conveyance was made to them of the land until the 17th day of April, 1865, when William Beard and wife executed separate deeds to them for the land in question;

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

[2] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

that through the negligence of these grantees, their deeds were not filed for record till August 26, 1876. It also appears that about the month of February, 1876, William Beard made application through the Davis County Loan Company, of which the managing members were F. C. Overton and Amos Steckel, to the defendant trust company, for a loan of $3,000; that said William Beard executed a deed of trust to secure the same to said Jonathan Edwards, as trustee for the company, which said deed of trust was delivered and duly recorded on the 30th day of March, 1876; that this deed of trust included, with some of said Beard's land, the above described land, which had been previously conveyed by Beard to this complainant and his wife. It further clearly appears from the evidence, that, so far as said Beard was concerned, the said land of the complainant and his wife was included in the deed of trust by inadvertence and mistake; that Beard did not intend to mortgage the complainant's land, or any part of it, to secure said loan, but intended and agreed to execute the mortgage upon his (Beard's) own land, being in part the land on which Beard lived. It further appears clearly by a great preponderance of evidence, that when said Overton, after the loan had been agreed upon, was at Beard's house for the purpose of having the deed of trust executed, Gum, the complainant, was present; that both Gum and Beard cautioned Overton not to get the mortgage on Gum's land; that Overton called for Gum's deeds; that Gum went to his own house and returned with the two deeds from Beard to him and his wife; that he handed these two deeds to Overton; that Overton took them and compared the description, and assured Gum that his (Gum's) land was not included in the deed of trust; that neither Gum nor Beard or his wife could read or write; that the deed of trust was not read over to Beard and his wife, but that they executed and delivered the same to Overton, by whom it was taken away. Thus it appears that the property involved in this suit did not, at the time when William Beard conveyed it by way of mortgage to respondents, belong to him. It was then, in fact, as the evidence clearly and satisfactorily shows, the property of the complainant William Gum. Beard had sold it to Gum for a valuable consideration in 1865, and executed a formal conveyance on the 17th day of April, 1875. Beard, therefore, clearly had no title to the land when he conveyed it to respondents on the 29th of March, 1876. Upon what grounds, then, do the respondents claim title under Beard as against William Gum, the real owner at the time of the execution of the deed of trust or mortgage to Jonathan Edwards?

The respondents place their claim of title upon two grounds: 1st. That they are purchasers without notice for value under the complainant's grantor. 2d. That respondent is estopped by his own action as appraiser from now setting up his title as against the respondents. Both parties claim title under a common grantor, William Beard. The complainant's deed was first executed, but it was not filed for record until after the recording of the respondents' deed, when the respondents advanced their money and took Beard's mortgage to secure it. Beard was of record the apparent owner of the property. There was then no record of any conveyance from Beard to complainant. If this were all, the respondents would have a clear right to the property as against the unrecorded deed of the complainant. This is undoubtedly true, if it be found that Overton was not the respondents' agent in taking the conveyance. Overton had actual notice of the conveyance from Beard to Gum under which the latter claims—of this there can be no question upon the evidence. The proof that Gum, when Overton was at Beard's house to get the mortgage executed, exhibited his deed to Overton, leaves no doubt whatever that Overton had actual notice of Gum's deed. But respondents insist that Overton was not their agent, and they offer testimony to show that they had no agent in Iowa to effect loans for them. It would seem, if we are to credit their witnesses, that none of the middle men were acting for the respondents, or for their interest. These middle men were not the principals in the transaction. They were agents for some one, and if the testimony of respondents' witnesses be correct, they were acting as agents for Beard.

And from this, the conclusions follow that the respondent, a monied corporation, was engaged in the business of lending money in this distant state, not upon information furnished by their own agents, but upon information supplied to them by the agents of the borrowers. In other words, the borrowers' agents made abstracts of title, examined and valued the land, and gave information of the character and responsibility of the borrowers, and upon the information so furnished the corporation based their loans! It must be admitted that this is somewhat extraordinary, if true. But if it be conceded, then it follows that the respondents had no actual notice of Gum's prior deed; but had defendants not constructive notice of the existence of that conveyance? The complainant was at the time of the execution of the mortgage in the actual open and notorious adverse possession of the land; he had occupied the land for a period of eleven or twelve years. Now, under the settled law of Iowa, this possession of the complainants was equivalent to constructive notice of the recording of the deed; actual possession is constructive notice to all the world. It matters not where the grantees resided, they were affected by this constructive notice of the complainant's title, the same as if the deed had been recorded. If complainant's deed had been recorded, it will not be claimed that respondents, wherever they resided, could have ob-

tained a title from Beard, so as to have postponed the complainant. The same rule applies in case of constructive notice resulting from the actual adverse possession of the complainants. Putting, therefore, entirely out of view the matter of actual notice to Overton or any other agent of the respondents, their claim of title as innocent purchasers for value without notice cannot be sustained. The respondents' principal reliance, however, would seem to be upon the ground of estoppel. Let us consider the facts upon which that defense rests. William Beard, in order to obtain a loan of $3,000 from the respondents, proposed to secure them by a deed of trust upon his home farm, or so much of it as might be required for that purpose. It is perfectly clear from the evidence that he had no purpose whatever to mortgage the complainant's land; but in the written and printed application which it became necessary for him to make in order to comply with the rules of the defendant company, he by mistake included the land involved in this suit, which he had previously conveyed to William Gum and Sarah E. Gum, his wife. Beard's application for the loan was made through F. C. Overton and Amos Steckel, loan agents in Bloomfield; the application was made by Beard upon a printed blank, filled up by the loan agents and signed by Beard, or by some one for him. It was necessary to have the land valued by two appraisers, which was evidenced by their signatures upon another page of the same printed blank. It appears that Beard had signed the application, and that one Luther Hunt had subscribed the appraisement, and that afterwards William Gum, at the request of Beard, went to the office of Overton and Steckel to give his appraisement of the land.

It is perfectly clear from the evidence that Gum supposed and believed that he was to appraise Beard's homestead land. Beard told him what land he was to appraise, and pointed it out to him. Gum clearly had no thought that his own land or any part of it was to be included in the appraisement, but only the land of Beard, which the latter had shown him. Gum, with this understanding, went at Beard's request to Overton and Steckel's office to make the appraisement. Upon the face of the appraisement it appears that Gum signed it and swore to it, but Gum swears that neither the application nor appraisement was read to him, and that no oath was administered. He was an ignorant man, and could neither read nor write. There is very good reason to believe Gum's statement as to what happened at the loan agent's office when he went to appraise the land. But let us assume that the appraisement was signed by Gum, as it appears to be, and that both the application and appraisement were read over to him.

The application contained, as I have said, a description of the land by numbers, with a plat of the same. The description by numbers erroneously and by mistake included Gum's land, but the plat showed that Beard's land, and not Gum's, was the land intended to be appraised and mortgaged. Beard in the application makes the following answers: "11. By whom are the premises occupied? Ans. By applicant." "14. In whom is the title vested? Ans. Applicant." The appraisers appear upon the face of the paper, after giving their valuation of the land, to affirm (the same being in printed form) as follows: "We also state that the condition of the property is truly set forth in the applicant's statement in said application, and that his answers to the questions contained therein are true, as we verily believe." This is what constitutes the estoppel asserted by the respondents. They insist that the appraisement is an essential part of the application, and that they took the loan on the faith of it, believing what the appraisers affirmed under oath to be true, and that they would not have parted with their money but for their belief in the truth of the statement contained in the appraisement. How far the lenders of money rely upon the statements of appraisers respecting the borrower's title to land, is certainly very questionable. Appraisers are generally understood to be freeholders of the neighborhood, called to place a value upon the land. They are not supposed to be acquainted with land titles. Anything they are made to answer in an indirect way to printed questions as to their belief in the truth of what the borrower affirms respecting his title, would, we should think, have very little weight with the lender in determining the matter of title. The lender must surely rest his determination as to the title upon more certain, direct and reliable information than the answers which he thus obtains from persons called upon to make a gratuitous valuation of the land. What the appraiser may affirm in regard to the title must be regarded, I think, as a mere make-weight by the lender in making up his judgment. But, however this may be, it is perfectly clear upon the evidence in this case, that William Gum, if the application was read to him, and if he did affirm that Beard occupied and owned the land described by numbers in that application, was laboring under a mistake of fact. Gum believed that he was speaking with reference to the land which Beard had pointed out to him, and which he came to appraise. The mistake was perfectly innocent on his part. He was a volunteer, acting at the request of, and for the accommodation of other parties; his services were gratuitous; he had no interest whatever in the transaction. Now it would certainly strike any one as a severe measure of justice if a mere appraiser of land, serving gratuitously for the benefit of others, without any interest whatever of his own involved, should lose his homestead and his farm in consequence of an innocent mistake respecting the description of the

land. If in such a case the appraiser's own land should be inadvertently described by numbers in the borrower's application, and the appraiser should innocently and without the least semblance of fraud, by mere mistake, untruly affirm that the borrower is in possession of the land, and has good title to it, is he to be visited with the heavy penalty of the loss of his farm and his homestead? Certainly nothing but fraud or gross negligence on the part of the appraiser could justify so severe a judgment against him. Indeed, estoppel must proceed upon the ground of fraud or gross negligence. These elements lie at the very foundation of the doctrine of estoppel. It is at best a severe doctrine that closes the mouth of a party and denies him the right to assert the truth respecting his title. That there was any fraud on the part of Gum in this appraisement will not be asserted. It is clear that he acted in perfect good faith.

There is no evidence to warrant the imputation of gross negligence on the part of Gum. Admitting that the application and appraisement were read to him, and that he did not, from the reading of the numbers, see that his own land was described, it does by no means follow that he can be charged with negligence. There are many careful men who do not retain in memory the numbers describing their land, and who would not, from the mere reading of the numbers, know that their own land was described. If any one doubts, this, let him make the experiment upon himself, and I think he will be convinced. Moreover, Gum came to the loan office to appraise Beard's land, which had been pointed out to him. Beard and Overton both told him the land was Beard's. They described the land in the application, and Overton, as we assume, read it to him. Had he any reason to suppose that they had inserted wrong numbers in the paper read to him, and, least of all, that they had inserted numbers describing his (Gum's) own land? What Gum came for was to value, not describe the land or verify the description. To have scrutinized the numbers, to have verified them by comparison with deeds and records, or with the plat which accompanied the application, would indeed have been acts of extraordinary care and diligence. But the failure to do these acts falls very far short of gross negligence. There is another circumstance which goes very far to relieve Gum of the imputation of gross negligence, or, indeed, of any negligence at all. There was a plat attached to the application; indeed, it was on the same sheet of paper. This plat had been made by Luther Hunt. Upon this plat the land which was to be appraised was marked out. If Gum, who could neither read nor write, is to be strictly bound by the printed and written parts of the application, by much greater reason is he entitled to the benefit of any inference justly to be drawn from the fact apparent on the face of the plat in question. Was it not perfectly natural for Gum, an illiterate man, to look to the plat as truly showing the land to be appraised, and for that reason give less attention to the numbers as read off to him? Is there one man in a thousand, who, if called upon to appraise land, and to affirm anything respecting it, would not rely rather upon the plat of the land exhibited to him by the parties interested for a true description, than upon the numbers of the land? Now upon the plat thus exhibited to Gum, the land marked for appraisement was Beard's land, not Gum's. What the plat showed corresponded with what Gum had been informed by Beard respecting the land to be appraised.

It may doubtless be said that the respondents have been mistaken and injured by the false and negligent statements of the complainant, and that the complainant ought to be responsible for the consequences; that if one of two innocent parties must suffer, the damages should fall upon him who causes the injury, though ever so innocently, etc. But in the first place the respondents cannot fairly trace their injury to the appraisement. They must look behind it to Overton, who was really the party whose misconduct led to the whole difficulty. I am satisfied, from the evidence, that all the parties except Overton labored under an honest mistake as to the land conveyed. It would seem that even Overton labored under the same mistake until the deeds of the complainant and his wife were exhibited to him at Beard's house. Now Overton was certainly not the complainant's agent. Whether he acted as agent for Beard or for the respondents may admit of question. If I found it necessary to decide this question, I would be compelled to say that, in my opinion, the preponderance of evidence tends to establish the fact that Overton was, as to that transaction, acting for the respondents. It is not necessary that a sub-agent should be known to his principal, or in any way recognized by his principal, in order to bind the latter. The innumerable sub-agents of railroads and other corporations are entirely unknown to their principals. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the sub-agent, although the latter may never be known or recognized by the principal. It would be difficult to affirm that, from the very nature of the business committed to Underwood and Clark, they did not have implied power to employ sub-agents in effecting loans for respondents.

It is not, however, necessary, in my view of this case, to determine whether or not the middle men in this case were, in fact, the agents of the respondents.

Lastly, if the respondents have received injury, they have a plain and adequate remedy. Beard is not insolvent, and he has not, it seems, conveyed the land which he intended to mortgage to respondents. The respondents

can undoubtedly file their bill to correct the mistake, and subject the land intended to be conveyed to the payment of their mortgage debt. Thus exact justice may be meted out to all parties. Decree for the complainant.

Case No. 5,868.

In re GUNIKE.

[4 N. B. R. 92 (Quarto, 23);[1] 2 Chi. Leg. News, 367; 1 Pac. Law Rep. No. 8, p. 3.]

District Court, N. D. Illinois. 1870.

BANKRUPTCY—DEATH OF BANKRUPT PENDING PROCEEDINGS—DISCHARGE.

Where a bankrupt died five months after filing petition, and his attorney asks for discharge on account of said death, *held*, that as the bankrupt had not taken the necessary oath in the 29th section prior to his decease, and the same being necessary to the granting of a discharge, that it could not be given.

This case was determined by the court upon the following state of facts: One Gunike applied in March, 1868, for the benefit of the bankrupt act [of 1867 (14 Stat. 517)], and filed his schedules. Warrants were issued, and the proceedings were all regular up to some time in July, 1868, when Gunike died. Since his death an assignee has been appointed and has made disposition of the assets, and the attorney of Gunike came in and asked the court for his discharge under the bankrupt law.

BLODGETT, District Judge. This discharge is asked under the last clause of section 12 of the bankrupt act, which reads as follows: "If the debtor dies after the issuing of the warrant, the proceedings may be continued, and concluded in like manner as if he had lived." It is contended on the part of the bankrupt, therefore, that, notwithstanding his death, a discharge from his debts should be granted; but, on examination of the 29th section, it will be found that "no discharge shall be granted to any bankrupt until he shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act, as a ground for withholding such discharge, or as invalidating such discharge, if granted." This oath never having been taken by the bankrupt prior to his decease, and that being a condition precedent to the granting of the discharge, I am of the opinion that the discharge cannot be granted. There is no authority in the court to grant the discharge, until this oath has been taken by the bankrupt himself. No person can take it for him. The language of the last clause of the 12th section, although very comprehensive, must, therefore, be taken as applying to such proceedings as may be taken by the assignee or other parties in settling the estate, as the making of dividends, etc.

[1] [Reprinted from 4 N. B. R. 92 (Quarto, 23), by permission.]

GUNN (PLANT v.). See Case No. 11,205.

Case No. 5,869.

GUNNEL v. DADE.

[1 Cranch, C. C. 427.][1]

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

SALE—RECOVERY OF PURCHASE MONEY—RETURN OF GOODS.

The plaintiff, to whom a negro has been sold, without title, cannot recover the purchase-money in an action for money had and received, without proof that he returned or offered to return the negro; nor if there was a bill of sale under seal with an express warranty of title.

This was an action for money had and received, for the price of a negro sold by the defendant to plaintiff, without title. The plaintiff, on the evening before the trial, gave notice to the defendant to produce a deed of trust including the negro in question. The affidavit of service stated the service on the defendant and his promise to produce the deed.

E. J. Lee, for plaintiff, under the 15th section of the judiciary act of 1789 (1 Stat. 82), moved the court for judgment by default in not producing it.

But THE COURT refused; because there was no affidavit that the deed was in possession of the defendant, and although the defendant promised to produce it, yet that was not sufficient; the presumption is that the deed is in the possession of the trustees, who are entitled to the possession: and because the notice ought to be of a motion to the court to require the defendant to produce the paper; and such an order of court must be served on the defendant, and disobeyed, before the court can give judgment by default.

Mr. Taylor and Noblet Herbert, for defendant, moved the court to instruct the jury, that the plaintiff cannot recover upon the warranty, in this action for money had and received; and cited Lindon v. Hooper, Cowp. 414; Power v. Wells, Id. 819; Stuart v. Wilkins, Doug. 18; Weston v. Downes, Id. 23; Towers v. Barrett, 1 Term R. 133; Fielder v. Starkin, 1 H. Bl. 17. They contended that an action for money had and received will not lie unless the consideration has totally failed; nor unless the plaintiff had returned or offered to return the negro to the defendant; nor if there was an express warranty of title by a written bill of sale.

E. J. Lee and Mr. Swann, contra, cited Moses v. Macferlan, 2 Burrows, 1005; Towers v. Barrett, 1 Term R. 133; Morgan's Essays, 143, 144; Astley v. Reynolds, 2 Strange, 915; 1 Esp. N. P.; Shove v. Webb, 1 Term R. 732; Straton v. Rastall, 2 Term R. 370; Power v. Wells, Cowp. 819; Weaver v. Bentley, 1 N. Y. T. R. [1 Caines] 47.

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

THE COURT (nem. con.) instructed the jury that the plaintiff cannot recover in this action unless they should be satisfied, by the evidence, that the plaintiff, before the suit brought, returned or offered to return the negro, or that the defendant had waived such return or offer. And that if the jury should be satisfied, &c., that the bill of sale contained a general warranty of the title under the seal of the defendant, the plaintiff could not recover in this case.

GUNTHER (SCHILLINGER v.). See Cases Nos. 12,456–12,458.

Case No. 5,870.

GUNTON et al. v. INGLE et al.

[4 Cranch, C. C. 438.] [1]

Circuit Court, District of Columbia. March Term, 1834.

PRIVATE CORPORATIONS — USURPATION OF OFFICE UNDER—INFORMATION IN NATURE OF QUO WARRANTO.

1. An information in the nature of a writ of quo warranto, may be sustained against a person usurping an office under a private corporation; but it is in the discretion of the court to grant it, or not.

2. The information must show that the office usurped is a corporate office. It must be a case in which the court would have power to impose a fine; a case in which the public is concerned, or in which the authority of the United States is contemned or abused.

3. Although an information has, in effect, become a civil proceeding, yet its form is criminal.

4. The information may be amended: and it seems, that the usurper may be amoved, and a mandamus granted to hold a new election.

[Cited in State v. Kearn, 17 R. I. 396, 22 Atl. 322, 1018.]

Upon affidavit filed, R. S. Coxe moved for a writ, in the nature of a quo warranto, against the defendants [Edward Ingle and others], to show by what authority they claim to hold the office of president and directors of "The Washington, Alexandria, and Georgetown Steam-Packet Company." The suit is brought [by W. Gunton and others] to try the validity of the election; the judges of the election not having been appointed by the president and directors, according to the provisions of the third and fourth sections of the charter. Davis' Laws D. C. 401.

Mr. Wallach, contra. It was the fault of the relators themselves, that judges were not appointed. They do not state that the new election was not authorized by the by-laws.

Mr. Coxe, in reply. If the president and directors have not done their duty, their neglect does not make the election valid.

THE COURT (THRUSTON, J., not voting,) ordered the writ to issue, returnable on the first Monday of March next. The court having permitted an information in the nature of a writ of quo warranto to be filed, the defendants filed a general demurrer.

Mr. Wallach, for defendants, contended, and objected, (1) That the information does not state that the right exercised by the defendants is to an office of a public nature. King v. Shepherd, 4 Term R. 381; Lord Bruce's Case, 2 Strange, 819; King v. Mein, 3 Term R. 596; Rex v. Dawbeny, 2 Strange, 1196. (2) That the affidavit is insufficient. (3) That the information is against divers persons for divers and distinct offices. Rex v. Warlow, 2 Maule & S. 75; Rex v. Barzey, 4 Maule & S. 253.

Mr. Carlisle, contra. The information, in this case, is copied from Jac. Law Dict. which does not show that it was a public corporation. Jac. Law Dict. tit. "Quo Warranto"; Com. v. Griffith, 2 Dall. [2 U. S.] 112. It is not necessary that it should be a public franchise. In England, a rule of court must be obtained to authorize the attorney-general to file an information. Whiteham v. Jokeham [2 W. Kel. 143] Hardw. Cas. Temp. 62; Lowther's Case, 2 Ld. Raym. 1409; Lowther's Case, 1 Strange, 637. But in this country, the court leaves it entirely to the attorney-general; and in all cases where the office is created by charter, an information lies. Ang. & A. Corp. 476, 478, 480; Com. v. Arrison, 15 Serg. & R. 127; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371; Com. v. Union Ins. Co., 5 Mass. 231; People v. Utica Ins. Co., 15 Johns. 358.

R. S. Coxe, on the same side. This is not now a question of discretion, whether the information shall be filed. It has been ordered, or received by the court; and the question is now upon the demurrer. It is not necessary to aver a charter, for a quo warranto lies to try the validity of a charter. The precedent in Rast. Ent. 540b, does not aver a charter. The affidavit on which the information was ordered, refers to the 4th section of the charter, &c. The information states that the defendant usurped the office of president of the Georgetown, Alexandria, and Washington Steam-Packet Company, (the corporate name.) The charter is a public act, and the court is bound to notice it. The writ of quo warranto was originally a criminal proceeding, but it has now become a mere civil remedy, and no more precision is required than in civil cases. It is not necessary to aver that it was the usurpation of a chartered right. In this country, there is no difference, in this respect, between a public and a private corporation. Case of Dartmouth College, 4 Wheat. [17 U. S.] 518; Smith v. Boucher, Hardw. Cas. Temp. 62; People v. Superior Court, 5 Wend. 120. As to the objection, that it is against several persons; the president and directors constitute the legislature of the corporation. They are chosen jointly. It is but one election. It is but one usurpation. If void as to one, it is void as to all.

Mr. Bradley, for defendants. Quo warranto will not lie for usurping the franchise of a

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

private corporation. This information is only warranted by the statute of Anne, and that applies only to municipal corporations, such as a city, a town, a borough, &c. Rex v. Nicholson, 1 Strange, 299; Rex v. Lewis, 2 Strange, 835; Ang. & A. Corp. 476. The New York case cited, is upon the New York statute, which is copied from the statute of Anne. The cases cited from Pennsylvania and Massachusetts, are not applicable, for they have no court of equity in which a remedy could be had. Where there is a court of equity, a remedy may be had by injunction. All the precedents state the rights usurped to be corporate rights, and that there was a charter. 6 Went. Pl. 62, &c.

Mr. Coxe, in reply. All the forms in Wentworth, are against private corporations.

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

CRANCH, Chief Judge. This is an information in the nature of a quo warranto, charging that the defendants use and exercise the office of president and directors of the Washington, Alexandria, and Georgetown Steam-Packet Company, without any warrant or lawful authority therefor, which said offices they have usurped, and still usurp to the great damage of the lawful authority of the United States. To this information the defendants demur, 1st. Because the offices, said to be usurped, are not averred to be offices of a public nature. 2d. Because the information is against divers persons, for divers and distinct offices. I am satisfied that an information may be sustained at the relation of a private person against a person usurping an office under a private corporation; that it is in the discretion of the court to allow, or to refuse to allow such an information to be filed. I am also of opinion that, in the present case, the information is defective in not showing that the offices exercised by the defendants, are corporate offices. They may be offices held under a company, or limited partnership assuming to itself the name of the Washington, Alexandria and Georgetown Steam-Packet Company. There was once a private association bearing that name; and, for any thing that appears to the contrary in this information, it may still exist, and be the company named therein. Every thing averred in the information may be true, and yet the court may have no authority to interfere by an information in the name of the United States. It must be a case in which the court would have power to impose a fine. It must be a case in which the public is concerned, or in which the authority of the United States is contemned or abused. For although an information in such cases has become, in effect, a civil proceeding, yet its form is criminal, and indicates that the cases in which it may be used, are such as directly or indirectly concern the public. But I think it is competent for the relator, with the leave of the court, to amend the information. If the information should be amended, and the court should be of opinion that the election of the defendants to the offices they claim was illegal, I think they may be amoved, and a mandamus awarded to the president and directors to hold a new election.

See, also, 2 Barn. & Adol. 485; 10 Johns. 496; Doug. 524.

Case No. 5,871.

GUPPE et al. v. BROWN.

[4 Dall. 410.]

Circuit Court, D. Pennsylvania. Oct. Term, 1805.

COMMISSION TO TAKE DEPOSITIONS—HOW EXECUTED.

[A commission issued to four persons jointly to take depositions in England cannot be validly executed by three of them; and depositions taken by three will be ruled out, on the objection of a party, although the two commissioners nominated by him participated.]

[See Banert v. Day, Case No. 836.]

A commission had issued to four commissioners, jointly, to take the depositions of witnesses in England. It was executed and returned by three of the commissioners only, two of whom, however, were of the defendant's nomination. At the trial of the cause, the defendant's counsel objected to the reading of the depositions; and cited 1 Bac. Abr. 202; 2 Inst. The plaintiffs' counsel observed, that the commission had not issued in the usual form; but insisted that as the defendant's commissioners had attended, the objection could not be maintained on his part.

Ingersoll & Tod, for plaintiffs.

Franklin & Dallas, for defendant.

BY THE COURT. The objection is fatal. The commissioners do not derive their authority from the parties, but from the court; and as it is a special authority, it must be strictly pursued. The power given to four, cannot be well executed by three, commissioners. The evidence overruled.

Case No. 5,872.

GURNEE v. BRUNSWICK.

[1 Hughes, 270;[1] 1 Va. Law J. 301.]

Circuit Court, E. D. Virginia. June, 1876.

REMOVAL OF CAUSES — ACT OF MARCH 3, 1875— "COURT" — "SUIT" — APPEAL FROM BOARD OF COUNTY SUPERVISORS—WHEN APPLICATION FOR REMOVAL MUST BE MADE.

1. The board of supervisors of the county, under the laws and constitution of Virginia, is not a court, and a petition by a creditor to the board, praying the allowance of his claim, is not a suit. But where an appeal is taken from the decision of the board to the county or circuit court, it then becomes a suit, and the jurisdiction of such court is original and not appellate.

2. To remove a cause from a state court to the circuit court of the United States, under the

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

act of March 3, 1875 [18 Stat. 470], application must be made at or before the first term at which the cause may be tried, i. e., when the cause is ready for trial, although the court and parties may not be ready to try it.

[Cited in Forrest v. Edwin Forrest Home, 1 Fed. 462; Wheeler v. Liverpool, L. & G. Ins. Co., 8 Fed. 198; Meyer v. Norton, 9 Fed. 435; Cramer v. Mack, 12 Fed. 804.]

[Cited in Phoenix Life Ins. Co. v. Saettel, 33 Ohio St. 282; Eldred v. Becker, 60 Wis. 45, 18 N. W. 643; Clark v. Child, 136 Mass. 347.]

3. Under the laws and practice of Virginia an appeal to the county or circuit court of the state from a decision of the board of supervisors, disallowing a claim against the county, is triable at the first term of the court after the appeal is taken, without pleadings, and an application to remove the cause to the United States court, under the act of March 3, 1875, must be made at that term; if made afterwards, and the removal is effected, the United States court is without jurisdiction, and the cause must be remanded.

[Followed in Blackwell v. Braun, 1 Fed. 352. Cited in Winberg v. Berkeley Co. Railway & Lumber Co., 29 Fed. 721.]

4. Quaere.—Whether subdivision 3 of section 639, Rev. St., allowing the removal of causes from the state to the United States courts, on the ground of prejudice and local influence, has been repealed by the act of March 3, 1875.

[Cited in Aldrich v. Crouch, 10 Fed. 307.]

Motion to remand the cause to the circuit court of Brunswick county.

Legh R. Page and J. A. Jones, in support of the motion.

Sheffey & Bumgardner and R. B. Davis, contra.

Before WAITE, Circuit Justice, and BOND, Circuit Judge.

WAITE, Circuit Justice. W. S. Gurnee, the plaintiff, a citizen of the state of New York, being the alleged owner of certain bonds of the county of Brunswick, Virginia, on which there was a large amount of interest due and unpaid, on the 9th of January, 1875, presented his account for the same to the board of supervisors of the county, stating each item and the nature thereof separately and specifically, and praying for an order of the board directing the treasurer of the county to pay him the amount then due; that a levy might be made on the county to raise the sum necessary to pay off the debt, and generally, that such orders might be made and acts done as should be necessary to secure to him the payment of the sum then due, and such further sums as might thereafter accrue to be due and payable as interest upon the bonds, at the times, for the amounts, and in the manner set forth on the face of the bonds. His account was disallowed by the board, and he thereupon, in due time, appealed to the county court of the county. At the proper time the clerk of the board made his report to the court as follows: "I respectfully report to your honor, that, on the 9th January, 1875, W. S. Gurnee presented to the board of supervisors of said county a petition (a copy of which is hereto annexed, marked 'A,' and made part of this return) asking for the payment of a certain sum of money claimed to be due by the county of Brunswick to said Gurnee as interest in arrear and unpaid upon certain bonds of said county, executed to the Norfolk and Great Western Railroad Company, and the said board wholly disallowed the claim of the petitioner and refused the prayer of the petition. The said W. S. Gurnee, by his counsel, appealed and gave the notice, and executed the bond required by law, which notice and bond are herewith returned." This report, with the petition, notice, and bond, were duly filed in the county court, where, on the 22d February, 1875, by consent of parties it was ordered that the case be removed to the circuit court of the county. The files were thereupon transferred to the circuit court, and, on the 21st April, 1875, an order was there entered continuing the cause until the next term. At another term, and on the 18th October, 1875, the following entry was made: "On motion of the defendant, and for reasons appearing to the court, it is ordered that this cause be continued at the costs of the defendant until the next term." In vacation, and previous to a term to be held in April, 1876, on motion of Gurnee, an order was made for the issue of a subpoena duces tecum for the appearance of a witness to testify in his behalf and the production of certain books and papers at the court-house, April 15th, 1876. Depositions were taken by Gurnee on the 10th, 11th, and 12th March, 1875, and filed in the cause. No pleadings in form were filed by either party, and no orders were made by the court, or so far as appears, asked for in that behalf. On the 13th April, 1876, Gurnee filed his petition and bond under sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470), for the removal of the cause to this court, upon the ground of the citizenship of the parties. The record does not show that any action was taken by the state court upon this petition, but the papers were in due time filed and the cause docketed in this court. The defendant, on the 19th May, 1876, moved that the cause be remanded to the circuit court of the county. The questions now presented for consideration arise upon this motion. Two objections are made to the jurisdiction of this court, to wit: 1. That the case was not removable because it came into the circuit court of the county upon appeal and for review of the decision of another judicial tribunal. 2. That the petition for removal was not filed in the state court before or at the term at which the cause could have been first tried.

These objections will be considered in their order:

1. Did the circuit court of the county take jurisdiction of the cause under its appellate or original jurisdiction? Article 2 of the constitution of Virginia is as follows: "The legislative, executive, and judiciary depart-

ments shall be separate and distinct, so that neither exercise the powers properly belonging to the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided." Article 6 relates to the judiciary department, and provides (section 1) that, "there shall be a supreme court of appeals, circuit courts, and county courts," and corporation or hustings courts in cities and towns (section 14); and (section 22) that all judges shall be commissioned by the governor. Article 7 relates to county organizations. Each county is to be divided (section 2) into townships, and each township is required, among other things, to elect annually one supervisor. These supervisors of the townships are constituted a board of supervisors of the county, and are required to assemble at the court-house on the first Monday in December in each year, and audit the accounts of the county, examine the books of the assessors, regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the various townships, and perform such other duties as shall be prescribed by law. By section 5 it is made the duty of the general assembly, at its first session, after the adoption of the constitution, to pass such laws as should be necessary to give effect to the provisions of this article. The legislation, under this power, so far as it is important to the consideration of this case, is found in title 16, c. 46, Code Va. 1873, p. 438, et seq. By this it is provided (section 2) that the supervisors of the several townships in each county shall constitute the board of supervisors of the county, and that they may sue or be sued in relation to all matters connected with their duties as such board. They may have a seal. Section 7. They are empowered to examine, settle, and allow all accounts chargeable against the county, and, when so settled, to issue warrants therefor as provided by law. Section 6, subd. 2. No person can maintain an action against a county upon any claim or demand, other than a county order, until he shall have first presented it to the board of supervisors for allowance. Section 14. No account can be allowed by the board unless the same shall be made out in separate items, and the nature of each item specifically stated. It is made the duty of the attorney of the commonwealth, who is a county officer elected by the people (Const. art. 7, § 1), to represent the county before the board. He is required to resist the allowance of any claim which is unjust, or not before the board in proper form, or upon proper proof, or which for any other reason ought not to be allowed. When a claim has been allowed which is improper or unjust, he may appeal from the decision of the board to the county court. Section 10. If a claim is disallowed, the person presenting it may appeal to the county court by causing a written notice of the appeal to be served on the clerk of such board, within thirty days of the time of making the decision, and executing a bond in the form prescribed. Section 12. When the appeal is taken, the clerk of the board is required immediately to give notice thereof to the attorney for the commonwealth, and to make a brief return of the proceedings in the case before the board, with the decision thereon, and file the same, together with the bond and all the papers in the case in his possession, with the clerk of such court; and the appeal is to be entered, tried, and determined the same as appeals of right from an order of a county court in a controversy concerning a will. Section 13.

The determination of the board of supervisors disallowing a claim is final, and a perpetual bar to any action in any court founded upon such claim, unless the appeal shall be taken, or unless the board shall consent to the institution and maintenance of such an action. If judgment is recovered against the county upon the appeal, it is made the duty of the board of supervisors, to provide for the same in the next county levy, and for the treasurer to pay the money, when collected, to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher. If payment shall not be made before the first day of December next succeeding the levy, execution may issue upon the judgment, but not before. Section 15. From this recital it is apparent that the board of supervisors is not a court, and that the proceedings there are not a suit. In the Sewing-Machine Cases, 18 Wall. [85 U. S.] 585, a suit was defined to be, "Any proceeding in a court of justice, in which a plaintiff pursues his remedy to recover a right or claim." The board are the representatives of the people elected to supervise the business of the county, which has been, by law, committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. A part of their duties is to "examine, settle, and allow accounts," chargeable against the county, and when settled, to issue warrants and levy taxes for the payment. They are the officers charged by law with the duty of auditing claims. Demand of payment must be made on them; they alone represent the county for that purpose. When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing, they do not act judicially. They simply recognize the claim as valid against the county, and allow it, or they reject it. They render no judgment and issue no execution. Their duty is to direct payment of the accounts by the proper officer, and to provide him with the necessary means for that purpose by taxation. When they have made their allowance, the account has become liquidated, and may be sued without further demand. All these duties are purely administrative, and the proceeding by which their performance is enforced partakes

in no respect whatever of the character of a suit. There are no parties, save the claimant and the board; the board occupy one side, and the claimant the other. It is true the attorney for the commonwealth is required to represent the county, and resist improper allowances, but in this he appears rather as the legal adviser of the board than as the manager of the cause of a litigant. Apply another test. The act of congress provides for the removal, under certain circumstances, of any suit of a civil nature, at law or in equity, pending in any state court. If the board were a court, and the proceeding before them a suit, the case could have been removed while pending before the appeal. But the right of such removal, we think, will hardly be claimed, for the obvious reason that the relief asked of the board is administrative only, and not judicial. They were asked to pay, not to enforce payment. If, however, the board disallow the claim, and refuse to provide for its payment, judicial action becomes necessary. For this an appeal is given to the courts—not an appeal from one court to another, but to a court from the executive. By the appeal a suit is commenced, and thereafter the proceeding is judicial. The notice to the clerk is equivalent to a summons and service in ordinary actions. Under the appeal the case does not come up for review, but for original adjudication. All previous to the appeal was preliminary to the commencement of the suit.

There is nothing in the form of the commencement which makes the proceeding anything else than a suit. The form of commencing actions is always within the control of the legislature. It is "due process of law" within the meaning of the constitution of the United States, if there is lawful notice to appear, and time and opportunity to answer and defend. The form of the notice is not important, if there is notice in fact. The states may prescribe the form of a remedy in their own courts for every case. Here a demand is required before a suit can be commenced. There is nothing unusual or inequitable in this. It is no more than providing that contracts of the counties for the payment of money are contracts to pay after demand actually made in the manner required by law. Upon such contracts demand must always be made before suit is brought. The provision further in this case is, that after refusal to pay upon demand, suit shall be commenced in a certain form or not at all. This is certainly within the power of the legislature, so far as it relates to proceedings in the tribunals of the state. From this it is apparent that the case, at the time of the removal, was pending in the state court under its original and not under its appellate jurisdiction, and that the first ground urged in support of this motion is not sustainable.

2d. Was the application for the removal made in time? The right of removal is a statutory right. To support the jurisdiction of this court, therefore, the plaintiff must bring himself strictly within the provisions of the statute. The law requires that the petition for removal shall be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." A cause cannot be tried until in some form an issue has been made up for trial. The pleadings or statements necessary to make the issue are regulated by the practice in the court where the trial is to be had. As soon as the issue is made up, the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal to be in time must be made before or at this term.

This case is one to be "entered, tried, and determined, the same as appeals of right from an order of the county court in a controversy concerning a will." In such cases, the first duty of the court is to summon the persons interested to appear on a certain day, and, when they have been summoned or have otherwise appeared as parties, to proceed and hear the motion for probate. If any person interested asks it, the court must order a trial by jury to ascertain whether the paper produced is the will of the deceident, but if no such trial be asked the court must proceed without to decide the question of probate. Code 1873, c. 118, §§ 29, 31, 32. A summons from the court was not necessary in this case, even if it would have been otherwise required, because the record shows that the parties appeared in the county court on the 22d of February, and consented to a removal to the circuit court of the county. An appeal of right in a controversy concerning a will, carries a cause into court as upon a motion of probate. By analogy, then, this cause stood in the circuit court of the state upon its removal there, as upon a motion for judgment and notice served. Such a motion is authorized by the Code of Virginia in cases where a person is entitled to recover money by action on any contract. Code 1873, c. 164, § 6. And an established practice exists in the courts in reference to such proceedings. Before every term of a circuit court in Virginia, the clerk is required by law to make out a "docket of the following cases, to wit: First, cases of the commonwealth; second, motions and actions, in the order in which the notices of motion were filed, or in which the proceedings at rules in the action were terminated," and this docket is "to be called, and the cases for trial disposed of for the term, in that order, except that the court may, for good cause, take up any case out of its turn." Code 1873, c. 173, § 1. No provision is made for pleadings in motions for probate upon appeal or in motions for judgment, and none is necessary. The form of the proceeding is such as to require the plaintiff to make out his case by proof, whether the defendant appears to de-

fend or not. No judgment can be taken by default. Nothing is confessed by a failure to plead. The case stands from the time it comes into court as it would if a declaration had been filed and the general issue pleaded. The itemized account, with the specific statement of the nature of each item, presented to the board and sent to the court upon the appeal, constitute all the pleadings necessary to put the case in a condition for trial. The circumstances of a case may be such as to make it desirable that issues should be presented more specific than those which come up in this form. If so, the court may order accordingly, either upon its own motion or that of the parties. Such issues may simplify the trial when it is had, but there may be a trial without them. For all the purposes of the present inquiry, such orders for specific issues may be likened to amendments to pleadings after issue has once been joined. They change to some extent the character of the trial to be had, but the court could have proceeded without them.

This case was placed upon the docket which the clerk was required to make, at the April term, 1875, and also at the October term of the same year. It certainly must have been in a condition for trial, according to the practice of the court at the October term, for the record shows a continuance then upon the motion of the defendant at its costs. This condition would not have been imposed unless the plaintiff had a right to insist upon a trial if the court did not otherwise direct. From this the conclusion follows, that the application for removal was not presented in time, and consequently that this court has no jurisdiction of the case. It is said that a further application will be made to the state court for a removal under the third subdivision of section 639, Rev. St., on the ground of prejudice and local influence, and we are asked to decide now whether, since the act of 1875, this part of that section is in force. The point is not made upon the record, and for that reason we must decline its consideration. It cannot now be determined so as to bind the parties. An order may be entered remanding the cause to the circuit court of the county for such further proceedings as may be proper in the premises.

Case No. 5,873.

In re GURNEY.

[7 Biss. 414; 15 N. B. R. 373; 9 Chi. Leg. News, 255; 4 Law & Eq. Rep. 28.] [1]

Circuit Court, E. D. Wisconsin. April 4, 1877.

UNRECORDED BILL OF SALE — SECRET LIEN — RIGHTS OF ASSIGNEE — ASSIGNEE REPRESENTS CREDITORS.

1. Where a bill of sale of personal property is made, and the vendee leases the same to the vendor, with a clause in the contract of lease by which the bankrupt agrees to buy the property back at a fixed price, both bill of sale and lease being unrecorded, the transaction is, in effect, a mortgage.

[Cited in Lane v. Innes, 43 Minn. 141, 45 N. W. 5.]

2. Such an agreement is a secret lien, and a fraud on the rights of creditors.

3. The adjudication of bankruptcy is equivalent to a judgment and levy, and the assignee has the same right to have such a transaction nullified as a judgment creditor would have.

[Cited in Re Werner, Case No. 17,416.]

4. An assignee not only represents and stands in place of the bankrupt, but he also represents the creditors. He has a stronger right than the bankrupt. He can contest claims and rights to property which the bankrupt cannot contest.

[Cited in Cady v. Whaling, Case No. 2,285; Lloyd v. Hoo Lue, Id. 8,432; Platt v. Preston, Id. 11,219; Adams v. Merchants' Nat. Bank, 2 Fed. 180.]

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

[In bankruptcy. In the matter of Thomas C. Gurney.]

Ordway & Newland, for petitioner.

John J. Orton, for assignee.

DRUMMOND, Circuit Judge. This is a controversy concerning the right of property in an engine, boiler and some fixtures which were in possession of the bankrupt under the following circumstances: A man by the name of Hanchett appears to have loaned the bankrupt money, taking a bill of sale of the property, and the bankrupt taking back something in the nature of a lease, and agreeing to pay a certain sum for the use of the property; this was a secret arrangement between the bankrupt and Hanchett. There was no change of possession; it remained with the bankrupt, and there was no registry either of the bill of sale or the lease. It was, therefore, a secret lien or claim upon the property in possession of the bankrupt, of which he was the apparent owner, and so unknown to other parties who might deal with him. There is no doubt that this contract was good, as between the bankrupt and Hanchett. There was a clause in the contract of lease, by which the bankrupt agreed to buy the property back at a fixed price. This was, then, in effect a mortgage of the property to secure a loan made by Hanchett to the bankrupt, unrecorded and unknown to his other creditors. This was invalid under the law of Wisconsin as to creditors. If, then, a creditor had attached the property under such circumstances, as the property of the bankrupt, he could undoubtedly have held it. If an execution had issued upon a judgment against the bankrupt, and been levied upon the property as his, it would also have held it.

But it is claimed that when the party became bankrupt, and a deed was made to his assignee, the assignee took no other right of property than he himself possessed; and as it

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 28, contains only a partial report.]

was a good title as between the parties, it would be as against the assignee. In other words, if it be true in law and in fact, that the assignee merely stands in the place of the bankrupt to all intents and purposes, then of course this secret arrangement made between Hanchett and the bankrupt, would be valid. But is it true, that an assignee stands precisely in the place of the bankrupt as to creditors? It seems clear he does not. He has a stronger right than the bankrupt. He can contest claims and rights to property, which the bankrupt cannot contest. That is the meaning of the statute which declares, that all property disposed of in fraud of creditors, shall pass to the assignee. Now, this was a transfer of property in fraud of the creditors of the bankrupt. The district court decided (mainly upon the authority, as I understand, of a decision of Mr. Justice Hunt), that an assignee stands simply in the place of the bankrupt; that as the representative of the creditors he had no other right than the bankrupt, and therefore, upon a petition filed by Hanchett, this property was ordered to be delivered to him. If this decision of Mr. Justice Hunt is correct, then the decision of the district court was right; but I am of the opinion that it is not. It is contrary to the rule which has been always adopted in such cases in this circuit. It has been uniformly held that the assignee occupies a stronger position as the representative of creditors than the bankrupt; that he is the agent of the creditors, for the protection of their rights; that as to the property of the bankrupt, and as to actions against him, there is a suspension of all legal proceedings; that the assignee stands in the place of an attaching or an execution creditor, and that he has all their rights. Harvey v. Crane [Case No. 6,178]; and see Robinson v. Elliott, 22 Wall. [89 U. S.] 513.

Mr. Justice Hunt has asserted in the case referred to—In re Collins [Case No. 3,007]—that an assignee cannot impeach the validity of a mortgage which is void as against creditors, on account of the omission to record it, as required by the state laws. The ground upon which he puts it is, that the assignee cannot claim or hold the position of an attaching or an execution creditor; that he does not represent a judgment or execution creditor, and is not like a purchaser or mortgagee holding in good faith. The reason why an assignee stands as an attaching or judgment creditor, is stated in another case—Barker v. Barker's Assignee [Id. 986]—as follows: "Conceding that a general creditor, having no lien or judgment, could not file a bill to set aside, as void, an unrecorded conveyance of real estate, and to subject the property to the payment of his debts, does this rule apply to an assignee in bankruptcy? * * * It would appear that an adjudication in bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid." It is because all legal proceedings touching the property of the bankrupt, and as to suits against him, are suspended, that the adjudication of bankruptcy has this effect. "If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy to the payment of debts." "For after an adjudication of bankruptcy, no creditor, whose debt is provable, is allowed to prosecute to final judgment, any suit in law or in equity, until the question of the bankrupt's discharge shall be determined." This reasoning seems to me entirely satisfactory, and while there has been a difference of opinion upon this subject, I think the weight of authority is also in accordance with this last case, although it is the opinion of a circuit judge.

We have the opinion of another judge of the supreme court of the United States, Mr. Justice Strong, adverse to that of Mr. Justice Hunt, in a case very recently decided. Miller v. Jones [Case No. 9,576]. That was a case where it was held that if it were treated as an unrecorded mortgage of the property, it was valid, on the ground of possession in the mortgagee before the proceedings in bankruptcy were instituted. In the case at bar there was no change of possession. The bankrupt remained in possession of the property up to the time of the proceedings in bankruptcy.

"No one doubts," says Mr. Justice Strong, "that in this case Kaufmann & Hawk might have actually delivered the chattels to Jones as a security for the debt due him." If in this case we are now considering, the bankrupt had delivered the property to Hanchett instead of retaining it himself, it would have occupied an entirely different position. Mr. Justice Strong continues, "And had they done so, the pledge would have been good, even as against creditors. Until the delivery, creditors having recovered a judgment, might have levied upon the goods, and held them by right superior to that of a pledgee or mortgagee without possession, except so far as he might have been protected by the statute. And I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagors stands in the position of such creditors with equal rights (that is, judgment creditors), the adjudication of bankruptcy being equivalent to the recovery of a judgment and a levy."

Now, in view of this difference of opinion between two judges of the supreme court, and what I understand to be the general rule adopted by the district and circuit judges, and also in view of the one always adopted in this circuit, I must hold that this secret lien or mortgage, as against the creditors, represented by the assignee, was invalid and inoperative, and that Hanchett, the mort-

gagee, or vendee (whichever we may call him), had no right, upon a petition to the district court, to have this property surrendered to him, but that it belongs to the general creditors of the bankrupt. Therefore, I shall reverse the order of the district court. Of course, if Hanchett shall be advised that he has a valid claim to the property, he can have his rights litigated in a proper adversary proceeding against the assignee.

As to status of assignee in bankruptcy, see, also, Cady v. Whaling [Case No. 2,285].

Case No. 5,874.

GURNEY v. CROCKETT.

[Abb. Adm. 490.] [1]

District Court, S. D. New York. Feb., 1849.

MARITIME LIENS—PERSONAL SERVICES IN AND UPON VESSEL.

1. To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation directly by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea.[2]

[Cited in Cunningham v. Hall, Case No. 3,481; The Minna, 11 Fed. 759.]

2. A person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps and the like, cannot maintain a suit in admiralty to recover his compensation for such services. But if, in the course of such employment, a necessity arises that such keeper should get the ship under way, and navigate her from one anchorage to another, this is a maritime service for which libellant may recover in a court of admiralty.

[Cited in The May Queen, Case No. 9,360; The Geo. T. Kemp, Id. 5,341; The Trenton, 4 Fed. 662; The Erinagh, 7 Fed. 234; The Canada, Id. 122; The Maggie P., 32 Fed. 300; The Pulaski, 33 Fed. 384.]

This was a libel in personam by Jacob Gurney against William Crockett, to recover wages earned by the libellant as ship-keeper. The respondent, master of the schooner Excelsior, employed the libellant to unload her, as stevedore, on her arrival from Tampico. It appeared that the libellant was afterwards employed to watch and take care of the vessel during the temporary absence of the master from town. The agreement on the part of the libellant was, that he should have the schooner anchored at a proper place, with a sufficient length of chain payed out for her safety, and should visit her and see that she remained in good condition, and secure from harm, but that he need not remain on board at night. During the master's absence, and while the vessel was in charge of the libellant, she was moved from her anchorage, by advice of the resident physician, and moored some hundred yards from the shore. The libellant afterwards went out to her frequently, nearly every day, in his own boat or that of the schooner, and occasionally opened her hatches to air her, and pumped her out. The libellant's claim was chiefly contested on the ground that the court had not jurisdiction of such a demand.

J. B. Purroy, for libellant.

E. C. Benedict, for respondent.

BETTS, District Judge. Assuming the demand of the libellant to be well founded, he has, in my judgment, no remedy for it in a court of admiralty. The line of discrimination between cases which are maritime in their nature and those not so, is exceedingly dim and vague; and in the contested state of admiralty jurisdiction in respect to these border subjects, it is most desirable to keep within the limits of the clear powers of the court.

Manifestly not every contract in relation to maritime matters falls within the cognizance of maritime courts; and without attempting to define with strictness the terms within which the jurisdiction of admiralty courts is circumscribed, it may be safely asserted, that to impart a maritime character to a subject relating to personal services in vessels, it must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly by labor on the vessel, or in sustenance and relief of those conducting her operations at sea.

Under this general description, services are compensated as maritime which are not necessarily performed by mariners, or which may not in any way contribute to the benefit of a vessel in a nautical sense. Such are those of a cabin-boy, steward, chambermaid, and surgeon, on a voyage. These instances, however, carry the rule to its farthest extension, and are embraced within it because the services are performed mainly at sea, and have an immediate tendency to the preservation of the ship by promoting the health and efficiency of the ship's company. 2 Dod. 100; Shaw v. The Lethe [Case No. 12,721]; 3 Hagg. Adm. 376; Turner's Case [Case No. 14,248]; Hindman v. Shaw [Id. 6,514]; U. S. v. Thompson [Id. 16,492]; Macomber v. Thompson [Id. 8,919]; Trainer v. The Superior [Id. 14,136]. The case of engineers and firemen of steamships may appropriately be ranged under the head of maritime service, as their employment is necessary to the propulsion and navigation of the vessel.

When we recede from these classes to those of a more obscure claim to a maritime character, and even to such as can only be brought under the cognizance of the court by adopting the most enlarged interpretation of its powers, it would seem advisable for the subordinate tribunals, particularly in cases not subject to review, to confine their action within well authenticated limits.

A ship-keeper is ordinarily nothing more

[1] [Reported by Abbott Brothers.]

[2] Compare the somewhat analogous definition of a maritime service given in Cox v. Murray [Case No. 3,304], where it was decided that a libel could not be maintained for a breach of contract for services.

than a watchman having guard of a vessel anchored in harbor, or lying at a wharf or in a dock. In the present instance, the libellant did not remain on board by night or by day. His duty was to repair occasionally to the schooner, at her anchorage, to see to her safety, open her doors and hatches for ventilation, and to try her pump.

I advert to his casual resort to the vessel, not for the purpose of suggesting a distinction between this case and that of a keeper stationed on board, but to mark the description of services connected with his employment, and to ascertain whether they have the characteristics of maritime. Evidently these duties are in no respect nautical. They can be fully as well performed by shore laborers as by seamen; and the libellant, in this instance, it appears, was a common stevedore.

The services are distinct from the navigation of the vessel, ceasing when that commences; and have the same character and importance on board a hulk under keeping to be broken up or destroyed, as upon a vessel preparing or intended for sea. Sweeping and scrubbing the decks, throwing out and securing lines for her fastening, or keeping watch on the wharf against robbery, fire, or other injuries that might reach a vessel from the shore, are services rendered towards her preservation of like nature with those of ordinary keepers. No principle ever yet announced seems, however, to range services of that description under admiralty jurisdiction.

In the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, the inquiry and discussion as to the just character and extent of the admiralty jurisdiction, was very largely pressed by counsel, and the different members of the court who delivered opinions. The suit in that case was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents, running between New York and Providence, which was consumed by fire on the night of January 13, 1840, on Long Island Sound, about fifty miles from the former city, and probably without the jurisdiction of any state or county. The libel was dismissed by the district court pro formâ, and a decree entered accordingly. On appeal to the circuit court, this decree of dismissal was reversed, and a decree entered for the libellants.

Upon the review of the case before the supreme court, it is manifest that a strong portion of that high tribunal are disposed to restrain the admiralty jurisdiction within boundaries quite as narrow as the common-law courts in England have ever demanded; and the judgment of the court in that case, affirming the decree for the libellants, after renewed argument, seems to have been obtained only on the consideration that it was in character a case of tort at sea.

The result of the reasonings of the several judges demonstrates that the positions taken in the opinion delivering the judgment of the court were not sanctioned by a majority of the members concurring in the result. Two of the judges who declined assenting to the authority of the court over the subject as a matter of maritime contract, held, that cognizance could be taken of it as a tort, and on that ground united in supporting the decree.

So far as contract and service can characterize a subject and bring it under the jurisdiction of admiralty courts, those particulars are certainly not of less force in an undertaking for transportation of goods upon the high seas and the actual attempt to execute the agreement, than in one to act as keeper to a vessel lying in port. In my view of this claim, it is for mere labor, not for the reparation or fitment of the vessel, and in no respect maritime, as being nautical in its character, or distinguishable from ordinary services rendered in going to and from a vessel, or incidental to her probable employment at sea. I shall therefore disallow the claim entirely in this action.

It appears upon the testimony, that during the period the libellant was keeper of the vessel, he was directed by the health officer to move her from her anchorage farther out into the bay. He was compelled to get her under way and navigate her to the designated place. This was comparatively a small service, but it was in its nature maritime, and the libellant had a right to resort to this court to receive a proper compensation for it. As his remedy might have been equally perfect in a local court, costs would be denied him, but that the respondent has evinced a disposition to contest unreasonably and unnecessarily this demand, fair and just in itself. Had he proffered a reasonable reward for that service, no costs would have been adjudged against him. On the facts before me, I shall decree the libellant two dollars for that service, and summary costs, and dismiss the libel for the residue of the demand. Decree accordingly.

Case No. 5,875.

GURNEY et al. v. HOGE.

[6 Blatchf. 499.] [1]

Circuit Court, S. D. New York. June 30, 1869.

PLEADING—DEMURRER—SUFFICIENCY OF PLEAS.

1. Where, in an action of debt on a bond, in the penalty of £20,000 sterling, British money, conditioned for the payment of £10,000 sterling, with interest, the declaration claimed that the defendant should render to the plaintiff the £20,000, and averred that that sum was equivalent to the sum of $140,000 United States' money, and the defendant pleaded: (1) That neither the £20,000 sterling, nor the £10,000 sterling, with interest, was equivalent to $140,000 United States' money, and that the defendant was

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

not indebted to the plaintiff in the last-named sum; and (2) that the defendant did not owe, on an open or running account, for the payment of which the bond was given as collateral security, as much as $140,000: *Held*, on demurrer, that both of the pleas were bad.

2. The plaintiff was entitled to judgment on the demurrer, and was, under the 26th section of the act of September 24, 1789 (1 Stat. 87), entitled to recover from the defendant so much of the sum named in the condition of the bond, as was, according to equity, due to the plaintiff, and that, on the request of either party, such sum must be assessed by a jury; otherwise, it might be assessed by the court.

This was an action of debt, brought on a bond, under seal, executed by the defendant [William Hoge] on the 28th of January, 1859, to the plaintiffs [Samuel Gurney and others], in the penalty of £20,000 sterling, lawful money of the kingdom of Great Britain, conditioned for the payment to the plaintiffs, by the defendant, of the sum of £10,000 sterling, with interest, at the rate of five per cent. per annum, from the 21st of December, 1858, as follows: £2,500 sterling, and interest, on the 1st of May, 1860; £2,500 sterling, and interest, on the 1st of August, 1860; £2,500 sterling, and interest, on the 1st of October, 1860; and £2,500 sterling, and interest, on the 1st of December 1860. The declaration claimed that the defendant should render to the plaintiffs the sum of £20,000 sterling, lawful money of the kingdom of Great Britain, and averred that the said sum was equivalent and equal to the sum of $140,000, lawful money of the United States of America. It then averred the execution of the bond, and that the penalty thereof, £20,000 sterling, was equal and equivalent to the sum of $140,000 before demanded, and set forth, as a breach of the bond, the nonpayment of the said sum of $140,000, lawful money of the United States, and laid the plaintiff's damages at $100,000. The defendant pleaded two special pleas. The first plea claimed oyer of the bond and of its condition, and set them forth. It then averred, that the defendant did not owe, and ought not to be charged with, the sum of $140,000, lawful money of the United States, because the said sum of £20,000 sterling, of the money of the kingdom of Great Britain, was not equivalent or equal to the said sum of $140,000, lawful money of the United States, nor was the said sum of £10,000 sterling, with interest thereon, mentioned in the condition of said bond, equal or equivalent to the said sum of $140,000, lawful money of the United States, nor was he indebted to the plaintiffs in the said sum of $140,000, lawful money of the United States. The second plea averred, that the defendant ought not to be charged with the said alleged debt, because he said that the bond was given as collateral security for the payment of an open or running account for moneys which might be due and owing from the defendant to the plaintiffs, and that the said open or running account, with interest, did not amount to the said sum of $140,000, lawful money of the United States. To these pleas the plaintiffs demurred, assigning, as causes of demurrer, that, although the plaintiffs, in their declaration, had demanded from the defendant a sum certain, due by virtue of a bond under seal, yet the defendant had not, in and by his pleas, denied the bond to be his deed, nor in any manner shown himself to be discharged therefrom; and that the defendant should have pleaded that the bond was not his deed, and that he did not owe the debt demanded.

Edwin W. Stoughton and Clarence A. Seward, for plaintiffs.

William M. Evarts and Ashbel Green, for defendant.

BLATCHFORD, District Judge. The pleas are clearly bad. The first plea merely alleges that neither the sum named in the penalty of the bond, nor the sum named in the condition thereof, with interest, is equal or equivalent to the sum of $140,000, lawful money of the United States, and that the defendant is not indebted to the plaintiffs in the last-named sum. It was necessary for the plaintiffs, in order to make their pleading a correct one, to aver a sum in lawful money of the United States, to which the amount of the penalty expressed in the bond in foreign money was equal. But the first plea traverses no issuable fact which goes to the merits of the action. It does not deny the execution of the bond, or set up payment, or deny that the defendant owes the sum, in lawful money of the United States, to which the amount named in the condition of the bond is equivalent. It merely denies that the defendant owes, on the bond, as much as $140,000. The plea professes to set up a defence to the bond, but sets up none. The second plea merely avers, that the defendant does not owe, on the open or running account, for the payment of which the bond was given as collateral security, as much as $140,000.

There must be judgment for the plaintiffs on the demurrer. The 26th section of the act of September 24, 1789 (1 Stat. 87), provides, "that, in all causes brought before either of the courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or nonperformance shall appear by the default or confession of the defendant, or upon demurrer, the court before which the action is, shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And, when the sum for which judgment is rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury." In the present case, it is established, on this demurrer, and also by the confession of the defendant in his pleas, that the plaintiffs are entitled to recover from the defendant so much of the sum named in the condition of the bond as is, according to equity, due to

the plaintiffs. The sum for which judgment ought to be rendered is uncertain, because the sums named in the condition of the bond are expressed in foreign money, and judgment can be rendered only for so much money of the United States, and evidence is necessary to arrive at the proper amount in the latter money. Therefore, if either of the parties request, the sum due, according to equity, on the bond, that is, the sum for which judgment should be rendered, will be assessed by a jury. The rights of the defendant will be fully protected by such a proceeding, for he will have an opportunity, on such assessment, or on the ascertaining by the court, on evidence, of the amount for which judgment should be rendered, if no jury be requested, to raise all the questions he desires to raise as to the value of the pound sterling of Great Britain, named in the bond, in the money of the United States, and as to the true amount in such latter money for which judgment should be rendered, and as to whether the judgment should be rendered in one or another species of lawful money of the United States. So, also, the defendant will have an opportunity on such proceedings, to show how much is due on the account to secure which the bond was given. The course of practice, under the statute above cited, in a case like the present, is defined very clearly by Mr. Justice Washington, in the case of U. S. v. White [Case No. 16,686]. He says: "In cases, therefore, where the sum is uncertain, and a jury is requested by either party, the court may either direct a writ of inquiry, or may swear a jury immediately, to ascertain the sum justly due to the plaintiff. If the sum for which judgment should be rendered be not uncertain, the court, I conceive, is to ascertain it; if uncertain, and a jury be not requested, still the court may, in its discretion, ascertain it, or submit the matter to a jury. But, under no circumstances, can a final judgment be entered for the forfeiture, or penalty of the bond, in the cases mentioned in this section."

An interlocutory order will be entered, giving judgment for the plaintiffs on the demurrer to the pleas, and reciting, that it appears, upon such demurrer, that there has been a forfeiture by the defendant, under the writing obligatory named in the declaration, and a breach and nonperformance thereof, and of the condition thereof, by the defendant, and ordering that the plaintiffs are entitled to judgment herein, to recover from the defendant so much as shall be found to be due to them, according to equity, on said writing obligatory, according to the statute in such case made and provided. The appropriate further proceedings will then take place before the court or a jury, as the case may be, according to the statute.

GURNEY (UNITED STATES v.). See Case No. 15,271

Case No. 5,876.

The GUSTAVIA.

[Blatchf. & H. 189.] [1]

District Court, S. D. New York. Dec. 28, 1830.

MARITIME LIENS—SUPPLIES—LIEN OF A SHIP'S BROKER FOR SERVICES.

1. Impertinent and irrelevant allegations in an answer stricken out on motion.

2. Whether supplies furnished to a vessel are necessary is a conclusion of law, and the claimant, in answer to a libel by a material man, is not required to either admit or deny that the articles furnished were necessaries.

3. A master may hypothecate his vessel for necessaries in a foreign port, unless he has at his command funds or credit of his owner.

[Cited in The George T. Kemp, Case No. 5,341.]

4. A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel, and for advances for their wages.

[Cited in Seaver v. The Thales, Case No. 12,594; Scott v. The Morning Glory, Id. 12,542; The A. R. Dunlap, Id. 513; The Thames, 10 Fed. 848; Nippert v. The Williams, 39 Fed. 828.]

5. But he has no lien on the vessel for services in drawing a contract between the owner of horses shipped as part of her cargo and hostlers who accompanied her to take care of the horses.

6. Semble, that it is not necessary for a material man to show that the supplies furnished to a vessel by him were actually necessary for her. If they were furnished at the request of her master, they create a lien on her, although they exceed her actual need, provided there was no mala fides, or collusion on the part of the material man.

[Cited in Holcroft v. Halbert, 16 Ind. 258.]

In admiralty. This was a libel in rem by a ship's broker against the Gustavia, a foreign vessel. The master was under the necessity of shipping a new crew in New-York, and, not speaking English, employed the libellant to procure the crew, and make the necessary advances to them, and have them on board on a day specified. The expenses of shipping the crew, and drawing up the shipping articles, and advancing a month's wages, were laid at $254, and for these materials and necessaries the libel was brought. It appeared that the crew were presented to the master, at the vessel, according to the contract, but that he was not ready to sail, and, for some reason not put in proof, declined receiving them, and they dispersed. A few days afterwards the master called on the libellant, and demanded of him a fulfillment of his contract, and gave notice that if the men were not furnished by the next day he should employ another person to ship them. The libellant refusing to have anything more to do with the business, unless his advances were repaid and compensation was made for his services, the master obtained the crew by other means; whereupon the libellant instituted this suit. One of the items contained in the schedule an-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

nexed to the libel was for drawing a contract between the owner of the cargo and two hostlers who were to accompany the vessel to take care of some horses on board. Exceptions were taken to several allegations in the answer as impertinent and irrelevant, and to the answer itself, as neither admitting nor denying that the articles furnished were necessaries. The several allegations excepted to were stricken out on motion, after argument, without costs; but the court held, with reference to the exception to the answer itself, that the furnishing of all the articles was either admitted or denied, and that whether they were necessaries or not was a question of law. The exception was therefore disallowed.

Erastus C. Benedict, for libellant.
Thomas L. Ogden, for claimants.

BETTS, District Judge. By the well-settled principles of maritime law, a vessel is liable for necessaries furnished to her in a foreign port. The civil law gave a lien in such cases, without regard to the domicil of the owner; and the same rule substantially prevails in this state, though, in the case of domestic vessels, the remedy must be under the local law, and not in conformity to the general maritime law. The Robert Fulton [Case No. 11,890]; The General Smith, 4 Wheat. [17 U. S.] 438. By the term "necessaries," the law does not contemplate those things only which are indispensable to the safety of the vessel and her crew. But, whatever a prudent owner, if present, would be supposed to have authorized, the master may order, and the vessel will be held responsible for them. Webster v. Seekamp, 4 Barn. & Ald. 352. The necessity and propriety of shipping a crew in this case, at this port, are not questioned; nor is it denied that the services of the libellant were rendered in procuring them; but it is supposed that he has no remedy against the vessel for his demands. The contract has all the constituents of a maritime contract. It had respect to the equipment of a foreign vessel for sea-service, and may, accordingly, be prosecuted in this court, and carry with it the privileges appertaining to suits by material men. Nor can it be considered as made exclusively upon the responsibility of the master. He was not only a foreigner and a stranger to the libellant, but was wholly unknown in this port. No guarantee of the contract was asked or received, and the implication would, therefore, be exceedingly forcible, that the libellant did not intend to waive any security the law might afford him in respect to the matter of his undertaking.

The objection to the remedy against the vessel most relied upon is, that a case is not made out in which the master could have subjected the vessel to this claim by an express hypothecation. To enable him to exercise this power, it is supposed the proofs must show that he had no funds or credit, by means of which he could have satisfied the demand, and that, accordingly, it had become an act of extreme necessity for him to hypothecate the vessel. The objection also assumes, that a lien by implication can never arise, except in cases where the master might have given one directly. This court has heretofore had occasion to examine the point as to the power of a master to hypothecate a vessel, without its being shown that he had no funds of his own adequate to supply her wants. The conclusion arrived at was, that he might do so, unless he had means of the owner under his control, and that he was not bound to advance his own moneys. The William & Emmeline [Case No. 17,687]. Under this doctrine, it would be useless to inquire whether the master possessed funds of his own, out of which these expenses might have been satisfied, inasmuch as, if he had them, it was at his option whether to apply them to the use of the vessel or not. There is no evidence that he had any funds of the owner, or that the owner possessed any credit in New-York, to either of which resort might have been had to meet this demand; and, upon the evidence before me, I am satisfied that the owner had neither funds nor credit at New-York, within the control of the master, which might have supplied the means of discharging this claim without resorting to the ship.

But, it appears to me that the right of the libellant to a lien rests upon higher principles than these. The libellant is in the place of a material man, and possesses the privileges of one who has furnished a foreign vessel with necessary supplies. The law secures his claims by giving them a privilege against the ship itself. The moment the services were rendered, the privilege was perfected; and I am not aware that any thing inter alios acta, could, independent of the libellant's assent, divest that right without satisfaction of it. It does not appear to me the objection can be maintained in such cases, that the master was furnished with funds to meet all necessary disbursements, and that the only remedy is upon those funds, or against the master personally. Nor, in a case requiring the decision, should I be inclined to exact proofs from material men that the supplies furnished or services rendered by them, at the request of the master, were actually necessaries. This, from the nature of things, must be a matter left to the judgment of the master. All the cases recognise him as the agent of the owner, clothed, by implication of law, with the authority of the owner in respect to the employment and refitment of the vessel; and, unless the party dealing with him acts with a knowledge that the master transcends his powers, or colludes with him to defraud the owner, I am not aware of any principle which will deprive such party of compensation for appropriate supplies or services furnished or rendered on the requisition of the master, although they may exceed the actual need of

the vessel. Defects in his vessel, not discoverable by the most sagacious inspectors, may be known to the master, which it will be his duty to have repaired or provided against. For instance, in making his voyage, he may find that his spars are not properly set, or are disproportioned to the bulk of the vessel, so as to impair her sailing, or impede her working; or he may order additional seastores, sails, cordage, anchors, &c. Who but the master can decide upon the necessity of these things? It would be for the safety of navigation and general commerce to leave the subject to his discretion, as between the ship or her owners and material men.

The more simple rule, and the one most consonant, in my judgment, with the spirit of the maritime law, is, to hold the owner and his vessel responsible for all engagements of this character entered into bona fide with the master. The chance that owners will suffer under the operation of this rule, is vastly less than that material men will be wronged by exacting from them proof that the judgment of the master was correct, and that the supplies furnished were actually necessary for the vessel. All serious evil in the operation of the rule will be avoided by allowing the owner to prove the mala fides of the credit. The court has never met with a case where there was probable ground for supposing that labor, supplies and materials were furnished a master of a vessel to enable him to pervert them to his own benefit and to the fraud of his owners. When such a case is presented, the rules of the maritime law will supply an ample protection to the owner upon whom the fraud may be attempted. The vessel is liable for the libellant's demand for hiring the seamen, and for the advance of wages to them. But the residue of the account, for drawing a special agreement in relation to hostlers, and for hiring the hostlers, cannot be allowed. It may have been a convenience to the owner of the cargo to have that description of persons shipped to take care of his stock of horses; but, in that particular the vessel had no concern. It was not a service necessary to the safety, betterment or navigation of the vessel, and cannot be charged upon her. Let it be referred to the clerk to inquire and ascertain the value of the libellant's services in shipping the crew, and the amount of wages advanced to them, and to report thereon to the court.

Case No. 5,877.

GUSTINE v. RINGGOLD.

[4 Cranch, C. C. 191.] [1]

Circuit Court, District of Columbia. Dec. Term, 1831.

COMMISSION TO TAKE DEPOSITIONS—WITNESS LIVING WITHIN ONE HUNDRED MILES.

The court will not order a commission to issue under the Maryland law of 1773 (chapter 7, § 7), to take the deposition of a witness who resides out of the District of Columbia, but within one hundred miles of the place of trial, because this court has jurisdiction to compel the attendance of the witness.

Mr. Marbury moved for a commission to take the deposition of a witness residing within one hundred miles of this place, but out of this district, and relies upon the Maryland law of 1773 (chapter 7, § 7), which authorizes the court to issue such a commission when there are material and competent witnesses "residing or living out of this province," and contended that a witness, residing out of this district, was residing out of this province, within the meaning and spirit of the act. That the judiciary act of congress of 1789 [1 Stat. 73] does not authorize the sending of a subpoena beyond this district. That the marshal of Virginia has no right to serve an attachment from this court; nor is he bound to serve a subpoena; and if he refuses, this court cannot attach him.

THE COURT (THRUSTON, Circuit Judge, contra), refused to issue the commission, because it has jurisdiction to compel the attendance of a witness, if within one hundred miles; and, therefore, he does not reside out of this province, within the meaning of the act of Maryland, whose object was to obtain the testimony of a witness whose personal attendance could not be obtained. It may be difficult to compel the marshal of the district in which the witness may reside to do his duty; but this will not authorize the court to dispense with the personal attendance of the witness, and admit his deposition to be taken in chief, and to be used absolutely upon the trial.

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

Case No. 5,878.

GUSTY v. DIGGS.

[2 Cranch, C. C. 210.] [1]

Circuit Court, District of Columbia. June Term, 1820.

APPRENTICE—BINDING OUT.

An apprentice bound in Maryland, and brought into this district, may be discharged by the court, who will order him to be bound again by two justices of the peace, to a new master.

A negro boy, about eight years old, was brought into court by habeas corpus, in the custody of Edward Diggs. It appeared that he had been brought into the city of Washington from Maryland, where he had been bound to Diggs to be taught the business of a farmer. Diggs hired him here to a chimney-sweeper.

THE COURT discharged him from his indentures, and ordered him to be bound out again; and for that purpose directed him to be taken, in the custody of the marshal, before R. C. Weightman and William Hewitt, Esquires, two of the justices of the peace for Washington County.

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

GUTHRIE (COBLIDGE v.). See Case No. 3,185.

GUTHRIE (COOLIDGE v.). See Case No. 3,185.

Case No. 5,879.

GUTTA-PERCHA & RUBBER MANUF'G CO. v. GOODYEAR RUBBER CO. et al.

[3 Sawy. 542; 2 Ban. & A. 212.][1]

Circuit Court, D. California. Dec. 16, 1875.

INJUNCTION—PATENT—KNOWLEDGE AGAINST OPINION.

1. On an application for an injunction against the infringement of a patent, the bill should show, either that the validity of the patent has been established in an action at law, or that the right of the complainant under the patent has been recognized and acquiesced in by long unquestioned use and enjoyment, or other equivalent acts.

[Cited in American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 804; Wirt v. Hicks, 46 Fed. 71.]

2. Where a motion for an injunction against the infringement of a patent rests upon affidavits of dealers in the article, stating their opinion as to its composition, is opposed by counter-affidavits of the manufacturer of the article, who states the composition from his personal knowledge, other things being equal, the statements of the latter are the more reliable, and the injunction will be denied.

In equity.

Stephen H. Phillips and M. A. Wheaton, for complainant.

J. W. Winans, for defendants.

SAWYER, Circuit Judge. I have examined the papers, which are quite voluminous, in this case, and find that the matter upon which the decision is to turn lies in a very small compass.

I do not find it necessary to determine whether there is any conflict between the patents; or the question whether the dead oil of tar is identical with crude carbolic acid. The bill alleges an infringement by selling a certain quantity of a particular hose for the use of the Palace Hotel. The only testimony in the case as to the hose being carbolized hose, made in accordance with the complainant's patent, is the affidavit of Mr. Taylor verifying the bill, and his further affidavit, subsequently filed. What he said upon that point is very brief and not very satisfactory. He simply says that he has been engaged in selling rubber goods for a long time; that he has examined this piece of hose; that it is made with pure carbolic acid, as he judges from the appearance of the hose. He does not profess to be a manufacturer, but only a dealer in the manufactured article. On the contrary, Mr. Chevers, who is the treasurer and manager of the New York Belting and Packing Company, states that he is a manufacturer of hose, and is acquainted with the manufacture of this particular hose, which was made by that company, and knows how it was, in fact, made. He states positively that it is made under two patents of Mayall and Robbins, and in the mode prescribed in Robbins' patent; that the substance used in the manufacture was the dead oil of tar, which was applied in the manner described in Robbins' patents. These are the elder patents, and the use of coal tar and deal oil in the manufacture of rubber goods is mentioned in the plaintiff's own patent, as having been previously known. The specifications state that the applicant was aware that coal tar and dead oil had been used for those purposes before. If known before, it could not be covered by complainant's patent, even if not embraced in defendant's. According to the testimony, Mr. Chevers is in a better position than Mr. Taylor to know how this hose was made. He is a manufacturer himself, and as manager of the company he superintended the manufacture of this particular hose, and he knows all about it. He says it was manufactured in the mode prescribed in the Robbins' patent; that the dead oil of tar was used, and applied as therein specified. It meets, then, the allegation made by Mr. Taylor, which can only rest upon opinion, and which is the only testimony upon the point in favor of the complainant. It completely meets and defeats the case made by the bill and affidavit of complainant, and it is not necessary to determine whether dead oil of tar is crude carbolic acid, or not, as claimed by defendant and denied by complainant, if the hose was manufactured with that substance; for that substance appears to have been, in fact, used under defendant's patents prior to the issuing of the complainant's patent, or to the invention claimed to have been made by the complainant. It meets the whole case on the application for an injunction. It makes no difference whether Mayall's patent covered dead oil of tar or not, if dead oil was in fact used by him or anybody else in the manufacture of hose, prior to complainant's discovery. I would say, also, that the bill does not set out the facts necessary for an injunction. We have to go outside of the bill to the affidavits to determine the long and unquestioned use. There is no allegation that the matter has ever been litigated before, and decided in favor of complainant and no allegation in the bill, that the right of complainant has ever been submitted to, or recognized by, the public. The bill, as an injunction bill, is defective in this particular; but on the other point the testimony of Mr. Chevers is fatal to the injunction. It is more reliable than Taylor's, because he is in a better position than Taylor to know how the hose was made, and what the material used was. It is matter of knowledge with him, and of opinion only with Mr. Taylor, founded upon inspection of the article after its

[1] [Reported by L. S. B. Sawyer, Esq., reprinted in 2 Ban. & A. 212, and here republished by permission.]

manufacture; and he does not appear to be a manufacturer or chemist. The injunction must therefore be denied, and the restraining order dissolved. Of course, the case may turn out to be entirely different on the trial, but this injunction must stand or fall upon the bill and two affidavits; and the affidavit of Mr. Chevers shows that he is the person having the better means of knowledge.

Case No. 5,880.

GUTTSCHLICK v. BANK OF THE METROPOLIS.

[5 Cranch, C. C. 435.] [1]

Circuit Court, District of Columbia. March Term, 1838.[2]

VENDOR AND VENDEE—FAILURE TO CONVEY—DEFECTIVE TITLE—RIGHTS OF VENDEE.

1. The vendee of land cannot, after paying the purchase-money, recover it back, upon the failure of the vendor to convey, unless the vendee has tendered to the vendor the form of a deed of conveyance to be executed by the vendor. But if the vendor has not a good title, at the time he is bound to convey, the vendee may recover back the purchase-money without tendering the form of a conveyance, as he is not bound to accept a defective title.

2. A written contract under the hands and seals of the president and cashier of a bank, purporting that the bank, through its president and cashier, is pledged, upon payment of the purchase-money, to convey to the purchaser, in fee-simple, a certain lot of land, in testimony whereof the said president and cashier, by order of the board of directors, have thereunto set their hands and seals, and signed and sealed accordingly, is admissible and competent evidence, in an action against the bank to recover back the purchase-money, without further evidence of the authority of the president and cashier to make the contract.

[See note at end of case.]

3. If the vendee receives an insufficient deed, as a compliance with the vendor's contract to convey, and afterwards discovers that the title of the vendor was defective, and that the deed conveys nothing, the vendee, in an action against the vendor to recover back the purchase-money, may give in evidence the said deed, with other evidence, showing the title to be defective, &c.

[See note at end of case.]

4. If the vendor's title be defective, the vendee may recover back the purchase-money, in an action of assumpsit, although he has been in possession of the premises several years.

Assumpsit, to recover back the purchase-money from the defendants, for lot No. 5, in square No. 489, in Washington. The declaration had four counts: (1) That the plaintiff [Ernestus Guttschlick] bought of the defendants the lot No. 5, in the square 489, in Washington, for $1,191.25; in consideration whereof the defendants, through the president and cashier, agreed with the plaintiff that the defendants were pledged, when the purchase-money should be paid, to convey the lot to the plaintiff in fee-simple. That the plaintiff paid the purchase-money in full; but the defendants have not conveyed the lot to plaintiff, but refuse so to do. (2) That the defendants bargained and sold the lot to the plaintiff, and received the purchase-money, and in consideration thereof, put the plaintiff in possession of the lot, and agreed by their president and cashier, agents for that purpose duly authorized by the defendants, to convey the lot to the plaintiff in fee-simple. That the plaintiff continued in possession from the 9th of November, 1827, to the 30th of December, 1835, when he was turned out of possession by the Patriotic Bank; and while in possession was obliged to pay taxes and other public dues thereon, amounting to three hundred dollars. Yet the defendants, although often requested, have not conveyed the lot to plaintiff in fee-simple, but refuse, &c. (3) That the defendants promised, upon receipt of the purchase-money, to convey the lot to the plaintiff in fee-simple, free of incumbrance. That the plaintiff paid the purchase-money, but the defendants were not seized in fee-simple of the lot, and although requested, did not and would not convey the same in fee-simple to the plaintiff; and that the plaintiff, being in possession, was obliged to pay taxes, &c., to the amount of three hundred dollars. (4) Indebitatus assumpsit for money had and received.

Upon the trial, on the general issue, the plaintiff gave in evidence the following paper:

"Be it known, that on this 9th day of November, 1827, Ernest Guttschlick hath purchased of the Bank of the Metropolis lot No. 5, in square No. 489, as above described, and as laid down in the plat of the city of Washington, for the sum of $1,191.25, and that he hath paid, on account of the same, the sum of $591.25, leaving due the sum of $600, for which he hath given his note to the said bank, payable in six months after date, with interest from date, which sum of six hundred dollars, when paid, will be in full for the purchase-money of said lot. The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum shall be paid, to convey the said lot, namely, lot 5, in square 489, in fee-simple, to the said Ernest Guttschlick, his heirs or assigns forever. In testimony whereof, the said president and cashier, by order of the board of directors, have hereunto set their hands and seals, this ninth day of November, eighteen hundred and twenty-seven. John P. Van Ness (Seal), President of the Bank of Metropolis. Alexander Kerr (Seal), Cashier. In presence of George Thomas."

And further proved that he had paid the note in the said agreement mentioned.

Whereupon Mr. Coxe, for defendants, prayed the court to instruct the jury, that upon the evidence aforesaid, the plaintiff was not entitled to recover upon the first count in the declaration. Mr. Coxe contended that the plaintiff should have tendered a deed for the

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

[2] [Affirmed in 14 Pet. (39 U. S.) 19.]

defendants to execute. Sugd. Vend. 180, 296. If the vendor prepares the deed the vendee may not be satisfied. The rule, therefore, has settled down that a purchaser cannot maintain an action against the vendor for not conveying, unless he has demanded a conveyance and tendered the form of a deed.

Mr. Bradley, contra, contended that the defendants were bound to tender a deed of conveyance. Jones v. Gardner, 10 Johns. 266; Clute v. Robison, 2 Johns. 595.

THE COURT (THRUSTON, Circuit Judge, contra) gave the instruction as prayed by Mr. Coxe, being of opinion that the plaintiff could not recover upon the first count, as there was no evidence that he had demanded a conveyance, and tendered the form of a deed.

The defendants' counsel, Mr. Coxe, objected to the admissibility and competence of the paper aforesaid as evidence for the plaintiff, until some evidence should be given showing the authority of the president and cashier to sign the contract and to bind the bank, so as to take the case out of the statute of frauds.

But THE COURT (CRANCH, Chief Judge, contra) overruled the objection, and permitted the contract to be read in evidence to the jury, without further proof except of the handwriting of Mr. Van Ness and Mr. Kerr, and of the payment of the money to the bank.

The plaintiff then offered evidence of an outstanding title in the Patriotic Bank, older than the defendants' title; namely, a deed of trust from B. G. Orr, under whom the defendants claim, to Joseph Elgar, to secure and indemnify one Samuel Lane, who had indorsed Orr's notes for $6,000; a judgment against Lane's administrators; and a sale under the deed of trust, by Elgar to the Patriotic Bank.

Mr. Coxe, for the defendant, objected to evidence of the judgment against Lane's administrators, because there was no declaration filed in the cause, although one of the notes mentioned in the deed of trust was filed as the cause of action, and judgment confessed for that amount.

THE COURT (nem. con.) overruled the objection and permitted the evidence to go to the jury.

The plaintiff then offered in evidence a letter from him to the defendants, stating that he had received a deed for the lot; and also offered to read the deed to the jury to show them that it was not a deed from the bank; but from the president of the bank under his private seal, and therefore conveyed nothing.

Mr. Coxe, for the defendants, objected to the reading of the deed to the jury in evidence, but THE COURT (nem. con.) overruled the objection, and suffered the evidence to go to the jury. Mr. Coxe, for the defendants, then prayed THE COURT to instruct the jury that upon the whole evidence the plaintiff was not entitled to recover. He contended that the plaintiff having, in his letter of the 17th of December, 1835, admitted that he had "received the deed accordingly," that is, according to the agreement, could not, in this action, deny its validity. The agreement was executed.

As to the second count; upon the eviction. There is no evidence of any lawful eviction by the Patriotic Bank.

THRUSTON and MORSELL, Circuit Judges, here stopped Mr. Coxe upon that point.

As to the third count; the defect of title. The agreement is only to convey in fee-simple, that is to convey in fee-simple all the right which the bank had. The agreement is not for a conveyance in fee-simple. The terms of the agreement cannot be extended at law; the plaintiff's remedy is in equity alone. As to the fourth count. The plaintiff cannot recover on this count for money had and received, because the consideration has not entirely failed. The plaintiff has had the use and occupation for a period of seven or eight years.

Mr. Bradley, contra. The agreement is to convey the lot in fee-simple; this means a good title. The paper, which the plaintiff received, and which, in his letter, he calls a deed, is no deed from the bank, and would be good for nothing, even if the bank had had a title. It is under the private seal of the president of the bank only. If the defendants had no good title the plaintiff was not bound to demand a conveyance, nor to tender a deed to be executed. The deed of trust to Elgar was outstanding, and all the debts secured thereby were unpaid. The plaintiff's possession was no bar to the plaintiff's right to recover if the defendants can be placed in as good a condition as they were in before that possession. Clute v. Robison, 2 Johns. 595; Robb v. Montgomery, 20 Johns. 15; Greenby v. Cheevers, 9 Johns. 126; Caswell v. Black River Cotton & Woollen Manuf'g Co., 14 Johns. 453; Sugd. Vend. 178, 179, 202, 206, 214, 243, 244, 283; Hamilton v. Cutts, 4 Mass. 349; Conner v. Henderson, 15 Mass. 319.

Mr. Coxe in reply. No case has been cited in which an action for money had and received, has been maintained, to recover back the purchase-money, after a deed had been given and received. The cases cited are all special actions upon all the circumstances of the case. A conveyance in fee of such title as the bank had, was a good compliance with the contract. The bank was not bound to give a title free from incumbrance. In the cases cited the contract was for a good title, or a good deed, or a good conveyance. A mortgage is no breach of the covenant of seizin. The entry of Dyson, the cashier of the Patriotic Bank, was no disseisin; the plaintiff still remained in possession. The lot was vacant and unimproved. 2 Saund. Pl. 613; Keene v. Clark, 10 Pet. [35 U. S.] 291. The action for money had and received cannot be maintained for the purchase-money, unless the consideration has entirely failed. Greenleaf v. Cook, 2 Wheat. [15 U. S.] 13; Caswell v. Black River

Cotton & Woollen Manuf'g Co., 14 Johns. 457; Conner v. Henderson, 15 Mass. 319.

THE COURT (MORSELL, Circuit Judge, contra) refused to give the instruction prayed by Mr. Coxe, that the plaintiff could not recover upon the whole evidence.

MORSELL, Circuit Judge, thought that Mr. Elgar's trust was not an outstanding incumbrance, because twelve years had elapsed between the judgment against Lane's administrator in 1823, and the sale on the 21st of December, 1835, and therefore the plaintiff could not recover without tender of a deed to be executed by the bank.

THRUSTON, Circuit Judge, thought the plaintiff might recover upon the general equity and justice of the case.

CRANCH, Chief Judge, thought the outstanding title in Mr. Elgar, at the time of the contract, and at the time of the payment of the purchase-money, dispensed with the obligation of the plaintiff to tender a deed to be executed, as he was not bound to accept a defective title.

Verdict for the plaintiff, $1,191.25, with interest from the 9th of November, 1827. Bills of exception were taken by both parties.

[NOTE. On appeal to the supreme court, the judgment was affirmed in an opinion by Mr. Justice Barbour, who said that it was proper to give in evidence the insufficient deed of the vendor, which did not convey the title it had agreed to give. The allegation that the agreement was made by the bank, "through the president and cashier," without averring their authority, was sufficient, as it was within the power of the bank to give them such authority; and when it was averred that the bank, by them, agreed, this averment, in effect, imported the very thing the supposed want of which constituted the objection. The question is one of evidence, not of pleading. The court also said that an action of assumpsit was proper, although the agreement was under seal, because they were merely the seals of its officers, and not of the bank itself. 14 Pet. (39 U. S.) 19.]

GUY, The JAMES. See Cases Nos. 7,195 and 7,196.

Case No. 5,881.

GUYON v. SERRELL et al.

[1 Blatchf. 244;[1] 1 Fish. Pat. Rep. 151.]

Circuit Court, S. D. New York. Oct. Term, 1847.

PATENTS—DISCLAIMER—DAMAGES FOR INFRINGEMENT.

1. Where a disclaimer under section 7 of the act of March 3, 1837 (5 Stat. 193), was filed by a patentee after he had commenced a suit on his patent: *Held*, that although under section 9 of the same act he was not entitled to costs of the suit, on a verdict in his favor, yet under section 14 of the act of July 4, 1836 (5 Stat. 123), the court had power to increase the amount of the verdict.

[Cited in Tuck v. Bramhill, Case No. 14,213; Smith v. Nichols, 21 Wall (88 U. S.) 117; Dunbar v. Meyers, 94 U. S. 194; Sessions v. Romadka, 145 U. S. 41, 12 Sup. Ct. 802.]

2. The actual damages are, as a general rule, all that can be reasonably claimed for the infringement of a patent, though cases may arise, where the circumstances are aggravated and such as to repel altogether the bona fides of the infringement, in which the power to increase the verdict should be exercised. Each case must depend upon its own circumstances.

[Cited in Welling v. La Bau, 35 Fed. 304.]

This was an action on the case [by Henry G. Guyon against William F. Serrell and James R. Hitchcock] for the infringement of letters patent granted to the plaintiff, July 2d, 1836, for an improvement "in the compound lever for pressing and raising substances." A disclaimer of part of the claim was filed in the patent office, November 4th, 1842, after the commencement of this suit. On the trial, the plaintiff recovered a verdict of $200, and now moved for an increase of the verdict under the 14th section of the act of July 4, 1836 (5 Stat. 123).

George R. J. Bowdoin, for plaintiff.
Abraham Crist, for defendants.

NELSON, Circuit Justice. The fourteenth section of the act of July 4th, 1836, empowers the court to render judgment for any sum above the amount found by the jury as the actual damages sustained by the plaintiff, not exceeding three times such amount, according to the circumstances of the case, with costs. The act of April 17, 1800 (2 Stat. 38, § 3) fixed the amount of the recovery at three times the actual damages sustained. It now rests in the discretion of the court.

The act of March 3, 1837 (5 Stat. 193, § 7), authorizes a disclaimer by the patentee, in cases where, through inadvertence, accident or mistake, the specification of his claim is too broad. It is not, however, to affect any action pending at the time of the filing of the disclaimer, except in respect to the question of unreasonable neglect or delay in filing the same. The ninth section of the same act allows an action to be maintained for an infringement of such part of the invention as may properly belong to the patentee, notwithstanding the claim may be too broad, if it be made to appear that the error occurred through mistake, and without wilful default, but provides that the plaintiff shall not be entitled to costs against the defendant, unless the disclaimer shall have been filed before the commencement of the suit.

In this case, the disclaimer was filed after the suit was brought, and, of course, the plaintiff is not entitled to costs; and it is urged, from the phraseology of the fourteenth section of the act of 1836, that the case is one in which the court has no power to increase the verdict. That section authorizes an increase to not exceeding three times the

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

amount, "with costs." Here no costs can be awarded. But costs follow, as a general rule, against the defendant, upon judgment being rendered on a verdict against him for single or actual damages; and when the verdict is increased, the costs still remain a part of the judgment, as no power is given by the section to withhold them. They do not depend upon the power of the court to increase the verdict, but upon statute authority, wholly independent of such power. The power given to the court by the fourteenth section is a power only to increase the damages, and not a power over the costs. The words "with costs" add nothing, as the defendant was already liable for the costs, if liable for them at all. The increase of the verdict cannot operate either to award or to withhold them. The words were probably added, from abundant caution, to exclude any inference of an intention to limit the amount of the judgment to the precise sum as increased, which would have excluded the costs. The ninth section of the act of 1837 simply withholds costs in cases where the disclaimer is not filed till after the commencement of the suit, leaving the damages unaffected. The rights of the plaintiff and the power of the court in respect to the damages remain the same as if costs were allowed. We are unable, therefore, to perceive any ground for denying the power of the court to increase the damages in this case under the fourteenth section of the act of 1836.

We think, however, that the provisions of the section afford ground for the consideration of the court in the exercise of their discretion upon this application. The party infringing the patent may have been misled by the specification, and have honestly supposed that it was void, and afforded no protection to the patentee. The actual damages for the infringement would, therefore, seem, as a general rule, to be all that could be reasonably claimed. There may be exceptions. Cases may arise, where the circumstances are aggravated, and such as to repel altogether the bona fides of the infringement, in which the power to increase the verdict should be exercised. Each case must depend upon its own circumstances.

There is some evidence, here, tending to impeach the good faith of the defendants. But as they abandoned their machine some time before the commencement of the suit, and have not since put it in operation, and as the damages recovered are, probably, fully equal to the actual injury sustained after the machine was altered so as to infringe upon the plaintiff, we are of opinion, under all the circumstances, that the case is not one in which the court should interfere. The motion would not probably have been made if the plaintiff could have recovered costs, as there is nothing in the case, beyond this, to distinguish it particularly from others of this description occurring daily in the court. Motion denied, without costs.

Case No. 5,882.

GWATHNEY v. M'LANE et al.

[3 McLean, 371.] [1]

Circuit Court, D. Indiana. May Term, 1844.

PROMISSORY NOTES—PAYMENT—ASSIGNMENT WHEN OVERDUE.

1. An agreement of one partner to pay a note against his co-partner, by entering a credit on a note which he holds against the payee, and a charge is made on the books of the firm against the partner for whom the payment is made, and he delivers to his partner other paper as payment, it is a payment to the payee of the note, although a credit was not indorsed on the note to be credited, until after the lapse of some months.

2. Should the payee be sued, after the agreement, on the note, on which the credit was to be entered, he could set up the agreement in defence.

3. And so could the agreement be set up in the defence by the partner who owed the first note.

4. The assignment of this note after it became due, in violation of the agreement, would not prevent the partner from making this defence.

5. A note assigned, after it becomes due, leaves the equities open between the original parties.

At law.

Mr. Crawford, for plaintiff.

Quarles & Brown, for defendants.

OPINION OF THE COURT. This action is brought on two notes given by defendants to J. B. Danforth & Co., for one thousand and seventy-six dollars, and indorsed by the payees to the plaintiff. After one of the notes became due, Donahue, who owed the claim, in the fall of the year 1841, made an arrangement with the payees, by their agent, to pay both notes by procuring a credit to be given on a note held by William M'Lane on Danforth & Lewis, for three thousand dollars. The holder of this note agreed to enter the credit, and proper entries were made in the books of the defendant, in an account current with William M'Lane. The defendant, Donahue, passed to the other defendant, M'Lane, other paper in payment; but the actual credit was not indorsed on the note, until some time in February, though the arrangement for the credit was made in October preceding. Danforth & Co. were formed by Danforth & Lewis. Afterwards that firm was dissolved, and the firm of Danforth & Hildebran was formed. This firm was dissolved, and Danforth had the control and management of its concerns. The agent who made the arrangement as to the payment above stated, was fully authorised to act in the premises as attorney in fact for J. B. Danforth & Co. Danforth, at the time, was at Philadelphia. On his return to Louisville, Kentucky, and before he was informed of the above arrangement, he assigned the notes of Donahue to the plaintiff, as cashier of the Bank of Kentucky, as collateral se-

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

curity—the notes, at the time of the assignment, being over due. And from these facts, the question arises whether the notes were paid.

There can be no doubt, as between the original parties to the notes now sued on, there was payment. The power of the agent of Danforth & Co. is not questioned. And, in this respect, it cannot be material to which of the firms the notes were due, for Danforth had the settlement of the concerns of both firms. But the evidence is, that the notes were due to the first firm. M'Lane agreed that a credit should be entered on a note held against Danforth & Lewis for three thousand dollars. At this time M'Lane & Donahue were in partnership, and on the books of the firm, Donahue was charged with the amount. So, as regards these partners, the transaction was completed; and Donahue, by proving the agreement and entry, could have obliged his partner to enter the credit. He did enter it, after the lapse of some months, to take effect from the time of the transaction. Now could not this arrangement have been set up as payment by Donahue, had suit been brought against him by Danforth & Co.? Of this there can be no doubt. Had suit been brought against Danforth & Co. on the three thousand dollar note, they could have set up the arrangement, as so much paid on that note.

The only remaining question is, whether the assignment of the notes deprives the defendants from setting up this defence. As the notes were assigned to the plaintiff after they became due, the equities between the original parties remained open, although the credit on the three thousand dollar note was not indorsed until after this assignment. The plaintiff should have made inquiry as to any equities which might be alleged against the notes. Being over due they were dishonored, and he was bound to know any and every equitable defence which might be made against them.

These instructions were given to the jury, and they found a verdict for the defendants. Judgment.

GWYNNE (HARMER v.). See Case No. 6,075.

GWYNNE (UNITED STATES v.). See Case No. 15,272.

H.

Case No. 5,883.

In re HAAKE.

[2 Sawy. 231;[1] 7 N. B. R. 61.]

District Court, D. California. June 29, 1872.

BANKRUPTCY — INTEREST ACCRUING AFTER ADJUDICATION—SECURED CREDITORS—TITLE OF MORTGAGEE OF A CHATTEL—HOMESTEAD LAW AS AFFECTING RIGHTS OF CESTUI QUE TRUST UNDER A TRUST DEED TO SECURE ADVANCES.

1. Interest accruing subsequently to the time of adjudication is not proveable in bankruptcy.

[Distinguished in Re Town, Case No. 14,112.]

2. But a secured creditor will be allowed to apply the proceeds of his security to the satisfaction of the principal and interest of his debt until paid, when so stipulated in his contract.

[Cited in Phelps v. Sellick, Case No. 11,079.]

3. The title of a mortgagee of a chattel becomes absolute after condition broken. If he takes possession and omits to sell or foreclose within a reasonable time, the debt is satisfied to the extent of the value of the chattel, when taken possession of.

[Cited in Lee v. Fox, 113 Ind. 102, 14 N. E. 891; Whittemore v. Fisher, 132 Ill. 257, 24 N. E. 640.]

4. The cestui que trust under a trust deed to secure present loans and subsequent advances, will be protected as to such advances against the claims of the borrower who has declared the land a homestead, and has subsequently obtained such advances, and fraudulently concealed his declaration of homestead.

[In bankruptcy. In the matter of J. C. Haake.]

Cowles & Brown, for petitioners.

R. Thompson and L. J. Bachelder, for bankrupt.

HOFFMAN, District Judge. At various times during the years 1868 and 1869, the bankrupt obtained from the savings and loan society, a corporation organized under the laws of this state, loans of money, amounting in the aggregate to about $30,000. The notes given for these advances were payable in installments, and bore interest at the rate of one and one half per cent. per month, payable monthly in advance. And it was stipulated that in case default should be made in the payment of any of the installments of principal or interest, the whole amount unpaid of principal and interest should thereupon, at the option of the lender, become due, and should thereafter bear interest at the rate of two per cent. per month, compounding monthly until paid.

At the time of obtaining these loans, the bankrupt executed unto E. W. Burr and Benjamin D. Dean two deeds of certain premises in this city, in trust to secure to the savings and loan society the payment of the moneys loaned by it, with the interest thereon, and of all sums expended by it for insurance, repairs, etc., of the mortgaged premises, and for taxes, liens, or incumbrances

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

thereon. As a further security for one of the notes (that for $20,000), the bankrupt executed to E. W. Burr a bill of sale, intended as a mortgage, for the schooner Alice Haake, which bill of sale was duly recorded in the custom-house.

On the fourteenth day of February, 1871, Haake was duly adjudicated a bankrupt, and on the fifteenth of March of the same year, Henry C. Hyde was appointed assignee. On the twenty-sixth of March, 1872, the savings and loan society filed their petition in this court, praying that the trustees named in the deeds of trust might be permitted to sell the premises therein mentioned, in accordance with the stipulations therein contained, to satisfy the indebtedness of the bankrupt to the society.

This application is resisted by the bankrupt on the ground that the amount due the society is greatly overstated, and that he is willing and able to pay the amount justly due on the notes, for the payment of which one of the lots is mortgaged. It is also resisted on the part of one Ohme, who claims to be the owner of the other lot, under a conveyance from the bankrupt subsequent to the deed of trust, and who professes to be willing to pay to the society the amount justly due of any indebtedness of the bankrupt secured upon the lot.

A reference to the register was thereupon ordered, to ascertain and report the amounts due the petitioners, for the payment of which they are entitled to a lien on either or both of the lots in question. The register having made his report, the various questions presented were argued by counsel, and submitted to the court for decision.

1. In computing the amount of indebtedness for which the creditors may now claim a lien on the mortgaged premises, the first question to be determined is, up to what date shall interest be allowed? This question, at all times important, is peculiarly so in this case, for the society, availing itself of the stipulations contained in the contracts, on the fourteenth of June, 1870, declared the principal and interest then unpaid to be due and payable, and has, from that date, charged interest on the amount thus declared to be due, at the rate of two per cent. per month, compounded monthly.

The question presented, however, is to be determined on considerations applicable to all debts bearing interest, provable against a bankrupt's estate, and without reference to the terms and conditions of these contracts, which, harsh and oppressive as they may be, are, under the laws of this state, legal and enforceable. By the nineteenth section of the bankrupt act [of 1867 (14 Stat. 525)], "all debts due and payable from the bankrupt, at the time of the adjudication," may be proved against his estate. It is obvious that interest which accrues subsequently is not a debt due and payable at the time of the adjudication.

Debts which do not bear interest, and which, though existing at the time of the adjudication are payable at a future day are also by the same section allowed to be proved, but subject to a rebate of interest for the period between the time of the adjudication and the date of their maturity. By these provisions, both classes of creditors are put on an equal footing, and the intention of the act to establish the date of the adjudication as the time at which the liability is to be ascertained and determined, is made manifest. I have met with but one case in which these provisions of the act have received a judicial construction. In re Orne [Case No. 10,581].

In that case Mr. Justice Blatchford says: "If the debt is one, not only in existence at the time of the adjudication, but payable before that time, and running with interest by its terms and character, the statute intends that the debt shall be proved for the amount of the principal and interest thereon to the time of the adjudication in bankruptcy."

By the Massachusetts insolvent law, from which the provisions of the bankrupt act were in great part derived, provable debts were those due and payable at the time of the first publication of notice (section 25), and interest was computed up to that time. Subsequently accruing interest could only be paid out of any surplus remaining after satisfying all the debts so proved. Brown v. Lamb, 6 Metc. (Mass.) 210, 211.

Under the New York insolvent law, a similar rule prevailed. Interest was computed up to the date of the assignment. Further interest was allowed only after paying the principal and interest thus computed. Ex parte Murray, 6 Paige, 204.

The rule in New Jersey was the same. Prichett v. Newbold Saxton [1 N. J. Eq.] 571.

In England the rule that interest stops at the date of the fiat or commission is recognized by all the text writers, and established by numerous decisions. "Under the English bankruptcy laws," says Mr. Robson, "interest was not allowed to be computed in any case of an insolvent estate after the commission" (Robs. Bankr. p. 106; Bromley v. Goodere, 1 Atk. 79; Ex parte Badger, 4 Ves. 165); and interest will not be allowed to a separate creditor of a partner, even out of the surplus of the separate estate, until the joint creditors have been paid in full (Ex parte Minchin, 2 Glyn & J. 287; Ex parte Clarke, 4 Ves. 677).

The reason of the rule is stated in Ex parte Bennet, 2 Atk. 527, as follows: "Commissioners, after a man becomes bankrupt, compute interest on debts no lower than the date of the commission, because it is a dead fund, and in such a shipwreck if there is a salvage of part to each person in the general loss it is as much as can be expected."

It may also be observed that where, as in England and in most of the United States, in-

terest is regulated by law, and all the debts of the bankrupt bear the same, or nearly the same, rate of interest, it is immaterial to the creditor at what time interest stops upon his debts, provided interest on all the debts stops simultaneously with his own. For his proportionate share of the assets will be the same whatever period be fixed for the stoppage on all the debts. There can be no doubt, therefore, that interest on provable debts cannot be computed as against the general assets beyond the date of the adjudication.

But the question in the present case is, how far does this rule apply to a creditor who holds property of the bankrupt as security for the debt due him, and which, by the terms of his contract he is authorized to appropriate to the satisfaction of the debt, with interest thereon until payment. On this point, I have found no decision under the bankrupt act of the United States.

The rule in England, as to the stoppage of interest at the time of adjudication, applies, says Mr. Robson, to mortgagees who come to the court for assistance, but if the mortgagee relies on his security, the trustee cannot redeem without paying all the interest then due. Robs. Bankr. 253; Ex parte Kensington, 2 Mont. & A. 302, 304.

But this rule is sometimes relaxed. Thus, where the sale of the mortgaged property was delayed at the instance of the assignee, the proceeds were applied first to the payment of the interest accrued after the bankruptcy. Ex parte Kensington, 2 Mont. & A. 301; Ex parte Ramsbottom, Id. 79. In a similar case, where the mortgage was disputed, and the property had been sold pending the litigation, and its proceeds invested by the assignee, the mortgagee was allowed the interest which had accrued on the fund. Ex parte Pollard, 1 Mont. D. & D. 264. And an equitable mortgagee, although he cannot prove for interest subsequent to the order of adjudication, may nevertheless apply rents or income derived from the security towards the payment of subsequent interest. Ex parte Ramsbottom, 2 Mont. & A. 79; Ex parte Rufold, 4 Doct. & Stud. 282.

It seems also that in England, where a party has a security covering debts in general, some of which are provable, and some not, the security may be applied in payment of the debts not provable. Ex parte Kensington, 2 Mont. & A. 300. Thus, where a party having a lien on certain merchandise delayed, at the instance of the assignee, a sale of it, by means of which a greatly enhanced price was realized, he was allowed to apply the proceeds first to the payment of interest which had accrued since the fiat. In that case, Sir John Rose observed: "The petitioners may be considered as having a security for a debt part of which, viz.: principal and interest before the fiat, is provable, and part, viz.: interest since the fiat, is not provable, and he applies the security to the part not provable. There is nothing in the order now made which disturbs the general rule, that interest stops at the bankruptcy. The circumstances of this case take it out of that rule." Ex parte Kensington, 2 Mont. & A. 304. Whether under the recent English act of 1869, interest upon debts secured by mortgage or otherwise stops at the date of adjudication, I have nowhere seen decided.

By the 78th general rule, the court is required, on the application of the mortgagee, "to take an account of the principal, interest and costs due upon such 'mortgage,' etc., and upon a sale of the property, to apply the proceeds, after payment of the costs, etc., of sale, to the satisfaction of what shall be found due to such mortgagee for principal, interest and costs, and in case the proceeds shall be found insufficient, the creditor may prove for the deficiency." By the twelfth section of the act, no creditor to whom the bankrupt is indebted, in respect to a debt provable in bankruptcy, allowed to have any remedy against the property or person of the bankrupt except in the manner directed by the act. "But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize, or otherwise deal with such security in the same manner as he would have been entitled to deal with the same if this section had not been passed."

It is not clear that under these provisions a creditor holding a mortgage to secure the principal of a debt, with interest until paid, may not realize upon his security the whole amount due by its terms. Nor under the general rule above cited is it certain that the court, when taking an account of the principal, interest and costs due upon such mortgage, would be justified in excluding from this account all interest which, though due upon the mortgage, has accrued since the fiat.

Under the United States bankrupt act all valid liens and securities are protected. The twentieth section provides various modes of dealing with secured debts. The creditor may prove for the balance of the debt, after deducting the value of the security to be ascertained by agreement or sale. Or, he may release his security and prove for his whole debt, or he may pay to the assignee the excess in value of the property over and above the sum for which it is held as security, and the assignee may release the bankrupt's equity of redemption, or the property may be sold subject to the claim of the creditor thereon.

I have been unable to find a single decision to the effect that "the sum for which the property is held as security" is to be taken to be the amount of the principal, with interest only up to the date of adjudication. The entire absence of any authority on the subject justifies the presumption that the claim of the creditor to a full satisfaction of his debt, according to the terms of his contract out

of the secured property has been generally admitted.

It is not supposed that any different degree of protection was intended to be afforded to the secured creditor by the adoption of either of the modes of proceeding authorized by the act; and yet, if the amount of the debt for which the property is held as security is taken to be only the principal and interest up to the adjudication, the creditor would lose an advantage which, if the assignee elects to sell the property subject to his claim, he would gain. For the purchaser at such sale could not, I presume, in a foreclosure suit brought by the creditor, call upon the state court to disallow interest after the date of the adjudication, and thus pro tanto refuse to enforce the contract. I have, moreover, not been able to perceive upon what ground a distinction is drawn as stated by Robson, between a trustee seeking to redeem, and a mortgagee who comes to the court for assistance. It would seem that the rights of the mortgagee ought not to depend upon the form of proceeding adopted for their enforcement or ascertainment.

But, if there be anything in this distinction, it is to be observed that the trustees, or cestui que trust, in this case are not asking the assistance of the court. They are asking merely its permission to exercise a right conferred by the power of sale contained in the trust deed. A right which it would seem they would possess under the English bankrupt act (section 12, above cited), but which they probably cannot exercise under our law except on application to the court. In re Davis [Case No. 3,618]; In re Frizelle [Id. 5,133].

With regard, however, to one of the lots conveyed in trust by the bankrupt, no such application is necessary, for he had parted with his equity of redemption before the bankruptcy, and no interest whatever passed to assignee. As between the purchaser and the secured creditor, the latter is of course entitled to the full benefit of his security, as if no bankruptcy had occurred. But with respect to the other lot, and as between creditor and the assignee, I also think the former is entitled to the like benefit, and the assignee has no other rights than such as he could assert in a bill to redeem.

2. In addition to the security given by the deeds of trust the bankrupt also executed, as has been stated, a bill of sale, intended as a mortgage, of the schooner Alice Haake. The bill is dated March 11, 1869. At some time between February and the end of June, 1870, the mortgagee, learning that the bankrupt had pledged the earnings of the vessel, took possession of her, and from that time until March, 1872, when she was sold by order of this court, she remained under his exclusive management and control. He dispatched her on such voyages as he saw fit, furnished her outfit, paid the wages of captain and crew, and collected freights. He also, on one occasion, paid for repairing damages she had accidentally sustained. The business proved unprofitable—her expenses being largely in excess of her earnings, not, however, through any want of skill and diligence on the part of Mr. Burr. In the spring of 1871 she was laid up, and remained unemployed until sold in March, 1872, for a sum considerably less than her value when the mortgagee took possession. It does not appear that the bankrupt protested against these proceedings on the part of the mortgagee, or that he made any formal demand that the vessel should be sold. But there is no evidence of any agreement on his part that she should be run at his risk. In fact, he does not appear to have been consulted on the subject, or treated as having any rights in the matter, except that the mortgagee directed the master to procure at the bankrupt's store, such supplies as he could furnish. In the accounts now presented, the excess of expenses over and above the earnings of the vessel, are charged to the bankrupt with interest, at the rate of two per cent. per month, and he is credited only with the balance of her proceeds, after deducting these amounts. This balance is credited on the $20,000 note, to secure which the mortgage on the vessel was given. The remainder, it is claimed, is a charge upon the premises conveyed by the deeds of trust.

I am unable to perceive by what right the mortgagee, in the absence of an express agreement to that effect, can charge to the bankrupt the debts contracted by himself in running the vessel. He was her legal owner in the exclusive management and control. The debts were his own, contracted by himself, without authority of the bankrupt. If he chose not to sell the vessel on reasonable notice to the mortgagor, as he should have done, but elected to employ her in the freighting business, he did so at his own charges and risk, and the debts he incurred were his own debts, in no way chargeable to the bankrupt, at any rate of interest, still less at the exorbitant rate now claimed. But this point is immaterial, for I think it clear that the taking possession of the vessel by the mortgagee, and his omission to sell her within a reasonable time, operated a satisfaction of the debt to the extent of her value when the mortgagee took possession. It is well settled that a mortgagee of personal property upon the failure of the mortgagor to perform the condition of the mortgage acquires an absolute title to the property. Langdon v. Buel, 9 Wend. 80; Fuller v. Acker, 1 Hill, 473; 12 Wend. 61. The mortgagor, however, has an equity of redemption which chancery will protect unless it has been foreclosed by judicial proceedings or by a public sale after notice. 3 Denio, 33. But taking possession of the chattel after failure to perform the condition of the mortgage is a satisfaction of the debt if the chattel be of sufficient value. If on a fair sale it brings less the bal-

ance may be demanded of the mortgagee. Case v. Boughton, 11 Wend. 107. And a plea that on the sale of a chattel the vendor took a mortgage of it, and on the mortgage becoming forfeited took possession of the chattel to dispose of it, and that he might have disposed of it, and out of the avails retained the amount due, was held a good answer to a suit to recover the price of the chattel. But independently of the authorities it would seem plain that the mortgagee of a perishable chattel like a ship or a horse, can have no right to retain it for an indefinite period after condition broken, and when the property has diminished in value by use or age sell it and demand of the mortgagor payment of the deficiency. The value of the vessel at the time the mortgagee took possession appears to have been about $20,000. I think the bankrupt is entitled to a credit for that amount from June 14, 1870, when the mortgage debt was declared due.

3. The trust deeds given by the bankrupt were for the security of moneys then loaned to him and for future advances. After executing the deeds the bankrupt declared a homestead on one of the lots conveyed him in trust. He subsequently obtained further advances without disclosing the fact that he had declared a homestead on the premises. He now claims that his homestead should be protected against any charge under the trust deeds for advances subsequent to its declaration. It is unnecessary to inquire whether a person who has conveyed the legal title of his land to a trustee as security for a debt has any estate on which, under the laws of this state, a homestead can be declared, for it is clear that as against the trustee or cestui que trust the attempted fraud of the bankrupt cannot succeed. The validity of a mortgage to secure future advances is indisputable, and the mortgagee will be protected in making such advances as have been made without notice of an intervening security.

In some of the states the registry of the second mortgage is deemed full notice to the first mortgagee. 17 Ohio, 371; 2 Barr [2 Pa. St.] 96; 9 Barr [9 Pa. St.] 86. But the American courts generally, and the English courts uniformly, hold that nothing short of actual notice will suffice. "It must be," says Mr. Chief Justice Marshall, "actual notice brought home to the party." Shirrass v. Craig, 7 Cranch [11 U. S.] 34; Truscott v. King, 6 Barb. 346; Stuyvesant v. Hall, 2 Barb. Ch. 159. And see [Article on "Mortgages"] 2 Am. Law Reg. U. S. 19 et seq.

If, then, the question were presented as between the cestui que trust under the trust deed and a subsequent incumbrancer the former would be protected for any advances made without notice of the intervening incumbrance. The mortgagor who has declared a homestead, and fraudulently obtains further advances, cannot stand in a better position than an intervening incumbrancer.

An order of reference to the register must be entered to compute the amount due the petitioners on the principles declared in this opinion. On the ascertainment of the amount the premises will be ordered to be sold and the proceeds applied to the satisfaction of the debt due to the petitioners.

HAARFAGER, The HAROLD. See Case No. 6,083.

Case No. 5,884.

In re HAAS et al.

[8 N. B. R. 189.] [1]

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

BANKRUPTCY—IMPROPER MEANS TO SECURE APPOINTMENT AS ASSIGNEE.

Where B, to secure his election as assignee in bankruptcy, agreed with two of the creditors that he would pay their claims in full if they would give him their powers of attorney, the court disregarded his election and appointed the official assignee.

[In bankruptcy. In the matter of Haas and Samson.]

By the Register:

I, Isaiah T. Williams, the register of this court in bankruptcy in charge of the above entitled matter, do hereby certify that B—— received a majority in number and amount of the votes of creditors who have proved their claims at the meeting for the election of an assignee, in the above entitled matter, held before me on the 6th day of May, 1873, and I hereby decline to approve of and confirm the choice of the said B—— as assignee of the said estate, and in submitting to the district judge the question of the approval of such choice, do hereby certify, pursuant to the rule of this court adopted in Re Bliss [Case No. 1,543], that, in my opinion, such choice should not be approved of by this district judge, for the following reasons:

At the said meeting of creditors the vote of the White Star Line (a creditor to the amount of thirty-two dollars and forty-nine cents) was offered by the said B—— for himself, under a power of attorney for said creditors, to vote at said meeting for assignee, which vote was challenged by Mr. Hazeltine, who appeared for other creditors, and to sustain such challenge called said B—— as a witness, who was sworn and testified: "I hold the power of attorney of the White Star Line to vote at this meeting. Q. Under what circumstances did you procure this power? A. I asked Mr. Sparks to allow me to receive it and to vote upon it as I was the largest creditor and wanted to vote on it; I might have told him that as it was a small amount I would pay it in full." On his cross-examination he said: "I did not promise to pay this out of the bankrupts' estate;

[1] [Reprinted by permission.]

I offered it as a consideration to Mr. Sparks, for proving so small a claim."

The vote of Williams & Guion was also offered by the said B——, and challenged by Mr. Hazeltine on the part of other creditors, and the same witness gave the same testimony concerning that claim, to wit: that he had agreed with Williams & Guion to pay the whole of their claim if they would give him a power of attorney to vote at the meeting for the election of an assignee.

I am of opinion that such efforts to procure the election of oneself assignee are improper as tending to injure the wholesome operations of the bankrupt law [of 1867 (14 Stat. 517)]. I therefore recommend the appointment of the official assignee as assignee in this matter.

BLATCHFORD, District Judge. The recommendation of the register is approved.

Case No. 5,885.

HAAS et al. v. ARTHUR.

[14 Blatchf. 346.] [1]

Circuit Court, S. D. New York. Nov. 12, 1877.

CUSTOMS DUTIES—ENTRY AND APPRAISAL.

1. H., on the entry of merchandise at the custom house, added 18 per cent. to the market value, as stated in the invoice, with a protest, stating that he made the addition to prevent a seizure, and that the real value was the original invoice value. On like merchandise entered before by H., on like invoices, 18 per cent. had, on appraisal, been added to the invoice value, and the goods had been seized for forfeiture. In a suit brought by H. to recover back the duties paid on the added 18 per cent.: *Held*, that the action could not be maintained.

2. After the addition by H. of the 18 per cent., the value of the goods, for duty, could not be fixed, by appraisal, at a less sum than that arrived at by such addition.

[This was an action by Simeon Haas and others against Chester A. Arthur, collector of the port of New York.]

Stephen G. Clarke, for plaintiffs.

Henry E. Tremain, Asst. Dist. Atty., for defendant.

WALLACE, District Judge. The plaintiffs, upon the entry of certain merchandise, added eighteen per cent. to the market value as stated in the invoice, accompanying the act by a protest, in which they stated that they added the eighteen per cent. to the invoice value under compulsion, to prevent a seizure of the merchandise, and that the real value was correctly set forth originally in the invoice. Similar merchandise had theretofore been entered by the plaintiffs upon similar invoices, and upon appraisal, eighteen per cent. had been added, and the merchandise had thereupon been seized for forfeiture; and their object was to avoid such a result in the present entry. They now seek to recover from the defendant, the collector, the duty assessed upon the additional eighteen per cent.

The action cannot be maintained. Upon the entry of their merchandise, one of two courses was open to the plaintiffs. If they believed the market value of the merchandise to be correctly stated in the invoice, they could have relied upon this belief, and, in case it was fixed at a higher value, upon appraisement, could have had redress by an appeal from the appraisal. If they were unwilling to adopt this course, fearing the contingency of an appraisal which might fix the value of the merchandise at a sum so much greater than the invoice value, as to subject them to an action for penal duty or forfeiture, they had the right to add to the invoice value such sum as they should deem advisable, in which event there could not legally be an appraisal for a less value. No other course was open to the plaintiffs. Instead of selecting the former they selected the latter, and thereby put it beyond the power of the appraisers to fix a lower value than that on which the duties were collected. The plaintiffs could not qualify the effect of their act in adding to the value in the invoice, by assigning the reasons which induced them so to do. Having fixed the value at a sum below which there could not be an appraisal, they cannot be heard to complain of the result, and are liable to pay the duties assessed. Judgment is ordered for the defendant.

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

Case No. 5,885a.

HABEMAN et al. v. WHITMAN.

[5 Ban. & A. 530.] [1]

Circuit Court, E. D. New York. July, 1880.

PATENTS—INFRINGEMENT—NEW ARRANGEMENT OF OLD PARTS.

The complainants' patent, which claimed a method of arranging old parts to produce a new and useful result: *Held*, not to be infringed by the defendant's different arrangement of such parts, whereby he accomplished a different and better result.

[This was a bill in equity by Frederick Habeman and others against Samuel Whitman for the alleged infringement of reissued letters patent No. 3,438, granted to plaintiffs, May 18, 1869. The original patent, No. 62,807, was granted to Bardell and Smith, March 12, 1867.]

A. J. Todd, for complainants.

Robert Payne, for defendant.

BENEDICT, District Judge. This action is brought to recover damages for the infringement by the defendant of a reissued patent granted to the plaintiffs on the 18th

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

of May, 1869 [No. 3,438], for an improvement in coal scuttles. Only the first claim of the patent is alleged to have been infringed. The claim in question is as follows: "The combination of a body and base-rim with a bottom so constructed as to have a flange which can be sprung into the recess formed upon the body, and thereby bring together three thicknesses of sheet-metal just above the bottom of the scuttle or other utensil, substantially as and for the purpose herein described." This claim is for a combination having three elements, namely, the body, the base-rim, and the bottom of a coal scuttle or other utensil. In the specification, the invention cited by this claim is stated to consist "in a novel method of uniting the bottom, the body, and the base-rim of the scuttle, whereby the scuttle has three thicknesses of metal near the bottom of the body, and at the place where the ordinary scuttle first begins to wear out."

The advantages claimed for this arrangement are greater stiffness and strength in the base bottom and lower part of the body, a reduction of the liability of wet or moisture from the interior of the body to reach the point of contact of the body, base, and bottom, and the consequent rusting of the parts. The invention that forms the subject of the first claim, therefore, consists in the method devised for combining the body, base-rim, and bottom of the scuttle. No novelty is claimed for the particular form of body, base-rim, or bottom employed by the plaintiffs. The novelty consists simply in the manner of putting these parts together. What that manner is, the specification goes on to state. The bottom is placed inside the body, and the flange of the bottom sprung into a recess formed in the body. The base-rim is then inserted between the bottom and the body, running completely up to the flange of the bottom. All are then riveted together. This arrangement gives three thicknesses of metal from the bottom to the recess in the body where it is most needed.

In the defendant's scuttle, the arrangement of these parts differs from that of the plaintiffs in that the bottom is placed outside the body, the base-rim is then placed outside the bottom, and all these riveted. In regard to these two methods the plaintiffs contend that the defendant's method is substantially the same thing as the plaintiffs method, done in substantially the same way, and for substantially the same purpose, and that their patent cannot be evaded by a formal change in the location of the parts, when the claim is not limited to a certain location of parts. But the claim is limited to the location of the parts. The claim is for the method of putting together the base, bottom, and body of the scuttle, or other utensil described in the specification. The virtue of the invention lies in the location of these parts—as that location is described in the specification. In form the parts described are old, the method of fastening them together is old, the method of arranging them is what is claimed to be new.

That the defendant's method of arrangement is not identical with that of the plaintiffs is obvious. Whether the simple fact of a difference in the relative locality of the elements of the combination, without any change of result, would evade such a patent as this, need not be considered, for the proofs show that in this case, the change in the relative locality of the parts, made by the defendant, accomplishes a different and a better result than is produced by the plaintiffs' method of arranging those parts. In the plaintiffs' scuttle, because of the flare that is a necessary feature of the body and base of utensils of this character, the circumference of the upper edge of the base, when fitted in its location between the bottom and the body, must be larger than the circumference of the lower edge of the body. Hence, in order to insert the base between the bottom and the body, as described in the patent, the upper edge of the base must be notched or slit, and after its insertion it is fitted to the body by hammering. The necessary consequence is that when the parts are fitted the base is diminished in strength by reason of having been slit, and at the points where the notches or slits have been made, there are but two thicknesses of metal instead of three. The defendant's method of arranging these parts avoids this difficulty. In the defendant's arrangement the base is not required to be slit in order to be fitted to its place, and, consequently, three thicknesses of metal are given at all points around the scuttle near the bottom. From this difference results a manifest advantage. The parts are stronger than in the plaintiffs' scuttle, and there is less opportunity for access of moisture to the joints. The change of arrangement made by the defendant must, therefore, be held to be substantial, and not merely colorable. The defendant's combination is accordingly a different combination from that employed by the plaintiffs, and he cannot be held to have infringed on the right claimed by the plaintiffs by virtue of the patent sued on. The bill is dismissed, with costs.

HABERSHAM (JONES v.). See Case No. 7,465.

HABERSHAM (PARROT v.). See Case No. 10,771.

HABERSTRO (PEASLEE v.). See Case No. 10,884.

Case No. 5,886.

HABRICHT v. ALEXANDER.

[1 Woods, 413.] [1]

Circuit Court, W. D. Texas. April Term, 1867.

CONTRACT BETWEEN ALIEN AND CITIZEN OF REBELLIOUS STATES—PUBLIC POLICY.

A contract for the purchase of cotton made during the late war of the Rebellion, by a subject of the king of Norway and Sweden, domiciled in the city of New York, with a citizen of the state of Texas, actually residing therein at the date of the contract, was void as against public policy and the laws of war and the spirit of the legislation of congress.

Heard on demurrer to petition.

Amos Morrill, for plaintiff.

O. M. Roberts and J. H. Reagan, for defendant.

DUVAL, District Judge. The petition shows that the plaintiff, being a subject of the king of Sweden and Norway, and a citizen of that kingdom, did, on the 10th day of August, 1863, while temporarily residing in the city and state of New York, purchase of, and receive a conveyance from, C. C. Alexander, then a citizen of Fannin county, state of Texas, of 4,825 bales of cotton, weighing 2,313,927 pounds, for and in consideration of the sum of $231,392.70, alleged to have been paid therefor. That afterwards the said Alexander fraudulently took and carried away from the possession of said plaintiff the said cotton, and converted the same to his own use, to the damage of plaintiff, $300,000. The petition further alleges that said Alexander afterwards died, leaving a last will and testament, and prays judgment against the executors thereof for his damages aforesaid. By an amended petition, filed the day before this cause was called for trial, the plaintiff alleges that after the purchase of said cotton by him, the price thereof greatly enhanced in value, and that at the time of the wrongful conversion thereof by said Alexander, the same was worth one dollar per pound, and had not been worth less than fifty cents per pound since then. To this petition and amendment, the defendants interposed a general demurrer, and set forth, under the same, four special grounds, only two of which I will particularly notice. The first is, that the purchase of said cotton, as alleged, was a violation of the laws of the United States, and the proclamation of the president interdicting all trade and commerce between the citizens of the United States and of the rebel states and between persons residing and being within said rebel states, and all persons in the United States not native or naturalized citizens thereof. Second, that said contract and purchase was in violation of the public policy of the United States.

An act of congress, passed July 13, 1861 (12 Stat. 257, § 5), authorized the president of the United States to prohibit all commercial intercourse by and between the citizens of the insurrectionary states, and the citizens of the rest of the United States, as being unlawful. In pursuance of this act the president did, on the 16th day of August, 1861 (12 Stat. 1262, Append.), issue his proclamation, declaring that the inhabitants of certain states (Texas therein included) were in a state of insurrection against the United States, and that all commercial intercourse between them and the inhabitants thereof, and the citizens of other parts of the United States, was unlawful, and should so remain, until such insurrection should cease or be suppressed; and, that all goods and chattels, wares and merchandise, coming from any of said states (without special license) should be forfeited to the United States. My opinion is that under this law and proclamation, the contract in question must be regarded as unlawful and void. But apart from them, this would still be my opinion upon generally recognized principles of international law.

When war exists between sovereign and independent nations, it is now acknowledged as causing, of itself, an interdiction to all trade and commerce (including private contracts) between their respective citizens or subjects. At this day, this seems to be a universal principle of law, recognized and acted upon by all of the great civilized powers in the world. It results from the nature of war itself, even as softened and ameliorated by the humanity and civilization of modern times. No other branch of law has been so rapidly progressive, or has more surely marked the advancement of the human race in civilization and enlightenment, as that of international law. But while this is so, no surer or more certain principle exists under this national code, than the one that all private contracts, made between the subjects of the two belligerents, are unlawful, without special license from the proper authority.

It is contended, however, by the learned counsel for the plaintiff, that the contract set out in the petition was lawful, because the prohibition then existing only applied to citizens of the United States engaged in war against each other. And for proof of this, the act of congress of July 2, 1864, (13 Stat. 376, § 4), is relied upon. It is only by this act that the provisions and prohibitions of the act of July 13, 1861, are expressly declared to apply to all persons in the United States, not native or naturalized citizens thereof. And hence, it is argued that, until this last act was passed, foreigners domiciliated or temporarily residing in the United States could lawfully trade and hold commercial intercourse with the inhabitants of the insurrectionary states. To this proposition I cannot assent. If this were so, it seems to me, that the whole policy of the restriction as to trade and intercourse would be defeated and rendered nugatory. If foreigners in the loyal states, prior to the 2d of July, 1864,

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

could make contracts, trade, etc., with the people of the insurrectionary states, then the door was opened to vast frauds upon the national policy. The object of the prohibition to commercial intercourse was, obviously, to deprive the rebel states of the power and means to carry on the war. If citizens and subjects of foreign countries, temporarily resident in the United States, could carry on this trade and intercourse, they could easily have become the mediums or channels through which thousands of citizens of the United States would have been glad to use their capital in such traffic, and who would have placed means in the hands of such foreigners for that purpose. It is my opinion that the act of congress of July 13, 1861, and the president's proclamation of the 16th August, 1861, were only declaratory of a well recognized principle of international law, which would have controlled and been in full force without them. And such, I think, was also the case as respects the act of July 2, 1864.

The plaintiff's counsel frankly stated, in his argument, that if the plaintiff had been a resident citizen of New York, he would not have brought this action. Now, I am unable to see upon what principle of law or public policy a foreigner, residing in the United States during the war, should have a right to trade and contract with the enemies of the government, when the same right was denied to citizens of the United States. A foreigner, domiciliated in a country and receiving the protection of its flag, is subject to the same prohibitions and restrictions as to trade and intercourse with the enemies of such country, in time of actual war, as attached to her own citizens. This I believe to be a well established principle of international law, and one that is essential to the security of every nation when engaged in war. That a war existed here, no one will deny. It is true, as I believe, that the Confederacy, attempted to be formed by the rebel states, was never even a de facto government. It certainly was never recognized as such by the government of the United States. But it is equally certain that the inhabitants thereof were regarded as belligerents, so far as the actual necessities and exigencies of the war made it necessary. They were enemies to the government of the United States, as was held by the supreme court in the prize cases, and the same rules and regulations of international law, as regarded trade and intercourse with them during the existence of the war, prevailed and operated as if they had been citizens of a foreign power engaged in war with the United States.

But there is another consideration which induces me to think that the contract now declared upon was unlawful. By act of March 3, 1863 [12 Stat. 820], passed prior to the date of said contract, it was provided that all property coming into any of the United States from any of the insurrectionary states, through or by any other person than an agent duly appointed under the provisions of that act, or under a lawful clearance from the treasury department, should be subject to confiscation to the use of the government of the United States. This is certainly a legislative recognition on the part of congress that it was then unlawful for any person in the United States to purchase or trade for property in the rebel states. If such property was subject to confiscation, it must have been on the ground that it was illegally acquired. If the cotton, which formed the subject matter of the contract in this case, had been seized by the authorities of the United States it would certainly have been subject to confiscation under this act. This would not have been the case if the plaintiff could legally have contracted for its purchase.

In no view, which I have been able to take of the subject, can I see how the petition can be regarded as not obnoxious to this ground of demurrer. As my opinion on this point must be decisive of the whole case, so far as this court is concerned, I shall say nothing of the other special grounds of demurrer, except that, in my opinion, the claim sued upon, and as set forth in the petition, should appear to have been sworn to and presented to the executors according to law. It was not such an unliquidated claim as required the intervention of a jury to ascertain the amount due, as claimed under the petition. Believing that the contract, as set forth by the plaintiff, and now sought to be enforced, was contrary to public policy and international law, as well as to the laws of the United States, I must sustain the demurrer and dismiss the action.

Case No. 5,887.

HACKER v. STEVENS et al.

[4 McLean, 535.] [1]

Circuit Court, D. Indiana. May Term, 1849.

GARNISHEE—LIS PENDENS.

1. A garnishee summoned who owes a sum of money, for which his note was given to the absent or absconding debtor, creates a lien in his hands to the amount of the sum due, and the promisee can not afterwards assign such note.

2. If an assignment of the note be made to an individual who had notice, it will not affect the rights of the attaching creditor.

3. This proceeding having been had in the state of Pennsylvania, will be regarded as a legal procedure, by the courts of the United States, sitting in any other state.

4. And the attachment being still pending, and also the proceeding against the garnishee, will be good ground for a plea in abatement, if an action be commenced against the promiser, in any other state.

[Cited in Pratt v. Burr, Case No. 11,373.]

5. From the time the garnishee was summoned, he is amenable to the process, and lia-

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

ble to pay the debt to the plaintiff in the attachment.

[Cited in Bryan v. Duncan, 19 D. C. 380.]

[This was an action at law by William E. Hacker against Stevens and Berryhill. See Case No. 5,888.]

Mr. Stevens, for plaintiff.
Smith & Yanders, for defendants.

OPINION OF THE COURT. This suit is brought on defendants' note to Hacker, Brother & Co., for $896.96, which note was assigned to the plaintiff by the payee, 18th of October, 1848, and was then unpaid. The defendants pleaded that before the assignment was made and before suit on the note was brought, on 2d December, 1848, Charles Willing commenced an action in the district court of Philadelphia against Alfred W. Hacker, Henry M. Hacker, et al., by issuing a summons which was duly served on defendants, and that on the 23d of December, 1848, the court ordered judgment to be entered for want of an affidavit of defense for $2,507.18, and costs. That an execution was issued which was returned nulla bona. That on the 6th of March, 1849, an attachment sur judgment, in the county aforesaid, and that the defendants should be summoned as garnishees. Service was duly accepted by the attorney of the defendants. Sheriff attached Berryhill, one of defendants, by copy, etc., 8th March, 1849. In answer to interrogatories, Berryhill stated that when the attachment was served, defendants owed Hacker, Brother & Co. $896.96, for which amount they gave the note now sued on. That they received no notice of the transfer of said note until that day, 3d April, 1849, they were informed of the fact by one of the partners of Hacker, Brother & Co. That they had no other property or rights of the said firm in their hands. Jurisdiction of the Philadelphia court is averred, and that the suit is still pending, and that they are still defendants as garnishees. And they aver that the assignment of the note to the plaintiff was not made until service of process upon them as aforesaid, however the same may be indorsed on said note, and that the said note is the same on which they are sued in this action.

The plaintiff demurs to the plea specially: (1) Because the plea is argumentative, and not an averment of facts. (2) The whole plea is a mere statement of evidence, to prove facts, and not simple, direct averment of facts. (3) And otherwise, the whole, taken as it stands, is insufficient in law to quash said writ and declaration. The plaintiff joined in demurrer. On the part of the plaintiff it is contended that the state of Indiana has no laws authorizing any such proceedings. That the attachment is not in the name of the plaintiff in this action, nor was he a party to the proceeding. And it is argued that an attachment only becomes a suit pending on service upon the party defendant. That if nothing be found on which to lay the attachment, there can be no lis pendens. A suit pending, which abates a subsequent suit, must be between the same parties.

The facts might have been more succinctly averred in the plea, but we think it is not bad, as the facts are necessarily stated from which to draw the conclusion of law. A service on the garnishee creates a lien upon the debt in his hands, which makes him responsible to the plaintiff in attachment. By no act of his, after such service, can he, by paying the note, or by assuming to pay it to another person, exonerate himself from this responsibility. If this note had been assigned before the attachment was laid, no lien could have been raised, as the right would not have been in the payee; but the averment of the plea is, that the attachment was served before the assignment, and that fact is admitted by the demurrer.

The plaintiff in this case appears to be one of the firm to whom the note was originally given, and the facts authorize the presumption that the assignment was made to defeat the attachment. If the assignee had been a stranger, the argument of the plaintiff's counsel, that there was no notice of the attachment lien, when the note was assigned, would have been stronger. But even in such a case, we suppose that the lien would have been sustainable. The fact is admitted by the pleadings that the note was transferred, after the garnishee was summoned. The pendency of the suit against him, is notice to the holder of the paper, and any subsequent attempt, by a transfer of the note, to avoid the garnishment, is a fraud upon the plaintiff in the attachment; and finding the note in the hands of one of the late firm, or one of the same name, can not, as the facts are now before us, defeat the proceeding against the garnishee. It is immaterial whether there be a similar law in Indiana, under which this proceeding was had in Pennsylvania, or not. It is enough to know that it is the law of Pennsylvania. Upon the whole, the demurrer to the plea is overruled.

Case No. 5,888.

HACKER v. STEVENS et al.

[4 McLean, 540.] [1]

Circuit Court, D. Indiana. May Term, 1849.

UNNECESSARY PLEA—INCUMBRANCE OF RECORD.

An unnecessary plea will, on motion, be directed to be withdrawn, as improperly incumbering the record.

At law.

Mr. Stevens, for plaintiff.
Mr. Smith, for defendant.

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

OPINION OF THE COURT. This action was brought on a promissory note given by defendants, to [William E.] Hacker, Brother & Co., at Philadelphia. The defendants first pleaded jointly that one of them was garnisheed by Berryhill, a creditor of Hacker & Brother, against whom judgment was obtained. The case of garnishee is still pending, and that was pleaded in abatement. Also a single plea of Stevens was filed, setting up the same defense. Motion by plaintiff to withdraw the single plea—and the court directed the plea to be withdrawn as unnecessarily incumbering the record.

[For subsequent proceedings, see Case No. 5,887.]

HACKETT (CLARK v.). See Case No. 2,823.
HACKETT (LETTS v.). See Case No. 8,283.

Case No. 5,889.

HACKETT v. OTTAWA.

[7 Reporter, 8;[1] 11 Chi. Leg. News, 82.]

Circuit Court, N. D. Illinois. 1878.[2]

MUNICIPAL BONDS—VALIDITY—NOTICE.

Where municipal bonds are issued without authority of the legislature in aid of a quasi public enterprise, and the recitals on the face of the bonds are sufficient to put a purchaser on inquiry, and inform him of the purpose for which they were issued, such bonds are invalid in the hands of a bonâ fide purchaser for value

[See note at end of case.]

[3][The declaration in this case charges that on the second day of August, 1869, the defendant, the city of Ottawa, a municipal corporation of this state, made and delivered to one W. H. W. Cushman, its one hundred and twenty (120) bonds or written obligations, for the sum of five hundred (500) dollars each, bearing date on said second day of August, 1869; one-third of which bonds were due in five (5) years, one-third in ten (10) years, and one-third in fifteen (15) years from date, with interest at the rate of ten per cent. (10 per cent.) per annum, payable annually according to the tenor of certain coupons annexed to each of said bonds; the said coupons being for the sum of fifty dollars each. The bonds it is averred were alike in tenor and amount, except as to time of payment; and one of them is set out at length in the declaration, from which it appears that each of said bonds contained a recital in the following words: "This is one of one hundred and twenty bonds of like amount and even date, herewith, numbered one to one hundred and twenty, respectively, issued by the city of Ottawa, by virtue of the charter of said city, wherein it is provided that the city council shall have power to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof; provided, that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum. Art. V. Sec. 3d." "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to, and voted for, by a majority of the voters of said city attending an election for that purpose. Art. X. Sec. 20; and also in accordance with a certain ordinance passed by the city council of said city on the 15th day of June, 1869, entitled, 'An ordinance to provide for a loan for municipal purposes;' which ordinance was ratified by a majority of all the qualified voters of said city, at an election holden on the 20th day of July, 1869; and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled 'An ordinance to carry into effect the ordinance of June 15th, 1869,' entitled, 'An ordinance to provide for a loan for municipal purposes.'"

[The plaintiff avers that, after the issue of said bonds, to wit: on the first day of August, 1870, he became the purchaser, for a valuable consideration, paid by him, of twenty of said bonds, being from No. 41 to No. 61, inclusive, which he bought in the usual course of business, and without notice of any defense thereto; and that he also became at said time, the purchaser and owner of eighty of the interest coupons attached to said bonds so purchased by him, to wit: twenty coupons maturing and payable August 2d, 1874; twenty coupons maturing and payable August 2d, 1875; twenty coupons maturing and payable August 2d, 1876; and twenty coupons maturing and payable August 2d, 1877; and that he is now the holder and bearer thereof, whereby said defendant became liable to pay to said plaintiff the amount due on said several coupons, according to the tenor and effect thereof, and being so liable, said defendant undertook and promised to pay the same, yet has failed to make such payment.

[Defendant has plead to the declaration: 1st. The general issue. 2d. A special plea setting forth that the ordinance referred to in the body of said bonds, and alleged to have been passed by the common council of said city, on the 15th day of June, 1869, entitled "An ordinance to provide for a loan of money for municipal purposes," was in the words and figures following:

["Be it ordained by the city council of Ottawa, that the mayor of the city be, and he is hereby authorized to borrow in the name of the city, at a rate of interest not exceeding ten per cent., the sum of sixty thousand dollars, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes; and that bonds of the city be issued therefor, in sums of five hundred dollars

[1] [Reprinted from 7 Reporter, 8, by permission.]

[2] [Reversed in 99 U. S. 86.]

[3] [From 11 Chi. Leg. News, 82.]

each, with interest payable annually. Said bonds to be payable, one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof. Provided, that no application shall be made of the proceeds of said bonds, except for the purpose aforesaid, and in pursuance of an ordinance to be passed for that purpose, by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid, shall be fully secured to the city."

[The ordinance also contained further provisions in regard to the mode in which it should be submitted to a vote of the voters of the city, which it is not necessary to recite at length. The plea also avers that the ordinance referred to in said bonds, purporting to have been passed by said city council, on the 30th day of July, 1869, entitled "An ordinance to carry into effect the ordinance of June 15, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" was in the following words:

["Whereas, by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow, in the name of the city, sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and whereas, it was provided by said ordinance that the same should be submitted to the voters of the city, to be voted for or against at an election to be holden for that purpose, on the 20th day of July, 1869; and whereas, at said election the said ordinance was ratified by the voters of the city, by a majority of 823 votes, being a majority of the legal voters of the city. Now, therefore, be it ordained by the city council of the city of Ottawa, that the bonds of the city, for the sum of sixty thousand dollars, be issued by the mayor, in accordance with the terms and conditions of said ordinance of June 15, 1869, and that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water power upon the Illinois and Fox rivers, within the city, and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the state, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water power in the city and its immediate vicinity, provided that said Cushman shall execute and deliver to the mayor an agreement from him to the city of Ottawa, that he will, without unreasonable or unnecessary delay, cause a good, substantial and sufficient dam to be constructed across the Illinois river, above the city, to bring into use all the available water power of said river at Ottawa, and will construct sufficient head and tail races to make such water power available, said races to be constructed and continued to the Fox river, below the aqueduct and above the island in Fox river, as fast as the same may be required for actual use, and as fast as water power can be leased at fair and reasonable rates, and be brought into actual operation, and that he will also erect a good, substantial and sufficient dam across Fox river, so as to make available the water power of both rivers, at Ottawa, as soon as the additional water power created by such dam across Fox river can be brought into actual use by being leased at reasonable and fair rates, so as to have all the available water power of both rivers at Ottawa, ready for use as rapidly as called for. And provided, also, that said Cushman shall bind himself, that if said work is not constructed as aforesaid, that he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon; and in case said work shall not be completed by said Cushman, then to return a pro rata share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed, provided that at least one of the dams above mentioned with the races necessary to make the water power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman. The intent of this ordinance being to secure the improvement and development of said water power in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or pro rata, so far as said water power shall be made available for practical use."

[The plea also avers that the "franchises and powers," referred to in the ordinance of July 30, 1869, were certain powers and franchises granted by the legislature of this state to said W. H. W. Cushman and his associates, by an act approved Feb'y 15, 1851, entitled, "An act to incorporate the Ottawa Manufacturing Company," and that on the 16th day of Feb'y, 1865, an act was passed amending said act, by all which legislation said Ottawa Manufacturing Company was made a private corporation, with power to build and maintain dams across the Illinois and Fox rivers, and to lease the water power so created. The plea then avers that the matters set forth in said ordinances show the only object and purpose for which said city had no authority to issue bonds for said purpose. The second special plea sets up the same matter, and avers that Cushman has not constructed certain dams, nor made available the water power of said rivers at Ottawa, and that he hath not performed any of the covenants mentioned in said ordinances, of all which plain-

tiff had notice. To these special pleas plaintiff has demurrer.] [4]

BLODGETT, District Judge, (after stating the facts). The only question raised by the demurrer is, whether the city had power to issue the bonds in question, and whether sufficient appears upon the face of the bonds to put the plaintiff upon notice of the purpose for which the bonds were issued. It is conceded that no special authority was ever given by the legislature to the city to make this donation to Cushman or the Ottawa Manufacturing Company. The manufacturing company was a purely private corporation, with no public duties or obligations imposed upon it by its charter or any general law. The power given the city council, by the charter, to "borrow money on the credit of the city and issue bonds therefor," is given in connection with the general grant of powers to the city council, and must, undoubtedly, be construed as a grant to borrow money, and issue bonds only for the purpose of carrying out some of the purposes for which the city corporation is created. Article 9, of the constitution of 1848, in force at the time these bonds were issued, clothed municipal corporations with power to levy and collect taxes for corporate purposes. The courts of this state have gone to their extreme tether in sustaining issues of municipal bonds for corporate purposes, when special authority has been delegated by the legislature, to the corporation, to aid or foster such purpose. Of this class are the donations and subscriptions authorized to be made by municipalities, to aid in the construction of railroads, bridges, etc., and, more notably, a class of bonds which were issued by towns, cities, and counties, to pay bounties to persons who should enlist in the army during the late war, of which Taylor v. Thompson, 42 Ill. 9, is a leading case. Rogers v. Burlington, 3 Wall. [70 U. S.] 655; and Mitchell v. Same, 4 Wall. [71 U. S.] 270, are to the same effect. But in all these cases there was found by the court to be an express legislative authority for the corporation to do what it had assumed to do; the principle running through all the cases where these bonds have been sustained being that the legislature had made the object for which the debt was created a "corporate purpose," within the meaning of the constitution; but I find no case going so far as to uphold an issue of bonds by a municipality in aid of even a quasi public enterprise in the hands of a corporation or individuals, unless there was an express or necessarily implied delegation of authority to issue such bonds, or levy a tax. The charter of the defendant city clothes its common council with various powers and duties, such as maintaining and improving streets and alleys, building school-houses and maintaining schools, to provide for lighting the streets of the city, to establish hospitals, and adopt sanitary measures, adopt a system of sewerage, to sustain a police, etc. These are all corporate purposes. That is, the corporation was created to accomplish these purposes, and I do not intend to be understood as saying that the legislature might not have delegated to this city council the right to make a donation to Mr. Cushman or the manufacturing company, in its enterprise of developing the water-power of the Fox and Illinois rivers, because that question is not now before me. But it is admitted that no such express delegation of power was made; I am, therefore, of opinion that there was no power in the city council to issue the bonds. It is contended, however, that inasmuch as the city council is empowered "to borrow money on the credit of the city and issue bonds therefor," these bonds are therefore valid in the hands of a bona fide holder who has purchased them for value on the market. This position might be correct if the recitals on the face of the bonds did not fully inform any purchaser of the object for which the bonds were issued. The bonds on their face state that they are issued in pursuance of the clauses in the charter authorizing the city to borrow money and issue bonds, and of two ordinances described by title and date. These ordinances state specifically the object to which the bonds were to be applied, and put the purchaser upon inquiry as to whether such was a corporate purpose or not. If the corporation is bound by the recitals in its bond, certainly the purchaser is also; and this plaintiff, in my opinion, had ample notice that these bonds were not issued to carry out any of the express or implied powers granted to this corporation. Demurrer overruled.

[NOTE. On appeal to the supreme court the judgment was reversed, and the demurrer sustained, in an opinion by Mr. Justice Harlan, who said that money borrowed by the city, and expended in developing its natural resources for manufacturing purposes, seemed to be within the provision of the constitution permitting the borrowing of money "to promote the general prosperity and welfare of the municipality." Where bonds are duly issued under the corporate seal of the city and state, that the ordinances under which they were issued were ones "providing for a loan for municipal purposes," the city is estopped, as against a bona fide holder for value, to say that the ordinances appropriated the money to other purposes, and the bonds were therefore void. 99 U. S. 86.]

HACKFELD v. The COSTA RICA. See Cases Nos. 3,261 and 3,262.

HACKLEY (DAY v.). See Case No. 3,679.

HACKLEY (FOSTER v.). See Case No. 4,971.

HADDEN (HOWE MACHINE CO. v.). See Case No. 6,785.

[4] [From 11 Chi. Leg. News, 82.]

Case No. 5,890.

HADDEN et al. v. HOYT.

[2 Hunt, Mer. Mag. 269.]

Circuit Court, S. D. New York. Jan. 23, 1840.

CUSTOMS DUTIES—CLASSIFICATION—BRUSSELS AND WILTON RUGS.

[Brussels and Wilton rugs, composed of linen and worsted, without any wool, were not dutiable under the act of 1832 (4 Stat. 583), as carpets or carpeting, or as manufactures of wool, but were subject to a duty of 15 per cent., as a manufacture of which flax is a component part.]

The plaintiffs [David Hadden and others] had, during 1838 and 1839, imported various parcels of Brussels and Wilton rugs. The defendant, collector of the customs at New York, had exacted duties upon these importations at the rate of 50 per cent. ad valorem, as manufactures of wool. The plaintiffs insisted that they were an article not enumerated in the act of 1816 (3 Story's Laws, 1587 [3 Stat. 310]), and therefore by it charged with 15 per cent. ad valorem, and so, under the act of 1832 (4 Story's Laws, 2322 [4 Stat. 583]), rendered free. The defendant contended that they were subject to duty as a manufacture of wool, or as carpets or carpeting, under the act of 1832. The plaintiffs proved the payment of the duties under protest against the rate exacted, and that the articles were rugs, composed of linen and worsted, without any wool. It appeared that the article was usually manufactured by carpet manufacturers, although in some instances by manufacturers of this article only; that it was made in the same manner as carpets, only the patterns were different, having a border all around the piece laid out for a single rug; that in the piece they were all woven with selvages between every length of a rug, which selvages had not the raised figure or filling, and were so left to separate the pieces, and sometimes to have a fringe sewed on; that a piece woven for rugs would not serve for a carpet, both by reason of the figure and the selvages; that, in the trade, rugs were not known as carpets or carpeting, but bore a distinct name, and had a particular use; that, in trade, carpets were pieces of carpeting woven so as to form a pattern for a room or space of given dimensions, sometimes made up by sewing, sometimes woven in its shape; carpeting was the cloth woven for carpets in the piece, and to be made into carpets of any size. The witnesses stated that, under an order for carpets or carpeting, they would not expect, accept, or furnish rugs, nor vice versa; that carpets were sometimes cut in pieces, and had fringes sewed around, when they were sold, and called rugs, but they were not imported in this manner.

The district attorney conceded that upon the evidence the jury must find that the articles in question were not carpets or carpeting, nor chargeable with duty as a manufacture of wool. But he insisted that they were a manufacture of which flax was a component part, and so liable under the act of 1824 (3 Story's Laws, 1943 [4 Stat. 25]), to a duty of 20 per cent. ad valorem, reduced by the second section of the act of 1832 to 15 per cent. ad valorem.

D. Lord, Jr., for plaintiffs. B. F. Butler, Dist. Atty., for defendant.

THE COURT (BETTS, District Judge) was of this opinion, and so charged the jury.

Verdict for the plaintiffs, $1,436.64.

Case No. 5,891.

HADDEN v. HOYT.

[2 Hunt, Mer. Mag. 343.]

Circuit Court, S. D. New York. Jan. 24, 1840.

CUSTOMS DUTIES ACTS — RULE OF CONSTRUCTION.

This was an action [by David Hadden against Jesse Hoyt] to recover the excess of duties on knit shirts and drawers. The evidence was similar to that of the case of Hall v. Hoyt [Case No. 5,934]. But in the present case the defendant introduced the former collector of New York, who gave evidence that from the act of 1828 [4 Stat. 270] to that of 1832 [4 Stat. 583] the articles in question had, in pursuance of orders from the treasury, been charged with the duty on clothing ready made, and not with the duty on hosiery.

B. F. Butler, for defendant, insisted that the court should charge, upon this new evidence, that the act of congress of 1832 must in judgment of law be deemed to have reference to the then existing practice of the treasury department and its circulars to collectors, and that therefore, in this construction of the law, the articles were to be deemed as falling under the term "ready-made clothing," and not under the term "hosiery."

D. Lord, Jr., for plaintiff, insisted that the words in the law must be construed as they would be understood in their common or commercial use; and not in any peculiar sense or use, practised by the treasury, and as such known to congress. That the law was made to govern not the members of congress, but dealers in the articles to whom the law was most addressed, and whose understanding of its terms should control.

THE COURT (BETTS, District Judge) expressed doubt upon the question; and with the assent of the parties pro forma, charged that the jury were to be governed by the usual and well-known name of the article, and meaning of the words of the law, as understood generally in commerce at the date of the act.

A verdict was rendered for $2,400, and the cause was carried up, by a writ of error, to the supreme court of the United States. [Case unreported.]

HADDUCK (PAYSON v.). See Case No. 10,862.

Case No. 5,892.

HADE v. BROTHERTON.

[3 Cranch, C. C. 594.] [1]

Circuit Court, District of Columbia. May Term, 1829.

PLEA OF NUL TIEL RECORD—TRANSCRIPT OF JUSTICE OF THE PEACE—CERTIFICATION UNDER ACT OF CONGRESS.

Upon the plea of nul tiel record, a transcript of the record of a justice of the peace in Pennsylvania, certified by him to the county court, and certified by the prothonotary and the presiding judge of that court, according to the act of congress, is evidence of the judgment, although that transcript consists of short docket-entries.

Debt, upon the judgment of a justice of the peace in Pennsylvania, entered of record in the court of common pleas of county, in Pennsylvania. The record of the court of common pleas was certified by the prothonotary and the presiding judge, according to the act of congress; and it stated a transcript of a judgment rendered by a justice of the peace, for $78.62½, and 37½ cents costs, certified to the court by the justice of the peace. That transcript consisted of short docket-entries only, stating a summons, and judgment by default, upon a note and open account.

Mr. Marbury and Mr. Turner, for defendant, contended that it was no record of a judicial proceeding. It contained no declaration, no plea, and no issue.

Mr. Hall, for plaintiff.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion, upon the plea of nul tiel record, that it was such a record as is stated in the declaration.

MORSELL, Circuit Judge, thought it could not be considered as a record, because not made out in full form of a technical record.

HADE (UNITED STATES v.). See Cases Nos. 15,273 and 15,274.

Case No. 5,893.

HADEN v. PERRY.

[1 Cranch, C. C. 285.] [1]

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

CONFESSION OF JUDGMENT—RETURN OF WRIT.

Judgment cannot be confessed before the return term of the writ.

The defendant was arrested on a writ returnable to the next term.

Mr. Taylor, for defendant, moved for a habeas corpus, to bring up the defendant to confess judgment at this term, and cited the act of assembly of Virginia of 19th December, 1792 (page 113, § 43), that a confession of judgment is equal to a release of errors.

But THE COURT overruled the motion. See McNeil v. Cannon [Case No. 8,913], June term, 1803, and Smith v. McCue or Askew v. Smith [Id. 588], March adjourned term, 1804.

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

HADFIELD (RHODES v.). See Case No. 11,748.

Case No. 5,894.

In re HADLEY.

[12 N. B. R. 366.] [1]

District Court, E. D. Michigan. 1875.

BANKRUPTCY—PETITION FOR ADJUDICATION—VALUE OF DEBTS OF PETITIONERS — STOPPAGE OF PAYMENT OF COMMERCIAL PAPER — PREFERENCE —AFFIDAVIT BY ATTORNEY — WARRANT OF ARREST.

1. In computing the number of creditors who must join in a petition for adjudication, creditors whose respective debts do not exceed two hundred and fifty dollars, are not to be reckoned; but in computing the amount or value of creditors all should be included. The aggregate of petitioners' debts must be equal to one-third of all the debts, irrespective of the amount, provable against the estate.

[Cited in Re Bergeron, Case No. 1,342; Re Currier, Id. 3,492. Followed in Re Woodford, Id. 17,972; Re Broich, Id. 1,921. Cited in Re McAdam, Id. 8,654; Re Lloyd, Id. 8,429; Roche v. Fox, Id. 11,974.]

2. The nature of petitioners' debts should be so far stated in the petition that the court may see they are provable against the estate.

3. The depositions in proof of debt are intended to support the allegations of the petition, not to supply defects in them.

4. The forms prescribed by the supreme court should be followed as closely as the circumstances will permit.

5. Under the amendment of 1874 [18 Stat. 178], the general allegation that the debtor "being a merchant and trader, fraudulently stopped payment" is sufficient, without alleging that the stoppage was of commercial paper. The clause was intended to cover the fraudulent stoppage of the payment of debts generally.

6. Where a fraudulent stoppage of payment of commercial paper is alleged, the pleader may aver a general stoppage of payment without describing any paper, or he may aver the non-payment of a particular piece of paper, describing it, and rely upon it as prima facie evidence of a general stoppage.

7. Where a preference is alleged it is not necessary to state that such preference was in fraud of the bankrupt act [of 1867; 14 Stat. 517], but the name of the person preferred should be set forth.

8. Where a petition is verified by an attorney, the non-residence of his principal should be alleged directly and not by way of recital.

9. The allegations in the deposition in proof of the act of bankruptcy should be made upon the personal knowledge of the deponent and should make out a prima facie case. Such alle-

[1] [Reprinted by permission.]

gations should be made by separate deposition and not in the petition itself.

[Cited in Ex parte Lane, 6 Fed. 39.]

10. Facts relied upon to justify a warrant of arrest and seizure should not be set forth in the creditors' petition.

On exceptions to creditors' petition. The several grounds of exception are stated in the opinion of the court.

J. G. Dickinson, for debtor.
W. S. Edwards, for creditors.

BROWN, District Judge. I shall proceed to dispose of the several exceptions in the order in which they are taken.

First. That it does not appear by the petition that the requisite number of creditors have joined. The allegation in the petition is that the petitioners "constitute one-fourth in number of the creditors of the said Joseph F. Hadley, and that said above-mentioned indebtedness amounts to at least one-third of the debts provable against the said debtor, under the bankrupt act and the amendment thereto." Immediately following this, however, is the further allegation "that the indebtedness of the said Hadley, as shown by his books, and from statements made by him, amounts to upwards of fourteen thousand three hundred dollars." The aggregate of debts set forth in the petition is four thousand seven hundred and fifty-three dollars and sixty-three cents, which is one-third of fourteen thousand two hundred and sixty dollars and eighty-nine cents. There is no statement as to the number of persons to whom the indebtedness of Hadley is owing, and the general allegation that the petitioners constitute one-fourth in number must be presumed to be true, and is sufficient; but by a comparison of the figures above given it appears that the aggregate of their demands does not equal one-third of the indebtedness as set forth in the petition. It was suggested upon the argument that much of this indebtedness consists of debts of less than two hundred and fifty dollars in amount, and that the aggregate of petitioners' claims, being so nearly one-third of the entire amount, the court might presume there were enough debts below two hundred and fifty dollars which should be excluded to make the petitioners' one-third in amount. This argument is based upon the theory that in computing both the number and the amount of creditors, only those whose respective debts exceed two hundred and fifty dollars shall be reckoned. I am aware that such was the ruling of the learned judge of the Southern district of New York in Re Hymes [Case No. 6,986]. It was held in this case that where the petition was filed on behalf of creditors holding provable debts exceeding the sum of two hundred and fifty dollars, to ascertain whether the amount of provable debts held by them is equal to one-third in amount, only the provable debts of creditors which exceed two hundred and fifty dollars must be reckoned, and the requirement of the statute is satisfied if the debts due to such petitioning creditors equal one-third of the provable debts due to creditors holding provable debts exceeding the sum of two hundred and fifty dollars, and that it was not necessary that the amount of debts of the petitioning creditors should be equal to one-third of all the provable debts. I was much struck with the force of the reasoning of the learned judge upon this question, but upon more mature consideration I find myself unable to concur in his opinion. I think a comparison of the several provisions of section 39, as amended in 1874, indicates the design of congress to exclude the smaller creditors only in estimating the one-fourth in number by personal enumeration, and that in computing the amount the aggregate of their debts must be equal to one-third of all the debts, irrespective of amount, provable against the estate. In mentioning the proportion of creditors who must join in instituting or compromising proceedings in bankruptcy, the word "number" is constantly used in contra-distinction to "amount." For example, in speaking of cases commenced since December, 1873, the same section provided that "if such allegation as to the number or amount of petitioning creditors be denied by the debtor," the court shall require him to file forthwith a full list of his creditors, and ascertain whether "one-fourth in number and one-third in amount" have petitioned; but if the debtor "shall admit in writing that the requisite number and amount of creditors have petitioned," the court shall so adjudge, "and if it shall appear that such number and amount have not so petitioned," the "court shall grant time within which others may join;" and if at the expiration of the time so limited the number and amount shall comply with the requirements of this section, "the matter may proceed, but if such number and amount shall not answer the requirements of the section the proceedings shall be dismissed." Near the close of the section follows the provision in question. "In computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned." If congress had designed to exclude the smaller creditors in computing the amount who should join, it seems very singular they should not have used the language "in computing the number and amount of creditors," instead of using merely the word "number," since the distinction between "number" and "amount" is constantly kept in view in the prior clauses of the section. The same distinction is preserved in the language of section 40, which provides that "if the court shall be satisfied that the requirement of section 39, as to the number and

amount of petitioning creditors, has been complied with," or if creditors "sufficient in number and amount shall sign such petition, so as to make a total of one-fourth in number and one-third in amount of the provable debts, as provided in said section, the court shall so adjudge." Additional support is found for this view in the language of section 41, with respect to the discontinuance of bankruptcy proceedings, which may be entered upon the assent, in writing, of the debtor, "and not less than one-half of his creditors in number and amount." Section 43 also provides for a supersedeas of proceedings in bankruptcy by a resolution of three-fourths in value of the creditors, and further provides that "such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value, and shall be confirmed by two-thirds in number and one-half in value, and in calculating the majority for the purposes of a composition, under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value but not in the majority in number." By this clause congress clearly indicated its intention that, in determining whether a composition should be effected by a majority in value of all the creditors, even the smallest in value must be reckoned, but only those whose debts exceed fifty dollars should be reckoned in determining the majority in number. I do not see how the court can assume in this case that any of the creditors making up the sum of fourteen thousand three hundred dollars hold claims of less than two hundred and fifty dollars, but even if it could do so it would not change the result upon my view of the construction of this section.

Second. That it is not stated in said petition what is the nature of the debts set forth therein. The allegation of the petition is that the demands "each exceed the amount of two hundred and fifty dollars, and the nature of your petitioners' demands are as follows: Accounts." Here follows the name of each creditor and the amounts. No detailed statement of the petitioners' demand is necessary in a creditor's petition, but form No. 54 seems to contemplate that it should be so far stated that the court may see that it is a provable debt. It was argued that the court had a right to look at the deposition in proof of the debt and to consider it as a part of the petition for that purpose. This court, however, held in the Case of McKibben [Case No. 8,859], that the petition should be a complete pleading in itself, and should contain all the requisites necessary to make out a case, and that the depositions were intended to support the allegations in the petition, and not supply defects in them. General order 32 provides that the "several forms specified in the schedules * * * shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case." I think these forms should be followed wherever it is practicable to do so, and should be complied with as closely as the circumstances of the case will admit of. And this, I believe, has been the rule adopted in most of the districts. See Hunt v. Pooke [Case No. 6,896].

Third. That the first act of bankruptcy charged is insufficient, in that it alleges only that the debtor, "being a merchant and trader, fraudulently stopped payment," without alleging that he stopped payment of his commercial paper. The clause upon which this section is based, as originally enacted, read as follows: "Who being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days." So many different interpretations were given to this section that in 1870 [16 Stat. 276], it was amended so as to read, "who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days." In Case of Hercules Mut. Life Ins. Soc. [Case No. 6,402], it was held by Judge Blatchford: (1) If the debtor were a banker, broker, merchant, trader, manufacturer, or miner, he might be put into bankruptcy for the fraudulent stoppage of the payment of his debts generally, whether such debts were commercial paper or not. (2) That the latter clause, "who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," applied to all persons whether of the classes enumerated or not. I entertain very grave doubts whether this construction was correct, but whatever conflict of opinion may have existed with reference to the clause as it then stood, I think the last amendment to the section in 1874 has removed the difficulties. It now reads, "who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended, and not resumed payment, within a period of forty days, of his commercial paper." I think that congress intended to provide by this that any person who has fraudulently stopped payment of his debts generally may be adjudicated a bankrupt. What would constitute a stoppage of payment is usually easy to determine. The closing of the doors of a banking-house, a general assignment for the benefit of creditors, or any other act which, in common parlance, is termed a "failure," would be evidence of such stoppage; whether it would be fraudulent or not would depend upon the circumstances of each case. I think this allegation sufficient.

Fourth. That although the second act

charges that the debtor, being a merchant and trader, fraudulently stopped payment of his commercial paper within a period of forty days, to wit, a certain draft, it does not appear that there was any fraud in the stoppage of payment, nor that the paper was actually the commercial paper of the said Hadley, and made by him in his character of merchant or trader, nor that it was ever presented for payment, and that payment was ever demanded. The petition charges that "at Holly, in said district, on the 25th of March, 1875, the said Hadley, being a merchant and trader, has fraudulently stopped payment of his commercial paper within a period of forty days, to wit: a draft drawn by Watrous, Boyden & Co., for the amount of one hundred and thirty dollars, due and payable on or about the 25th of March, 1875, and duly accepted by the said Hadley, said draft still remaining unpaid." I think this allegation sufficient. It is substantially a compliance with the forms. It is not necessary that the facts constituting the fraud should be set forth in the allegation of the act of bankruptcy, although it must appear in the deposition in proof of the act. So, the allegation that it was the commercial paper of Hadley, and made by him as a merchant, need not be averred except in general language, although these facts should be made to appear by deposition. The allegation of stoppage may be made in two forms: The pleader may set up a general stoppage of payment without describing any paper, or he may aver the stoppage of a particular piece of commercial paper, and rely upon it as prima facie evidence of a general stoppage. McLean v. Brown [Case No. 8,880]; In re Hercules Mut. Life Ins. Soc. [supra]; In re McNaughton [Case No. 8,912]; In re Wilson [Id. 17,780]. In the latter case he must describe the paper sufficiently to identify it. In re Randall [Id. 11,551]. Although this allegation does not give the date of the draft in question, still I think it sufficiently describes it to identify it, and is sufficient to prevent the party from being misled.

Fifth. That although the third act charged sets up a payment by way of preference, it is not stated or charged that such payment or preference was in fraud of the provisions of the bankrupt act or the amendments thereto. I do not think that such allegation is necessary. The act does not provide in express terms for it, nor do the forms seem to contemplate the insertion of any such allegation. I think, however, the count is defective in not stating the name of the person who was intended to be preferred by the payment of the money in question. This the form contemplates, and I think good pleading requires.

Sixth. That the petition is not properly verified. Objection is made that it is verified by an attorney of the petitioners instead of the petitioners themselves. The amendments of 1874 provide, however, that "if any of the said first five signers shall not reside in the district, the petition may be verified by the oath of the attorney or agent of the signers." But it does not appear in the verification that the first four signers, for whom the attorney signs the petition, are not residents of the district, and no authority appears for the signatures of the attorney. It is true that in the introductory portion of the petition the first four signers are described as of the cities of Rochester and Utica, in the state of New York, but I do not think that such description can be regarded as direct affirmation of the fact. The fifth signer is the firm of Hitchcock, Esselstyn & Co., of Detroit. The sixth signer is Isaac Sloman, of Rochester, and the seventh signer is the firm of Swartout, Ackerman & Co., of Syracuse, New York. The petition is verified by one of the firm of Hitchcock, Esselstyn & Co., in person, and by Mr. Edwards, who purports to sign for the first four petitioners, but I think the verification is fatally defective in failing to aver that they are non-residents of the district.

Further objection is made that the allegations in the petition are not supported by the depositions. The first deposition is that of William S. Edwards, who swears generally to the several acts of bankruptcy contained in the petition, but only upon information and belief. I think that a deposition in proof of an act of bankruptcy should be made upon the personal knowledge of the deponent. I would not say here that every fact contained in the deposition should be made upon personal knowledge; but if any fact whatever is stated upon information and belief it should be made with such particularity and detail that the court may see from whom the information was derived, the circumstances under which it is acquired, and the weight that should be attached to it. In the deposition in question, however, not only are all the facts stated upon information and belief, but they are stated in the most general terms, not specifying how, from whom, when and where the information was derived; and, in fact, it is substantially a rehearsal of the allegations in the petition. No weight whatever can be attached to it. The other deposition is that of Cornelius J. Reilly, who swears that on the 21st of May he visited Holly for the purpose of investigating Hadley's affairs; that he saw and conversed with him; that in his conversation Hadley stated that about one month previously he had taken an inventory of his stock, which showed his assets to be about eleven thousand dollars, and his liabilities about thirteen thousand dollars; that that was his present condition, except that he had sold about one thousand dollars worth of goods. To deponent's question as to what had been done with the money realized from the sale of these goods, he replied that he had paid the Merchants' National Bank about five hundred or six hundred dollars, and that the president of the bank was a relative of his. There is nothing in this depo-

sition to support any of the acts of bankruptcy charged, except possibly the preference to this bank. There is nothing to indicate a general stoppage of payment, or even the non-payment of the draft in question, much less that such non-payment was fraudulent in its character. Although I do not think it necessary that the petitioners should anticipate any defense in their depositions or make out anything more than a prima facie case, still there must be enough to justify the court in putting the party upon his trial. There are, it is true, certain facts recited in the petition itself, following the several allegations of bankruptcy, but the form seems to require that such allegations should be contained in a separate deposition, and the practice has been uniform in that regard. It follows from this that the order to show cause must be vacated, with which, of course, will follow the warrant of arrest and seizure.

The facts set forth in the petition as above stated were relied upon in part to justify the issuing of a provisional warrant. This court held in Case of McKibben [Case No. 8,859], that the prayer for a warrant of arrest might be incorporated in the petition, and that, if sufficient grounds appeared in the depositions to justify the issuing of the warrant, it would not be quashed because a separate petition was not filed, although such separate petition was deemed the better practice. I have never known, however, of the facts relied upon in support of the warrant being incorporated in the petition, and do not approve of the practice. The facts stated in this petition are set forth with great looseness and generality, many if not most of them upon information and belief, and the petition is verified by one petitioner and by an agent of four others. Of course every fact stated in the petition of the parties' own knowledge must be held to be within the knowledge of each person verifying the petition. A case will very rarely arise where six or eight persons, or even two persons, will have personal knowledge of every fact set forth in a long statement of this kind, and to allow such statement to be made in this general way, and to be verified by several persons, is giving sanction to a looseness of practice which ought not to be tolerated. I think that in every case the facts in support of the warrant of arrest and of the order to show cause should be set forth in separate depositions, and, as above indicated, I think the better practice is to file a separate petition for the warrant. It results that the petition must be dismissed, and the order to show cause and the warrant of arrest be vacated.

HADLEY (ATWATER v.). See Case No. 639.

HADLEY (CAMPBELL v.). See Case No. 2,358.

HADLEY (HARRISON v.). See Case No. 6,137.

Case No. 5,895.

Ex parte HADRY.

[2 Cranch, C. C. 364.] [1]

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

INSOLVENCY—DISCHARGE—PRODUCTION OF BOOKS OF ACCOUNT.

Upon the trial of an issue upon allegations filed by the creditors of an insolvent debtor to prevent his discharge, he must produce his books of account, if called for.

Upon the application of Henry Hadry to CRANCH, Chief Judge, for a discharge under the act for the relief of insolvent debtors within the District of Columbia, he appointed the 2d Monday of November, for that purpose, when the court was in session.

Mr. A. C. Cazenove, one of his creditors, filed allegations of fraud, and petitioned the court for a jury, which was ordered accordingly.

On the trial of the issue upon his allegations, the counsel of Mr. Cazenove called upon the petitioner to produce his books of account. The petitioner stated that he had them ready to produce, if the court should order him to produce them, but he did not mean voluntarily to produce them, to gratify his creditors.

THE COURT (THRUSTON, Circuit Judge, absent) ordered the books to be produced; and observed that the petitioner when he makes application to the judge, must offer to surrender all his property, effects and evidences of debts, and is presumed to have them ready to be produced, and before his discharge must deliver them to the trustee. Allegations of fraud may as well be filed after his discharge as before; and if filed after, the books would be evidence.

Case No. 5,896.

In re HAFER et al.

[1 N. B. R. 547 (Quarto, 147); [2] 25 Leg. Int. 148; 15 Pittsb. Leg. J. 389.]

District Court, E. D. Pennsylvania. March 17, 1868.

BANKRUPTCY — EXEMPTION OUT OF PARTNERSHIP ASSETS.

The individual members of a bankrupt firm, in Pennsylvania, have no right to any of the partnership assets as exempt property; either under the United States bankrupt law of 1867 [14 Stat. 517], or the law of that state.

[Cited in Re Parks, Case No. 10,765; Re Blodgett, Id. 1,555; Re Handlin, Id. 6,018; Re Corbett, Id. 3,220.]

In bankruptcy. The assignee in his certificate of exempted property set apart the separate property of the bankrupts [James H. Hafer and brothers], but refused to allow them any part of the partnership assets. To

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

[2] [Reprinted from 1 N. B. R. 547 (Quarto, 147), by permission.]

this certificate exceptions were filed on behalf of the bankrupts, on the ground, that, either jointly or severally, they were entitled to the sum of $500, and also under the act of 1841 [5 Stat. 440], to property to the value of $300, or such sum as, taken with the amount of their separate property, would equal $300.

J. V. Darling, for assignee.
Mr. Goodman, for bankrupts.

CADWALADER, District Judge. As I understand this case, all the separate property of each bankrupt has been allowed to him as exempted. The state exemption laws have been decided by the state courts not to apply to partnership property; and the words of the act of congress manifestly refer only to separate property of the debtor. The exceptions are overruled.

Case No. 5,897.

In re HAFER et al.

[1 N. B. R. 586 (Quarto, 163);[1] 6 Phila. 474; 25 Leg. Int. 164.]

Circuit Court, E. D. Pennsylvania. May 22, 1868.

BANKRUPTCY — EXECUTION CREDITOR — SUMMARY HEARING — PROCEEDINGS TO RESTRAIN EXECUTION CREDITORS — PRIORITY.

1. Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing at any stage, after the execution of the assignment.

[Cited in Ford v. Keys, Case No. 4,933.]

2. If the injunction has been issued out of the circuit court, under the equitable jurisdiction auxiliary to that of the district court in bankruptcy, the execution creditor may, at his election, require the assignee, as complainant, to proceed in the circuit court in equity, or invoke the summary jurisdiction of the court of bankruptcy for a decision of the question of priority.

[Cited in Re Lanier, Case No. 8,070.]

[In bankruptcy. In the matter of Hafer & Bro.] The adjudication of bankruptcy was made in the district court [case unreported], during the pendency of auxiliary proceedings in equity, in the circuit court, to restrain execution creditors. Under an agreement between these execution creditors and the petitioning creditors, an order was made that the delivery, by the sheriff of Berks county, to the assignee in bankruptcy, of the property levied on at the suit of the execution creditors, might be made without prejudice to such valid and rightful lien, if any, under the levies by the sheriff, as might be sustainable against the assignees; so that the alleged rights of the execution creditors respectively, and the alleged adverse rights and interest of the assignee, and of the general body of creditors represented by him, might be fully and freely asserted, contested, and decided, under the proceedings in the circuit court, or in the district court in bankruptcy. The assignee having been appointed and the assignment executed, he was, under an amended and supplemental bill, added, or substituted, as complainant in the proceeding in the circuit court. The answer of certain execution creditors having been filed, the case was, by consent, set down for a hearing as upon bill and answer, under an agreement that the only question for argument should be, whether the facts in the answer stated were, if proved, sufficient to defeat the bill. If the court should be of opinion that they were, the complainant was to be at liberty to file a replication and go into proofs.

Mr. Darling, for assignee.
Mr. Greenbank, for execution creditors.

CADWALADER, District Judge. The effect of the agreement, under which the sheriff relinquished possession of the property levied upon, was to give to the execution creditors an option to proceed summarily in the district court in bankruptcy, to obtain adjudication upon their asserted right of priority, or to require the assignee to proceed in the equity suit in order to sustain, if he could, his asserted adverse right. So soon as an assignee was duly qualified, the execution creditors might have applied to the district court in bankruptcy for an adjudication upon their asserted priority. Upon such an application, the case would be referred for summary investigation to a commissioner, or to the register, to report upon the question of priority. His report would be subject to investigation, as that of a master in chancery or commissioner in ordinary cases, except that in bankruptcy such function may be executed somewhat less formally and more expeditiously. The execution creditors and the assignee might, perhaps, without any special reference to the register, attend before him and proceed as under such a reference.

Mr. Greenbank, for the execution creditors, then said, that he would prefer proceeding summarily before the register in bankruptcy. The case upon the hearing in equity then went off without any action by the court. The court, however, intimated that there would have been some difficulty in pronouncing a decision upon the question submitted, because upon a hearing on bill and answer, a greater effect is attributable to the answer than had apparently been here intended on the part of the complainant.

[1] [Reprinted from 1 N. B. R. 586 (Quarto, 163), by permission.]

HAGAMAN (WELLS v.). See Case No. 17,396.

Case No. 5,898.

In re HAGAN.

[6 Ben. 407;[1] 10 N. B. R. 383.]

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

BANKRUPTCY—INTEREST ON CLAIMS PROVED.

Creditors, who have proved their claims against the estate of a bankrupt, are entitled to interest on their claims from the filing of the petition to the date of payment, if the bankrupt's estate is sufficient to pay the same to all.

By I. T. Williams, Register:

[I, the undersigned register, in charge of the above entitled matter, do hereby certify to the judge of this honorable court, that the assets in this case, which have come into the hands of the assignee of the above named bankrupt [Edward Hagan], are more than sufficient to pay in full all claims that have been proved against the same, with interest thereon, besides the fees, costs, and expenses of the several proceedings in bankruptcy in the said matter. That by an order made by me on the 3d day of March, 1873, I directed payment of all the proved claims, with interest thereon, up to the day of filing the petition for the adjudication of bankruptcy herein, which said claims have been duly paid. That afterwards it appearing that there was still sufficient left to pay interest on said claims up to the present time, an application was made on the part of said creditors for the payment of interest thereon from the day of filing the said petition to the present time, which application was opposed by the attorney for the bankrupt, and thereby an issue was duly framed upon the question, whether the said creditors were entitled to have interest allowed on their said claims up to a period beyond the date of filing said petition. I further certify, that in my opinion the said interest is allowable and should be paid up to the day of the payment of such claims respectively. There is nothing in the bankruptcy act [of 1867 (14 Stat. 517)] that would seem to prohibit such payment, when there are sufficient funds in the hands of the assignee to do so. This would seem to be the rule of the English law. Blackstone says (book 2, p. 488), "Though the rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet in case of a surplus left after payment of every debt, such interest shall again revive and be chargeable on the bankrupt or his representatives." Citing 1 Atk. 244.][2]

BLATCHFORD, District Judge. I concur in the views of the register.

HAGAN'S PETITION. See Case No. 9,802.

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

[2] [From 10 N. B. R. 383.]

Case No. 5,899.

HAGEN v. KEAN et al.

[3 Dill. 124.][1]

Circuit Court, E. D. Missouri. 1875.

DAMAGES FOR DEATH BY WRONGFUL ACT — WHO ARE PERSONAL REPRESENTATIVES.

1. An action is given by a statute of Illinois to the "personal representative" of one whose death is caused by the wrongful act of another. *Held*, that the words, personal representative, meant the executor or administrator, and that under the statute the widow, although the deceased died without children and she was the sole beneficiary of the amount receivable, could not sue in her own name.

2. Whether such an action can be maintained in another state than the one where the cause of action arose, quaere?

Demurrer [by the defendants, William R. Kean and others] to the petition on the ground of the plaintiff's want of capacity to sue.

W. H. H. Russell, for plaintiff.

Blakeman & Thayer, for defendants.

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

DILLON, Circuit Judge. In 1853 the state of Illinois enacted what is known in England as "Lord Campbell's Act" (9 & 10 Vict. c. 93). The second section of the Illinois act provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered shall be for the exclusive benefit of the widow and next of kin" of such deceased person. This action is originally brought in this court by Louisa Hagen, widow of the late Charles E. Hagen, whom the petition states to have been killed in 1870, in the state of Illinois, by the wrongful act of the defendants. The petition states a case within the Illinois act above mentioned. It avers also that the said husband of the plaintiff died without children or next of kin, and that she is his widow and personal representative. It does not aver however, that she has ever taken out letters of administration either in Illinois or Missouri. It does state a case showing that, under the statutes of Illinois, she would as widow be solely entitled to any sum recovered for the wrongful death of her husband.

The right of action in a case of this kind is created by statute, and it must be brought by and in the name of the person whom the statute prescribes shall bring it,—that is the "personal representative" of the deceased. And these words in the statute of Illinois have been authoritatively construed by the supreme court of that state to mean "the executor or administrator." City of Chicago v. Major, 18 Ill. 349; Boutiller v. The Milwaukee, 8 Minn. 97 [Gil. 72]; Western, etc., R. Co. v. Strong, Sup. Ct. Ga., 1874 [52 Ga.

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

461]. See Woodard v. Michigan, etc., R. Co., 10 Ohio St. 121; Whitford v. Panama R. Co., 23 N. Y. 465; Shear. & R. Neg. § 290 et seq. The plaintiff does not allege nor is it claimed that she is the executor or administrator of her deceased husband, and hence she cannot maintain the action in her own name, even though she is the beneficiary of the sum which the personal representative might recover. Suppose the proper probate court in Illinois should to-morrow appoint an administrator of the plaintiff's deceased husband, and he should bring an action in Illinois, or in this state, if such an action will here lie, is it not clear that the present action could not be pleaded in abatement? If not, then this suit is improperly brought, or the defendant is liable to two separate actions for the same injury, each looking to a full recovery for the damages thereby caused. Whether an administrator appointed in Illinois or in Missouri or in the latter state as auxiliary to an administration in the former could recover in this district by virtue of the Illinois statute, we give no opinion.

Demurrer sustained.

HAGERSTOWN AGRICULTURAL IMPLEMENT MANUF'G CO. (BIRDSALL v.). See Cases Nos. 1,436 and 1,437.

HAGERTY (TYLER v.). See Case No. 14,308.

Case No. 5,900.

HAGGETT v. BOWMAN et al.

[1 Sawy. 4.] [1]

District Court, D. California. Jan. 10, 1870.

SHIPPING—MASTER—ERROR IN JUDGMENT—INSUFFICIENCY OF TACKLE AND APPAREL.

1. An error in judgment on the part of a master not shown to be incompetent in respect to the navigation of the vessel, will not render the owners liable for its consequences.

2. A deduction from the monthly hire will be made, where the voyage has been protracted by reason of the insufficiency of the sails, etc.

[In admiralty. Libel by Thomas Haggett against J. W. Bowman and others.]

Pixley & Harrison, for libellant.

James McCabe, for claimants.

HOFFMAN, District Judge. This is an action brought by the master to recover the monthly hire of the vessel of which libellant was master, as stipulated by charter party. The execution of the charter party is not denied. The defense set up is that the master was incompetent, that he unnecessarily delayed the voyage, thereby defeating its objects, and that the sails of the vessel were old, and unfit for use. It is not pretended that the master willfully attempted to thwart the designs of the charterers. They appear to have been engaged in a somewhat undefined enterprise, of which the principal objects were to trade with the natives of Alaska, and to search for mines or mineral lodes.

That the voyage, both going and returning, was unusually long is evident. But it is far from clear that this was owing to the fault of the libellant. The expedition appears to have been very imperfectly organized, and, as Lew, the steward, expresses it, there was "neither head nor tail to the vessel's management." Capt. Bowman, who was in charge of the expedition, seems also to have had more or less share in the navigation of the vessel.

Mr. Lew states that there was a good deal of talk and disturbance and jarring among the crew, but he cannot say that it was caused by Capt. Haggett more than any one else. There was evidently more time consumed in reaching the point for which they started, than would have been necessary if the vessel had taken the proper course, but this Mr. Lew declines to attribute to the fault of Capt. Haggett, as no observation had been taken for three days, and no reckoning obtained. Some difference of opinion existed as to the propriety of going close in to the shore, anchoring, etc. But these matters may, I think, be considered as left to the master's discretion. He appears to have been interested in the adventure. He is acquitted of all intention to frustrate its objects, or impede the operations of his associates, and even if he did commit an error of judgment, and was as Capt. Bowman says, "too much afraid of the land," that circumstance affords no reason why the charterers should not pay the stipulated sum for the hire of the vessel.

It has seemed to me that the respondents are attempting to attribute to the fault of the libellant the failure of an enterprise, the want of success of which was due to other causes.

It is established beyond controversy, that the sails were old, and required continual repairs. Mr. Lew states that this caused danger, delay and much inconvenience. So far as I can gather from the terms of this very inartificially drawn charter party, the hirers of the vessel were to furnish a full crew, provisions, and utensils for the voyage, and to pay all port charges and other expenses that might accrue on the voyage and fitting out of the vessel.

The libellant has presented a claim for various expenses incurred by him. I hardly think it could have been intended by the parties, that anchors, flags, and other articles necessary to the vessel, and which still remain on board as part of her apparel, furniture, and appurtenances, should be paid for by the hirers and retained by the master. The sums paid for these articles should, therefore, be deducted from the account by the master. I think, too, that the condition of the sails, to some extent protracted the voyage, and as the vessel was hired by the month a deduction should be made on that account. The whole time during which she was engaged

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

in the service was three months and nine days, at the rate of $150 per month.

The bill of Wright & Bowne, sworn to as correct by the master, is $143.44.

From this should be deducted, for anchor, etc.		$29 10
For side lights, (lanterns)		21 50
For hand leads and line		4 75
		$55 35

The bill for custom-house fees—$13.50—appears to be properly chargeable to the respondents. There is also to be deducted $20, paid to libellant by Mr. Lew on account of his disbursements.

I shall deduct from the monthly hire, otherwise due, the hire for nine days, and allow the libellant $150 per month for the period of three months			$450 00
For outfit, charges, etc.	$143 44		
C. H. fees	13 50		
		$256 94	
Less for anchor, etc.	$55 35		
Amount paid by Lew	20 00		
		$75 35	
			$181 59
Total			$626 59

For which sum, in gold coin, a decree will be entered.

[NOTE. The figures given above are apparently in error so far as the total is concerned; they are reprinted from the original report.]

HAGNER (BRENT v.). See Case No. 1,839.

HAGNER (HALL v.). See Case No. 5,933.

Case No. 5,901.

In re HAHNLEN.

[1 Pa. Law J. 10.]

District Court, E. D. Pennsylvania. 1842.

BANKRUPTCY—REAL ESTATE—SALE UNDER LIEN PRIOR TO BANKRUPTCY.

The court will not order a sale of real estate of the bankrupt, where it is charged with incumbrances to its full probable value, and where a suit under a lien prior to decree of bankruptcy is in progress, under which a sale will probably be had within a reasonable time.

In bankruptcy.

J. A. Phillips, for the assignee, presented a petition in writing, setting forth that Jacob F. Hahnlen, had been decreed a bankrupt, and that, among other properties which came to petitioner as assignee, there were certain pieces of real estate, subject to incumbrances which were daily decreasing in amount, thus diminishing the fund of the creditor, and praying for a sale of said real estate.

H. M. Phillips and C. Guillon, who represented mortgagees of the real estate, opposed the application, because the first mortgage upon the premises had been sued, and sale would be had where no question as to priority of lien, or right of distribution would arise; that though the act of congress [of 1867 (14 Stat. 517)] carefully preserved the position of existing liens, yet a sale by the assignee, who claimed to make a judicial sale, and clear of all incumbrances, could raise a question of distribution, wholly unnecessary, and the tendency of which would be to charge the bankrupt's personal property with the expenses of the sale of the real estate, from which nothing would be realized to the assignee.

RANDALL, District Judge, refused the application for the present, with liberty for the assignee to renew it, if a sale was not effected, under the suit pending in the state court, in a reasonable time.

HAIGHT (BLISS v.). See Case No. 1,548.

HAIGHT (DEXTER v.). See Case No. 3,861.

Case No. 5,902.

HAIGHT et al. v. MORRIS AQUEDUCT.

[4 Wash. C. C. 601.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1826.

EQUITY—ANSWER OF CORPORATION—COMMON SEAL—AFFIDAVIT IN CHANCERY—ADVERSE POSSESSION—WATER RIGHTS—ACQUIESCENCE.

1. The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted.

[Cited in Baltimore & O. R. Co. v. City of Wheeling, 13 Grat. 62.]

2. An affidavit in chancery, not sworn to before a judge of this court, or a commissioner appointed to administer an oath, cannot be read in evidence.

[Cited in Carpenter v. Providence Washington Ins. Co., 4 How. (45 U. S.) 219.]

3. The defendants having had the adverse possession for twenty years, of certain water which had previously flowed into the plaintiffs' mill pond, which they had used during that period by means of an aqueduct for supplying water to a certain town, suffered it to go into disuse, in consequence of a decay of the logs of this aqueduct, for three years; during which, the water again flowed into the plaintiffs' pond. Upon the defendants commencing the reconstruction of the aqueduct, the plaintiffs applied for an injunction; the same was refused by the court, twenty years possession having vested a complete title to the water in the defendants; which was not impaired by the three years reflow of the water into the plaintiffs' pond, it appearing that the right of the defendants was not intended to be abandoned.

[Cited in Bonaparte v. Camden & A. R. Co., Case No. 1,617.]

[Cited in Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 703, 716; Dexter v. Tree, 117 Ill. 533, 6 N. E. 506.]

4. Acquiescence, even by the plaintiff, or by those under whom he claims, for a shorter period than twenty years, would be sufficient to induce a refusal of the injunction.

[Cited in Sheldon v. Rockwell, 9 Wis. 163; Arbuckle v. Ward, 29 Vt. 51.]

The bill states the plaintiffs [Benjamin and Halsted Haight] to have been since the 10th

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

of April 1821, owners of a grist mill, situated on a branch of the Speedwell river, in Morris county, New Jersey, which, with the pond, the waters flowing into it, and all other appurtenances, they purchased on that day, at a sale thereof made by the administrator of Ural Tuttle, under an order of the orphan's court, and received a regular conveyance therefor. That they took possession of the said mill with all its appurtenances at the time of purchase, and have been ever since in the quiet and uninterrupted possession of the said property. That this mill and mill seat have been the site of a mill, and used as such by those under whom the plaintiffs claim, for seventy years. That it has always been, and still is dependent for a sufficient supply of water on a branch of the Speedwell, which is formed by a junction of two smaller streams above the mill, which, by its natural course, empties into the plaintiffs' said mill pond; the largest of which two smaller streams has its source in a group of natural springs, which rise near each other, in a tract of land belonging to one James Wood, about a mile and a quarter above the mill. That the said stream is essential to the value and enjoyment of the mill, by the supply of water which it affords to the pond. The bill then charges that there exists in the said county of Morris an incorporated company, called the "Proprietors of the Morris Aqueduct," which was created by an act of the legislature of New Jersey, the seat of whose operations is at Morristown. That the officers of this company have threatened, and are now actually preparing to take the waters that rise from the aforesaid group of springs, and which now naturally flow into the plaintiffs' pond, and to divert them by pipes or aqueducts, from their natural course, to Morristown, for the purpose of supplying its inhabitants with water. The prayer of the bill is for an injunction. The answer admits the antiquity of the mill, mill-seat, and appurtenances, the waters which supplied the pond, and the plaintiffs' purchase, and three years possession thereof as set forth in the bill; alleges that one of the smaller streams mentioned in the bill is fed by upwards of twenty permanent springs, and the other by about fifteen. But it denies that when the plaintiffs purchased the mill, all the waters which fed those streams flowed into the pond of said mill; that on the contrary, a portion thereof which would naturally have so flowed, was then diverted therefrom, and had been so for more than twenty years by the defendants, through their aqueduct to Morristown, to supply the inhabitants with water. The answer then alleges that, in April, 1799, certain of the inhabitants of Morristown formed an association for the purpose of supplying the town with water by means of an aqueduct, and that they immediately proceeded at a considerable expense to construct the aqueduct with wooden pipes, from a group of springs issuing near to each other on lands belonging to James Wood and others, which before that time constituted a small portion of the water which formed one of the branches of the stream flowing into the said mill-pond; which waters were by means of the said aqueduct conducted as early as the 1st of November, 1799, to various parts of the said town, and were thereby entirely directed from their natural course to the said mill-pond. That the work being thus completed, the members of the said association applied for, and obtained from the legislature of New Jersey, in November, 1799, an act of incorporation, investing them with the usual corporate powers, and authorising the said corporation to lay and extend the said aqueduct to such places, and through any lands that might by them be thought necessary, and to continue the same where then laid. That some time in the year 1801, one Schense, then the owner of two thirds of the said mill, rented of the defendants a share of the said aqueduct water, and continued to hold the same, and to pay an annual sum for the use of the water, for some years—that he sold his interest in the mill and appurtenances to one Vaide, who bought in the other one third, and then sold the whole of the property to the said Ural Tuttle mentioned in the bill. That during the whole period from November, 1799 to the year 1822, the defendants held the full, quiet, and adverse possession and enjoyment of the waters from the springs which supplied their aqueduct, and diverted them away from the said mill by means of their said aqueduct, during all which time, the said mill was in full operation, and did a full and profitable business. That some time in the year 1821, the logs of the aqueduct became decayed and leaky, and the defendants, being embarrassed by debts due by the corporation, they were at that time unable to make the necessary repairs, so that the aqueduct went into partial disuse in the year 1821, and was entirely disused during the succeeding year, in consequence of which, the waters of the said springs were suffered to flow again in their natural course to the plaintiffs' mill pond. But the defendants deny that they ever intended to abandon the right to the use of the waters so long enjoyed by them, or any of their corporate privileges, but purposed, when in their power, to relay the pipes, and to restore the aqueduct to its accustomed operation and use. They admit that about June, 1825, they commenced their preparations for reconstructing the aqueduct, and again conducting the waters before used and possessed by them to Morristown, and that they have in part relaid the said aqueduct at a considerable expense, and would have had it completed by this time, but for the present proceedings—that they contemplate using only two of the springs of the group formerly used by them, and have not threatened to use more, which are considerably less in quantity

than they had been accustomed to take from the year 1799 to 1821, during the whole of which period, the want of the water so diverted by the aqueduct produced no sensible effect whatever on the work or value of the mill, and that the difference would not amount to the grinding of ten barrels of flour a year.

The plaintiffs now moved the court for an injunction; and the defendants offered to read sundry affidavits to support their answer, which were objected to on the ground that they were sworn to before a state master in chancery, and not before any person authorised by an act of congress to administer oaths. In support of this motion, it was contended, that the long and uninterrupted use of the waters of these springs, which in their natural course had flowed into the plaintiffs' mill-pond, has vested in them a right thereto, which can be opposed only by a grant or long possession. That the defendants cannot set up a right by grant, in virtue of the charter of incorporation, because it makes no provision whatever for compensation to the owners of the mill for the loss of the water which the aqueduct might divert from it, without which no vald grant of it could be made; it being against every principle of natural justice, that private property should be taken for public use without a just compensation being made. That the answer being taken not upon oath, but under the common seal of the corporation, the facts stated in it cannot be regarded in this stage of the cause, and of course, no title in defendants by a long adverse possession is shown; neither can the affidavits to support the answer be regarded, as they are sworn to before a master of the chancery court of this state, who has no authority by the laws of the United States to administer oaths. The plaintiffs show an uninterrupted use of these waters for three years last past, which is sufficient to entitle them to apply for an injunction to restrain the defendants from diverting these waters from their mill. Cases cited: 2 Desaus. Eq. 616; 18 Ves. 515; 9 Johns. 507; 14 Ves. 130; 2 Johns. 162, 463, 472; 3 Johns. C. C. 287; 2 Ves. Sr. 414; Cox, Cr. Cas. 101, 102; 6 Johns. C. C. 19, 46; Johns. C. C. 101. On the other side it was insisted that, upon a motion for an injunction, the answer of a corporation, under its common seal, denying the equity of the bill, is sufficient to prevent the order for the injunction, as the corporation can answer in no other way. That the answer disclosed a case which must exclude the plaintiffs from the equitable interposition of the court. It shows that the plaintiffs have no legal right to this easement; the same being completely vested in the defendants by twenty years quiet, adverse possession, which can only be divested by a similar possession in the plaintiffs; whereas, if they have any possession, it does not exceed three years. That independent of this fatal objection, the long acquiescence of those under whom plaintiffs claim is sufficient to shut them out of this court. That the use of those waters by the defendants, having been granted to them by an act of the legislature, the exercise of the right cannot be treated as a private nuisance. Lastly, that it appears by the answer, that this is not one of those cases of irreparable injury which recommends itself to the favour of a court of equity. Cases cited: 1 Phil. Ev. 120, 123; 6 East, 208; 2 Sandf. 175, notes; 18 Ves. 515; 2 Eq. Cas. Abr. 522, pl. 3; Eden, Inj. 167, 168; 2 Atk. 483, 391; 2 Vern. 646; 3 Mass. 136; 4 Burrows, 2400; Coop. Eq. Pl. 154; 1 Root, 535; Ang. Water Courses, 43, 44, 49, 69.

Hornblower & Vanarsdale, for plaintiffs.
Freylinghuisen & Stockton, for defendants.

WASHINGTON, Circuit Justice. It must be admitted that the bill, taken by itself, makes out a case which would warrant this court in granting the equitable relief which it seeks. It states a title in the plaintiffs to an ancient mill, together with the pond and waters flowing into it, and a long, uninterrupted possession of the said mill and waters by those under whom the plaintiffs claim. The complaint is, that the defendants have threatened, and, at the time the bill was filed, were preparing, to divert the waters of certain springs which flowed into the said mill-pond from their natural course; which waters, it alleges, are essential to the value and enjoyment of this property. To such a case, the many authorities relied on by the plaintiffs' counsel strongly apply; and if it stood uncontradicted, the court could not refuse to grant the injunction prayed for. The only question upon this motion, is, whether the court can regard the statement made by the answer, so far as it contradicts the allegations of the bill; the answer being put in, not upon oath, but under the common seal of the corporation? The question is not whether the answer of an aggregate corporation, under its common seal, would avail the defendants at the hearing, in like manner as the answer of an individual under oath would; but whether such an answer, when it denies the equity of the bill, is not sufficient to prevent the granting of an injunction, and even to dissolve it after it has been granted? No cases upon this point were cited on either side, nor are any recollected by the court. But I am strongly of opinion, upon principle, that such an answer is sufficient to produce either of the consequences which have been mentioned. The corporate body is called upon, and is compellable, to answer all the allegations of the bill, but can do so under no higher sanction than its common seal. A peer of the realm, in England, answers upon his honour, the oath being dispensed with. In like manner the plaintiff may, in ordinary cases, dispense with the oath to an answer; and, if

he do so, the court will order the answer to be taken without oath. Now if, in these cases, the answer, denying the equity of the bill, cannot avail the defendant as an answer under oath would do, to prevent the granting of an injunction, or to dissolve it when granted, the legal impossibility to take an oath in the first case, the privilege of the peer in the second, and the dispensation extended to the defendant in the last, would place each of those defendants in a situation infinitely more disadvantageous than that of other defendants, whose answers cannot be received otherwise than upon oath. Such then cannot be the practice of a court of equity. I shall now proceed to consider the case which the answer presents, disregarding altogether the affidavits taken to support it; as they were taken, not before one of the judges of this court, or one of the commissioners appointed by this court to take affidavits, but by a person unauthorized by any act of congress to perform this duty.

The material facts stated in the answer are: (1) That in November, 1799, the defendants were by law constituted a body corporate, with power to construct an aqueduct to convey water into Morristown for the use of its inhabitants; and that in that month and year the aqueduct was so far completed as to divert the waters of the springs referred to in the bill from their natural and accustomed course to the mill now owned by the plaintiffs, and to conduct them into Morristown. (2) That the water of those springs, which thus supplied the aqueduct, continued to flow therein, and thus to be withdrawn from its natural course to the mill from November, 1799, to the year 1821 or 1822. (3) That, by the decay of the pipes, the aqueduct became useless, and ceased in the year 1822 to conduct the water of those springs; the consequence of which was, that it returned to its natural course, and again flowed into the stream that supplied the mill pond. (4) That the defendants never, for an instant, abandoned, or intended to abandon, the use of the waters of those springs for their aqueduct; but after an interval of about three years, when they recovered the ability to commence their operations, they made preparation to reconduct the aqueduct, and actually laid down pipes in the same direction as formerly, to receive and conduct the water to Morristown. (5) That at the time when the plaintiffs purchased this mill, the contested water had been in the quiet, undisputed, and adverse possession and enjoyment of the defendants for upwards of twenty years. (6) That such use and possession by the defendants had, during all that time, been acquiesced in by those under whom the plaintiffs derived title to this mill, not only silently, but, as to one of the proprietors, by acts of an unequivocal character. Lastly. That during all this long possession and diversion of the waters of these springs by the defendants, no perceptible injury was experienced by this mill, and that in truth the injury now anticipated by the plaintiffs will be trifling.

Taking these facts for the present to be true, they do, in the opinion of the court, deprive the plaintiffs of all ground of equity to ask its aid to restrain the defendants from renewing their aqueduct. The objection which meets us in limine is, that the plaintiffs never did acquire a right to the easement to which they now assert a claim, without which they could not recover damages at law for the alleged nuisance, and consequently they can have no pretence for asking the interposition of a court of equity. If the plaintiff's title be apparently good, the court will, in general, send the plaintiff to law to establish his title there; and will grant an injunction in the mean time. But if by the plaintiff's own showing, or by the answer, the plaintiff appears to have no title at all, a court of equity will not do a vain thing, by requiring him to establish it at law; and much less will that court grant an injunction in the mean time. Now it appears by this answer, that in the year 1821, when the plaintiffs purchased this mill with its appurtenances, the water of the springs which supplied the plaintiffs' aqueduct had been for more than twenty years in the quiet, undisturbed, and adverse possession and enjoyment of the defendants, with the knowledge and the tacit, if not the express, acquiescence of the legal proprietors of the mill, with all the easements and appurtenances belonging to it. This length of possession affords, at law, a conclusive presumption of right in the person who has enjoyed it, insomuch that the court would be bound to direct the jury to presume a grant. It affords a complete bar to an action on the case against the party who has, for so long a time, used and enjoyed the easement. Even a possession short of twenty years may afford such a presumption, according as it may be attended by circumstances to support the right. The cases upon this subject at law and in equity are both numerous and uniform. Bealey v. Shaw, 6 East, 208, is conclusive. If then the right of Tuttle to the water of these springs, so far as they had been used and diverted from his mill by the defendants, was divested out of him and vested in the defendants by virtue of this long and uninterrupted possession and enjoyment; his administrator had no power to grant them as an easement or appurtenance to the mill sold and conveyed by him to the plaintiffs.

But it was contended by the counsel for the plaintiffs, that they had regained and retained the possession of this water for the last three years, which they insist is sufficient to warrant the interposition of this court; and they cited a number of cases to support, as they supposed, this proposition. It will be seen at once by an examination of those cases, that they are confined to a possession of the easement which is opposed by

no superior adverse possession in another. If, for example, the defendants were now, for the first time, about to disturb the plaintiffs' right to the flow of those waters to his mill; the court, which requires of the plaintiff seeking the injunction to show, not only a title to those waters, but a possession of them, would be satisfied if that possession should extend to the term of three years. But when the defendant sets up a superior right to the easement, by showing an undisturbed adverse possession and enjoyment of it for twenty years, it would be very extraordinary if a subsequent possession for only three years should be sufficient to defeat such better right, either at law or in equity. It may indeed be well made a question, whether the plaintiffs have ever, for a moment, had an adverse quiet possession of this water, since it is plain that the flow of it, in its natural course to the mill, was suffered, not under an intention to abandon the use and possession of it, but from the necessity of the case, arising from the decay of the old pipes, and the difficulties which were in the way of the defendants in replacing them with new. But be this as it may, there is nothing more clear than that a mere non-user of the water for a period short of that which would create a presumption of title, will not avail the plaintiffs, either at law or in equity. The next objection to the interference of this court, which I consider to be insuperable, is, the acquiescence of those under whom the plaintiffs claim in the construction of this aqueduct originally; and in their subsequent use and enjoyment of the water by which it was supplied: which circumstance, though unaccompanied by long possession, would be sufficient to close the doors of a court of equity against this application. In such a case, that court will not only refuse to interpose in favour of the party who has thus acquiesced, or been guilty of inexcusable negligence, but will even grant injunctions, to restrain actions brought at law for the nuisance. In the case of Birmingham Canal Co. v. Lloyd, 18 Ves. 515, the court refused an injunction after an acquiescence of only two years. Now, in this case, the owners of this mill stood by and suffered the defendants to apply for, and obtain an act of incorporation without objection, as far as appears; and, at a great expense, to construct this aqueduct, and to use the water which supplied it: and now, when an attempt is making by the defendants, not to cut a new aqueduct, or to divert from the plaintiffs' mill water which had not for upwards of twenty years been used, and enjoyed by the defendants, but to repair the old aqueduct, by laying down new pipes for again conducting the water which supplies that aqueduct to Morristown; this application is made to arrest their proceedings. Were it to prevail, the court would, in my humble judgment, give its countenance to something very much like a fraud; for I cannot distinguish this case from that, where the owner of land stands by and sees another innocently expending his money by making improvements on that which the other side believes to be his own, and is silent as to his title; or where a mortgagee sees another advance his money on the same security, and fraudulently conceals his prior incumbrance; in which case equity will postpone him in favour of the second mortgagee.

There are other objections raised to the relief asked for by this bill, which would deserve much consideration, if the case stood in need of it. It might, in the first place, be a subject of serious inquiry whether the exercise of the right, or privilege, granted to the defendants by an act of the legislature of this state, can be treated by courts of justice as a private nuisance, although it should operate injuriously to the rights of the plaintiff, provided he had any, in the subject of this controversy. The omission to provide a compensation for injuries which might result from the grant, would, in all cases, mark the act with manifest injustice towards the party aggrieved; but if such a provision be not required by the constitution of the state, which it is not in this, it may admit of a very serious doubt, whether a remedy can be afforded by judicial interposition. I wish it, nevertheless, to be understood, that I mean to give no opinion upon this point; and I have noticed it chiefly because it was one which engaged much of the attention of the counsel on both sides. It may well be doubted, in the next place, whether this is one of those cases of irreparable mischief, in which the court will exercise the extraordinary power which this bill prays for. That no injury was sustained by this mill during the space of twenty years, on account of the loss of the water which then supplied the aqueduct, may fairly be presumed from the acquiescence of the former proprietors of the mill, without the aid of positive evidence, and the answer states, that the defendants contemplate using, in future, a smaller portion of water than they did formerly. It further alleges, that the anticipated injury which forms the grounds of the present complaint, will be of the most trifling nature. On the other hand, the effect of the injunction would be in the highest degree mischievous to the defendants. In such a case a court of equity, it would seem, ought not to interfere, but leave the plaintiffs to their remedy at law, if they have any. Injunction denied.

Case No. 5,903.

HAIGHT v. PITTSBURGH, FT. W. & C. R. CO.

[1 Abb. U. S. 81;[1] 24 Leg. Int. 381; 6 Int. Rev. Rec. 161; 15 Pittsb. Leg. J. 16; 3 Pittsb. Rep. 105; 1 Am. Law T. Rep. U. S. Cts. 44.]

District Court, W. D. Pennsylvania. 1867.[2]

INCOME TAX—CORPORATE BONDS.

A stipulation in a mortgage by a corporation, requiring payment "without any deduction, &c., for or in respect of any taxes, charges, or assessments whatsoever," does not prevent the corporation from paying the income tax chargeable against the holder of the mortgage in respect to the interest accruing to him from time to time upon the mortgage, and deducting the amount paid from such interest.

[See note at end of case.]

Trial by the court. This action was brought to recover arrears of interest upon bonds given by the defendants to the plaintiff, secured by a mortgage upon land. The defendants claimed to deduct from the interest due by the tenor of the bond, the amount of the income tax imposed by the internal revenue law upon the plaintiff, in respect of such interest, and which had been paid in behalf of plaintiff by defendants.

E. Knox, for plaintiff.

E. Lawrie, for defendants.

McCANDLESS, District Judge. On April 10, 1857, Samuel Haight and wife conveyed to the Pittsburgh, Fort Wayne, & Chicago Railroad Company a lot of ground in the city of Pittsburgh, for the sum of one hundred and five thousand dollars. Five thousand dollars were paid in hand; and for the residue of the purchase money Mr. Haight received one hundred bonds of one thousand dollars each, with coupons attached, bearing seven per cent. interest, payable semi-annually. These bonds are secured by a mortgage on the premises, containing, in the clause of defeasance, the usual stipulation, "without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever."

By the internal revenue law the interest on these bonds is subject to a tax of five per cent. The bonds have nearly twenty years yet to run, and the mortgage upon the above-recited clause of which it is claimed the defendants have incurred the liability to pay this tax, could not be sued for foreclosure until a year and a day after the maturity of the bonds. As the mortgage is a mere security for the payment of the bonds, their satisfaction would be its discharge.

We must, then recur to the coupons, upon which, properly, this suit is instituted. What are they but income, the annual profit on money safely invested? There is no special contract to pay government taxes upon the interest. The measure of the defendants' liability is expressed in the bonds as being debt and interest only. They have nothing to do with the taxes which the government may impose upon the plaintiff for the interest payable to him.

The clause in the mortgage cannot enlarge the duty which the mortgage was given to secure,—that is, the payment of the debt and interest. It is to be found in all mortgages, and if the doctrine contended for by the plaintiff be sound, the standard by which the imposition of taxes should be regulated would be in proportion to a man's poverty and not his wealth; for the mortgagor would be bound to pay not only his own taxes, but those of the mortgagee.

It was admitted, at the argument, that the plaintiff, a citizen of New York, paid no internal revenue tax on these bonds at the place of his residence. The facts, therefore, do not present a case of double taxation. The tax should be paid somewhere, and it was to meet investments like this in banks, railroads, insurance and other companies that section 122 of the act of 1864 [13 Stat. 284]. was passed. Congress enjoined it as a duty upon all such corporations to deduct and withhold from all payments on account of any interest or coupons due and payable, the tax of five per cent.; and provided that the payment of the same shall discharge the companies from that amount of interest or coupon, unless where the companies have contracted otherwise; and it was properly so provided, for citizens of the United States, resident both at home and abroad, sometimes forget the institutions in which their capital has been invested. The opinion of the court is with the defendants; and instead of two thousand and ten dollars, judgment is ordered for the plaintiff for five hundred and forty dollars, admitted to be due, with interest from July 1, 1867. Judgment accordingly.

[NOTE. On writ of error, this judgment was affirmed by the supreme court in an opinion by Mr. Justice Grier, who said that the provision in the condition of defeasance of the mortgage had reference only to covenants between mortgagor and mortgagee, and is usual in every mortgage. It was put there in order to protect the mortgagee, who may not be in possession, from demand for taxes levied while the mortgagor was in possession. It has no possible application to the income tax of bondholders. 6 Wall. (73 U. S.) 15.]

HAIGHT (THOMPSON v.). See Cases Nos. 13,956 and 13,957.

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

[2] [Affirmed in 6 Wall. (73 U. S.) 15.]

Case No. 5,904.

HAILES et al. v. VAN WORMER et al.

[7 Blatchf. 443.] [1]

Circuit Court, N. D. New York. June, 1870.[2]

PATENTS—OLD DEVICES—NEW COMBINATION.

1. Although a combination of old devices may be patentable when a new and useful result is produced, no one can, by combining several devices, each of which is old, thereby deprive others of the right to use them separately, or of the right to use them in new combinations, or of the right to use some of them in combination, omitting others.

[Cited in Sarven v. Hall, Case No. 12,369; Coolidge v. McCone, Id. 3,186.]

[See note at end of case.]

2. The mere addition of an old device producing a specific result, to another old device producing its own result, in such wise that their combination produces those same two results, and no other, is not invention.

[Cited in Sarven v. Hall, Case No. 12,369; Reckendorfer v. Faber, Id. 11,625.]

[See note at end of case.]

3. If the combination itself produces a new and useful result, not due to the separate action of either, nor attained thereby, but due to the co-operative or reciprocal action of the combined devices, a different question arises.

[Cited in Russell & Erwin Manuf'g Co. v. Mallory, Case No. 12,166.]

[See note at end of case.]

4. Invention generally consists in new modes of employing what was before known, so as to produce thereby effects either not produced before, or not produced in that manner, or not produced so usefully.

5. If the combination of the old devices be supplemented by other and new devices co-operating therewith, and thereby a new and useful result is produced, not attained by the action of the old devices, that is invention.

[Cited in Russell & Erwin Manuf'g Co. v. Mallory, Case No. 12,166; Carstaedt v. United States Corset Co., Id. 2,467.]

[See note at end of case.]

This was a suit in equity, founded on two letters patent. One was a reissued patent [No. 1,397], granted to the plaintiffs [William Hailes and Ellen T. Treadwell] February 3d, 1863, for an "improvement in stoves," the original patent [No. 32,257] having been granted to John G. Treadwell and William Hailes, as inventors, May 7th, 1861. The other patent [No. 39,535] was granted to Martin L. Mead and William Hailes, assignees of John G. Treadwell and William Hailes, as inventors, August 11th, 1863, for an "improvement in coal stoves." and the interest of Mead in the patent had become vested in the plaintiff Treadwell. The specification of the reissue of February 3d, 1863, said: "Our experience in this class of stoves"—base-burning or reservoir stoves—"is, that the most beneficial effects are to be secured from an organization which does not pass the products of combustion up, around and over the top of the coal-supply-reservoir, so as to heat a surrounding jacket thereof, but heats a circulating or ascending body of air by means of radiated heat from the fire-pot, and at the same time heats the base of the stove by means of direct heat, circulating through descending flues which lead into the ash-pit, or around it, and to the smoke and draught flue; also, that the greatest economy, considering the increased benefit secured from supplying coal continuously out of a reservoir, is attained with an arrangement which holds the superincumbent body of coal in suspension, such arrangement being a reservoir with a contracted discharge extending slightly down into a flaring or enlarged fire-pot, around or above the whole upper edge of which, outside of the contracted discharge of the coal-supply-reservoir, the flame is allowed to circulate, and, therefore, caused to descend and circulate around or under the base portion of the stove, in its passage to the smoke and draught flue." There were in this reissue twelve claims, the first five of which, the plaintiffs alleged, had been infringed by the defendants [Jasper Van Wormer and others] namely: "(1) A base-burning, coal-supply-reservoir stove or furnace, so constructed that the products of combustion do not pass up around and above the supply-reservoir, nor up through the grate, but down outside of the fire-pot toward the base of the stove, and out through a main draught flue, which leads directly from a space or chamber above the lower part of the stove, all for the purpose set forth and substantially as described. (2) The contracting of the discharge end of the coal-supply-reservoir, the expanding of the fire-pot, and the extending of the flame passage downward, for united operation, in a base-burning, coal-supply-reservoir stove or furnace, essentially as set forth. (3) A fire-pot resting on a base, and imperforated on its inner or outer circumference, or from its inner to its outer circumference, and so constructed and applied, with respect to a coal-supply-reservoir, that an inclosed horizontal chamber for the free expansion and circulation of the flame and gases, is formed all around and outside of the contracted discharge, and above the upper edge of the fire-pot, substantially as and for the purpose set forth. (4) The descending passage or passages, in combination with the continuous flame-expansion and circulation passage, and a main draught flue, leading out of the base or lower part of the stove or furnace, substantially as set forth and for the purpose described. (5) Constructing the fire-pot of a base-burning, coal-supply-reservoir stove or furnace, with an imperforated circumference and in the form of a trumpet-mouth at its upper portion, in combination with descending flame-passages, substantially as described and for the purpose set forth." The specification of the patent of August 11th, 1863, stated that the invention covered by it was an improvement on the stove patented by the reissue of February

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

[2] [Affirmed in 20 Wall. (87 U. S.) 353.]

3d, 1863, and consisted, "1st, in the construction of an illumination-window or windows, at one or more points in the continuous flame-expansion-chamber or channel, which is about the base of the coal-supply-reservoir and the top of the coal-burning fire-pot, in combination with a descending flue which leads to a chamber about the base of the stove, and from such chamber into a chimney-flue; 2d, in the construction of a damper draft flue in the continuous flame-expansion-chamber or channel, located as just stated, in combination with a descending flue, which first leads down into a chamber about the base of the stove, and then into the chimney-flue, with which the damper-draft-flue connects directly at the top of the fire-pot." There were in this patent six claims, the first two of which, the plaintiffs alleged, had been infringed by the defendants, namely: "(1) The combination of the illuminating openings, flame-expansion-chamber, coal-supply-reservoir, fire-pot, descending flue and draft-flue, substantially in the manner and for the purpose described. (2) The combination with the flame-expansion-chamber, formed at the base of the coal-supply-reservoir, and around the upper edge of the fire-pot of a base-burning stove, of the branch draft-flue with damper, when the same are located with respect to the flame-expansion-chamber, fire-pot, coal-supply-reservoir, and descending combustion-flues, substantially as and for the purpose described." The case was now heard on pleadings and proofs.

Joel Tiffany, for plaintiffs.
Charles M. Keller, for defendants.

WOODRUFF, Circuit Judge. Upon a careful examination of the evidence in this case, aided by the very full and elaborate discussion of the counsel for the respective parties, I am of opinion that the defendants are guilty of no infringement of the rights of the plaintiffs.

The introduction of a magazine or reservoir into a stove, for the purpose of supplying coal to the fire-pot below, was no novelty at the time when the plaintiffs' base-burning stove is claimed to have been invented, in 1861. The contraction of the lower end of such reservoir, so that it should be smaller than the upper portion thereof (which is claimed by the plaintiffs to aid in sustaining the mass of coal therein, and prevent too great pressure upon the burning coal in the fire-pot), is found in several stoves before that time in public use. The construction of a fire-pot of larger diameter at the top than at the bottom, was then not new.

Stoves so constructed that the smoke, gas and other products of combustion passed from the fire chamber, through downward flues, to or near the level of the bottom of the stove, were common; and the revertible flues, so called, had long been in use. In one of the exhibits describing the Sexton stove, and in the American gas-burner, these products of combustion were passed down and through a chamber in the base of the stove, and thence out into the smoke-pipe. The addition of a direct draft to such stoves as were constructed with revertible flues, by means of a flue above the fire-pot, provided with a damper to be closed after the fuel had been ignited, was no novelty.

The use of openings in the exterior, or shell, of the stove, and the insertion of mica therein, in order to permit the light emitted in the process of combustion to be seen, had been employed for very many years. If there are any other devices in the stove patented by the plaintiffs, embraced within the details of their specifications, the stove manufactured by the defendants does not contain them. The stove of the defendants does embrace all of these particulars in combination, and this use is claimed to infringe the plaintiffs' patents. This claim, however, cannot be sustained, unless it be true that the plaintiffs have invented such a combination of these old devices, as precluded their introduction into the defendants' stove. To determine this, it is necessary to examine the combination which the plaintiffs allege and describe; and, before doing so, it is proper to say, that, although a combination of old devices may be patentable when a new and useful result is produced, no one can, by combining several devices, each of which is old, thereby deprive others of the right to use them separately, or of the right to use them in new combinations, or of the right to use some of them in combination, omitting others.

The plaintiffs, in their patent of 1861, did unquestionably combine all these several devices in some form. Their construction of a flue for the direct draft was, however, plainly and materially different from that of the defendants. It consisted of a flue leading from the chamber at the top of the magazine or feeder, in such wise that, in the process of igniting the coal, all the smoke, gas, and other products passed through the coal before reaching the flue leading to the smoke-pipe; and the same is true of the invention as exhibited in the drawings annexed to that patent, as reissued February 3d, 1863. But, in their patent of August 11th, 1863, they have described the draft flue as leading directly from the combustion-chamber over the fire-pot, backward into the smoke-pipe, without leading the smoke, gas, &c., through the coal in the magazine. Have they, then, secured such an exclusive right to the combination of these old devices, that the defendants are precluded from employing such combination in their stoves, at the times and in the manner they have introduced them?

1. The plaintiffs' combination is not the simple union of these several devices to produce a new result, but their employment in combination with other devices, producing a

stove differing in many particulars from the stove of the defendants. Thus, the stove of the plaintiffs has an exterior perforated casing, or "jacket," which surrounds the radiating surfaces of the magazine, fire-pot, and flues. Of this it must suffice to say, that it has no apparent connection with the invention alleged to be infringed, its declared object being to receive air through its perforations, and discharge it (when heated by contact with, or radiation from, the fire-pot, descending flues and magazine), for warming the apartment, or other apartments, above, to which it may be conducted. Nothing of this description is found in the defendants' stove.

Again, the downward flue or flues in the plaintiffs' patent are wholly exterior to the stove itself, and are separated from the fire-pot, so as to leave a vertical space between them and the fire-pot, which, when the outer casing is applied, forms a part of the hot-air chamber communicating with the external air, which enters through the perforations before-mentioned, and, when warmed, passes up and out at the top. The existence of this space between the downward flues and the fire chamber is specifically pointed out in the plaintiffs' specification. There are no such exterior flues for the downward draft in the defendants' stove, and, of course, no such space around the fire-pot to which the exterior air can have any access.

The plaintiffs' specification describes the downward draft for the passage of smoke and the other products of combustion to the bottom of the stove, as pipes placed over apertures made in the top plate of the base of the stove, and extending upward to the upper rim of the fire-pot, and connected therewith by perforated flanges or ears, not only so that a space is left between the pipes and the fire-pot, as above stated, but such perforation forms the outlet from the combustion chamber. In the defendants' stove none of these devices exist. The space around the magazine and the fire-pot is tightly enclosed, and there is one entire continuous chamber from the top of the stove to the bottom of the fire-pot, around the magazine, over the surface of the coal, and around the fire-pot, constituting an extended combustion chamber surrounding each, through which the unconsumed smoke and gas pass upward to the top and out, when the direct draft is in use, and downward to the base of the stove, when the direct draft is not desired.

In the stove described in the plaintiffs' specification, the base of the cylinder which forms the reservoir terminates in a circular flange (h), projecting outwardly, and then curved downward, and fitted down upon the upper edge of the fire-pot, so as to form a perfectly close circulating chamber, or "flame-channel," around the bottom of the magazine, and with no communication upwards with the space around the magazine, or downwards around the exterior of the fire-pot, the only outlet therefrom being what are called perforated flanges or ears, with which the downward pipes already referred to are connected. This, with its flange or ear-passages, constitutes, as claimed, the combustion-chamber contrived to retain the products of combustion in immediate contact with the incandescent coal around the base of the reservoir, in which they may expand, and, in their passage to the outlet, be drawn over the surface of the coal, and their more complete combustion be effected.

Now, although very great stress was laid upon this feature of the plaintiffs' alleged invention, I am clearly of opinion that there is no corresponding device in the defendants' stove, nor any infringement thereof, if the plaintiffs' right to its exclusive use were to be conceded. In the defendants' stove, the magazine or feeder has no connection with the fire-pot, or with the sides of the stove. Communication with the upper part of the stove around the magazine is not cut off by flanges or otherwise. The circulation and passage of the heated smoke, gas, and products of the combustion, while the direct draft is in operation, are up and around the reservoir or feeder, and their circulation and passage are down and around the sides of the fire-pot, in immediate contact therewith, when the downward draft is in operation. The combustion-chamber consists of the entire space over the fire-pot not occupied by the reservoir, extending to the top of the stove, and the space downward around the fire-pot. This arrangement does not embrace, but excludes, the effect claimed for the plaintiffs' stove, (namely, passing the products of combustion over and across the incandescent coal, horizontally, to secure their more complete combustion,) by passing the products of combustion directly over the edge of the fire-pot, downward, along its sides.

It is unnecessary to dwell upon the plaintiffs' arrangement of the lower extremity of the reservoir or feeder, by means of the ring flange (k) and the detachable ring (v), with a horizontal flange and bolts, to form, in their connection, a frame for the reception of fire-brick or other fire-proof material. These are, however, a part of the plaintiffs' combination, and are not only a material part, but are the immediate and sole agents or means of producing one of the new results, namely, the protection of the lower extremity of the reservoir or feeder from destruction by the heat of the burning coal below—a result, however, not at all produced by the combination of a reservoir with a revertible flue and the fire-pot, and having no more fitting application to that combination than to any reservoir introduced into any stove. However valuable they are, and whether they do or do not produce a new result, the defendants have not used them. They employ the mere iron cylinder as a receptacle and conductor of the coal to the top of the fire-pot, without any such protection.

2. Bringing thus into view the fact that

the plaintiffs' patents are not for the mere combination of a reservoir diminished in size at its outlet, with a flaring fire-pot and revertible flues and mica windows, but that these are used in combination with other devices, I observe, that, whatever new results are produced, they are due, not to the combination of the first named four devices (which alone appear in the defendants' stove), but to those other devices which are used in combination therewith. This renders some attention to the difference between a mere aggregation of devices and its results on the one hand, and a patentable combination of old devices, which produces a new result, or an old result in a better or more economical manner.

The mere addition of an old device producing a specific result, to another old device producing its own result, in such wise that their combination produces those same two results, and no other, is not invention. For illustration, suppose the use of a fire-pot constructed of fire-brick, or like indestructible material, were common, in stoves having a direct draft only, its use being valuable because of its indestructibility and hence its economy, and suppose, also, stoves constructed with revertible flues were in like common use, the revertible flues around and under the base of the stove effecting, as results, a more perfect combustion, and warming the lower part of the stove, by the passage of the heated products of combustion around or beneath it, and so warming the air in the room near the floor—adding or combining the fire-pot of fire-brick to or with the stove having revertible flues, would not be invention, no other results being thereby produced. The fire-pot of fire-brick would still produce its appropriate and original result, namely, it would be a more economical fire-pot, and the revertible flues would still produce their appropriate and original results, namely, more perfect combustion, and the warming of the base of the stove and the air near the floor; but neither result would be due to the combination, nor would any result be produced that either, separately, did not produce. On the other hand, if the combination itself produces a new and useful result, not due to the separate action of either, nor attained thereby, but due to the co-operative or reciprocal action of the combined devices, a totally different question arises; for, obviously, invention generally (as distinguished from discovery) consists in new modes of employing what was before known, so as to produce thereby effects either not produced before, or not produced in that manner, or not produced so usefully. So, also, if the combination of the old devices be supplemented by other and new devices co-operating therewith, and thereby a new and useful result is produced, not attained by the action of the old devices, there, also, is invention.

I am, therefore, not required, in order to the decision which I make, to hold that the plaintiffs have no patentable invention. They have supplemented the combination of devices already in use, by constructing a close circular space immediately over the burning coal and around the lower end of the reservoir or feeder, by extending flanges from the side of the feeder and connecting them with the upper edge of the fire-pot, thus cutting off the ascent of the heated products of combustion and their access to the space above around the sides of the magazine, and also, as is claimed, compelling those products to pass horizontally over the incandescent coal, to reach the outlet to the pipes placed outside and leading to the base of the stove. The two useful results of this arrangement, as alleged, are, 1st, a more perfect combustion of the smoke and gases rising from within the fire-pot; and, 2d, the protection of the reservoir and coal therein from being overheated. Now, these results are not due to the combination of the four devices which are included in the defendants' stove, but to the supplementary device. Hence, the significance of the description, and especially of the claim in the plaintiffs' specification, which is not to the mere combination, but to the combination in the manner and for the purposes set forth. The defendants, on the other hand, use the four old devices in their stove, and in it they produce the several appropriate and original results pertaining to each. Their stove is supplied with a space around the fire-pot, leading to the base, which forms the downward passage way thereto, operating to conduct the unconsumed products of combustion through the base to the smoke-pipe. By this they secure the beneficial results long before attained by the use of revertible flues. But these benefits, whatever they are, are not the results of the combination. They are just what revertible flues in any stove, and in any combination, are adapted to produce, unless their peculiar construction has produced other or greater benefits, so as to be protected by their own patent, which it is not material here to consider. So, they use a reservoir or feeder contracted in size at its lower end or at some point above. By this they secure the benefit of the contraction, if there be such benefit, in sustaining in part the necessary coal in the reservoir above, and also the continuous supply of coal to the fire-pot, heated so as readily to ignite. But this was no new result, nor is it a result arising from the combination, in any sense whatever. Again, they use a flaring or funnel shaped fire-pot, that is, a fire-pot having a larger diameter at the top than at the bottom. Now, obviously, the diameter of the fire-pot at the top being fixed by its proper relation to the size of the discharge end of the reservoir or feeder, the result of contracting it at the bottom is to enable them to use less coal, without diminishing the surface of the burning coal at the top; and there may be other results of using a fire-pot with oblique instead of perpendicular sides. Whether this form is, in any view,

useful, or to be preferred to the other form, is left, to say the least, in great doubt, by the evidence; but that is not a point material to the view I am presenting, which is, that these results are not the results of the combination, and, as I have above stated, the form is not new. The results flow from this form of fire-pot, whether used in the defendants' stove or elsewhere.

What is above said applies with most obvious fitness to the openings, closed with mica, for the purpose of illumination. The office they perform is, in the defendants' stove, precisely what they have performed in other stoves, for more than thirty years, namely, to permit the light produced by the combustion to escape into the room, and, if not made perfectly tight, then to permit the entrance of some atmospheric air into the fire chamber. These results have no relation to the combination, are not due to it, and are not affected by it. It follows, therefore, that, however useful and valuable the plaintiffs' stove may be, and whether they have or have not invented a patentable combination supplemental by new devices, so that new results are produced, or old results by new means, or in a better manner, the defendants have done nothing to infringe any right which the plaintiffs have acquired.

3. I have thus considered the question of infringement, by showing what the defendants do use in their stove, and that, so far as is material to this case, it consists in employing mica windows, a reservoir or feeder contracted in size at or above its lower end or place of discharge, a fire-pot having a larger diameter at the top than at the bottom, and a downward draft, with a direct draft for the purpose of more speedy ignition of the coal; that these were all old devices; that, whatever the plaintiffs may have accomplished in the construction of their stove, the defendants have not, in theirs, secured any new results, nor employed any new modes of producing or of improving the separate result of each of these devices; and, therefore, that what they have done, so far as is material to this controversy, is merely gathering these separate results into one stove, without new devices for their accomplishment, or altering or improving them as a result of the combination. I have also shown some of the actual differences between the stove of the defendants and that patented by the plaintiffs; that the devices introduced by the plaintiffs in perfecting their combination, make it a different and more comprehensive combination; and, that the defendants have neither used such more comprehensive combination, nor those other and additional devices which form a part of the plaintiffs' stove, as decribed in their specifications. I ought to remark here, that, in making the comparison, it was of most essential importance to use the stove described in the plaintiffs' specifications, and exhibited in the drawings annexed thereto, and not the stove called the "Brilliant," produced on the hearing, which departs largely therefrom in most of the particulars which are distinctive features of their stove, as described in their specifications.

It is, moreover, important to the right understanding of my decision, and just, also, to the defendants, that I should state distinctly, that, in saying that the defendants, in their combination of the old devices contained in their stove, have not, by such combination, produced new results. I mean, that they have not produced any such results by mere combination, nor by the use of any devices embraced within the plaintiffs' patents. I do not decide that their employment of the open circular space around the fire-pot, as a chamber for the continued combustion of the flame, and the descending unconsumed smoke and gases, is or is not a new device, producing the new and useful results claimed therefor in their own patent. This is also true in respect to the peculiar devices employed in their stove for adjusting the reservoir or feeder, also mentioned in their patent. The novelty and utility of what in their patent they claim to have invented, in the view I take of the question of the infringement of the plaintiffs' patent, are wholly immaterial to the decision. These devices are not in the plaintiffs' patent.

This discussion is already very prolix, and enough has been said to exhibit, as I think, sufficient grounds for the decision I am constrained to make. There are other points of difference between the stove of the plaintiffs, described in their patents, and the stove of the defendants, which make the departure from the plaintiffs' aggregate combination still greater; but I deem it unnecessary to discuss them further. As a mere combination of the devices which have been used by the defendants, and apart from the supplemental and auxiliary devices which the plaintiffs introduced and claim in their patents, and which the defendants have not used, I am not at all satisfied that the Sexton stove does not embrace all that is useful in the stove of the plaintiffs. It is a base-burning stove, with revertible flues and a reservoir or feeder. The differences of form are obvious, but, whether those differences are anything more than differences in form, and produce either new or useful results, are left at least doubtful by the evidence. I have not deemed it necessary to consider the further fact, that the defendants use a reservoir and feeder having an enlarged mouth, for the alleged purpose of preventing a clogging of the coal in its passage to the coal-pot. It was not necessary, because my conclusion is already reached upon other grounds.

Finally, the counsel for the plaintiffs, on the hearing, and in his printed argument, frankly, and in unequivocal terms, admitted and repeated, that "the defendants may apply the self feeder to the American gas-burner, or to any other stove, provided, that, in

the organization and construction of such magazine stove, they do not include the improvements patented by the plaintiffs." This concession accords perfectly with the views which I have above presented. The defendants were at liberty to use the reservoir or magazine, together with a coal stove having revertible flues, and also the direct draft for kindling the fire, and mica openings for the purpose of illumination. Such, without the reservoir, was the American gas-burner, constructed by the defendants several years before the plaintiffs' patents were granted. They were not at liberty to borrow from the plaintiffs any patented devices employed by them to produce new and useful results from the combination.

What have the defendants done which it is not here conceded they had a right to do? In answering this, it is material to observe, that, at the time the plaintiffs received their patents, both the American gas-burner and the stoves described by the plaintiff's patent, were of nearly or quite uniform size in their exterior from top to bottom. Both, however, were somewhat contracted in size at the base. The irregular and highly ornamental form since given to both, has made an exterior resemblance which might mislead, were it not observed, that this is a purely adventitious and subsequent conformity, and a change from the form originally used by both. The mere form, in this respect, is not secured by the patents, and has no actual bearing or significance in the determination of this case. Changing the form in this respect did not impair or enlarge the rights of the plaintiffs, nor does a change in that respect constitute any violation of the patents by the defendants. Place, then, in the American gas-burner, a reservoir, conical in form, with its greater diameter at top, and, except in two particulars, the defendants' stove is produced, with literal exactness. Those particulars are these: 1st. The products of combustion in the American gas burner pass through a series of openings in and all around the bell-formed top edge of the fire-pot, and circulate freely along and around the fire-pot below, whereas, in the defendants' present stove, that top edge of the fire-pot is removed, so that these products of combustion pass without any obstruction directly over and downward along and around the fire-pot; 2d. The fire-pot in the American gas-burner had perpendicular sides, while in the defendants' last stove the bottom is contracted, so that the sides are oblique or sloping. If these changes were not the adoption of new devices covered by the plaintiffs' patents, this is decisive.

As to the first, there is nothing like it in the stove described in their patents. By the change, the space over the edge of the pot was made perfectly open and free from all obstruction to the even, regular and constant overflow of the products of combustion down, around and along the sides of the fire-pot to the base. In the plaintiffs' stove, as described in their patents, a directly contrary arrangement is introduced, namely, the circular flange connected with the lower part of the magazine is brought down and made to fit upon the upper edge of the fire-pot, not only so that there can be no such overflow, but so as to form a close circular chamber or "flame-channel;" from which there is no outlet except through what are described as "perforated flanges or ears of said pot," forming outlets leading to the descending pipes on the outside of the pot, such flame-channel compelling, as is claimed, the products of combustion to pass horizontally over the surface of the incandescent coal to reach the outlets, and thus, as is alleged, producing a more perfect combustion of such products—an arrangement and a result not made or attained in the defendants' stove.

As to the second, namely, the reduction of the diameter of the fire-pot at the bottom, I have already shown that this was neither new nor produced any new result. The diameter of the top must, in any base-burning stove, have such a relation to the diameter of the mouth of the reservoir or feeder, as will permit the passage of air from the grate up through the burning coal and maintain combustion in the fire-pot; and this will be precisely the same whether the diameter of the pot at the bottom be greater or less, provided always it be of a diameter sufficient to admit the current of air required to maintain the combustion. Any results of the reduced form are no other in this stove than they were in any stove in which a fire-pot of that form had been before used, and they are, therefore, not results of any invention or combination embraced in the plaintiffs' patent.

This concession by the counsel for the plaintiffs was made in a spirit of commendable candor, and could not, I think, have been reasonably withheld, since it was true, in fact, that the defendants had applied the magazine or reservoir with diminished diameter below the top, to the American gas-burner, in 1857 or 1858, three years before the plaintiffs' first patent, and in a modified form afterwards, down to the construction of the stove now complained of. I have not attached importance to this prior use nor to many other facts which may be deemed material, because the views already stated at too much length are decisive. The defendants are entitled to a decree dismissing the bill, with costs.

[NOTE. On appeal to the supreme court this judgment was affirmed in an opinion by Mr. Justice Strong, who said that a new combination of old devices is patentable if the result produced is new and useful. The result, however, must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. A person who brings together several old devices without producing a new and useful result, and something more than an aggregate of old results, cannot prevent others from using the same devices, nor, even if a new and useful result is obtained, can he prevent others from using a combination of some of the devices. 20

Wall. (87 U. S.) 353. See, also, Hale v. Stimpson, Case No. 5,915, for a case involving a similar point.]

Case No. 5,905.

HAINES et al. v. CARPENTER.

[1 Woods, 262.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1872.[2]

EXECUTOR—DISPLACEMENT—VERIFICATION OF BILL IN EQUITY—KNOWLEDGE AND BELIEF — MULTIFARIOUSNESS—CONCURRENT JURISDICTION—BILL TO ESTABLISH VALIDITY OF A BEQUEST.

1. Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take the possession of the property from him.

2. The application for a receiver must be supported by evidence showing that the appointment is necessary.

3. The verification by complainant of a bill stating upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court.

4. In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger and that the trustee is irresponsible.

5. A bill which united a controversy raised by the heirs of testatrix touching the validity of the bequests in the will, with the claims of the heirs of the husband of testatrix to the property bequeathed by the will, and with the suit of a creditor seeking judgment against the succession, and with a demand for an account to be rendered by the executor, was *held* to be multifarious.

6. Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits.

7. Where two courts have concurrent jurisdiction, the one which first obtains actual jurisdiction of the parties and subject matter is entitled to proceed to final adjudication, and neither party can be forced into another forum, except as provided by the acts of congress for the removal of causes from the state to the federal courts.

[Cited in Pulliam v. Pulliam, 10 Fed. 29; Latham v. Chafee, 7 Fed. 524.]

[See note at end of case.]

8. The effect of the case of Payne v. Hook, 7 Wall. [74 U. S.] 425, considered.

9. Where the purpose of a bill is not to obtain possession of a particular thing bequeathed, but to establish the validity of the bequest, a demand for the particular legacy is not a necessary preliminary to the suit, under article 1626 of the Code of Louisiana.

In equity. This cause was submitted upon a motion by complainant for the appointment of a receiver, and at the same time upon the demurrer of defendants to the bill.

Harris & Harris, E. C. Billings, and A. de B. Hughes, for complainant.

Given Campbell and E. T. Merrick, for defendants.

WOODS, Circuit Judge. The bill alleges in substance that complainants are trustees of the Vicksburg Baptist Church of Vicksburg, in the state of Mississippi, a body corporate under the laws of that state; that Celia A. Graves, late of Madison parish in the state of Louisiana, by her last will and testament, dated January 27, 1872, bequeathed to the said church a certain plantation known as "Willow Glen," situate in said parish of Madison, and of the value of about $24,000; that by said will Charles Carpenter was constituted universal legatee and given seizure of testatrix's estate and nominated and appointed executor; that Celia A. Graves departed this life in February, 1872, and her succession was opened in said parish, her last will and testament duly proven and admitted to record, and Carpenter qualified as executor, and that the estate and property of testatrix, including the said plantation, are in the hands of Carpenter as executor; that complainants are informed and believe that said Carpenter is wholly unfit and incompetent to manage and control the estate in such a way as will best secure the benefit and advantage of the succession; that it was his duty as executor to take immediate personal control and supervision of all the affairs of the succession, yet he has depended upon others to manage and direct its affairs, from which facts it is charged that the succession is liable, in the hands of the executor, to go to waste and be greatly damaged and decreased in value; that the executor is endeavoring to defeat the bequest made to said Baptist Church, by depreciating the value of the estate, and by confederating with one Elias S. Dennis, to institute fictitious suits against himself as executor, in order to sweep away the assets of the estate and to consume the succession in the payment of the judgments thus obtained; that Dennis, with the knowledge and consent of the executor, has instituted a suit in the district court for the parish of Madison, in Louisiana, against the executor, by which he seeks to recover a large amount claimed to be due him as partner of the testatrix. Complainants charge that they will be able to prove, as they are informed and believe, that Dennis was not the partner but merely the agent of testatrix, and that he is not entitled to recover in his suit, and that a fraudulent design exists between the executor and Dennis in reference to said suit; that Mary Stout and others, representing themselves to be the only heirs at law of testatrix, have instituted a suit in the parish court for the parish of Madison, in which they claim that the bequest to the church and all other bequests in the bill, except the one to John A. Klein, were null and void, charging illegal and fraudulent conduct on the part of the executor and Dennis, and praying that said bequests be declared null and void and petitioners put in possession of the succession, and that complainants in their corporate capacity had appeared and filed

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

[2] [Affirmed in 91 U. S. 254.]

an answer in said cause; that Richard H. Graves and others, claiming to be the only heirs at law of George W. Graves, who was the husband of testatrix, have filed their petition in the district court for the parish of Madison, in which they claim all the estate which belonged to said George W. Graves at his decease, and that the property bequeathed by testatrix was in fact the property of George W. Graves, and that the will of testatrix was null and void, and conveyed no right or title to any property to the legatees therein named, and praying that said will be declared null and void, and petitioners placed in possession of said property.

The bill further alleges that said will is in all respects legal and valid; that it contains nothing in conflict with either the laws of Mississippi or Louisiana. The bill makes Carpenter, in his capacity as executor, Dennis, the legatees under the will, and the heirs at law of both Celia A. Graves and George W. Graves, defendants, and prays that Carpenter may be required to file in this court his accounts as executor, and to pay into court all amounts received by him and now remaining in his hands; that a master may be appointed, to whom all claims against the succession of Celia A. Graves may be referred, and to whom all creditors may be required to make proof thereof, and that claims not presented to him shall be barred; and that the master shall report to this court; that a receiver may be appointed, who shall take immediate possession of all property, real and personal, belonging to said succession, wheresoever the same may be found; that payment may be made of all claims which this court shall find to be just and valid claims against said succession, and all others rejected; that a decree may be entered by this court, declaring the validity of said will, and after the payment of all just debts of said succession, ordering the receiver to place complainants in full possession of the property bequeathed to the Baptist Church, as well also as the payment of all the legacies named in the will, and direct, by said decree, the full and final administration of the succession; and that the possession of the property of the succession may be taken from Carpenter, the executor. The bill also prays for an injunction to restrain defendants or any of them from prosecuting any suit affecting said succession or the interests of said church in said succession, and especially from further prosecuting the said suits in the state courts of Louisiana above mentioned. The bill is demurred to on several grounds: 1. Because it is multifarious. 2. Because the bill shows that the state courts of Louisiana were seized of jurisdiction of the question of the validity of said will, and that the property in question was in the custody of the state courts, and in the process of administration by them.

The first question to be considered is: Ought the court, upon the case made, to appoint a receiver? The party in possession of the property for which a receiver is asked is the executor named in the will of the testatrix, who has qualified in the probate court and given bond for the faithful discharge of his trust. Under these circumstances the court should not displace him upon light grounds. Beverley v. Brooke, 4 Grat. 208. And though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator is to be set aside. A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act. Kerr, Rec. 19; Smith v. Smith, 2 Younge & C. Ex. 361; Bainbridge v. Blair, 4 Law J. Ch. 207. The grounds upon which this court is asked to dispossess the executor and turn over the property of the succession to a trustee are, that Carpenter, the executor, is unfit and incompetent to manage and successfully control the estate; that he has only cultivated a part of the land susceptible of cultivation, when, in the opinion of the complainants, all of it should have been cultivated; that he is endeavoring to defeat the bequest to the said Baptist Church, by depreciating the value of the estate, and that he is confederating with said Elias S. Dennis to institute fictitious suits against the estate in order to sweep away its assets. These charges are not directly made, but are stated on the information and belief of complainants, and they are not supported by a single affidavit to any fact. The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. Middleton v. Dodswell, 13 Ves. 266.

There is absolutely no testimony to support the application in this case. It is true that one of the complainants swears to the bill, but in doing so he only swears that he has been informed of and believes certain statements in his bill. This is not evidence, and gives no support to the application. The fact is that the court is asked to appoint a receiver in this case on mere rumor, without any proof showing the necessity of the appointment. But even if the fact were established that the trust property was in danger, that of itself would not be sufficient. It must be further shown that the party in possession is irresponsible. Willis v. Corlies, 2 Edw. Ch. 281; Clark v. Ridgely, 1 Md. Ch. 70; Blondheim v. Moore, 11 Md. 365; Burt v. Burt, 41 N. Y. 46; Haggerty v. Pittman, 1 Paige, 298. There is no proof that the executor is irresponsible, or his bond insufficient, nor is there any averment in the bill to that effect. The motion for a receiver must therefore be overruled.

Let us next consider the grounds of demurrer to the bill. Several of these grounds appear to be well taken. The most obvious objection to the bill is that it is multifarious. "By multifariousness is meant the improperly joining in one bill, distinct and

independent matters and thereby confounding them; as, for example, by uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent matter against several defendants in the same bill." 1 Coop. Eq. Pl. 182; Saxton v. Davis, 18 Ves. 72. In this bill the controversy raised by the heirs at law of the testatrix, touching the validity of the bequests of the will, is united with the claim of the heirs of George W. Graves, the husband of testatrix, to the property disposed of by the will; they claiming that the property descended to them, and did not belong to the testatrix, and could not therefore pass by her will, and with the suit of Elias W. Dennis, a creditor of the succession, whereby he seeks to recover judgment against the estate, and with a demand for an account to be rendered by the executor. I do not think the adjudged cases furnish a better illustration of a multifarious bill. A bill by a creditor sought an account against an executor and trustee of the testator's estate, and also to set aside a sale made by the executor and trustee to a purchaser who was made a party to the bill; it was held demurrable for multifariousness, for the purchaser had nothing to do with the general settlement of the accounts of the estate, and ought not to be involved in any litigation respecting it. Salvidge v. Hyde, Jac. 151. So when devisees and legatees brought a bill against the trustees and executors under the will and against a mortgagee of part of the estates, alleging collusion between the trustees and executors and the mortgagee, and that they refused to compel the mortgagee to account for the rents and profits, or to redeem the mortgage, and the bill prayed for an account of the testator's effects, and that the mortgage might be redeemed; the bill was held on demurrer by the mortgagee to be multifarious, for the mortgagee had nothing to do with the general settlement of the accounts of the estate. Pearse v. Hewitt, 7 Sim. 471. The cases where unconnected parties are allowed to be joined in a suit are where there is one common interest among them all, centering in the point in issue in the cause. Ward v. Duke of Northumberland, 2 Anstr. 469.

Now in the case under consideration, the heirs of George W. Graves have no interest in the controversy between the heirs of the testatrix and her executor, and the devisees under the will, for they claim as heirs of the husband of the testatrix, and their claim would not be affected, no matter how that controversy might end; neither are they interested in the accounts of the executor, as such, nor in the controversy between Dennis and the executor. Neither is Dennis a creditor interested in the issue between the devisees and the heirs of the testatrix nor in the general accounts of the executor, nor in the claim of the heirs of George W. Graves to the property of the testatrix. In this bill a creditor is called on to litigate his claim against the estate, in connection with a controversy about the validity of certain bequests in the will, and a trial of the right of property between the executor and the heirs of a third party. Is not this "the uniting of several matters of a distinct and independent nature against several defendants in the same bill?" In my judgment, therefore, the bill is multifarious. It is further alleged, as ground of demurrer to the bill, that the bill itself shows that the state courts of Louisiana were seized of jurisdiction of the question of the validity of said will, and that the property in question was in the custody of said state courts and in process of administration by them before the filing of this bill. When two courts have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction. Smith v. McIver, 9 Wheat. [22 U. S.] 532; Shelby v. Bacon, 10 How. [51 U. S.] 56; Taylor v. Carrol, 20 How. [61 U. S.] 583; Peale v. Phipps, 14 How. [55 U. S.] 368; Mallet v. Dexter [Case No. 8,988]. The jurisdiction of the probate court of the parish of Madison, to pass upon the validity of the bequests in the will of Celia A. Graves, is unquestioned. That court, before the filing of this bill, had entertained a cause in which the validity of said bequests was litigated, and the complainants in this case had entered their appearance therein, and filed their answer. What right has this court to interfere, and draw that controversy to itself, or forbid the parties from litigating the question in the forum of their choice, which has ample jurisdiction to adjudicate it? No reason is given in the bill why this court should so interfere. No collusion is alleged between the executors and the heirs of Celia A. Graves. True, it is averred that from local prejudice complainants cannot get justice in the Madison parish court. That might prove a ground for the removal of the cause in the parish court to this court, if the subject matter of the controversy was such that this court would have jurisdiction, but it is no reason for enjoining the proceedings in the parish court by a new and original suit commenced in this. The property of the succession of Celia A. Graves is in gremio legis; the jurisdiction of the parish court has attached to the assets; they are in the hands of a trustee, who is required to account only to the court which appointed him, and this court has no power to take the assets from the possession of that trustee and compel him to account here.

The case of Payne v. Hook, 7 Wall. [74 U. S.] 425, is much relied on to sustain the jurisdiction of this court to grant the relief prayed by this bill. But the purpose of the bill in that case was only to recover the share of a distributee against the estate, and to compel an account to show what that

share was. It does not appear that the bill in this case sought to remove the administrator appointed by the state court, and to take the assets from his hands and place them in the hands of a receiver who should be charged with the duty of being administrator; in short, to transfer the administration thereof to the federal courts. No case can be found where a court of the United States has assumed to go the length required by this bill. In the case of Peale v. Phipps, 14 How. [55 U. S.] 376, the court in speaking of the case of Erwin v. Lowry, 7 How. [48 U. S.] 172, say of the proceedings of the United States court in that case, that "they were made to enforce a lien created by the testator in his lifetime, and consequently could not interfere with the duties of the curator or the authority of the state court under which he was acting, and to which he was bound to account." The spirit of this remark applies to the case of Payne v. Hook [supra], and I am of opinion that that case is not an authority to sustain this bill.

In the argument of the demurrer the prevention of a multiplicity of suits was stated to be one of the grounds of equity in the bill. But courts of equity do not allow a multifarious bill as a remedy for the multiplicity of suits. The objection to the bill that complainants have never demanded their legacy and their right has never been recognized by executor does not appear to be well taken. Article 1626 of the Code of 1870 declares that "every legacy under a particular title gives to the legatee from the day of the testator's death a right to the thing bequeathed, which right may be transmitted to his heirs or assigns. Nevertheless the particular legatee can take possession of the thing bequeathed, or claim the proceeds or interest thereof only from the day the demand of delivery was formed," etc. The purpose of this bill being not to obtain possession of the thing bequeathed, but to establish the validity of the request, it does not appear that a demand made is a necessary preliminary to the suit. The bill is demurrable for multifariousness and for want of jurisdiction in this court to grant the relief prayed, and on these grounds the demurrer is sustained.

[NOTE. On appeal to the supreme court the judgment was affirmed, in an opinion by Mr. Justice Bradley, who said that a mere statement of the bill was sufficient to show that it could not be sustained. The main object of the bill is to stop litigation in the state courts, and to bring the questions involved before the circuit court. This is one of the things which the federal courts cannot do, as the act of March 2, 1793, declares that a writ of injunction shall not be granted to stay proceedings in a state court, and this extends to all cases, except where otherwise provided by the bankrupt law. 91 U. S. 254.]

HAINES (RUGG v.). See Case No. 12,114.

HAINES (UNITED STATES v.). See Case No. 15,275.

Case No. 5,906.

HAINEY v. The TRISTRAM SHANDY, ETC.

[Bee, 414.] [1]

Admiralty Court, Pennsylvania. 1781.

PRIVATEER—BREAKING UP OF CRUIZE—PRIZE MONEY.

If a single mariner withholds his consent, and the cruize is broken up by the rest of the concerned, and a new cruize commenced, this must be done subject to the legal claim of the unconsenting mariner, of wages or prize money that may accrue during the term of the first cruize for which he contracted.

Having entered as a landsman on board the privateer Rising Sun, and signed articles for a cruize of four months: the privateer was successful; and the libellant [Nicholas Hainey] was sent in with one of her prizes, and soon afterwards fell sick. During the cruize the Rising Sun came into port to refit. Being at Philadelphia, a great part of the crew left her; whereupon the captain (or owners) published an advertisement, calling upon the officers, seamen, and mariners, belonging to the Rising Sun, to repair on board by a certain day, in order to complete the cruize. One third of the crew, however, neglecting to appear, the owners and officers agreed to break up the cruize, opened a new rendezvous, and enlisted a crew under a new set of articles. The ship sailed on this second cruize, the four months of the first having not yet expired. Soon after her last sailing she captured the Tristram Shandy, and the Dimsdale, both which were condemned as prize. It appeared in testimony, that the Tristram Shandy was taken before the expiration of the first cruize, and the Dimsdale some days after. The libellant did not appear on the day advertised, neither did he sign the second set of articles, being sick at the time. As this cause touches a general doctrine, viz. how far owners are justifiable in breaking up a cruize, without the consent of all concerned, it wears a face of considerable importance. I have attended to it in this view, and am of opinion, that shipping articles form a contract between the owners on the one part, and the officers and crew on the other, and are for the period specified, in full force with respect to the contracting parties. And this contract is not made with the officers and crew as an aggregate body, but with each mariner individually. Upon this ground, I think the contract cannot be totally dissolved (as hath been contended) by the will of any majority on either side, however great. If a single mariner withholds his consent, and the cruize is broke up by the rest of the concerned, and a new cruize commenced, as in the present case, this must be done, subject to the legal claim of the unconsenting mariner, of wages or prize money that may accrue during the term of the first cruize for which he con-

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

tracted. If it were otherwise, if owners could for their own convenience, or from an apparent or real necessity, break up a cruize, those of the crew who may be languishing in captivity, or may be confined on shore by wounds or sickness incurred in the service of the ship, or otherwise, might be excluded from the advantages of a period of time for which they had engaged to run all hazards, and of which they may as yet have only experienced the misfortunes.

JUDGMENT—That the libellant have a landsman's share of the prize brig Tristram Shandy, and that the bill be dismissed with respect to a share of the Dimsdale.

HAISH (WASHBURN & M. MANUF'G CO. v.). See Case No. 17,217.

HAIZLETTE v. LAKE. See Case No. 3,253.

HALBERSTADT (UNITED STATES v.). See Cases Nos. 15,276–15,278.

HALCYON, The (ACOSTA v.). See Cases Nos. 31 and 32.

Case No. 5,907.

HALDERMAN et al. v. BECKWITH et al.

[4 McLean, 286.] [1]

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

NAVIGATION OF RIVERS — COLLISION BETWEEN STEAMBOATS — DAMAGES — APPORTIONMENT — REGULATION OF COMMERCE.

1. The general usage of a river, in regard to the navigation of ascending and descending boats, and which, from long experience, has been established as a precautionary measure, should be followed by pilots and others.

[See Barrett v. Williamson, Case No. 1,051.]

2. A descending boat, when apprehensive of a collision, will stop her engine, and float, leaving the ascending boat to choose the best mode of avoiding a contact.

3. If the plaintiff is in fault, he can not recover damages; nor where both parties are in fault, by the common law.

[Cited in Wright v. Brown, 4 Ind. 98.]

4. The maritime rule apportions the damages as the faults of the respective boats may be established.

5. A state has no power to regulate a commerce which extends beyond its jurisdiction.

[Cited in Sherlock v. Alling, 44 Ind. 195; Com. v. Philadelphia & R. Ry. Co., 62 Pa. 290.]

6. Where a commerce begins and terminates within a state, it has the exclusive commercial power over it

7. The Louisiana law, which adopts many regulations in regard to the navigation of the Mississippi, can not affect boats engaged in carrying on commerce between the state of Louisiana and other states. Such a power exercised by the states, would be destructive to a general commercial intercourse.

8. What damages may be recovered from an offending boat?

In admiralty.

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

Fox & Lincoln, for plaintiffs.

Walker, Kebler & Taylor, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiffs, to recover damages for an injury done to the Yorktown, the plaintiff's boat, by the Talma, the boat of the defendants. The collision took place at the Dead Man's Bar shute, on the Mississippi river, the 16th of March, 1845. The Yorktown was descending the river, and the Talma ascending it. Coleman Stewart was pilot on the Yorktown, and between one and two o'clock at night was descending the Dead Man's Bar shute, about two hundred yards from the Louisiana shore. When he first saw the Talma, she was ascending the river near the opposite shore. The Yorktown was descending the river in the usual channel for descending boats. The Talma changed her course, and ran across the river until she struck the Yorktown almost at a right angle, or nearly so, and cut a hole through her hull as large as a flour barrel. The Yorktown was running parallel with the shore. William B. Dodson was mate of the Yorktown, and was on her hurricane deck nearly over the place where the Talma struck her. When he first saw the Talma, she was running up the river. The Yorktown was nearly parallel to the shore, on the opposite side. The Talma turned nearly across the river. The distance between the boats would have been eighty yards, had not the Talma changed her course. It was a starlight night. Witness could see the shore distinctly. A descending boat could be seen from three-quarters to a mile. When the danger became apparent, nothing could be done to avert the collision. James E. Workman was a passenger on board the Yorktown, and was on the boiler deck when the collision occurred. The Yorktown pointed down the river; the Talma appeared to run across it. The Yorktown was from two hundred and fifty to three hundred yards from the shore. The witness took particular notice of the position of the boats, by the request of the captain of the Yorktown. The Talma backed out. The witness could see the shore distinctly. He heard Captain Sturgeon, of the Talma, say, if Walpole had been at the wheel, the accident would not have occurred. John Hickman was a passenger on the Yorktown, and was on the starboard guard when the collision took place. The Talma was about fifty yards from the Yorktown when witness first went out. Witness was formerly a pilot. The boats were about three hundred yards from the shore when the contact took place. He could see the shore distinctly. Henry Pierce was a passenger on the Yorktown. The Talma struck the Yorktown from two hundred and fifty to three hundred yards from the shore. He could see a boat on a straight part of the river two or three miles. Jacob Beber was a passenger on board the York

town, and was on her larboard guard when the collision took place. The Talma struck her on the starboard side. The Yorktown was running down the river, two hundred or two hundred and fifty yards from the shore. The Talma turned across the river and struck the Yorktown. James W. Venience was a passenger; the Yorktown was running down the river; the Talma turned across it, appearing to have a full press of steam, until she struck the Yorktown. William F. Davis was a passenger on the Talma, and was, at the time of the collision, sitting on the boiler deck, over the hatchway wheel; saw the descending boat before the contact. It was a clear night; the Talma was running up under full way; she headed across the river, and the witness saw that a collision was inevitable. After the Talma struck the Yorktown, the engine went ahead, one-fourth or half a minute. James Bell was engineer of the Yorktown, and was on watch. Both engines of the Yorktown were stopped, and he coupled up the engines for backing. Saw the Talma coming out square from the shore. The Yorktown was two hundred and fifty or three hundred yards from the shore. Everything was done, that could be done, to avoid the collision by the Yorktown.

The above statements are fully corroborated by nine other witnesses. And fifty-six witnesses were examined, being pilots, many of them having great experience and being well acquainted with the navigation of the river, and especially at the shute where the collision took place; and they all say that at the stage of water then in the river, the Yorktown was in her proper track; and the track of the Talma, as an ascending boat, was near the shore. And they all concur in saying, that the usage of the river is for the descending boat to keep on her way, and the ascending boat was bound to do the dodging, or avoid a collision with the descending boat. That when the peril becomes great, the descending boat should stop her engine, so as to slacken her speed, and make the duty of the ascending boat easier to avoid a collision. On such occasions the big bell is usually rung. In behalf of the defendants, many witnesses were examined, but they were less numerous than those of the plaintiffs. William Pennington, who was pilot of the Talma, says, when the Talma entered the shute, she ran as near the shore as was safe. When he first saw the Yorktown, she was within one-fourth of a mile of the Talma. As soon as the Yorktown hove in sight, the mate said that boat was running on them. He stopped the engine, directed it to back, and the Talma was going back when the collision occurred. Thomas Miller was on board of the Talma, and a watchman called his attention to the Yorktown, which was from three to six hundred yards distant. The Talma was as near the shore as safety would permit. The stern of the boat was very near the shore. Her engine commenced backing before the collision. William O. Irvin was assistant mate on the Talma. When the collision took place, the bells of the Talma were ringing violently. The stern of the boat was so near the shore, as to prevent the lowering of the yawl. Michael Rogers was assistant engineer on the Talma. He was in his berth when the collision took place. Ran out on the starboard side over the boiler deck. The boats had been separated ten or twelve yards. The stern of the Talma was near the shore. James Mann was second engineer on the Talma. The boat was too near the shore for the Yorktown to run between her and the shore. Before the collision, the larboard engine had made three revolutions backward, and the other engine one. The force of the Talma was nearly exhausted when the boats came together. Charles M. Corrie was mate on the Talma, and was on his watch when the collision took place. When he first saw the Yorktown, she was from three to five hundred yards distant. She seemed to be coming on the Talma. Witness ordered the bell to ring, then to back hard. The Yorktown ran down the stream, turned her bow from the shore, which threw the stern of the boat round, so as to strike the Talma. The Talma was so near the shore that it was not safe to let down the yawl. No mistakes made by Pennington, within the knowledge of the witness, as to ringing the bell. Eleven other witnesses were examined, who corroborated many of the facts stated by the above witnesses. And twenty-three pilots were sworn, who agree in saying, that the proper place for the Talma as an ascending boat, was from thirty to fifty yards off the shore. In this, there is a concurrence of all the pilots. And the witnesses all agree that it was a star-light night.

The court have been requested, gentlemen of the jury, to state their views of the law on several points. And first, the court charge you, that if the collision was a misfortune, without the negligence of either party, the plaintiff can not recover. There can be no wrong in such a case, which the law will redress, where the persons navigating the respective boats, possessed the proper skill and experience and were chargeable with no negligence, and had no intention to do wrong. This is the common law rule, not the maritime. And the court will also charge you, that if the collision resulted from the negligence of the plaintiffs, they can not recover. In this respect also, the rule of the common law is different from that of the maritime law. Under the latter, if both parties have been negligent, but one of them in a greater degree than the other, the loss will be apportioned accordingly. But by the common law, a party who asks damages for a wrong done, must fix the wrong on his adversary. If the parties are both chargeable with negligence, more or less, a court of law will not balance the negligence, to ascertain whether on the one side it was not greater than on the other.

If the collision occurred from the negligence or design of the defendants, and the plaintiffs acted with ordinary caution, they are entitled to recover. Whether negligence on the part of the offending boat, was the result of ignorance or design, it is equally liable. If, indeed, there was an intention proved, by the officers of the Talma to run into the Yorktown, that, I suppose, would establish their liability, without much inquiry into the conduct of the other party. On this point, the language of Chief Justice Tindal is: "If the plaintiff contributed in any degree by any want of care or improper conduct to the injury he can not recover." This does not mean that the plaintiff must be entirely faultless. Raisin v. Mitchell, 38 E. C. L. 358. Tindal, Chief Justice, to the jury: "You must be satisfied that the injury was occasioned by the want of care, or the improper conduct of the defendants; and was not imputable, in any degree, to any want of care, or any improper conduct on the part of plaintiffs." Five hundred pounds claimed—jury found two hundred and fifty pounds. Some mistake was alleged. Tindal asked the jury how they had made up their verdict. The foreman answered, that there were faults on both sides. Tindal: "Then you have considered the whole matter?" The foreman replied in the affirmative. Richards then submitted that the verdict should have been for the defendant. Tindal said: "No. There may be faults to a certain extent." It might appear that the plaintiff, possibly, could have acted more judiciously than he did to avoid the collision after the event has occurred. There is a great difference between the view at the moment of danger, under excitement, and after the event, on looking calmly at the facts. And the law adapts itself to the exigencies of the moment, making some allowance for the infirmity of human judgment—not the infirmity resulting from ignorance, or a nervous excitability, which unfits a man for such an emergency. This is one of the most important qualifications of a pilot. He must stand firmly at the helm, and look on the danger, however imminent, as the best mode of avoiding it. The highest possible degree of skill is therefore not required in a case like the present, for that is possessed by very few individuals, engaged even in the most hazardous enterprises. But there must be caution and skill, such as every one would be expected to exercise, who takes upon himself the pilotage of a steam vessel.

The attention of the court is called to the Louisiana law, which regulates the navigation of steamboats. This law contains numerous provisions in regard to the inspection of boilers by competent persons, hanging out lights, ringing the bells, stopping the engines and floating, by the downward boat, when within a certain distance of the ascending boat, etc. As a matter of fact, it is known that this law was before congress, and especially the committee of the house of representatives who reported the bill to regulate the navigation of steamboats, and it appears on an inspection of both laws, that parts of the Louisiana act were incorporated into the act of congress. Such parts, were, no doubt, adopted as congress deemed judicious, having the subject fully before it. And we are asked to charge the jury that the Louisiana law is binding on the parties before us, and that unless the plaintiffs complied with its requirements, they can not recover. There can be no doubt that Louisiana has the power to regulate commerce within her limits, where the trip begins and terminates within her jurisdiction. But the voyage of the Yorktown, at the time the collision happened, was from Cincinnati to New Orleans, and the question arises whether the Louisiana law regulates the duties of the officers of the Yorktown under such circumstances. It is admitted that the Talma, having left New Orleans, was proceeding to Louisville, in Kentucky. The vital importance of this question to Western navigation, entitles it to a serious examination. We are aware that there are some minds, who have so long and ardently cherished a jealousy of federal powers, that they deny the existence of such powers when they stand in the way of state authority. They seem to think that our Union is safe only, and the rights of every citizen best secured, by recognizing all power in the states except, not those that have been delegated to the federal government, but those which the states, respectively, shall determine belong to it. This would throw us back on the articles of confederation, an escape from which, by the adoption of the constitution, saved the Union from ruin.

In the 8th section of the 1st article of the constitution, it is declared that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power is found in a class of powers conferred by the constitution, every one of which, in its nature and character, is exclusively vested in the federal government. Two of them, it has been held, may be exercised by a state, until congress shall act on the subject; and the other, it has been decided, may be carried out by a state, in disregard of the action of congress. The two first include the power to pass a bankrupt law, and to regulate commerce. The other is the power to punish for counterfeiting, or passing the coin of the United States. The first two are impracticable, as they involve the absurdity of two distinct powers regulating the same thing. This is only obviated by the admission, that the action of congress necessarily supersedes state action. But this is wholly indefensible. And it is disparaging to state power to say, that any part of it may be abrogated by the action of congress. It is not the regulation of the subject by congress which is to annul state action, but the very thing must be regulated by the former, which the latter has

acted on; as, for instance, the hanging a light out, at night, on the deck of a steamboat. In other words, that the law of congress and the law of a state regulating commerce must be compared and considered, as having been passed by the same power, and if they are not identical, the state regulation stands. In this view, congress, however much they may have considered a regulation similar to the one adopted by the state, can only get rid of it by expressly nullifying it. And when such a game shall commence, we are not wanting in experience to know, that a state, being a smaller body than the Union, will outstrip it. The other power, to punish for counterfeiting the coin, involves the inconsistency and inconvenience of punishing a counterfeiter twice for the same offense. It is clear that a punishment under a state law for such an offense could not be pleaded in bar to a prosecution under the act of congress. It would be a singular anomaly in any government, having the power to coin money and regulate the value thereof, if it should look to a distinct government for the protection of this right.

It will be observed that the power to regulate commerce among the several states, is given in the same clause of the constitution, and in the same language, as the power to regulate commerce among foreign nations. And the power may be exercised to the same extent, with the few exceptions contained in the constitution. As the power is "to regulate commerce among the states," no regulation can be made by congress but such as shall embrace two or more states. The constitution, therefore, did not intend to interfere with a commerce which was limited to a state. But the commerce carried on by both the boats in question, was one among several states, and was, in no sense, limited to the state of Louisiana. In a voyage from Pittsburgh to New Orleans, a steamboat passes within the jurisdiction of ten states, each one having the same power as Louisiana to regulate the commerce which passes through it, or is destined to any of its ports. Concert of action among so many states is not to be expected. Each state following its own notions, in regard to commerce, may make such regulations as it shall deem proper, regarding only its own interests. Collisions, in the nature of things, would arise between different states, as they did under the confederation, and the commerce of the country would be destroyed. Here are ten different regulations, and how is the steamboat conductor to ascertain when he passes out of one jurisdiction into another? The jurisdiction of each state extends to the middle of the river, and how is a pilot to know, in descending or ascending, to which shore he is the nearest? A stroke of the wheel takes him from one jurisdiction to another. Could any one imagine a system more impracticable than this? If any one were to devise a means for the destruction of commerce, nothing would better secure such an object than this system. Even the steamboat captains are better constitutional lawyers, I fear, than some of our jurists, as they say uniformly, on being asked the question, that they disregarded the Louisiana law, believing the state had no power to pass it. And, gentlemen of the jury, they have no such power. As before remarked, the law is operative on a commerce that is wholly within the state. But over a vessel which is pursuing a trip from Cincinnati, or Louisville, or Pittsburgh, or any other place out of the state of Louisiana, the law has no operation. And you will regard it as having nothing to do in the regulation of either of the boats in question.

There is a good deal of conflicting testimony in this case, more I think, than I have ever witnessed in any case. You are the exclusive judges of the credibility of witnesses. The facts admitted by all the witnesses may aid you in coming to a satisfactory conclusion. It appears the Yorktown was run into, which could not have been done, if her stern, as one of the witnesses said, was thrown round so as to strike the Talma. Serious injury was done to the Yorktown by the collision, and it would seem, could only have been done by the Talma striking her in the manner stated by a majority of the witnesses. Some allowance should be made for the conflicting statements of witnesses, from the deceptive water view at night, especially in regard to distances. But the remark is made with regret, that this cause can not satisfactorily account for the conflict in some of the statements.

The following instructions were asked in form and exceptions as noted, were taken. And thereupon the plaintiffs claimed the following items of damage of which they offered proof: 1st. For the expenses and delay of the Yorktown at the place of collision, and at New Orleans, her port of destination. 2d. For the expense and delay of taking said Yorktown to Cincinnati, which, it was admitted by the parties to be the most suitable port for making the repairs. 3d. For loss of time in the use of said boat while she was undergoing said repairs, which was proved to be two months. 4th. For the cost of said repairs, which were proved to be ($3,025 07) three thousand and twenty-five dollars and seven cents. 5th. For the diminished value of said boat after she was repaired, from loss of reputation or otherwise. 6th. For interest upon all the items from the time said boat was repaired. And thereupon, the defendants produced a statute of the state of Louisiana, entitled "An act relative to steam boats," passed March 6th, 1834 [Laws La. p. 55], a copy of which is hereto annexed, marked A, and made part thereof, by the tenth section of which it is provided as follows: "That it shall be the duty of the master and pilot of a steam boat, when descending any river or stream, in the night, within the limits of this state, when within one mile of an ascending

boat, to shut off the steam and ring the bell, and permit the boat to float upon the current of the river until the ascending boat shall have passed, and the master and owner of the ascending boat shall then assume the responsibility of steering clear of the descending boat and be liable in damages to the extent of the injury which shall be sustained."

And thereupon, the defendants requested the court to charge the jury that this act governed the case, and was a bar to any recovery by the plaintiffs; which charge the court refused to give, but did charge that the act was void as a law, for want of power in the legislature of Louisiana to pass the same, except as to boats exclusively navigating waters within the state of Louisiana, but might be received by the jury as a fact going to show what the said legislature regarded as prudent navigation. The defendants also gave in evidence tending to show that the Talma was coming up the river in her right place, near the Louisiana shore, and rang her big engine bell and stopped her engine and commenced backing as soon as a collision was apprehended by her officers, and was in the act of backing when the collision took place, which was somewhere within three hundred yards of the Louisiana shore, the river being about one mile wide at that place, and adduced the evidence of twenty-five pilots to show that the most prudent and usual course of navigation for the descending boat in the night season, even at the high stage of water which then existed, would have been to descend in the main channel of the river, which at that place was near the Mississippi shore, and more than half a mile from the place of collision, and if there were danger of collision to ring the alarm bell and stop her engines and float, and back her engines when danger became imminent, which course is pursued by many pilots, though not by a majority; the plaintiffs having previously introduced evidence of fifty-five pilots navigating said river, to show that it was the most usual course of navigation at the place of the collision, for descending boats to navigate between one hundred and fifty and three hundred yards from the Louisiana shore, and the ascending boat to navigate from twenty to fifty yards from the Louisiana shore.

And thereupon the counsel for the defendants requested the court further to charge the jury as follows: 1. In order to recover in this case, the plaintiffs must satisfy you that the collision was caused wholly by the fault of the defendants, and that no fault of the plaintiffs contributed thereto. 2. That if it was a case of mere misfortune, or of mixed fault, or of inscrutable fault, the plaintiffs can not recover. 3. The issue to be tried, is negligence or not; and if the negligence of the plaintiffs contributed to the collision, they can not recover. 4. No usage of navigation can sanction a departure from the rules of prudence and safety. 5. The rule of damages, if plaintiffs recover, is the cost of repairs, and the expense of bringing the boat to the place of repairing. The second, third and fourth of which instructions were given as requested; but the court refused to give the first charge, and refused to give the fifth charge in the language asked, and charged the jury as follows, in lieu of the first charge asked: That if the plaintiffs were making use of ordinary care and caution, and running according to the most usual course of navigation at that place, although such course might not be the most prudent and safe, in the opinions of some individuals, nor the course pursued by many pilots less than a majority, this was sufficient to entitle them to a verdict, if the jury believed the collision was occasioned by the fault, negligence, or unskillfulness of the defendants' officers navigating the Talma. That no usage could be respected in a court of justice, which was not founded on prudential considerations, and such as tended to the safety of navigation. But extreme caution was not required. The plaintiffs must show that they were descending the river in the ordinary course of descending boats, and that they exercised ordinary prudence and skill, under the circumstances, to avoid the collision. That if the Talma took a shear across the river, running her bow square into the Yorktown as she was descending the river, and it was not in the power of the helmsman of the Talma to prevent such a shear, the facts should be proved in excuse.

And THE COURT charged, in lieu of the fifth instruction asked, that if the plaintiffs recovered at all, they were entitled to recover the five first items above mentioned, except so much of the fifth item as related to loss of reputation; and as to the sixth item—that of interest—the court refused to charge either way, and left it to the discretion of the jury. To all which refusals to charge, and charges given not according to the request of the defendants, the defendants excepted, and pray the court to sign and seal this their bill of exceptions, which is accordingly done, and ordered to be made a part of the record.

Verdict for the plaintiffs.

The judgment in the supreme court was affirmed by a divided court [case unreported]. The division was on the instruction in regard to the Louisiana law.

Case No. 5,908.

HALDERMAN v. HALDERMAN.

[Hempst. 407.] [1]

Circuit Court, D. Arkansas. April, 1839.

BILL IN EQUITY—JUDGMENT BY CONFESSION.

1. Before a bill can be taken for confessed, the defendant must have been ruled to answer, according to the seventeenth rule of equity adopted in 1822. 7 Wheat. [18 U. S.] 5.

2. The eighteenth rule commented on and construed in relation to filing answer.

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

3. A court of equity would not permit a bill to be taken for confessed, when at the same time the defendant offers to file his answer; but the court can impose terms on the defendant.

[See Case No. 5,909.]

[Bill in equity by John Halderman against Peter Halderman.]

F. W. Trapnall and John W. Cocke, for complainant.

A. Fowler, for defendant.

JOHNSON, District Judge.—This is a motion by the complainant to take the bill for confessed, and to reject the answer of the defendant, which he now offers to file, on the ground that the time allowed by law for filing the answer has elapsed. The bill was filed on the 30th of November last, and the subpoena made returnable to the first day of the present term, which commenced on the fourth Monday in March last, and was duly executed on the defendant on the 12th day of February of the present year. The sixth rule of practice for the courts of equity of the United States, prescribed by the supreme court of the United States in 1822 (7 Wheat. [20 U. S.] 5), provides, that "if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly." A question here arises, What proceeding on the part of the plaintiff is necessary in order to entitle him to take his bill for confessed? The answer is furnished by the seventeenth rule of the supreme court, which provides, "that rules to plead, answer, reply, and rejoin, when necessary, shall be given from month to month, with the clerk in his office, and shall be entered in a rule book, for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof." Before any proceeding can be taken by the plaintiff, on account of the failure of the defendant to file his answer, he must give the rule to answer as prescribed in the above rule of practice. If this is not required, the seventeenth rule of practice is useless, and destitute of any sensible meaning whatever. In this opinion, I am sustained by Judge Washington, in the case of Pendleton v. Evans [Case No. 10,920], who says: "I hold it to be indisputable to the success of the application to take the bill for confessed, that the defendant should have been ruled to answer under the seventeenth rule of the court." He further remarks in the same case, that "the rules do not require that the bill should be set down for hearing in order to the decree nisi being made; but as the court, according to the English practice, is to pronounce the decree, and not to permit the plaintiff to take such a decree as he is willing to abide by, there seems to be a propriety in removing the cause from the rule docket to that of the court, by setting down the cause for hearing. This will operate, too, as an additional notice to the defendant, without producing any additional delay." Upon this point, in relation to the necessity of setting down the cause for hearing upon the court docket, I withhold the expression of any positive opinion, merely observing that I do not at present very clearly perceive its utility. It may be further remarked, that by the eighteenth rule of the court, the defendant is allowed, at any time before the bill is taken for confessed, or afterwards with the leave of the court, to demur or plead to the whole bill or part of it, and he may demur to part, plead to part, and answer as to the residue.

Now it must be admitted that an answer to the whole bill is not enforced by the letter of the above rule; but it is difficult to perceive any good reason why the defendant shall not be permitted to file his answer to the whole bill, when he is allowed to demur or plead to the whole bill or part of it, and demur to part, plead to part, and answer as to the residue. By a liberal construction of the rule, it seems to me that an answer to the whole bill is as clearly allowed as a demurrer or plea to part, and an answer as to the residue. Indeed, it seems to me that in no case would a court of equity permit a bill to be taken for confessed, when at the same time the defendant appears and tenders his answer. In such cases, it is always in the power of the court to impose terms upon the defendant, and thus in some degree compensate the plaintiff for the laches of the defendant. 1 Dickens, 70; 3 Paige, 408; 6 Paige, 377. The motion to reject the answer is overruled, and the same is ordered to be filed.

[See Case No. 5,909.]

Case No. 5,909.

HALDERMAN v. HALDERMAN.

[Hempst. 559.] [1]

Circuit Court, D. Arkansas. Aug., 1847.

EVIDENCE—SECONDARY—SUITS BETWEEN PARTNERS.

1. A copy is inadmissible unless the original is lost or destroyed, or beyond the power of the party to produce it.

2. Until there is a final settlement and adjustment of all partnership accounts, and a balance struck, one partner is not permitted to sue the others, either at law or in equity, for money paid by him on account of the partnership concern.

3. For money due to a partner from the partnership, payment, except in a few special cases, can only be enforced by application to a court of equity for an account and dissolution of the partnership.

[Cited in Culley v. Edwards, 44 Ark. 423.]

4. When upon the dissolution of a partnership, all accounts have been adjusted, and a balance struck, an action at law will lie for such balance.

5. The jurisdiction of a court of equity in such a case doubted.

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

F. W. Trapnall and John W. Cocke, for complainant.

Absalom Fowler, for defendant.

JOHNSON, District Judge. John Halderman filed this bill in chancery against the defendant, Peter Halderman, in which he alleges that many years ago he entered into partnership with the defendant, together with William Knox and Alexander Scott, who, being non-residents, are not made defendants, and carried on business under the name, firm, and style of Knox, Halderman & Scott, and after carrying on the partnership business for some time, it was dissolved by mutual consent of the parties concerned. And on final settlement of all the concerns of the partnership on the 1st of January, 1822, the firm was found to be indebted to John Halderman, individually, in the sum of three thousand one hundred and four dollars, one fourth of which he claims from the defendant, as one of the partners, being seven hundred and seventy-six dollars, and for that sum prays a decree against the defendant. The defendant, in his answer, admits the partnership, but denies the final settlement, as stated in the bill, and also positively denies that he is indebted to the complainant to even the smallest amount, on account of the partnership. The present complainant [Walter N. Halderman] has produced in evidence a copy of the individual account of his intestate against the firm, signed by John Halderman, William Knox, and Alexander Scott, dated at Pittsburgh, the 18th of March, 1820, without accounting for the absence of the original.

It is a rule of evidence that the original paper must be produced, and that a copy is inadmissible unless the original is lost, destroyed, or beyond the power of the party to produce it. [Riggs v. Taylor] 9 Wheat. [22 U. S.] 483; [Sebree v. Dorr] Id. 558; [Renner v. Bank of Columbia] Id. 581; [Taylor v. Riggs] 1 Pet. [26 U. S.] 596; [Winn v. Patterson] 9 Pet. [34 U. S.] 663.

But waiving this objection, upon looking into the account against the firm, it appears to be a statement of payments made by John Halderman, of debts due by the firm for which he is entitled to be credited. It does not purport to be a final settlement of the affairs of the partnership. On the contrary, it is manifest that it was not; because, in the memorandum on the account, it is expressed that "the accounts as stated in the books are to stand, and each partner to be charged with a fair proportion of all losses and expenses which may accrue in settling up the business. Each partner is to keep a correct account of all receipts and expenditures, returns of which are to be forwarded to William K. Rule, at St. Louis, quarterly, in order to enable him to square the accounts, without the trouble and expense of again coming to Maysville or Pittsburgh." From this memorandum it clearly appears that a final settlement was not then made, and that many things were to be done before one could be made. There was no final adjustment—no balance struck. Until there is a final settlement and adjustment of all accounts between partners, and a balance struck, one partner is not permitted to sue the others, either at law or in equity for money paid by him on account of the partnership concern. Where money is due from one partner to another, by simple contract on the partnership account, payment except in a few special cases, can only be enforced by application to a court of equity on a bill for an account and a dissolution of the partnership. Colly. Partn. 144. When upon a dissolution of a partnership, all the accounts have been adjusted and a balance struck, an action at law will lie for such balance. 1 Story, Eq. § 664, note 1; Colly. Partn. 151, 153; 1 Hall, 180. Whether a bill in chancery will also lie in such a case, need not now be determined, as the evidence shows that this is not a case of that description. My impression is, that the remedy at law would be ample and complete, and that unless a discovery is asked and obtained, or some special reason exists for invoking the aid of a court of equity, a chancellor ought not to entertain such a bill.

The bill in the present case not being filed with a view to obtain a general account and settlement of all the partnership transactions, but for the payment of a balance claimed to be due to one partner from another, and the case being unsustained by proof of any final settlement among the partners, must be dismissed at the cost of the complainant. Decreed accordingly.

[See Case No. 5,908.]

Case No. 5,910.

Ex parte HALE et al.

[5 Law Rep. 403.]

Circuit Court, D. New Hampshire. Dec., 1842.

BANKRUPTCY — CLAIM OF SOLICITORS FOR MONEY ADVANCED FOR EXPENSES—PETITION IN INVITUM—FEES AND COSTS.

1. *Held*, that the solicitors of a voluntary bankrupt, who advanced the expenses at his request, to enable him to obtain his discharge,—a portion of which were rendered necessary in consequence of the proceedings of an objecting creditor,—were not entitled to any relief for such expenses, and for their services, against the assets of the bankrupt.

2. It seems, that a creditor, who incurs costs and expenses in prosecuting a petition against a bankrupt in invitum, to have him decreed a bankrupt, may be remunerated for the same out of the assets of the bankrupt.

This case was adjourned into this court from the district court of New Hampshire district. The petition was as follows: "Respectfully represents to the said honorable court, John P. Hale and John H. Wiggins, attorneys and counsellors of said court and partners, that they were solicitors in the case of the

said Palmer, and in such capacity have advanced and expended large sums of money at different times, since the filing of the petition of the said Palmer for the benefit of the general bankrupt law [of 1841; 5 Stat. 440], at his request, to enable him to obtain a certificate of discharge under said law; that said Palmer is indebted to the said Hale and Wiggins in a further sum for services as solicitors; that said Hale and Wiggins made said advances and expenditures and rendered the said services with the understanding that the assets of the said bankrupt's estate would be appropriated to reimburse said solicitors, and secure their fees aforesaid; that a great part of the advances and expenditures aforesaid were made necessary in consequence of the proceedings of an objecting creditor, who several times, to the great delay and hindrance of the said bankrupt, obtained from the court orders for the taking of testimony and the examination of the bankrupt; that at such taking of testimony on three several occasions, the said solicitors were present at the request of the bankrupt, and were present also at the examination of the bankrupt, at his like request; that said objecting creditor, after the taking of said testimony and examination at the time of the hearing of the petition for discharge of the said bankrupt, withdrew his objections and appearance without in any way having made provision for the payment of the costs of the bankrupt, to which he had been subjected in consequence of his proceedings, in objecting to said bankrupt's discharge, although the court had directed, and in all cases made it a rule that every objecting creditor should, at the time of filing his objections, give a bond for the payment of all costs which should be awarded against him by said court, in consequence of said objections; that said bankrupt is advanced in years and utterly worthless; that said solicitors have no knowledge of any way of securing themselves now or in time to come, unless from the assets of the bankrupt's estate. The said solicitors therefore pray for relief, and move this honorable court, that so much of the assets of the said bankrupt's estate may be allowed to them, as will compensate them for their said services, and reimburse them for the advances which they have made according to the account hereto annexed. Mem. The bankrupt has obtained his certificate of discharge." Upon this petition, it was ordered, that the question arising upon it be adjourned into this court. The case was now submitted by the petitioners without argument.

STORY, Circuit Justice. The petitioners are the solicitors of William Palmer in bankruptcy, who has been declared a voluntary bankrupt, and has been discharged by a decree of the district court from his debts provable under the bankruptcy. They ask payment to be made to them, out of the assets of the bankrupt, for all the disbursements, which they have made, and the fees, which they have earned, as solicitors of Palmer, in carrying on the proceedings for his benefit. Whether the assignee, or the creditors of the estate have had notice of this application or not, does not appear upon the record, although certainly no order ought to be made, affecting the assets of the bankrupt in this case, without a full opportunity of appearing to, and being heard upon the matter of the petition, if they should desire it, before any order should be made. But without inquiring into the circumstances, I have no difficulty in pronouncing, that the petitioners are not entitled to any such relief as they ask, against the assets of the bankrupt. In respect to that portion of the costs and expenses, which have been incurred by the opposition and objections of a creditor of the bankrupt, those costs and expenses were properly chargeable upon him, if, under all the circumstances, the district court should think he ought to pay them. If it has decided, that the creditor ought not to pay any such costs and expenses, then the solicitors are entitled to none, and must look exclusively to their client for reimbursement. If the district court has not been applied to to decree such costs and expenses against the creditor, the default is on the part of the solicitors, or their client, in not procuring such decree, or in not taking security for the costs and expenses, according to the rules of the court—Qua cunque via data est, the solicitors are not entitled to any remedy against the assets thereof.

As to the other expenses incurred by the solicitors in prosecuting the voluntary petition of the bankrupt to obtain the benefit of the bankrupt act of 1841, c. 9, I can perceive no ground, upon which payment can be decreed therefor out of the assets of the bankrupt. They were incurred for his sole personal benefit, and not for the benefit or at the instance of his creditors. He, and he only, therefore, ought to bear them. It would, or at least might, have been different, if the costs and expenses had been incurred by a creditor in prosecuting a petition against a bankrupt, in invitum, to have him decreed a bankrupt; for then and in such a case the proceedings and decree might be said to be for the benefit of all the creditors. But, here, there is no ground upon which the court can say that the costs and expenses are to be a charge upon the assets in bankruptcy. I shall direct a certificate accordingly to be sent to the district court.

The certificate was as follows: Ex parte Hale and Wiggins, Petitioners in the Bankruptcy of William Palmer. It is ordered by the court, that the following certificate be sent to the district court, upon the question adjourned into this court, and in answer thereto, namely: It is the opinion of the circuit court, that the petitioners have no

right to have the costs, fee, expenses, and disbursements, stated in their petition, paid out of the assets of the said William Palmer, the bankrupt; but that the same are a personal charge, to be borne by him exclusively.

Case No. 5,911.

In re HALE.

[18 N. B. R. 335.] [1]

District Court, S. D. New York. Oct. 10, 1878.

BANKRUPTCY — PROVISIONAL WARRANT — ARREST — VOLUNTARY PROCEEDING.

1. The bankrupt was adjudicated upon his own petition. He remained in possession of his assets and disposed of a portion of them, and expressed an intention of going to Europe for the purpose of adjusting his foreign accounts, which constituted a considerable portion of his assets. He had expressed an intention of offering a composition, but had presented no application therefor to the court, and declared that his affairs were so confused, especially his foreign accounts, that he was unable to do so. *Held*, that the case was a proper one for a provisional warrant.

2. The bankrupt law [of 1867 (14 Stat. 517)] does not authorize the arrest of the bankrupt in a voluntary proceeding.

[In bankruptcy. In the matter of John M. Hale.]

Edward T. Bartlett, for petitioner.

A. Blumenstiel, for bankrupt.

CHOATE, District Judge. This is an application for a provisional warrant and for a warrant to arrest the bankrupt upon the petition of one of his principal creditors. The bankrupt was adjudicated August 27th, 1878, on his own petition. The warrant as first issued fixed October 10th as the time for the first meeting of creditors. The time was afterwards altered by procurement of the bankrupt's attorney to the 6th of November. The bankrupt is still in possession of his assets, and since the filing of the petition he has disposed of some part of his goods in store, amounting to between three hundred and four hundred dollars. He has expressed an intention of offering a composition, but has not presented any application therefor to the court. He has also expressed an intention of going to Europe for the purpose of adjusting his accounts with his foreign debtors, which constitute a considerable part of his assets. He declares his inability at present to make a proposition for a composition because his affairs, especially these foreign accounts, are so confused, and their availability for the purpose of a composition is so uncertain.

1. As to the provisional warrant, I think the creditor is entitled to have it issue upon the facts of this case, unless he shall accept in lieu thereof an order for the joint custody of the assets by the bankrupt and a custodian named by the petitioners, and for a full inventory to be filed with the clerk, and for the deposit of all moneys in bank subject to the order of the court. To this the bankrupt makes no objection if the case is held to be a proper one for a warrant, and this arrangement affords a practical security to the creditors without the expenses incident to the issue of a provisional warrant. The violation by the bankrupt of the injunction against disposing of his property, though apparently no fraud was intended, and the delay in the holding of the first meeting and the indefinite postponement of the proposed application for a composition, render it a proper case for taking from the bankrupt the exclusive custody of his assets.

2. The motion for a warrant of arrest must be denied, on the ground that the bankrupt law does not authorize the arrest of the bankrupt in a case of voluntary bankruptcy, and the holding of him in custody or under bail during the pending of the bankruptcy proceedings. The only power to arrest the bankrupt expressly conferred upon the court by the statute is that given in section 5024, which, in certain cases, authorizes the arrest of the alleged bankrupt in an involuntary case, and the holding of him in custody or under bail until the decision of the court upon the petition of the creditors, that is, until the further order of the court. It is at least very doubtful whether, under this section, the power of arrest in an involuntary case extends at all beyond the adjudication, the words "or until its further order" having been held in one case to mean only until such time before the adjudication as the court shall by its further order direct. Usher v. Pease [116 Mass. 440]. The power to arrest, therefore, in any other case, if it exist, must be implied from some other grant of power contained in the statute, or must be implied because it is essential to the proper exercise by the court of the powers granted. Such a power has been strenuously contended for by the learned counsel for the petitioner, but upon a view of all the provisions of the bankrupt law having any bearing on the question, I am satisfied that it was not intended to invest the court with this power. It is obvious that if the power exists at all, it is practically a power to hold the bankrupt in custody or under bail during the entire period that the case in bankruptcy may be pending, which may be for several years, upon proof to the satisfaction of the court that he intends to leave the jurisdiction. It can hardly be doubted that so great a power, practically reviving imprisonment for debt, and touching so seriously the personal liberty of a very large class of citizens, would, if intended to be given, have been given expressly and not left to be inferred merely from the grant of other powers, and that, if given, its exercise would have been carefully limited by the act, to prevent hardship and abuse. The express grant of the power in one case shows that the attention of the framers of the law was called to the subject,

[1] [Reprinted by permission.]

and they are silent as to all other cases. This raises a presumption of some strength against the existence of the power in other cases. Moreover, in the case of involuntary bankruptcy before adjudication, there are reasons for this remedial process which do not apply after adjudication or in a voluntary case. An involuntary proceeding is one hostile to the debtor and presumably against his will, and based upon prima facie proof of an act of bankruptcy injurious to or a fraud upon his creditors, and until the return of the order to show cause, and the action of the court thereon, the estate of the bankrupt is not so entirely within the control of the court as it is after an adjudication, or as it is at all times in a voluntary case, in which, in the petition itself, the bankrupt submits his property to the jurisdiction and disposition of the court for the purposes of the act. Nor is the bankrupt himself, before adjudication in an involuntary case, to the same degree subject to the orders of the court, or within its power to punish for contempt, as a party to a proceeding before it, as he is in voluntary cases after the filing of the petition. For these reasons it may well have been thought necessary in proper cases where, by evading the jurisdiction, he might defeat the purpose of the act to bring his property within the control of the court, to give a limited power until the hearing and decision upon the petition to hold him in custody to secure his appearance. But, after adjudication and at all times in voluntary cases, the act provides other means of coercing the debtor to do what is required of him under the act. Section 5104 provides that he shall be subject to the orders of the court. He is liable at any time to be put under examination by any creditor, and the power is expressly given to punish any refusal or neglect to obey the orders of the court as for a contempt. Thus it will be seen that the creditors are not remediless.

These are substantial powers of coercion, and in addition to this the bankrupt's right to his discharge will be forfeited if he absconds or fails in any respect to fulfill on his part all the requirements of the act. Although cases may be imagined where there may be a failure of justice and a defeat of the purposes of the act through the absconding of the debtor, yet it may well have been thought that these coercive powers were sufficient for the general enforcement of the act. At any rate, these provisions seem to me to relieve the case from the argument that the power of arrest is essential to the proper exercise by the court of the powers granted by the act. Further support to this conclusion is, I think, to be drawn from general order No. 13, which regulates provisional remedies in voluntary cases, and which provides for the issue of a provisional warrant to seize the property in a voluntary case, but makes no provision for a warrant of arrest in a voluntary case. The act expressly authorizes a provisional warrant only in case of involuntary bankruptcy; but by this general order the supreme court has indicated its opinion that the issue of a provisional warrant, in a voluntary case where the property is in peril, is authorized by implication by the other provisions of the act, and such implication may be fairly drawn from the fact that by the petition the property of the bankrupt is voluntarily subjected to the disposition of the court for the purposes of the act. And the fact that no provision has been made in this or any other general order, for a warrant of arrest in any other case than that expressly provided for in the act, indicates the opinion of the supreme court that no such remedy is available. For these reasons the motion for a warrant of arrest is denied, without critical examination of the circumstances which are claimed to make an arrest proper in this case.

Case No. 5,912.

In re HALE.

[19 N. B. R. 330.] [1]

District Court, D. Vermont. April 5, 1879.

BANKRUPTCY — FOLLOWING PROPERTY — SALE OF REAL ESTATE OF BANKRUPTS.

1. The court does not follow the property of the estates of bankrupts into the hands of purchasers, but only to their hands. After they have once had the property, they must take care of it and of the possession of it.

2. The bankrupt occupied the premises in question until conveyance thereof was made by the assignee to the purchaser. After the purchaser had perfected title, he had an interview with the bankrupt, in which it was agreed that the latter should vacate on a subsequent specified day. This he did not do. On petition by the assignee for delivery of possession to the purchaser, *held*, that the bankrupt was holding as a tenant under the purchaser, and not under the assignee; that the assignee had no further interest there, and was not further bound to maintain the purchaser's possession for him, nor to keep possession ready for him.

[This was a proceeding in bankruptcy in the matter of Charles F. Hale.]

WHEELER, District Judge. The petition of the assignee for delivery of possession of the real estate to the purchaser has been referred to the register, and heard upon his report. The facts reported show no ground for any action of this court. Regularly, possession of the estate, real and personal, should have been taken by the marshal by virtue of the warrant issued upon the adjudication of bankruptcy, and passed to the assignee upon the assignment of the estate to him, and to the purchaser from the assignee upon the conveyance from the assignee to him. Whether possession was taken of any part of this farm by the marshal or by the assignee does not appear; nor does it appear why possession of the part the bankrupt continues to occupy, whether the whole or a part, was not taken. It merely is shown that the bankrupt continued to

[1] [Reprinted by permission.]

occupy until the conveyance from the assignee to the purchaser, in some way, with the consent of, or without apparent objection by, the assignee.

If, then, whatever the terms of his occupancy were, he had refused to deliver up possession or to vacate the premises, unquestionably under the provisions of section 5104, Rev. St. U. S., this court could require the delivery up or vacation by order and punish as for a contempt on any failure to comply. Probably it was in that view that the assignee commenced this proceeding. But the report shows that after the purchaser had perfected his title, in an interview between him and the bankrupt, it was agreed that the bankrupt should vacate the premises by the 15th day of March then next, now just passed. This directly implies that it was agreed that the bankrupt might occupy till that time. The agreement to vacate would necessarily include an agreement for occupation until he should vacate. After that arrangement the bankrupt was occupying under the purchaser, and not under the assignee. The assignee had no further interest there. He was not further bound to maintain the purchaser's possession, nor to keep possession ready for him. He undertook that the purchaser should have good title, but that would extend to the rightful, not the wrongful, claims of others. This possession of the bankrupt is wrongful, not rightful, since the time when he agreed with the purchaser to quit. This court does not follow the property of estates of bankrupts into the hands of purchasers, but only to the hands of purchasers. After they have once had the property, they must take care of it, and of the possession of it. This purchaser has had this property once, and the possession of it, by having the bankrupt in possession of it under him. For aught that appears, and upon what does appear, the bankrupt was his tenant to March 15th, and since then has been holding over after the expiration of his tenancy. The laws of the state afford him the same remedies that are afforded other citizens in such cases, and which are ample, or as ample as the lawmaking power of the state has seen fit to provide for in such cases.

The petition is dismissed, but without prejudice.

Case No. 5,913.

HALE v. BALDWIN.

[1 Cliff. 511;[1] 24 Law Rep. 270.]

Circuit Court, D. Massachusetts. Oct. Term, 1860.[2]

INSOLVENCY—DISCHARGE—CITIZEN OF ANOTHER STATE—HOW FAR BARRED.

A discharge of a debtor under a state insolvent law is invalid against a creditor or citizen of another state who has never voluntarily subjected himself to the laws of the state where the discharge was obtained, otherwise than by the origin of his contract, and the plea of such discharge is insufficient to bar the rights of the plaintiff.

[See note at end of case.]

This was an action of assumpsit. Defendant was the maker of a certain promissory note as follows: "$2,000. Boston, February 21, 1854. Six months after date I promise to pay to the order of myself two thousand dollars, payable at Boston, value received. James W. Baldwin." The note was duly indorsed by the defendant to the order of the plaintiff [Oscar C. Hale]. The plaintiff was and always had been a citizen of Vermont, and the defendant, at the time of the making the note, was a citizen of Massachusetts. After the making of the note and before the commencement of the suit, the defendant, upon due proceedings in the courts of Massachusetts, pursuant to the insolvent laws of the state, obtained a certificate of discharge from his debts, and then afterwards appeared and pleaded this discharge in bar of this action. The plaintiff did not prove his debt against the defendant's estate in insolvency, or otherwise become a party to the proceedings.

H. C. Hutchins, for plaintiff.

The decisions are uniform that if these notes had no particular place of payment, the discharge would be no bar. Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Savoy v. Marsh, 10 Metc. [Mass.] 594. It makes no difference that the note was payable in Boston. This is a question, not where the contract was made to be performed, but whether the contract was made with a citizen of another state. Whitney v. Whiting, 35 N. H. 457; Springer v. Foster [Case No. 13,266]; Demeritt v. Exchange Bank [Id. 3,780]; Donnelly v. Corbett, 3 Seld. [7 N. Y.] 500; Woodhull v. Wagner [Case No. 17,975]; Poe v. Duck, 5 Md. 1; Frey v. Kirk, 4 Gill & J. 509; Scribner v. Fisher (dissenting opinion of Metcalf, J.) 2 Gray, 43–48; Gardner v. Lee's Bank, 11 Barb. 558; Hempstead v. Reed, 6 Conn. 480; Smith v. Parsons, 1 Ohio, 236.

F. A. Brooks, for defendant.

It is clear, upon legal authorities (excepting for the moment those cases where the state legislation is said to be limited, in this respect, by the United States constitution), that a contract discharged by the lex loci (both of making and performing the contract) is discharged everywhere, and that the citizenship of the contracting parties is immaterial. Story, Confl. Laws (3d Ed.) §§ 242, 263, 279, 280, 335; May v. Breed, 7 Cush. 38; 2 Kent, Comm. (6th Ed.) 459. The doctrine or principle seems to be, that, as contracts depend upon, and must be referred to, some legal sanction for construc-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 1 Wall. (68 U. S.) 223.]

tion, character, enforcement, or discharge, they shall be deemed to be referred to the laws prevailing where they are made and to be performed, and to which the parties have themselves referred them, by assigning locality to them. Taking the above to be the well-settled doctrine, public or international law, the question is, whether, under the facts of this case, this doctrine is set aside, and the Massachusetts discharge shut out, because it comes under the constitutional prohibition against laws of the states impairing the obligations of contracts. Now, inasmuch as the Massachusetts insolvent laws were in force at the inception of this contract, it follows necessarily that, if contracts are by public law, referred, for their character and incidents, to the existing legislation of the country where made or to be performed, these notes were, at their date, just as defeasible by the happening of the maker's insolvency and his discharge as if such a provision had been expressly incorporated on their face; and so only the condition and circumstances of the maker have changed, but not the legal nature of the obligation which he assumed in making the notes. The obligation was in its inception defeasible in a certain event, and it had not been impaired, except by its originally inherent qualities. The proposition that this discharge contravenes the prohibition against impairing the obligation of contracts rests entirely upon the fact of the promisees not being citizens of the same state in which the contract was made and to be performed, and therefore not being affected by the conditions attached by Massachusetts laws to the contract itself, and upon the supposed authority of the leading case. Ogden v. Saunders, 12 Wheat. [25 U. S.] 213. In that case, the discharge granted in New York was pleaded in Louisiana, to a contract made in New York with a citizen of Kentucky, following the person of the creditor, and not limited to New York, as the place of performance. In Ogden v. Saunders [supra], the contract was, in the eye of law, one foreign to the sovereignty granting the discharge, while in this case it was not, though made with a citizen of another state. Same is true of Cook v. Moffat, 5 How. [46 U. S.] 295. The supreme court of Massachusetts held a discharge in a case like this one a bar. Scribner v. Fisher, 2 Gray, 43. In Donnelly v. Clark [unreported], the discharge was set up in a state foreign to the one where the contract was to be performed. In Demeritt v. Exchange Bank [supra], the law there under discussion was one regulating procedure in state courts, and the court held such a law inapplicable to United States courts, because they were not bound by procedure laws of state courts. It is in derogation of state rights to hold that a state cannot attach incidents to a contract made and to be carried out within its limits, as well as give force and effect to it. Bank of U. S. v. Lyman, 20 Vt. 666, was also cited.

CLIFFORD, Circuit Justice. The force and effect of the insolvent laws of a state have so often been considered, that any extended discussion of the principles originally supposed to be involved in the question under consideration would be useless, as I am of the opinion that the question presented is authoritatively settled by the decisions of the supreme court. All agree, I suppose, that the decisions of the supreme court are authority in all questions involving the construction of the constitution of the United States; and if so, it would be difficult to maintain the proposition that they are not so in cases of this description. Whether the binding obligation of those decisions is conceded or not, in other jurisdictions, it must certainly be admitted in this court, and it is vain to suppose that they will not be followed here in all cases where they apply. Discussion upon the general subject to which this question appertains has become so nearly exhausted that the more important inquiry now is, as to what has been decided; and it is not a little remarkable that most of the diversity in the recent decisions has grown out of the difficulty in answering that inquiry. One of the leading cases upon the subject is that of Sturgis v. Crowninshield, 4 Wheat. [17 U. S.] 122. Recurring to the facts of that case, it will be seen that the defendant was sued in this district as the maker of two promissory notes, both dated at New York and made payable to the plaintiff, and the suit was brought after he had been discharged in New York under the insolvent laws of that state, which, in their terms, applied to past as well as future contracts. He pleaded his discharge in bar of the action, and the plaintiff demurred to the plea. Certain questions arose in the circuit court on which the judges were opposed in opinion, whereupon the questions were certified to the supreme court for their final decision. Able counsel were employed on both sides in the supreme court, and the court decided that, since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy conflicting with such law; but also held that the act pleaded in the case, so far as it attempted to discharge the contract on which the suit was instituted, was a law impairing the obligation of contracts within the meaning of the constitution of the United States; and that the plea of the defendant was not a good and sufficient plea in bar of the action. Another case, involving the same question and some others, was also presented to the supreme court for decision at the same session. M'Millan v. M'Neill, 4 Wheat. [17

U. S.] 209. As appears from the statement of the last-named case, the contract on which the original suit was brought was made in Charleston, in the state of South Carolina, and both parties resided there at the time the contract was made; but the original defendant subsequently removed to New Orleans, in the state of Louisiana, and there obtained a certificate of discharge from his debts, under the insolvent laws of that state, which were passed prior to the date of his contract. He was also one of a firm doing business in Liverpool, and a commission of bankruptcy was issued there, both against him and his partner, and they obtained certificates of discharge. Those certificates he pleaded in bar of this action, and the plaintiff demurred to the plea. Two points were ruled by the court: First, that the circumstance that the state law, under which the debt was attempted to be discharged, was passed before the debt was contracted made no difference in the application of the principle; and, secondly, that a discharge under a foreign law was no bar to an action on a contract made in this country. Whatever diversity of opinion there may be as to the correctness of the decision in the leading case, it must, nevertheless, be admitted that the rules of law laid down in the conclusion of the opinion are plain and clear. Speaking of the other case, Mr. Justice Johnson, in Ogden v. Saunders, 12 Wheat. [25 U. S.] 279, says it is nothing more than this, that insolvent laws have no extra-territorial operation upon the contracts of other states; and he maintains that the principle is applicable as well to the discharges given under the laws of the states as of foreign countries, and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle. Some misapprehension existed for a time on the point, whether the final opinion delivered by Mr. Justice Johnson in that case was, in point of fact, the opinion of a majority of the court, but I do not see any ground for doubt upon the subject. He states explicitly in the outset that he is instructed by the majority of the court to dispose of the cause, and explains that the majority on the occasion is not the same as that which determined the general question previously considered. Three propositions were laid down in that case, and it is a matter not now open to controversy that they severally received the sanction of a majority of the court: (1) That the power given to the United States to pass bankrupt laws is not exclusive. (2) That the fair and ordinary exercise of that power does not necessarily involve a violation of the obligation of contracts multo fortiori of posterior contracts. (3) But when, in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of the citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States. His statement of the question involved in the case, and the answer given to the same, are quite as explicit as the third proposition just recited. He states the case thus: the question now to be considered is, whether the discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state who has never voluntarily subjected himself to the state laws otherwise than by the origin of his contract; and he answers the question by saying, I therefore consider the discharge under a state law as incompetent to discharge a debt due a citizen of another state; and it was upon that ground that a majority of the court determined that the plea of a discharge set up in that case was insufficient to bar the rights of the plaintiff. Attention is very properly called to the fact that the discharge in that case was granted in New York, and was pleaded in Louisiana to a contract made in New York without limitation as to the place of performance. Conceding that to be so, still the suggestion cannot have weight, because the decision of the court is placed upon the ground of citizenship; and if that be the true criterion, as it undoubtedly is, then it is clear that the place of performance is a matter wholly immaterial. That the supreme court intended to settle the law as laid down in the conclusion of the final opinion of Mr. Justice Johnson is placed beyond doubt by the decision of the same court in the case of Boyle v. Zacharie, 6 Pet. [31 U. S.] 348. Marshall, C. J., says in that case, that the judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws concurred in the final opinion disposing of the case. That opinion, therefore, says the learned chief justice, is to be deemed the opinion of the other judges, who assented to that judgment; and he adds, that whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court. Whenever the question has been presented to the supreme court, since that opinion was pronounced, the answer of the court has uniformly been that the question depended upon citizenship; and accordingly it was held, in the case of Suydam v. Broadnax, 14 Pet. [39 U. S.] 75, that a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States or of any other state than that where the discharge was obtained. Judge Story says, in the case of Springer v. Foster [Case No. 13,266], that the settled doctrine of the supreme court is, that no state insolvent laws can discharge the obligation of any contract made in the state, except

such contracts as are made between citizens of that state. To support that proposition he refers to the case of Ogden v. Saunders [supra], and remarks, without qualification, that it was subsequently affirmed in Boyle v. Zacharie [supra], where there was no division of opinion. Confirmation of the fact that such was his opinion, if any be needed, may be found both in his Commentaries on the Constitution and in his valuable work entitled "Conflict of Laws." In the former, he says the result of the various decisions of the supreme court on the subject is: (1) That state insolvent laws apply to all contracts within the state between citizens of the state. (2) That they do not apply to contracts made within the state between a citizen of a state and a citizen of another state. (3) That they do not apply to contracts not made within the state. His views, however, are even better expressed in the last-named treatise, where he says: "Under the peculiar structure of the constitution of the United States prohibiting the states from passing laws impairing the obligation of contracts, it has been decided that a discharge under the insolvent laws of the state where the contract was made will not operate as a discharge of the contract, unless it was made between citizens of the same state"; and he adds: "It cannot therefore discharge a contract made with a citizen of another state." 3 Story, Comm. p. 256, § 384; Story, Confl. Laws, p. 573, § 341. Chancellor Kent says the discharge under a state law will not discharge a debt due to a citizen of another state who does not make himself a party to a proceeding under the law. It will only operate upon contracts made within the state between its own citizens or suitors subject to state power; and the supreme court held, in Cook v. Moffat, 5 How. [46 U. S.] 308, that state insolvent laws "could have no effect on contracts made before their enactment or beyond their territory." 2 Kent, Comm. (9th Ed.) p. 503. Some modification of the doctrine, as stated in the authorities cited, was attempted to be made by a majority of the supreme court of Massachusetts, in the case of Scribner v. Fisher, 2 Gray, 43, and it was there held that a certificate of discharge under the insolvent laws of that state is a bar to an action on a contract made by a citizen of the state with a citizen of another state who does not prove his claim under those laws, if the contract, by its express terms, is to be performed in that state. Metcalf, J., however, delivered a very able dissenting opinion, approving the doctrine that state insolvent laws cannot discharge the obligation of contracts made with the citizens of other states. Shortly after the volume containing that decision was published, the same question came before the circuit court for this district, and my immediate predecessor held the opposite opinion, stating that he considered the settled rule to be, that a state law cannot discharge or suspend the obligation of a contract, though made and to be performed within the state, when it is a contract with a citizen of another state. Additional authorities were also cited by the learned judge in support of the proposition; and it will be found upon examination that every one of them supports the point to which they were cited. Woodhull v. Wagner [Case No. 17,975]; Donnelly v. Corbett, 3 Seld. [7 N. Y.] 500; Poe v. Duck, 5 Md. 1; Demeritt v. Exchange Bank [Case No. 3,780]. Since that decision was made, the same conclusion has been reached by the supreme court of Connecticut, and also by the supreme court of Maine, where the whole subject has been very thoroughly examined and very ably discussed. Anderson v. Wheeler, 25 Conn. 607; Felch v. Bugbee, 48 Me. 9. Nothing, therefore, can be more certain, as it seems to me, than the conclusion, that the question presented in this case has already been settled by the supreme court. It was certainly so regarded by the court in Cook v. Moffat [supra], as well by Mr. Justice Grier, who gave the opinion, as by the chief justice, and the other justices who expressed their opinions on the occasion. According to the agreement of the parties, the defendant must be defaulted.

[NOTE. On writ of error, the supreme court affirmed this judgment in an opinion by Mr. Justice Clifford, who said that the insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial effect, and the tribunal sitting under them, unless the citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. 1 Wall. (68 U. S.) 223.]

HALE (BURDICK v.). See Case No. 2,147.

HALE (COXE v.). See Case No. 3,310.

Case No. 5,914.

HALE v. DUNCAN et al.

[7 Cent. Law J. 146; 12 West. Jur. 593; 6 Reporter, 422; 26 Pittsb. Leg. J. 32.] [1]

Circuit Court, N. D. Mississippi. Dec. Term, 1877.

SUIT AGAINST RECEIVERS—LEAVE OF COURT ESSENTIAL—STATUTE.

1. A suit cannot be commenced against a receiver without leave being first obtained from the court appointing such receiver. Therefore, where a suit was commenced in a state court against the receiver of a railroad appointed by an order of the federal court, no leave to bring said suit having been obtained from the latter court, and the suit was removed to the federal court, a demurrer on the above ground was sustained, and the suit was dismissed.

[Cited in Kennedy v. I., C. & L. R. Co., 3 Fed. 100.]

[See note at end of case.]

2. The statute of Mississippi, providing that all receivers appointed by any court may be sued

[1] [Reprinted from 7 Cent. Law J. 146, by permission. 6 Reporter, 422, and 26 Pittsb. Leg. J. 32, contain only partial reports.]

without leave of the court appointing or controlling them, can have no application to receivers appointed by courts of the United States.

At law.

B. B. Boone and Curlee & Stanley, for plaintiff.

E. L. Russell and Finley & Selman, for defendants.

HILL, District Judge. This is an action brought by the plaintiff against the defendants, as receivers of the Mobile & Ohio Railroad, who were appointed as such by orders of the United States circuit court for Alabama and Mississippi, and were acting as such at the time the alleged wrongs were committed by the agents and servants of said receivers. The action was commenced in the circuit court of Prentiss county, in this state, without having obtained permission from either the circuit court of the United States in Alabama or Mississippi, by which courts the said receivers were appointed. The cause was removed to this court, where the defendants interposed their demurrer to plaintiff's declaration, and state grounds of demurrer that plaintiff had no right to institute this suit, without first having obtained leave of the courts, or of one of them, by which said receivers were appointed. Whether this is so or not is the only question submitted for decision.

It is a well settled rule that a receiver appointed by a court of equity to take charge of and manage property whilst litigation is pending touching such property, while managing the property under the orders and direction of the court is the agent or officer of the court only; or, as some authors express it, he is but the hand of the court to hold the possession of and manage the property under the directions of the court. A receiver is not supposed to act in the interest of one party more than the other, but holds and manages the property for the benefit of the party to whom the court may adjudge it; acting in this fiduciary capacity only, he is not subject to suit by any party who may have complaint against him, without first obtaining leave from the court appointing him to bring such suit, designating the court in which the suit shall be brought. In most cases the court appointing the receiver, upon motion or in any other mode the court may think best, hears the complaint and defense, and upon the issue made and the proof adduced on both sides, grants or denies the relief, as the court may upon the issues made and the proof under the rules of law deem right and proper; or the court may direct a regular suit to be brought, either in the court in which the receiver has been appointed and is acting, or in some other court; but unless authorized by the action of such court, or by legislative authority, such suits are not permitted to be brought or prosecuted, and upon application of the receiver the court will enjoin the prosecution of such suit, regardless of how clear the right may appear, and will hold any breach of such injunction as a contempt of court. And by some courts it is held a contempt of the court appointing the receiver to bring such suit without first having obtained its leave. See High, Rec. pp. 168, 169, §§ 255, 256, and authorities therein referred to. Such are the general rules in this class of cases, and strictly observed by the federal courts. See Peale v. Phipps, 14 How. [55 U. S.] 368; Wiswall v. Sampson, Id. 52; and other cases to which reference might be made, but these are deemed sufficient.

This action was doubtless commenced under a misapprehension of the effect of an act of the legislature of this state, passed January 6, 1877 [Laws Miss. p. 81], entitled, "An act to authorize suits in certain cases," which provides that all receivers appointed by any court, and trustees and assignees, running or operating railroad trains in this state, carrying either freight or passengers, may be sued in the several courts of this state in all matters ex contractu and ex delicto arising after their appointment, without leave of the court appointing or controlling them being first had; and such suits may be prosecuted to final judgment, and satisfaction may be had out of any property held by them in their fiduciary capacity. That this act was intended to authorize suits against receivers appointed by the United States courts, and operating railroads in this state, there is no doubt, and especially the present defendants, as there were not then any railroads in the hands of receivers appointed by the courts of this state, and hence in the act it is provided that suit may be brought against receivers appointed by any court, and not any of the courts of this state. But upon well established rules again and again announced by the supreme court of the United States, the legislatures of the states can pass no law regulating, or in any manner affecting the jurisdiction of the federal courts. Congress may and has adopted the process and modes of practice in the state courts as the process and practice in the federal courts at law, but it is as much the act of congress that makes it the law as though it had been enacted by congress in the first instance, and with out alluding to the state laws. But in these enactments the practice and pleadings in the courts as courts in equity are expressly excepted from their operation.

This suit, as it appears from the face of the declaration, was commenced without authority of law. The result is that the demurrer must be sustained, and the suit dismissed at the plaintiff's costs.

[Under the act of congress of March 3, 1887 (24 Stat. 552), this permission is no longer necessary. McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11; Railroad Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905.]

Case No. 5,915.

HALE et al. v. STIMPSON et al.

[2 Fish. Pat. Cas. 565.] [1]

District Court, D. Massachusetts. Oct., 1865.

PATENTS—OLD DEVICES—NEW COMBINATION.

1. The patentee of a machine which consists merely of a combination of old parts can not prevent the use of any number of those parts less than the whole, nor of new and substantial improvements of those old parts themselves, but only his own combination of parts or known substitutes therefor.

[See Case No. 5,904.]

2. A patentee can not repudiate one of the parts of his machine after another inventor has taught him to dispense with it.

3. The machine patented to William N. Oakes, June 8, 1858, for cutting irregular forms, is not an infringement of the reissued patent granted to Hale and Goodman, February 10, 1863, for "improvements in shaping irregular surfaces in wood."

This was a bill in equity, filed to restrain the defendants [Charles N. Stimpson and others] from infringing letters patent [No. 4,120] for "improvements in shaping irregular surfaces in wood," granted to Warren Hale and Allen Goodman, July 22, 1845; extended July 22, 1859, and reissued to Warren Hale, Allen Goodman, Lorenzo Hale, and J. W. Goodman, assignees, February 10, 1863 [No. 1,400]. The defendants were using a machine constructed under a patent for an "improved machine for cutting irregular forms," granted to William N. Oakes, June 8, 1858. The claim of the original patent of Hale and Goodman was as follows: "We claim the method herein above described of copying or forming the longitudinal irregularities of piano legs, and other similar articles, on rough blocks of wood, by means of a carriage moving horizontally against the revolving cutter, and holding both the pattern and the rough block, the cutting tool being raised and depressed for depths of cut by rollers resting on the patterns, the whole method or modus operandi being substantially as herein above set forth." The claim of the reissued patent was as follows: "The combination of the carriage, the pattern or patterns, the tracing roller or rollers, the rotating cutting or planing cylinder, and the means for turning or holding the block of wood to be fashioned, as described, or the equivalents of them, or either of them; the said combination being so organized, substantially as described, that by its mode of operation the block of wood to be fashioned can be turned to present in succession each of its faces to the action of the cutter or planing cylinder, whose axis is at right angles or nearly so, with the axis of the block of wood, so as to cut the wood longitudinally, while, by a longitudinal movement, the block of wood is gradually cut or planed from one end to the other on each face in succession, and by another movement at right angles thereto, or nearly so, the cutting action is caused to follow the irregular lines of the pattern, thereby producing a polygon of any desired number of sides, of any desired configuration, longitudinally, and with all its sides of similar form." The claim of William N. Oakes' patent was as follows: "The combination of two carriages, B, C, having a rectilinear motion at different speeds, with the elongated pattern, tracers, and cutter, for the purposes set forth; not intending to claim an elongated pattern as such, or combined with other machinery to cut irregular forms, but only its combination with two carriages having a rectilinear motion, at different speeds, in the manner described." The facts are sufficiently presented in these claims, and in the opinion of the court.

J. E. Maynadier and Causten Browne, for complainants.

Chauncey Smith and B. R. Curtis, for defendants.

LOWELL, District Judge. In July, 1845, two of the complainants, Warren Hale and Allen Goodman, both of Dana, in the county of Worcester, and state of Massachusetts, procured a patent for certain improvements in planing irregular forms of wood, such as piano legs and other similar articles; and in their specification they declared that their invention differed from the machines then in use for turning lasts, gunstocks, etc., in that those machines produce their effects by the revolution of a pattern which guides the cutting tool, and makes an article irregular in all directions, and left in a rough state when delivered from the machine; while in their machine the pattern does not revolve, and the articles produced are irregularly shaped longitudinally, but plane in a transverse direction, and the surfaces when cut are perfectly smooth and fitted for the application of veneers. The specification proceeds: "The main features of our machinery are, first, a rectangular carriage moving horizontally on rails, and holding the rough block firmly in the center, and having also a perfect pattern on each side of the carriage; and, secondly, a revolving planing cylinder, similar to those in common use, arranged in a vertical sliding frame, the motions of said frame being controlled or guided by the patterns aforenamed, as will be shown in the sequel." Then follows a full and accurate description of the machine, including the contrivance called the centers and index for holding and turning the blocks so as to present several surfaces in succession to the cutter at any desired distances apart. It now appears, and is admitted on both sides, that those parts of the patented machine which are referred to as distinguishing it from other turning machines were not new. At least two machines were in public use in Massachusetts some years before this patent was taken out, which contained the rotating planing cylin-

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

der, the carriage and patterns, and the rollers, and so organized, substantially like the patented machine, so far as these main features are concerned, as to plane, smoothly, a block of wood having longitudinal irregularities. These were the "Hayward" machine for planing chair backs, and the "Springfield" machine for planing parts of gunstocks.

Comparing the plaintiffs' machine with that of Hayward, which it most resembles, it is found to differ in three particulars, all of which are especially adapted to fit the machine for planing piano legs and similar articles, which it is desirable to produce in forms having great irregularities and steep inclines on each face, and with several faces alike. These three points are:

1. The carriage containing the block to be planed is fed through under the cutter, by hand, by the aid of a rack and pinion, and crank wheel, instead of by power, because an intermittent movement was required.

2. The motions of the cutter are guided and aided by the operator, by means of another similar arrangement of rack, and pinion, and crank wheel, by which he keeps the rollers attached to the cutter frame constantly in contact with the pattern, pressing them down or easing them up as occasion may require.

3. The block is so fastened to the carriage by the index and centers, already referred to, that different faces may be presented in succession, at precisely equal distances, to the action of the cutter.

No one of these parts is new in itself, or is so alleged to be new by the plaintiffs. The business of manufacturing piano legs has been successfully carried on by machines constructed under this patent to the present time. The patent itself has changed hands several times, and nearly all the parties to this suit, on both sides, have been interested in it at one time or another. When it expired, its renewal for seven years more was obtained by the original patentees. Two suits were brought on the patent: the last, in 1855, against one Brooks, in the Southern district of New York; and it is alleged in the bill here, that Brooks, after the hearing, consented to a perpetual injunction, which was issued. This statement is literally true, but conveys an entirely false impression, because it suppresses the very material fact that the consideration for that perpetual injunction was a perpetual license to Brooks to use the machines; and the motive for that was, that Brooks had discovered, and produced in court, the Springfield machine, and the then plaintiffs were thereupon advised that they should probably lose their case, and thought best to settle it in a manner which in fact amounted to a defeat, instead of a victory, as the bill would have us infer. The patentees, one of whom was a plaintiff in that case, were well aware of the Hayward and Springfield machines long before the hearing in that suit, though perhaps not for a year or so after the original patent was issued, and were not unprepared for its discovery by the opposite party.

In 1858, one William N. Oakes took out a patent for an improvement in machines of this kind, and it is the use of one of his machines by the defendants which is here complained of.

The Oakes machine is substantially like that of the plaintiffs, excepting in the mode in which the rollers and pattern co-operate. Oakes makes his pattern larger in a certain definite proportion than the outline which he wishes to cut, and, by the use of a compound carriage, this pattern moves faster in a similar definite proportion than the block to be cut; the effect of which is, that the rollers do not need the aid of the operator in moving over these elongated curves, and the cutter frame being made sufficiently heavy to keep the rollers in place downward, the contrivance of the rack, and pinion, and crank wheel, for raising and lowering the cutters, which we have mentioned as the second of the alterations made by the plaintiffs in the Hayward machine, is dispensed with, and the machine is made, in this part, automatic.

In 1863, the plaintiffs surrendered their patent and obtained a reissue, and in their amended specification describe the machine and invention in most respects as before, but make fuller mention of the index, and lay more stress upon its use; and their claim is quite different, being for a combination of certain elements, none of which are in this part of the specification spoken of as new in themselves. And the questions here are upon the validity and construction of this reissue patent, and its infringement by the Oakes machine. It is conceded that the patent is for a combination of old parts, and that the patentee of a machine which consists merely of such a combination can not prevent the use of any number of those parts less than the whole, nor of new and substantial improvements of those old parts themselves, but only his own combination of parts or known substitutes therefor. The following cases are to these points: Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Carver v. Hyde, Id. 513; Brooks v. Fiske, 15 How. [56 U. S.] 219; McCormick v. Talcott, 20 How. [61 U. S.] 402; Vance v. Campbell, 1 Black. [66 U. S.] 429; Eames v. Godfrey, 1 Wall. [68 U. S.] 79; Burr v. Duryee, 1 Wall. [68 U. S.] 531.

It is further conceded that the invention of Oakes is new and ingenious, and probably useful, and that it is mechanically a different contrivance for raising and lowering the cutter frame from that used by the plaintiffs. But the plaintiffs say that the particular device for raising and lowering the cutters is no essential part of their invention; that their combination consists of only five elements: the carriage, the pattern, the rollers, the planing cylinder, and the index. Perhaps the plaintiffs' claim in their reissue pat-

ent is capable of this construction; but this reissue was obtained avowedly for the purpose of stopping the use of the Oakes machine, while avoiding to claim the Hayward and Springfield machines, and the claim, if construed as the plaintiffs now contend it should be, is very ingeniously adapted to this end. It is our duty, however, to construe the patent in such a way, if possible, as to conform to the actual invention. Now, the plaintiffs' invention was a machine of which we are unable to see that any of the parts are unimportant. It differed from one of these, confessedly anterior, in the three particulars which we have mentioned; all of which were adapted to fit the machine for making piano legs. And especially is this true of the device in question. It is essential to the proper working of all these machines, and is so described in the plaintiffs' specification, that the rollers should be kept in contact with the pattern; and the only mechanical difficulty to be overcome in adapting the machine to this particular use seems to have arisen from the steepness of the curves, which requires something beyond mere weight in the frame to insure this contact. The plaintiffs' contrivance to this end was one which needed, for its working, the constant attention of the operator, and the use of one of his hands. And we think it must be considered, in fact and in law, an important part of the plaintiff's invention. Two of the cases above cited are important authorities to show that a patentee can not repudiate one of the parts of his machine after another inventor has taught him how to dispense with it. Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Vance v. Campbell, 1 Black. [66 U. S.] 428.

It was urged by the defendants, that upon the uncontradicted evidence of the general and familiar use of the index in various machines, where it performed the same function in the same way as in the plaintiffs' machine, and it not appearing that any invention was or could be required to adapt it to this machine, it followed, as matter of law, that a patent could not be taken out for the mere application or special use of this contrivance under such circumstances.

As we have considered the patent to be for a machine made up of old parts, of which the index is only one, and of which one of the others is dispensed with by the defendants, it has not become necessary to pass upon this point; nor upon the point that the elongated pattern of the Oakes machine is not the "perfect pattern" of the reissue patent, nor any colorable evasion of it, nor a known substitute for it, but a new and substantial alteration, adopted for the honest purpose of enabling the pattern to perform two functions; or, in other words, that the Oakes invention may well be described as an improvement in the pattern itself. This appears to be Oakes' view of it, as set forth in his specification. But we have not found it necessary to pass upon this; nor upon the existence and date of several of the alleged prior inventions; nor upon the question, which perhaps might be worthy of argument, whether the patentees, in their reissue, have properly distinguished between the new and the old as fully and clearly as is required by law.

Our decree must be that the bill be dismissed.

HALE (UNITED STATES v.). See Case No. 15,279.

Case No. 5,916.

HALE et al. v. WASHINGTON INS. CO.

[2 Story, 176;[1] 5 Law Rep. 200.]

Circuit Court, D. Massachusetts. May Term, 1842.

MARINE INSURANCE—COLLISION—BETWEEN SAILING VESSELS — WHAT DEEMED A PERIL OF THE SEAS—FRENCH LAW — LIABILITY OF MASTER OF SHIP.

1. The doctrine of De Lovio v. Boit [Case No. 3,776), respecting the jurisdiction of the district courts of the United States, as courts of admiralty, over policies of insurance, affirmed.

[Cited in The Martha Anne, Case No. 9,146; Camden & A. R. Transp. Co. v. The Lotty, Id. 2,337a; The Lotty, Id. 8,524; Gloucester Ins. Co. v. Younger, Id. 5,487; New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 35; Insurance Co. of Pennsylvania v. The Waubaushene, 24 Fed. 559.]

2. A collision between two ships on the high seas, whether it result from accident or negligence, is, in all cases, to be deemed a peril of the seas, within the meaning of a policy of insurance.

[Disapproved in General Mut. Ins. Co. v. Sherwood, 14 How. (55 U. S.) 367.]

[Cited in Walker v Boston & Hope Ins. Co., 80 Mass. (14 Gray) 289.]

3. It seems, that by the French law, the underwriter is not liable for those losses by collision, which are solely occasioned by the fault of the assured or his agents.

4. Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship also is primarily, although not exclusively, liable for the compensation.

[Cited in Edwards v. The Robert F. Stockton, Case No. 4,297; Sherwood v. General Mut. Ins. Co., Id. 12,776; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 432.]

[Cited in Dyer v. Piscataqua Fire & Marine Ins. Co., 53 Me. 121; Nelson v. Suffolk Ins. Co., 62 Mass. (8 Cush.) 479.]

5. All expenses, resulting as a direct and immediate consequence of a peril insured against, are covered by the policy.

[Cited in Indianapolis Ins. Co. v. Mason, 11 Ind. 180; Nelson v. Suffolk Ins. Co., 62 Mass. (8 Cush.) 492; Blanchard v. Equitable Safety Ins. Co., 94 Mass. (12 Allen) 390.]

6. Where the ship Columbia, through the negligence or fault of her mate and crew, came into collision with the bark Ritchie, by which both vessels sustained damage; and the master of the Columbia, in behalf of his owners, paid to the owners of the Ritchie a certain sum, by way of compromise for the damage sustained by the latter vessel; it was *held*, that the underwriters

[1] [Reported by William W. Story, Esq.]

on the Columbia were liable for the sum so paid, as well for the damages as for the repairs and losses by the collision, to the Columbia.

[Cited in Williams v. New England Ins. Co., Case No. 17,731.]

[Cited in Nelson v. Suffolk Ins. Co., 62 Mass. (8 Cush.) 477.]

[7. Cited in Providence Washington Ins. Co. v. Wager, 35 Fed. 364, to the point that the remedy against the vessel and the remedy against the owner cannot be united or enforced in the same action.]

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

Libel [by Samuel Hale and another,] on a policy of insurance, on the ship Columbia, for $12,000, dated the fourth of February, 1840, for one year, from the eighth day of the preceding January. Ship valued at $32,000. It appeared from the libel, that the Columbia, in the course of a voyage from Liverpool (England) to New Orleans, via New York, on the 9th of April, 1840, in sailing down St. George's channel, by the fault or mistake of the mate and crew of the Columbia, came in collision with an English barque, called the Ritchie, by which both vessels received considerable damage in their hulls, sails, and rigging. The Columbia proceeded on her voyage; and having on another voyage returned to Liverpool, the owners of the Ritchie demanded of the master of the Columbia, the sum of £738, as damages and expenditures occasioned to the Ritchie by the collision; and the master, to prevent a proceeding in rem, in the English high court of admiralty, for these damages, made a compromise with the owners of the Ritchie, and paid them the sum of £282; and for this sum, as well as the damages for the repairs and losses by the collision on the Columbia, the present suit was brought. The answer substantially admitted the facts as stated in the libel; but denied the liability of the underwriters to repay the said sum, which under the compromise had been paid to the owners of the Ritchie. In the court below, a decree was pronounced for the libellants, from which an appeal was taken to this court.

F. C. Loring, for libellants.

B. R. Curtis, for respondents.

For the libellants the argument was as follows: The insurers are liable for the damage done to the Columbia in her hull, &c. if it amounts to an average, although the cause of the collision was negligence on the part of her master and crew. Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 220; Waters v. Merchants' Ins. Co., 11 Pet. [36 U. S.] 213; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507; Williams v. Suffolk Ins. Co. [Case No. 17,738]; Shore v. Bentall, 7 Barn. & C. 798, note. The question is, whether they are not responsible for the other damage suffered at the same time: i. e. for the claim for damages, to which the owners of the Ritchie became entitled. Where a collision happens through negligence, the owners of the injured vessel have a claim upon the offending vessel, which may be enforced by an action in personam or in rem. The liability of the vessel is primary, and that of the owners is secondary; the owners being liable merely from the relation they bear to the vessel, and their liability being limited to its value. The Rebecca [Case No. 11,619]; Rev. St. c. 32, § 1. The liability of the offending vessel arises at the moment of the collision, constitutes a lien upon it, diminishes its value to that extent, and is a loss caused by the collision. This loss happens at the same time and from the same cause, as the damage done to the offending vessel, and both constitute the actual loss to the owners from the collision; and the loss being caused by a peril insured against, collision, the insurers are liable for the whole. The principles on which this claim is founded, are fully discussed in the case of Peters v. Warren Ins. Co. [Case No. 11,035], and 14 Pet. [39 U. S.] 99; and the cases cannot be distinguished in any important respect. In that case, proceedings were instituted, and a decree was given against the vessel. In this case, there was no decree, the claim being settled by compromise. If there had been a decree, finding the facts now admitted or proved, it would have been conclusive, and prevented the necessity of proof: in the absence of a decree, the libellants have been obliged to prove their case. In other respects the decree is immaterial. The whole argument may be stated thus: When the thing insured becomes, by law, chargeable with an expense, contribution, or loss, in consequence of a peril insured against, the law considers that peril as the proximate cause of the loss, &c. and holds the insurers responsible for it. Collision is a peril insured against, and for damages occasioned thereby, the insurers are liable, although it be owing to negligence; and the offending vessel is also liable to make good the damage done to the other vessel. Such liability being a direct consequence of the collision, and the insurers being responsible for damage by collision, they must indemnify the insured, against their liability to the owners of the injured vessel.

For the respondents, the argument was as follows: The owners of the Columbia claim to recover of the underwriters the amount of damages paid by the master to the owners of the Ritchie, for an injury caused by the negligence of the agents of the assured. This proposition seems, however, to be inconsistent with the contract of insurance, and with established principles of law. Mason v. Sainsbury, 3 Doug. 61, 65. The case of Peters v. Warren Ins. Co. [supra] is the only authority relied on, as at all approaching this case; and I propose to compare this case with that decision. In the first place; Judge Story relies on the foreign law. No writer on foreign commercial law has, however, sanctioned such a doctrine; but, on the contrary, all the

writers cited by him, and some whom he does not cite, declare that in case of a collision resulting from the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it; and that the insurers are not answerable. Poth. Traite d'Assur. Nos. 49, 50; Emerig. Ins. 414, 416; Boucher, 1500–1502; Mod. Code de Com. 350, 407; Sautayra's Com. 7, 223; Boulay Paty, Cours du Droit Com. 14–16; Dig. lib. 9, tit. 2, l. 29, § 2; Valin, bk. 3, tit. 7, a 11; Bynk. bk. 4, p. 679, cc. 18, 19; Laws, Wisbuy, art. 36. So, also, the law of Hamburg imposed one half the loss on each vessel as a general average. Peters v. Warren Ins. Co. [supra]. To this add, that the owner, by the general maritime law of Europe, might discharge himself from all personal liability, even from torts, by abandoning the ship and freight. The Rebecca [Case No. 11,619]. There is not the least reason to suppose, that it created any liability of the master or owner. The Rebecca [supra]. It was therefore, a charge imposed on the vessel, and the vessel only, as her share of the common calamity. In this case by the English law, the owner of the Ritchie has a claim, first, on the master, for he is liable for the negligence of the officers and crew. Curt. Merch. Seam. 204, 205, and cases. Second, on the owner. The Dundee, 1 Hagg. Adm. 113. Third, the marine law gives him a lien on the vessel as a security for the damages. It is manifestly only as a security, that he has this lien; it is subsidiary to his claim against the master and owners, and it is precisely like the mariners' lien. 2 Dod. 85; Valin, bk. 3 tit. 7, art. 11; Code de Com. art. 407. This distinction has several important applications. Suppose the owner to be in England, and the ship to be elsewhere, and he is sued and pays, could he recover? What ground of claims would there be against the underwriters? He, as owner, has been held responsible for damages done to a foreign ship, on account of the negligence of his servants. It is clear, that this would afford no pretence of claim. Can it vary the case, that in the owner's absence the vessel is arrested? Certainly not; for this would leave the liability of the underwriters to caprice or accident.

We now come to the most important question: Was this loss imposed on the vessel in consequence of a peril insured against? The loss is for damages occasioned by the tort of the servant of the assured. This is manifestly so; for if there had been no tort, the vessel would not be liable. It is no answer to say, that the underwriters are liable for a loss occasioned by a peril of the sea, the negligence of the master being the remote cause. In the case of Peters v. Warren Ins. Co. [supra], the peril of the sea was the immediate cause of the loss; but in the present case, the tort is the immediate and efficient cause. If the peril of the sea injures the vessel insured, it is no answer to say, that the peril was caused by negligence; for the peril is the cause. If a peril of the sea injures a vessel not insured, and the law, in consequence of the peril, imposes a part of that loss on the vessel insured, the peril is the cause of the loss. But if a peril of the sea injures another vessel, and the law imposes the loss on the assured, solely in consequence of the negligence of his servants, which negligence turns the disaster into a wrong, it is the negligence which is the sole cause of the loss. As long as it is a mere peril of the sea, the injured vessel recovers nothing. It is only by showing it to be a tort, that a recovery can be had; and no loss has ever fallen on the owners, or on the vessel, except by payment in their own wrong.

The owners are not bound to indemnify the master. They had a mere lien on the vessel, which has been discharged by the master. As to the question of general average, there is no evidence of the damage actually done to the Richie. Again; there is, in the answer, no denial of the fact, that the master was guilty of negligence. Indeed, there is prima facie evidence of negligence on his part; for the vessel was going before the wind when she came in collision with the vessel on the wind. Besides, the insured is not entitled to an indemnity for money paid as damages, for an injury occasioned by a peril not insured against. 3 Maule & S. 318; Godsall v. Boldero, 9 East, 72.

Mr. Loring, in reply. If the authorities cited, establish the point, that insurers are not liable for damage by collision owing to negligence, then the modern differs from the ancient law in this respect. No such consequence as is supposed, would follow, if both vessels were insured by the same person, i. e. that the insurer would pay a double loss. He is liable only to indemnify the owner. So far as he is indemnified by claims against another, his claim is satisfied; or if the insurer pays the loss, he thereby becomes substituted as to the claim for damages. See 2 Phill. Ins. 128; Godsall v. Boldero, 9 East, 72. It is said, that if a collision had been without fault, the owners of the Ritchie would have had no claim on the Columbia, and there would have been none on the insurers of the latter, and therefore, this claim owes its existence to there being negligence on the part of the Columbia. The objection to this argument is, that it goes behind the immediate cause, the collision, to find the remote cause. There would be no difficulty in maintaining the claim, if the owners of the Columbia had been sued in personam, and paid the loss on a judgment against them. The liability of the vessel existed, and it cannot be material in what manner it was discharged.

STORY, Circuit Justice. This is an appeal from a decree of the district court, sitting in admiralty, upon a libel brought upon a policy of insurance. Nearly twenty-seven years have elapsed since in the case of De

Lovio v. Boit [Case No. 3,776] I had occasion to consider and to affirm the jurisdiction of the district courts of the United States, as courts of admiralty, over policies of insurance. I have not unfrequently been called upon in the intermediate period to re-examine the same subject, and I wish now only to state, that I deliberately adhere to the doctrine therein stated. Indeed, in the various discussions, which have since taken place, here, and elsewhere, I have found nothing to retract, and nothing to qualify, in that opinion, in respect to the true nature and extent of that jurisdiction, and its importance to the commercial and maritime world. To no nation is it of more importance and value, to have it preserved in its full vigor and activity, than to America, as one of the best protections of its maritime interests and enterprises. I rejoice to find, also, that, by a recent act of parliament, the admiralty in England has been restored to many of the powers and privileges, and much of the jurisdiction, which it anciently maintained, and which has been studiously withdrawn from it for the two last centuries by the ill-considered prohibitions of the common law. See St. 3 & 4 Vict. c. 65; 3 Hagg. Adm. Append. p. 436, note. It was my hope and expectation, many years ago, that the jurisdiction of the admiralty over policies of insurance, would have been finally settled in the supreme court of the United States, in a cause from this circuit then pending before it. But the cause went off without any decision. But I have reason to believe that, at that time, my learned brothers, Mr. Chief Justice Marshall and Mr. Justice Washington, were prepared to maintain the jurisdiction. What the opinion of the other judges then was, I do not know; but I have no reason to believe, that a majority of them were opposed to the jurisdiction. Since that period, I have often expressed a determination, whenever any cause of sufficient magnitude to be carried to the supreme court, by appeal, should arise in this circuit, not to act upon the merits of it, until the question of the jurisdiction of the court over policies of insurance should be settled in the highest court. The sum in controversy, in the present case, falls below that necessary to maintain the appellate jurisdiction; and, therefore, it is my duty to decide the questions involved in it upon their own merits.

The cause has been very ably and ingeniously argued; and turns upon some niceties, which have not as yet come into direct and positive judgment in any former case. The first point naturally presented is; When and under what circumstances, a collision between two ships on the high seas is to be deemed a peril of the seas? And I take it to be now clearly established, that a collision is, in all cases, deemed a peril of the seas, within the words of a policy of insurance, not only when it resulted from accident (see Buller v. Fisher, 3 Esp. 67; 2 Phill. Ins. 2d Ed., p. 635, c. 13, § 8; Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 99), but also when it has been occasioned by the fault or negligence of either ship, or of both of them. The case of Smith v. Scott, 4 Taunt. 126, is directly in point, that where the loss has happened to the vessel insured by a collision, arising from the fault or negligence of the other vessel, not the subject of the insurance, it is a loss for which the underwriters are liable. The other point was formerly a question of more difficulty; but since the cases of Busk v. Royal Exchange Ins. Co., 2 Barn. & Ald. 73; Walker v. Maitland, 5 Barn. & Ald. 171; Bishop v. Pentland, 7 Barn. & C. 219; Shore v. Bentall, Id. 798, note b; Sadler v. Dixon, 8 Mees. & W. 895; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507; and Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 213, it must be deemed at rest in England and in the courts of the United States. In these cases, it was held, that where a loss occurs from a peril insured against, there it is a loss to be borne by the underwriters, although it may have been occasioned by the negligence of the master and crew. And this doctrine not only stands upon the maxim, "Causa proxima, non remota spectatur"; but upon the more general ground, that the underwriters take upon themselves all losses by the perils insured against, without any reference to the fact, whether they are attributable to the negligence or default of the master and crew, or to mere accident or irresistible force. There being no such exception in the words of the policy, the policy of the law does not create one; as the owner can, in most cases, be in no better a condition to guard himself against a loss by the negligence of his agents, than he is to guard against a loss by accident or irrisistible force. He does not warrant the fidelity of his agents, but merely their capacity and ability.

The case of Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 99, completely covers the third case, where there is a mutual loss to both ships by collision, which is properly chargeable and apportionable on both in rem, whether that loss be by accident or by mutual fault. A different rule may prevail, and indeed seems to prevail, in the French law, making the underwriters liable for losses by collision occasioned by accident, or the fault of the other party; but not for losses occasioned by the fault of the assured or his agents. Pothier, and his excellent commentator, Estrangin, and Valin and Emerigon, hold this doctrine. Poth. Traite d'Assur. 2, 49, n. 50; Estrangin's Notes, Id.; 1 Emer. Assur. p. 411, c. 12, § 14; Id. (Ed. 1783) pp. 414, 417, 418; 2 Valin, Comm. bk. 3, p. 177, tit. 7, art. 10; Id. p. 183, art. 11; Code de Comm. arts. 350, 407. But it has not received any sanction in our law; and, after all, as it stands upon mere general reasoning, it is open to some question,

both as to its policy and practical convenience. It is sufficient, however, to say, that in a case of difference between us and foreign writers as to the interpretation of the true rules of commercial law, we must follow our own decisions and doctrines, in preference to theirs. But an attempt has been made to distinguish the present case from the foregoing, upon various grounds; first, that the loss is primarily a personal charge upon the master, who committed the fault; secondly, that it is a charge personally upon the owner; thirdly, that the ship is liable only as a collateral security for the damages. It is hence inferred, that as the charge was not actually fixed upon the ship by any decree, but was paid by the master on the owner's personal account, the loss is not a loss on the ship insured; but a mere personal loss of the owner, which the underwriters are not bound to compensate.

Now, I agree, that where the loss by collision arises from the negligence of the master and crew, the master is personally responsible for the damages, and the owner is also personally responsible. But it is by no means true, that the ship is, therefore, to be treated only as secondarily liable for the loss, in aid of, or as security for, the master and owner. On the contrary, as I understand it, the ancient law of the admiralty holds the ship to be the offending or guilty party, and, therefore, primarily, although not exclusively, liable for the compensation. The judgment of Lord Stowell in the case of The Dundee, 1 Hagg. Adm. 109, 120, 122, recognizes this doctrine, if it does not proceed upon it as its true foundation. Indeed, the common course in the admiralty is to proceed against the ship in rem for the damage, whenever she can be reached, and this is not only a proper course, but in many cases almost indispensable, as the owner is now by statute not liable ordinarily for damages beyond the value of the vessel and her appurtenances and freight, which must be first ascertained and established. See St. 53 Geo. III. c. 159; The Dundee, supra; The Richmond, 3 Hagg. Adm. 431. Indeed, the argument admits, that by the general (perhaps not the universal) maritime law of the continent of Europe, the owner may escape all personal liability by abandoning the guilty ship and freight to the injured party. This of itself would seem to show, independently of any statute provisions, that the liability for losses by collision is primarily understood to be a charge on the ship itself, and that so far from the ship being a mere collateral security for the damages, in aid of the personal responsibility of the owner, he is to be deemed, under the present British law, as well as the maritime law of the continent, as rather a collateral security for the guilty ship, to the amount of her value and the value of the freight, and, at most, personally responsible only when they are not forthcoming to the amount of their value.

The citations from the Digest prove nothing more than the responsibility of the offending mariners for the loss, which I suppose to be undeniable. "Si navis tua impacta in meam scapham, damnum mihi debit," &c.; "si in potestate nautarum fuit, ne accideret, et culpa eorum factum sit, lege Aquilia cum nautis agendum." Dig. lib. 9, tit. 2, l. 29, § 2. And again; "Si navis alteram contra se venientem obruisset; aut in gubernatorem, aut ducatorem, actionem competere damni injuriae. Sed si tanta vis navi facta sit, quae temporari non potuit, nullam in dominum dandam actionem; sin autem culpa nautarum id factum sit, puto (says Ulpian) Aquiliae sufficere." Dig. lib. 9, tit. 1, l. 29, § 4. But this personal responsibility does not, at least in modern times, exclude, or supersede, or qualify the right to proceed in rem against the offending ship. My learned friend, Judge Ware, of the district court of Maine, in his able opinion in the case of The Rebecca [Case No. 11,619], has fully expounded this doctrine, and traced it up to its fountain head.

But it does not strike me, that it is at all material in the present case to establish, whether the ship or the owner is primarily liable for the loss sustained by the Ritchie, or whether they were each liable pari passu, and in solido. Suppose the ship had been actually arrested under the admiralty process in England, as clearly she might have been (see The Christiana, 2 Hagg. Adm. 183; The Johann Friederich, W. Rob. Adm. 35); and the master had made the compromise, which is not denied to have been fairly and reasonably made, or suppose a decree had passed against the ship, and the master had paid the money to deliver the ship from a sale, or to discharge the lien; there cannot, as I think, be the slightest doubt, that the underwriters would have been liable for the charges; for the master would be an agent acting for all concerned under such circumstances. At least, if there be any doubt on this point in any mind, I do not partake of it; and I deem the case of Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 99, a direct authority in favor of it. What possible difference can it make in law, if the charge is a fixed lien in rem, and properly chargeable on the ship, that it has been paid without any legal process or proceedings? If the master pays for a salvage service to the ship without process, is it less a charge on the underwriters, than if it had been adjudged under a decree in the admiralty? If a ransom is paid to enemies or pirates by the master bona fide out of property on board, or other funds, to deliver the ship from their possession and power, can there be a doubt, that it is a loss to be borne by the underwriters, without any inquiry, whether there be or be not a right, primary or secondary, to proceed in rem or in personam by those, whose money or goods have been applied or sacrificed, against the ship or the owner, for contribu-

tion? In truth, however, the loss by collision must be treated as a loss, giving an immediate title and remedy to the persons or property injured, from the time of the injury; and whether the amount be paid by the proceeds of the ship, or by the owner personally, it is still a loss occurring to the owner from the peril insured against, for which the underwriters are responsible to him.

And this leads me to add, that, in my judgment, it makes no difference, whether the ship was liable at all for the loss, if the loss was a peril insured against, and the owner was compellable to pay the loss, as happening by and in consequence of the peril. Unless the collision had taken place, the owner would have incurred no responsibility for any damages. It did take place, and he became chargeable therefor, and it was a peril insured against; how then can he say, that it was not a loss directly occasioned by and attaching to the peril? The case of Peters v. Warren Ins. Co. [supra], shows, that the collision was the proximate cause of the loss; and if the owner was thereby compellable to pay it, as well as the ship, the payment must be deemed an immediate charge on him, occasioned by the collision, just as much as upon the ship. The argument seems to suppose, that the insurance attaches only to the extent of the direct injury sustained by the very thing insured. But that argument is not well founded. Any and every expense, borne by and chargeable upon the owner of the thing insured, as a direct and immediate consequence of a peril insured against, is covered by the policy. There are many expenses incurred by the owner, in consequence of a peril insured against, which constitute no charge in rem; and yet the underwriters are bound to pay the same. Take for example, the fees of proctors and counsel, and officers of the court, paid under judicial proceedings in cases of capture; or the fees of notaries in making a protest; or the costs of a survey; or the duties and expenses, and charges paid in a port of necessity; or the expenses and charges of a sale of damaged goods, or of a sale of other goods, to enable the master to repair damage by a peril of the seas. These are all incidents to the original peril or loss; and they must be borne by the underwriters, although they constitute, strictly speaking, no lien in rem. The truth is, that in all these and the like cases we look to the origin of the loss. If it be a peril insured against, all the incidents attached thereto by law, as necessary or natural incidents, become a part of the loss; just as much as the storage of goods saved from a shipwreck is deemed a part of the loss; and the expenses of court, in a suit to ascertain the salvage, are also deemed a part of the loss.

Upon the whole, I see nothing to take the case out of the general rule fixed by the cases of Waters v. Columbia Ins. Co., 10 Pet. [35 U. S.] 507, and Peters v. Warren Ins. Co. 14 Pet. [39 U. S.] 99. The money, paid to the owners of the Ritchie, was a part of the loss occasioned to the owner of the Columbia by the collision, and a direct consequence thereof. I shall, therefore, affirm the decree of the district court.

Case No. 5,917.

HALE v. WILKINSON.

[See 21 Grat. (Va.) 75.]

HALE, The MARY. See Case No. 9,213.

HALE, The SYLVESTER. See Case No. 13,712.

Case No. 5,918.

In re HALEY.

[2 N. B. R. 36 (Quarto, 13).] [1]

District Court, N. D. Alabama. 1868.

BANKRUPTCY—PROOF OF DEBTS—NON-RESIDENT CREDITORS.

A deposition in support of a claim is not properly a proof of a debt. Debts due by the bankrupt to resident creditors must be proved before one of the registers of the court of the home district. Debts due to non-resident creditors must be proved before any register or commissioner of the court in any district other than that in which proceedings in bankruptcy are pending. Commissioners of the circuit court of the United States are not authorized to take proofs of debts due to creditors residing in district where proceedings are pending.

[Cited in Re Merrick, Case No. 9,463.]

On the 8th day of May, 1868, Daniel Johnson, a creditor of the bankrupt, presented to the register a deposition in proof of his debt, with security, taken and certified to by William T. Price, one of the commissioners for the circuit court for the judicial district of Northern Alabama, in which district the proceedings in bankruptcy in this case are being had. The register declined to admit the deposition to the files on account of its not having been taken and certified by a register in bankruptcy of the judicial district "in which the proceedings in bankruptcy were pending," as required by the twenty-second section of the bankrupt act [of 1867 (14 Stat. 527)]. Upon this state of facts the question arose: Can proof of debts against the estate of a bankrupt be made before a commissioner of the circuit court of the United States for the district in which the proceedings in bankruptcy are pending?

By JOSEPH W. BURKE, Register:

It is provided by the twenty-second section of the bankrupt act, that all proofs of debt against the estate of the bankrupt, by or in behalf of the creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers in bankruptcy of the court in said district. The intent of the framers of the law is clearly expressed in this

[1] [Reprinted by permission.]

clause, conferring on the registers this authority, and obliging resident creditors to prove their debts before them. Charged as they are with the conduct of the cases, and the administrative duties arising in each, they are properly made the instruments under whose survey and inspection all claims against the estate of a bankrupt are audited and allowed. Those claims are rigidly canvassed, scrutinized and prepared for the final action of the court in their disallowance or admission. The duties of the register in this respect are more judicial in their character than in that of any other duty he is called on to perform or authorized to discharge, and the framers of the law, by investing him alone with the power to take proof of debts against the estate of a bankrupt, within the judicial district in which the proceedings in bankruptcy are pending, doubtless had in view the important consideration that he is presumed to be more familiar with the intrinsic merits of each case, its history, the parties thereto, their respective claims, and the relations they bear towards each other.

It may be inquired why congress did not require that proofs of debts should be made by non-resident creditors before the registers of these districts to the exclusion of any other class of officers. This is fully answered by the reason above stated. The registers and commissioners in the foreign districts are placed on an equal footing on these matters. Objections to the proof cannot be made before or entertained by them. The schedules of the bankrupt are not before them. The amount due, the consideration for, and the nature of the debt, and the circumstances surrounding it, are not matters into which they are bound to inquire beyond the mere statement of the claimant, verified as the form prescribes. Different, very materially, however, is the case when considered in connection with the register of the district in which these proceedings are pending, and in which the creditor resides. What in one case amounts to a deposition, in this assumes the form of a judicial question. Before the admission of any claim against the estate of a bankrupt, two preliminary acts are done: First. The making of the deposition, which is merely formal. Second. The investigation of the claim.

In the case of proofs of debts by non-resident creditors, those acts are performed by two distinct officers. The deposition is made before a register or commissioner of the district in which the creditor resides, and the merits of the proof investigated by the register in charge of the case. The law plainly intends that where it is possible for these two acts to be blended and performed by one officer as a single act, two officers shall not be required. As it is the particular sphere of the register of the district in which the proceedings in bankruptcy are pending, to pass upon those claims, resident creditors are, by the law, referred to him to submit their proofs, and ascertain whether or not they may be allowed. The fact of their being supported by the deposition of the creditors, does not absolutely entitle them to be allowed. Each case must stand on its own particular merits, and it will not be claimed that a commissioner is competent to reject or allow the debt in the district of the residing creditor, more than the same officer would be in the district of the non-resident creditor. The law prescribes that the claim shall be presented to the register of the district in which the proceedings are pending, canvassed by and passed on by him, and in order that this may be satisfactorily accomplished, the record of the bankruptcy is furnished him, by authority of the law, for his guidance and control. A deposition in support of claim is properly not "a proof of debt." Instances are of almost daily occurrence where those affidavits are rejected for informality, as well as for the failure of the claim itself. The forms are furnished by the supreme court for the guidance of persons requiring to use them, and for the purpose of regularity, uniformity and system. Congress certainly did not intend that where the deposition could be drawn, and the examination of proof be made before the same officer, it would be proper to require the services of two. When a warrant issues, the marshal is directed to serve notices on the creditors of the bankrupt, to appear before the register, on a day appointed, "to prove their debts," &c. On that day the creditor is referred to the register, and, in the language of the form (No. 4,) must "prove his debt," before he has any standing in court.

A close analysis of the language of the twenty-second section will, it is submitted, sustain this view of the case—for while it enacts that all proofs of debts against the estate of the bankrupt, by or in behalf of the creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, "it is equally plain in declaring that the proofs of the debts by non-resident creditors may be made" before any register in bankruptcy within the judicial district where such creditors or either of them reside, or before any commissioner in any district. The sense conveyed in this section, I take to be, that a debt due by the estate of a bankrupt to resident creditor, shall be proved before one of the registers of the court of the home district, while debts due creditors residing in other districts, shall be proved before any register or commissioner in any district other than the one to which the limitation expressed in the first clause refers. If this were not the true meaning of the law, a more concise and simple mode of expression would have been used, conferring on registers and commissioners generally the power

to take proof of debts in their respective districts. Notwithstanding the ambiguity contained in the text of the statute, effect should be given to that construction that comports with reason and law. In the present case an important question arises regarding the validity of the lien claimed by the creditor, which must be investigated, and it is hardly possible that the law requires that two officers are necessary for the performance of the duties arising in the case, where it is more practical and less cumbersome that it be performed by one, and he the one specified in the act. In obliging all creditors of the estate of a bankrupt resident in the district in which the proceedings are pending to submit their claims to a register of the district to examine and audit before proof of the same, we have a simple, well regulated system. To adopt the opposite course will entail delays and harrassing inconvenience not only to the creditor but also to the court.

A timely suggestion from the register in the case, not unfrequently saves creditors much trouble and expense, and those officers are directly charged with the duty of examining the charges presented and perform their duties under the eye of the judge. I think that where it is practicable all creditors should be compelled to submit their demands in the court originally before making solemn oath sustaining the same. I think this is intended by the law, and although some doubts may exist regarding the import conveyed in the wording of the section, effect should be given that construction which is most consistent with reason, and which affords a more concise and effective practice in the administration of the law. It is, therefore, my opinion that the law intends proofs of debts shall be made by creditors residing within the judicial district in which the proceedings in bankruptcy are being held, before one of the registers of the court therein, and that commissioners of the circuit court of the United States are not authorized to take such proofs in that district.

BUSTEED, District Judge. It appears that the creditor, Daniel Johnson, is a resident of the judicial district in which the proceedings are pending. Proof of his debt must be made before a register in bankruptcy exercising his functions within the district. The affidavit before United States Commissioner Price is not a compliance with the twenty-second section of the law of March 2d, 1867. This section, in relation to its present matter, is mandatory. I agree with the conclusions arrived at by Register BURKE, and in the reasons he gives for these conclusions.

HALEY (BAYERQUE v.). See Case No. 1,135.

HALEY (MAINE v.). See Case No. 8,977.

HALF BARREL, ETC. (UNITED STATES v.). See Case No. 15,280.

Case No. 5,919.

Ex parte HALL.

[5 Law Rep. 269.]

Circuit Court, D. Massachusetts. 1842.

BANKRUPTCY — WHERE PROCEEDINGS TO BE INSTITUTED.

1. By the seventh section of the bankrupt act of the United States [Act 1841; 5 Stat. 446], proceedings in bankruptcy may be instituted either in the district where the supposed bankrupt resides, or in which he has his place of business; and when once proceedings in bankruptcy rightfully attach in one district court, all the proceedings, as to the party, must be exclusively had there.

2. In case of partnerships, either partner may be declared a bankrupt in the district, where he resides, or where the partnership is established. But the court first acquiring jurisdiction has exclusive jurisdiction over all the partners, and all their property, joint and several.

3. Where A., who resided in New Hampshire, was a member of a partnership doing business in Massachusetts, consisting of A. & B., and B. presented his petition to the district court in Massachusetts, in which A. was not joined, praying, that he and the said firm might be decreed bankrupt, it was held, that the court had exclusive jurisdiction over the subject-matter, and ought to decree both partners to be bankrupts; A. having subsequently filed a petition, that he might become a party to the petition of B.

This was the case of a petition by Horace Hall, of Charlestown, in the state of New Hampshire, in which he set forth, that he was, and for many years had been, a partner with James Read, doing business in Boston, under the name and style of James Read and Company. That the said Read, on the seventeenth day of March last, filed his petition in this court, representing that he and the said firm were unable to meet their debts and engagements, and praying that he and they might be decreed to be bankrupts. That the petitioner was not joined as a party by name to the said petition. Wherefore the petitioner now presented his petition, setting forth, that the said firm was insolvent at the time of the said petition by James Read; that the petitioner was also unable to meet his debts and engagements, which he owed as a member of said firm, and in his individual capacity. And he prayed that he might be permitted to become a party to the petition of said Read, and be entitled to the benefit of all the decrees which heretofore had been, or that hereafter might be had therein. The petitioner further represented, that he had previously filed a petition in this court for the same purposes, which was informal and insufficient, wherefore he prayed that all further proceedings thereon might be stayed, and for leave to withdraw the same. Upon this petition it was ordered by the district judge, that the question be adjourned into the circuit court, "whether upon the facts set forth in said petition of Horace Hall, and in the petition of James Read, filed on the seventeenth day March last past, and who has been declared a bankrupt, and in the several decrees in the

case of said Read, the court here may take jurisdiction of said petition of said Horace Hall, and what decree shall be made thereon."

The cause was spoken to by Dehon for the petitioner, no objection being made on the other side.

STORY, Circuit Justice. The main question in this case seems to be, whether the district court of Massachusetts has jurisdiction under the circumstances to decree the petitioner, Hall, to be a bankrupt, and to give him the benefit of the former decrees made upon the petition of his copartner, Read, for the benefit of the bankrupt act. The firm of Read and Company, consisting of Read and Hall as partners, at the time of the bankruptcy of Read, was established in Boston, and there had its sole place of business. Read then was, and now is, an inhabitant of Boston; and Hall then was, and now is, an habitant of Charlestown, New Hampshire. The question, then, is, whether under the bankrupt act of 1841 (chapter 9) Hall can be decreed to be a bankrupt in this district, or the jurisdiction solely attaches to the district court of New Hampshire. The seventh section provides: "That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district, in which the person supposed to be a bankrupt shall reside, or have his place of business at the time when such petition is filed, except where otherwise provided in this edict." The fourteenth section provides: "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company and also all the separate property of each of the partners shall be taken, excepting such parts thereof as are exempted, and all the creditors of the company and the separate creditors of each partner shall be allowed to prove their respective debts; and the assignees shall keep separate accounts of the joint stock or property of the company and of the separate estate of each member thereof." Then follow some provisions as to adjusting accounts, &c. The section then concludes: "And the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be, if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner, as if they had been commenced and prosecuted against one person alone."

Now, taking these two sections together, it appears to me, that under the circumstances, the district court of Massachusetts possesses a clear jurisdiction in the present case; and that no jurisdiction exists in any other district court to decree Hall to be a bankrupt. The seventh section provides, in the alternative, that the bankrupt may be declared such, either in the district, in which he shall reside, or in which he has his place of business. And when once proceedings have been commenced in either district, it is a necessary consequence that the like proceedings cannot be had in the other; and that the jurisdiction must be exclusive in that court, where the jurisdiction first attached; upon the known rule, that "Qui prior est in tempore potior est in jure," and that, in cases of concurrent jurisdiction, that court must have authority to proceed exclusively, to which jurisdiction has first attached. Any other construction would involve an utter repugnancy in the exercise of jurisdiction; for the orders of the one court, both as to the person and the property, as well as to all other incidents, attaching to the bankruptcy, would be, or might be, in perfect conflict with each other; and it is scarcely possible, that they could all be contemporaneous, or coincident with each other. It appears to me, therefore, that the necessary construction of the statute is, that when once proceedings in bankruptcy have rightfully attached in one district court, all the proceedings, as to the party, must be exclusively had there. In the case of an insolvent partnership, the fourteenth section appears to me manifestly to proceed upon the like grounds. Either partner may be declared a bankrupt in the district where he resides, or where the partnership is established; for a partnership may have a domicil, as well as the individual partners. The section expressly declares, that an insolvent partnership may be declared bankrupt upon the petition of the partners, or any one of them, and that the proceedings against partners shall be conducted in the like manner as against one person alone. The section further provides, what shall be the effect of a decree of bankruptcy upon any such petition, viz., that all the joint stock and all the separate property of each partner shall be taken, and administered by the assignee; and that the certificate may be granted or refused to each partner, in the same manner, as if the proceedings had been against him alone. Now, how is it practicable, in any manner whatsoever, to carry these provisions into effect if the entire jurisdiction does not attach exclusively in the district court, where proceedings are first instituted. It is plain, that in all cases of bankruptcy under the act of 1841, all the property of the bankrupt, in whatever districts it may be situate, passes to the assignee, and is distributable by the court, which has jurisdiction to decree the bankruptcy. In the case of an insolvent partnership, the joint, as well as the separate, property of all the partners, in every district, must pass, and be distributable in the like manner.

In the present case, Read was resident in

the district of Massachussetts, and the partnership also had its sole establishment or domicil in the district of Massachusetts. He applied for the benefit of the act for himself and for the firm; and the insolvency of the firm was expressly averred in his petition, and the prayer was, that the firm might be declared bankrupts, and that he might be deemed to have a certificate of discharge. Now, whatever difficulty there might have been in granting Hall a certificate under the petition, he not having been made by name a party thereto, there can be no doubt, that Read was competent to file the same on his own behalf, and to bind the property of the firm, as well as his own separate property, in and by those proceedings under the same. Hall, now, seeks the benefit of the same proceedings, and petitions to be declared a bankrupt, and to have a certificate of discharge granted to him. If he had originally joined in the petition of bankruptcy, filed by Read, there can be no doubt, I think, that he was by law well entitled so to do, since the firm was established in Boston, athough his own residence was in New Hampshire. What possible difference can it make, that he now seeks the like relief upon his own separate petition, averring his own insolvency, as well as that of the firm? I see no ground to say, that he might not originally have filed a separate petition, if Read had not, in the district of Massachusetts, if the firm was insolvent, as it did its business in Boston. If a person does business in independent establishments in different districts, I cannot perceive any ground in the statute for doubting, that he may be declared a bankrupt in either. But in the present case, the petition of Read was clearly within the competency of the district court of Massachusetts; and if so, then its decree must, upon the very language of the fourteenth section, reach all the joint property, as well as the several property of the partners. The joint effects are first to be applied to the payment of the joint debts, and the separate effects to the separate debts; and the surplus, if any, is then to be applied to the payment of the unsatisfied creditors, either joint or several, as the case may be. Now, how is this to be done, unless all the joint and all the separate effects are brought under the control of the same assignee, and are to be distributed and marshalled by one and the same court? It seems to be utterly impracticable, and against the obvious policy of the statute, to allow separate commissions, in different districts, to act upon the same persons and the same property at the same time. Either we must say, that no person can be a bankrupt within the meaning of the statute, where the partners are insolvent, but are resident in different districts, which I think would be repugnant to the language, as well as to the purposes of the statute; or we must say, that they may all be declared bankrupts in one and the same district, in which proceedings are originally and first properly had by or against one or all of the partners. In short, it seems to me, that the proceedings in every case in bankruptcy are to be treated as an entirety, inseparable and indivisible, as to the persons and property involved therein. If the proceedings in bankruptcy are by or against one or more partners, on account of the insolvency of the firm, the court, thus acquiring jurisdiction over the partner or partners under such proceedings so had, must, from the very necessity of the case exercise exclusive jurisdiction over all the partners; and all their property, joint and several, as incident to the complete operation of such proceedings, must come exclusively under its administration.

We all know, that under a joint commission in bankruptcy, in England, all the joint and several property of the bankrupt partners passes to the assignees and is distributable under the bankruptcy. Ex parte Cook, 2 P. Wms. 500, is directly in point in this matter. In cases of partnership also, where one partner only becomes bankrupt, the other remaining solvent, the rights of the bankrupt partner only become vested in his assignees, leaving to the solvent partner his undivided interest in the partnership. But under our statute, where the partnership itself is insolvent, it seems to me that the whole of the joint property of the firm must, as of course, pass to the assignee, upon the petition of either partner, since the joint creditors are entitled to the whole proceeds, and the separate estate of the petitioning partner also must necessarily pass, as well as that of the other partner, if he also is insolvent. If he is solvent, then the question, as to his separate property, may possibly admit of a different consideration. However, it is unnecessary in the present case, closely to sift this matter, as both partners, Hall as well as Read, are admitted to be insolvent.

Upon the whole, I shall direct it to be certified to the district court upon the question adjourned into this court, that that court may take, and indeed ought to take, jurisdiction of the said petition of the said Horace Hall; and a decree ought to be entered substantially according to the prayer of the said Hall in the same petition, namely: that he be declared a bankrupt, pursuant to the act of congress, that he be entitled to the benefit of all the decrees, which have heretofore been and hereafter may be rendered upon the said petition of the said Read, and all the proceedings that have heretofore or hereafter may be had therein, and that he have leave to discontinue the petition heretofore filed by him on the 28th of April last past, praying to be declared a bankrupt; and that all the proceedings therein be stayed upon the payment of costs. But that nothing contained in this order is to be construed in any wise to impair or alter or annul the rights of any parties under the various decrees and orders heretofore made, and pro-

ceedings had by the district court upon the petition, or in the matter of the said Read in bankruptcy.

Case No. 5,920.

In re HALL.

[1 Dill. 587.][1]

Circuit Court, D. Iowa. 1871.

BANKRUPTCY—APPEAL—REVIEW—COMMERCIAL PAPER—SUSPENSION OF PAYMENT—BANKRUPTCY.

1. A creditor who does not claim under commercial paper may charge, as an act of bankruptcy, failure by debtor after suspension to resume payment of commercial paper, though suspension be not fraudulent.

[See In re Ballard, Case No. 816; Baldwin v. Wilder, Id. 806.]

2. An order vacating an adjudication of bankruptcy made at the former term cannot be revised on appeal.

In bankruptcy.

E. A. Storrs, for petitioning creditor.

N. M. Hubbard, opposed.

DILLON, Circuit Judge. 1. An appeal to the circuit court does not lie by the petitioning creditor from an order of the district court vacating, at the instance of another creditor, an order made at a previous term, adjudicating their debtor a bankrupt; the remedy of the petitioning creditor in such a case is under the second section of the bankrupt act [of 1867 (14 Stat. 518)], and not by an appeal under the eighth section. Ruddick v. Billings [Case No. 12,110]; Ex parte Alexander [Id. 160]; Langley v. Perry [Id. 8,067]; Hawkins v. Bank [Id. 6,245].

2. A creditor whose claim is not evidenced by commercial paper, but rests in an open account, may file a petition against his debtor, under section 39 of the act, and charge, as an act of bankruptcy, that he has suspended and failed to resume payment of the commercial paper for the prescribed period.

3. It is not necessary, in order to constitute an act of bankruptcy, that the suspension and failure to resume payment of commercial paper for fourteen days should be fraudulent. In re Burt [Id. 2,210].

Case No. 5,921.

In re HALL.

[2 Hughes, 411;[2] 9 N. B. R. 366.]

District Court, E. D. North Carolina. Dec., 1873.

BANKRUPTCY—ALLOTMENT OF HOMESTEAD—REASSESSMENT.

Where the homestead has been duly laid off and allotted under the law of North Carolina, act of April 7th, 1869, and no fraud, complicity, or other irregularity is shown, the bankrupt courts will not order a reassessment for mere excess of value.

Article 10 of the constitution of North Carolina provides "that every homestead, and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of owner, any lot in a city, town or village, with the dwelling and buildings thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process, obtained on any debt," except for taxes, etc., for a specified period of time. The general assembly, at the session of 1868–69, passed a law to carry into effect the foregoing provisions of the constitution. Laws 1868–69, p. 331, c. 137. Said law provides, among other things, that "before levying upon any homestead thus owned and occupied, the sheriff, or other officer charged with the levy, shall summon three disinterested persons qualified to act as jurors," to whom he shall administer the prescribed oath. "Said appraisers shall thereupon proceed to value the homestead, with its dwelling and buildings thereon, and lay off to said owner such portion as he may select," etc. "The appraisers shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court of the county in which the homestead is situated, and filed with the judgment roll in action, and a minute of the same entered on the judgment docket. If the judgment creditor for whom the levy is made, or judgment debtor or person entitled to homestead exemptions, shall be dissatisfied with the valuation and allotment of the appraisers, he may, within ten days thereafter, or any other judgment creditor within six months, and before sale under execution of the excess, notify the clerk of the township thereof and file with him a transcript of the return of the appraisers, and thereupon the clerk shall notify the other trustees of the township to meet him, at a time specified, within ten days, on the premises, to reassess and allot the said homestead. Any appraisal or allotment by the trustees of the township may be set aside on application of any party interested in it, for fraud, complicity, or other irregularity. The proceedings shall be upon petition, as in other special proceedings, and the applicant shall give bonds to the opposing party for costs and damages." By the amendments of the bankrupt law of June 8th, 1872 [17 Stat. 334], and March 3d, 1873 [Id. 577], it is provided "that the exemptions allowed the bankrupt by the said amendatory acts shall be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871," etc.

On the 23d day of June, 1873, Jack Hall was duly adjudged a bankrupt in said court up-

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

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

on his own petition. In due time John S. Henderson, of Salisbury, was appointed assignee of his estate. Within twenty days thereafter he proceeded to lay off and assign to the said Jack Hall, bankrupt, the property exempted from the operation of the 14th section of the bankrupt law [of 1867 (14 Stat. 517)], as amended by the acts of June 8th, 1872, and March 3d, 1873, and returned a schedule of the same into the register's office. In pursuance of what he understood to be a rule of this court, the assignee adopted the return of the sheriff's appraisers, and laid off and assigned said bankrupt the homestead laid off and allotted by the said appraisers under the state law on the 16th day of April, 1870. In due time exceptions were filed to the assignee's report of exempted property by Fannie Williams and Alice March (assignees of W. B. March), creditors of said bankrupt, who have duly proved their debt against his estate, alleging that the homestead assigned therein is valued much below its real value; that they are informed and believe that the same is worth four thousand dollars. The judgment on which the present proof of debt by Fannie Williams and Alice March (assignees of W. B. March, and excepting creditors in this case), against said bankrupt's estate is founded, was taken on the 4th day of April, 1870. No other creditors have proven debts against said bankrupt's estate.

Upon the above statement of the case the following question of law arises: Whether, where the homestead of a debtor has been laid off and allotted to him by appraisers, summoned by the sheriff pursuant to the provisions of the act of April 7th, 1869, of the laws of North Carolina, and the creditors of such debtor filed no exceptions to the return of such appraisers, but have acquiesced in the same for more than three years, "the amount" of such debtor's homestead, both in value and extent, has not been thereby ascertained and fixed under the state law, especially as against all who were his judgment creditors at the time such assessment was made by the sheriff's appraisers, and whether, therefore, such homestead thus ascertained and fixed, under the operation of the state law, is not "the amount" of exemption in lands to which such debtor is entitled when he afterwards avails himself of the benefit of the bankrupt law of congress, as amended by the acts of June 8th, 1872, and March 3d, 1873, no fraud, complicity, or other irregularity being alleged against the sheriff's appraisers in laying the same off under the state law.

On the case and this state of facts, the Register, R. H. BROADFIELD, Esq., filed his opinion as follows:

The homestead laws of the state, it will be seen, have expressly provided the means of their own execution and enforcement. They have provided a tribunal to ascertain and fix both the value and extent of the homestead. Where the debtor has not previously had his homestead laid off and allotted by assessors appointed by a justice of the peace, that tribunal is the sheriff's appraisers. Where there is no appeal from the judgment and return of such appraisers, by filing exceptions with the clerk of the township within the time prescribed by law, that judgment is final—certainly final as against all the judgment creditors. Such appeal, by filing exceptions, must not only be taken by any judgment creditor within six months, but it must be taken "before sale under execution of the excess." Such appraisement can never afterwards be set aside, at least by any one who was a judgment creditor at the time it was made, except "for fraud, complicity, or other irregularity," and then the proceeding must be by petition. If no "fraud, complicity, or other irregularity" can be shown, such homestead has been thereby ascertained and fixed under the state law, both in value and extent, and must remain the fixed homestead of the debtor during the period of its legal duration against all such judgment creditors, if not against all others. In this case, the judgment on which the proof of debt by the excepting creditors is founded was in existence at the time the homestead was laid off by the sheriff's appraisers. The then owner of it, the assignor of the excepting creditors, failed to notify the clerk of the township and ask for a reassessment within the required time. The judgment of such appraisers has ever since been acquiesced in —a period of over three years. And even now, in the exceptions filed to the report of the assignee in this court, no "fraud, complicity, or other irregularity" is alleged in the laying off of the same by the sheriff's appraisers. The homestead of said Jack Hall, bankrupt, had certainly thereby become fixed and irrevocable under the state law as against the excepting creditors, and no others have proven debts against his estate. "The amount" to which said bankrupt was entitled as a homestead under the state law, had been clearly ascertained and fixed by the tribunal created by law for that purpose, and that is "the amount" to which he is entitled under the bankrupt law, as amended by the acts of June 8th, 1872, and March 3d, 1873.

This view of the law seems to me to be fully sustained in the only case I have been able to find where the point of law involved has been distinctly raised. In re Moseley [Case No. 9,868]. In that case the families of the bankrupts had instituted proceedings in the court of ordinary of Lowndes county, Georgia, under the homestead act of that state, to have their homesteads adjudged and set apart. The court of ordinary appointed appraisers to appraise and allot the exempted property. They acted and returned their proceedings into court on the 27th April, 1872. The court of ordinary approved their proceedings on that day, and set apart the property so appraised to the families of the bankrupts.

On the 1st of May, certain creditors of the bankrupts took an appeal to the superior court, from the judgment of the court of ordinary, on the ground that the property set apart was of greater value than that placed upon it by the appraisers and approved by the court of ordinary. On the 6th day of May, 1872, and while the appeal was pending, proceedings were instituted against the said Moseley, Wells & Co., by their creditors, on which they were duly adjudged involuntary bankrupts on the 6th of June, 1873. The counsel for the creditors contended that on the filing of the petition in involuntary bankruptcy, the jurisdiction of the state courts over the proceedings then pending by virtue of the state statute, in regard to homesteads and exemptions, ceased, on the ground that the proceedings therein had not been concluded. This view was overruled by Judge Erskine, on the ground that "when the court of ordinary rendered its decisions on the homestead proceedings, the judgments were binding and operative, if no appeals had been taken to the superior court." By the local law of the state of Georgia, an appeal does not vacate, but only suspends, the judgment of the court appealed from. The judgment of the court of ordinary was still the judgment of a court of competent jurisdiction, and would remain so, unless overruled by the superior court, to which an appeal had been taken. The United States district court, therefore, merely instructed the assignee in bankruptcy to apply to the superior court, to which the appeals had been taken, for leave to be made a party to the proceedings there pending, on the appeals from the court of ordinary of Lowndes county, and there defend the rights of the creditors. Here, it seems to me to be distinctly and clearly held, that where the homestead has been laid off and allotted by competent authority, under the state law, "the amount" of it thus ascertained and fixed is "the amount" to which such debtor is afterwards entitled under the bankrupt law, when he seeks to avail himself of its benefits, or when he is adjudged an involuntary bankrupt on petition of his creditors.

In discussing the general question of homestead exemptions, in Re Vogler [Case No. 16,986], though the point was not directly raised, his honor, Judge Dick, said: "Where homesteads have been duly allotted under the state law, and there is no fraud, such allotment will be recognized and allowed to bankrupts under the bankrupt act." In view of the reasoning from the facts and law of the case, and the authorities cited, I am of opinion that the exceptions filed to the assignee's report of exempted property should be overruled.

Charles Price, for certain creditors.
Luke Blackmer, for bankrupt.

DICK, District Judge. After careful consideration of the question of law presented in this case, I concur in the opinion so well expressed by the Register, and affirm the orders which he has made. The evident intent of congress in passing the amendatory acts referred to by the register was to give bankrupts the full benefit of the homestead and exemption laws existing in a state when questions affecting such legal rights are to be considered and determined by a court of bankruptcy. The homestead estate of the bankrupt in this case was allotted and its value ascertained and fixed in the manner prescribed by the state laws upon such subjects. Those laws furnished the excepting creditors a plain and direct mode of proceeding for setting aside the allotment of the homestead estate for excess of value. As they had an opportunity for having a day in court for asserting their rights, they cannot avoid the consequence of their laches by resorting to a different forum. The courts of the United States usually recognize and observe the rights of parties as ascertained and adjudicated in the tribunals of the state where such federal courts are held. Where fraud, complicity, or irregularity are alleged and established by proper special proceedings, the allotment of homestead may be set aside in the state courts, and in such cases similar relief will be furnished by a court of bankruptcy. Fraud vitiates the most solemn judicial proceedings, and a judgment or decree is clearly impeachable on the ground of fraud and deception practiced on the court, and the law furnishes adequate and ample remedies in such matters. Mere excess of value in the allotment of a homestead is not fraud, and to successfully impeach such proceedings it must be shown that the debtor by some fraudulent representation or deception, or by complicity with the appraisers, procured such excessive allotment. The value of an estate is a question of fact generally depending upon circumstances which are apparent to the public, and an excessive valuation may be clearly shown by proper evidence. As no fraud is alleged in this case, the allotment of the homestead under the state law is valid, and the estate did not vest in the assignee, and was properly designated and set apart by him in the certificate of exempted property.

The cost of these proceedings must be taxed against the excepting creditors.

Case No. 5,922.

In re HALL.

[2 N. B. R. 192 (Quarto, 68);[1] 16 Pittsb. Leg. J. 52.]

District Court, N. D. New York. 1868.

BANKRUPTCY—NOTICE OF MEETING OF CREDITORS—IRREGULARITY IN WARRANT OF REGISTER.

An omission to publish notice of the first meeting of creditors to prove their debts, in one of the papers designated for that purpose, also a

[1] [Reprinted from 2 N. B. R. 192 (Quarto, 68), by permission.]

failure to state in the warrant the names, residences and amounts of the debts of creditors, and the false return of the messenger, are sufficient irregularities to set aside the proceedings before had.

[Cited in Re Archenbrown, Case No. 504.]

In bankruptcy.

HALL, District Judge. The discharge of the bankrupt in this case was not opposed; but upon the hearing of the application therefor, under the usual order for creditors to show cause, it was stated by the counsel for the bankrupt that it had been discovered that the notice of the first meeting of creditors to prove their debts and choose an assignee had not been published in one of the newspapers designated for that purpose in the warrant issued by the register, and that he was not aware of the fact until just prior to the hearing upon the application for a discharge. It was stated that the return of the messenger set forth that such notice had been duly published; but as it was conceded that this return was false, and that the notice had never been published in one of the papers designated, this fact must be considered as properly before the court. As this was the notice required by statute, in order to give to creditors and others in interest notice of the pendency of the bankrupt's petition, the omission to publish such notice is such an irregularity as cannot be disregarded. The creditors have not had the notice the statute requires to be given them, that they may take measures for the protection of their interests, and it cannot therefore be decreed that all the requirements of the law have been conformed to by the bankrupt. It was his duty, or that of his attorney, to see that these notices were published; or at least to see that a proper affidavit of such publication was before the register, before the appointment of an assignee.

On looking into the papers it appears that the warrant first issued by the register, and which ought to have contained a list of the creditors of the bankrupt, with their respective places of residence, and the amount of their respective debts, with directions to serve a notice containing such list and statements upon each of such creditors, contained no list of creditors; but in lieu thereof, such warrant contained a statement that "the names of creditors in the schedule annexed to the duplicate copy of the petition of said bankrupt could not be read." If this were true the obvious course for the register to pursue was to decline to issue any warrant until a proper and legible copy of the petition was furnished; and it is not surprising that a case in which so gross an irregularity was allowed to occur, almost at its very inception, should exhibit other inexcusable blunders. The next of these is found in the messenger's return to this warrant, which states that the publication of the notices in the two papers in which it was directed to be published, although, as before stated, it is now conceded that it had been published in only one of them. It is clear that the messenger could have had no proof of the publication, and, though bound by the express terms of his official oath to make true return to his warrant, he made a return not warranted by the facts—probably without taking any measures to ascertain whether it was true or false Subsequently the schedule of the bankrupt was amended by inserting a statement of debts which had been previously omitted because they were barred by the New York statute of limitations, and thereupon a new warrant was issued directing service, by mail, of notice of an adjourned meeting of creditors, but not directing any publication of notice of such meeting; and it was under these notices that the meeting to choose an assignee, &c., was held.

The proceedings under the first warrant, and indeed the issuing of such a warrant, was a gross and palpable blunder, and one which ordinary care and a reasonable observance of the general orders in bankruptcy and the general rules in bankruptcy adopted by this court would have prevented. The fourteenth general order requires all petitions, and the schedules therewith, to be printed or written out plainly; and the third rule in bankruptcy adopted by this court, requires that all papers filed in proceedings in bankruptcy shall be written in a fair and legible hand, or else printed; and there was, therefore, no possible excuse for filing with the register a paper which could not be read. The twenty-eighth general rule of this court in bankruptcy, as amended, requires that due proofs of the publication of the notices directed by the warrant be furnished to the messenger, and filed with the papers or proceedings to which they related,—that is, with the warrant and return. If this requirement had been regarded, the neglect of the messenger in failing to procure the due publication of the notice would have been discovered, and the meeting could have then been adjourned, and a new notice given as required by the twelfth section of the bankrupt act; and no other delay or unnecessary expense would have been incurred. As the case now stands, most of the proceedings already had must be set aside, and the same proceedings had with due regularity; and the party must be careful to renew his application for a discharge within the year from the adjudication in bankruptcy.

Case No. 5,923.

In re HALL.

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

District Court, E. D. Michigan. Nov., 1876.

BANKRUPTCY—CREDITORS' PETITION — AGGREGATE AMOUNT OF DEBTS—NUMBER OF CREDITORS.

1. Under the ordinary allegation in a creditors' petition that petitioners constitute one-

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fourth in number, etc., and that the aggregate of their debts amounts to at least one-third of the provable debts, etc.; if it appears that the claims of several of the petitioners are each less than two hundred and fifty dollars in amount, the petition is not thereby rendered invalid.

2. In making up the requisite number, petitioners may compute those simply whose debts exceed two hundred and fifty dollars, or they may proceed upon the hypothesis that they represent one-quarter of the entire number of creditors, in which case those of less amount than two hundred and fifty dollars may be reckoned.

On motion to dismiss creditors' petition upon the ground it did not set forth that the requisite number of creditors had joined in it.

W. E. Jackson, for debtor.

E. Y. Swift, for petitioning creditors.

BROWN, District Judge. By section 39 of the bankrupt act [of 1867 (14 Stat. 536)] as amended, a debtor may be adjudged a bankrupt "on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable;" * * * "and in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned." But to this provision there is a qualification that "if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid." The petition in this case contained the ordinary allegation "that the petitioners constitute at least one-fourth in number of the creditors of said Robert L. Hall, and that the aggregate of their debts provable under the said acts amounts to at least one-third of the debts so provable." As it appears, upon the face of the petition, that of the twelve creditors who signed it, but two of them held claims exceeding two hundred and fifty dollars, it is insisted the petition is invalid. It is conceded that in order to force a party into bankruptcy there must unite at least one-third of the creditors in amount, irrespective of the magnitude of their claims. It is claimed, however, that as but two creditors hold claims of over two hundred and fifty dollars, the requirement of the statute as to number is not complied with. In support of this is cited the Case of McKibbin [Case No. 8,859], decided by this court.

It will be observed that in section 39 there are two theories or bases upon which the number may be computed, and the petitioning creditors apparently have an option in making up the requisite proportion. They may compute those simply whose debts exceed two hundred and fifty dollars, in which case only creditors representing that amount should join to make up the number; or, if the requisite number of those holding that amount fail to sign or are not procured, they may proceed upon the hypothesis that the petitioning creditors represent one-quarter of the entire number of creditors, in which case those of a less amount than two hundred and fifty dollars may be reckoned. The difficulty in the Case of McKibbin was occasioned by the peculiar language used in the petition. It was not the ordinary allegation that is found here, but it was averred that the petitioners "constituted at least one-fourth in number, upon the basis of two hundred and fifty dollars and upwards, of the creditors of said James McKibbin." Now as it appeared that, of the seven petitioners, only five held debts to the amount of two hundred and fifty dollars and over, there was evidently a failure to sustain the allegation that the petitioners constituted a fourth in number, upon the basis of two hundred and fifty dollars. It was held that the names of those two could not be stricken out as surplusage, and that the court could not regard the petition as that of the remaining five creditors under that allegation. The case was practically decided upon the peculiar language of the petition. The result, even then, might have been different had the petition averred that those of the petitioners whose debts exceeded two hundred and fifty dollars constituted one-fourth at least in number, upon the basis of two hundred and fifty dollars, and that the aggregate of the debts of all the petitioners provable under said acts amounted to at least one-third of the debts so provable. But, under the allegation here used, I think the creditors were at liberty to make up the requisite number, either by computing those only whose debts exceeded two hundred and fifty dollars, or by uniting one-quarter in number of all the creditors. That they have chosen the latter course is evident from the fact that ten of the twelve creditors hold claims of less than two hundred and fifty dollars. No allegation is necessary that the larger creditors were applied to and refused to join, because the language of the section is that if they fail to sign the petition, from whatever cause the failure proceeds, smaller creditors may be reckoned. This was practically the view taken by Judge Lowell in the Case of Currier [Case No. 3,492], and I coincide with him in his interpretation of the law. It seems to me that the ruling in this case applies with full force here, and that the creditors have chosen to base their allegation upon the fact that one-fourth of the entire number have petitioned to have the debtor adjudged a bankrupt. Had the petition followed the language of the Case of McKibbin, where it was expressly based upon the petition of one-fourth of the number of creditors, and it appeared upon the face of the petition that several creditors were of small amount, I should have held the peti-

tion invalid; but I think this case clearly distinguishable from that, and that it falls rather within the rule laid down in the Case of Currier above cited. The exceptions to the petition are therefore overruled.

Case No. 5,924.

HALL'S DEPOSITION.

[1 Wall. Jr. 85.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1843.

PEDIGREE—HEARSAY—PRESUMPTION OF DEATH.

1. Presumption of death does not arise from the fact that a person who twenty-two years ago was in "bad health," would, if now living, be eighty years old; not even although on recent inquiry his name was not known at the post-office of a large city, (his former residence,) nor inserted in its directory:—there being no evidence of the sort nor degree of bad health, nor of inquiries having been made about him among his friends, nor of his having ever left the place of his former residence.

2. The question whether or not declarations post litem motam are evidence in matters of pedigree, is largely examined on the authorities, English, American and continental; and the court declares, in opposition to rulings in this circuit temp. Washington, that they are not: but these rulings are not positively overthrown; the case going off on the point stated in the first paragraph.

[Cited in Banert v. Day, Case No. 836.]

In ejectment the plaintiff claimed title through J. P. who was alleged to be heir at law of the original owner; and to prove the heirship, offered in evidence the deposition of one Zebulon Hall, regularly taken in New York, A. D. 1822, in an ejectment then pending in this state, for other land by this same plaintiff against a different defendant, and where the fact in dispute was the heirship. The evidence was offered not as a deposition, but as a declaration concerning pedigree. As ground for the offer it was proved that when Hall's deposition was taken, in 1822, he was fifty-nine years old, and in bad health; that on recent inquiry at the New York post-office, no person named Zebulon Hall was known there, and that the name was not found in any late New York directory. Hall lived in New York when his deposition was taken. No evidence was given to shew the nature nor the extent of Hall's bad health; nor that his name had been in more ancient directories; nor that he had ever left New York; nor that prior to offering the deposition any inquiry had been made concerning his friends or relatives, or whether they knew any thing of his existence or death.

For the evidence it was argued, that the balance of probability preponderated in favor of Hall's death. He would, if alive, be 80 years old; an age to which but a small majority even of the persons who reach 50, ever attain. This was true of persons favoured by robust health. But here is a man whose health is bad. It is not necessary to inquire into the diagnosis of his case. "Bad health," means health that is likely soon to decay. We are thus asked to suppose, that a sickly, diseased man has reached an age which even the robust are rarely so strong as to be able to attain. A specifick danger is always to be regarded when there is a question as to a presumption of death. Watson v. King, 1 Starkie, 121; Sillick v. Booth, 1 Younge & Coll. Ch. 117, 120. The case of ill health, and that of age also, is mentioned in the books. See Webster v. Birchmore, 13 Ves. 362, where "a very bad state of health" was a strong circumstance in accelerating a presumption of death; though, indeed, there were others in that case. In Rex v. Inhabitants of Harborne, 4 Nev. & M. 341, 345, Lord Denman asks: "Can there be the same presumption as to a party who is 100 and one who is 35; as to a party who was in good health when last heard of, and one who was proved to have then had a disorder upon him which was likely speedily to terminate in his death? It cannot be." The continental jurists speak the same language. Among several questions to be put by the judge before a decision involving a presumption of death, is this: "Cujus esset aetatis ille absens? An is absens sui natura esset robusti vel debilis corporis?" Menochius de Presumptionibus, lib. 6, pr. 49. Then Hall's existence was unknown at a department which, by its duty and employment, is conversant with the names of all residents in its neighbourhood; nor is his name to be found among those where the residents of a city are oftener recorded than omitted. Any one of these facts would afford a presumption of death. All four united afford a strong presumption. Death being presumed, the declaration is clearly admissible in this circuit. This point was settled in Boudereau v. Montgomery [Case No. 1,694], where, after full argument at the bar, and an able opinion from Judge Washington, depositions like the present were read to the jury. The same point had been ruled in Banert v. Day [Id. 836]; and, as we may infer from that case, had been decided in Hurst v. Jones [Id. 6,934], under the former organization of this court. It is not at all necessary to inquire into the decisions of other courts: our own practice is settled.

BALDWIN, Circuit Justice. Supposing Hall's death to be proven, the same question arises here as we find in Boudereau v. Montgomery [supra]. That decision is one which I had occasion to consider a good deal in a suit which came before me a few years ago. I then felt reluctant to overrule it: the same reluctance yet exists. I feel, that in the first place it is a precedent, and, yet more, that it is a precedent left to us by a judge of great learning, of the utmost patience, and largely endowed with that finest, rarest, last betrayed of the qualities of human intellect; I mean with good judgment. I can never dissent from my honoured predecessor,

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

Judge Washington, without diffidence, and without feeling that in such a case he is likely to be right and I am likely to be wrong. Still, it is not in the nature of human minds to view every thing in the same way; and where great principles are concerned, it may be obligatory on each to give utterance to his opinion.

Before examining the state of the law as elsewhere existing, I will say a word as to the cases in this circuit. Boudereau v. Montgomery was in affirmance of a former ruling reported in 3 Wash. [Case No. 836]; C. C. 243, the case, I mean, of Banert v. Day [supra]. Like many of the cases in what are called Washington's Circuit Court Reports, (a book printed from Judge Washington's notes never originally designed for the press,) this case is stated short and almost in the form of a syllabus; the ground of the ruling and the arguments of counsel being wholly omitted. It appears only that the counsel who argued in favour of the depositions, relied on the case of Hurst v. Jones [supra], decided in this circuit under the organization of 1801–2. We cannot tell what view of that case was given to the court; but I have been at some pains to learn what the case really was: and through the kindness of a friend am in possession of the original, contemporary MS. notes of the reporter of that court, and also with the notes of one of the judges. Each is full; and both accord. I will state that case: it is an interesting one. (His honour here stated the case, for a full report of which, see [Case 6,934].) It is obvious that Hurst v. Jones was no precedent for Banert v. Day; quite the contrary: and if this last case was ruled on the authority of the former decision, and Boudereau v. Montgomery, in turn, settled upon the base of Banert v. Day: then, that we might exclude the deposition here offered, without so much disturbing the precedents of the circuit as making them conform to the case by which they were meant to be guided, and from which they have diverged only through imperfect observation.

It would appear, however, from the learned argument of Judge Washington, in Boudereau v. Montgomery (and, indeed, from his direct statement,) that the ruling in that case, conformed to what he deemed the prevailing temper of the American decisions, (as well as of the English prior to the Berkeley Peerage Case,) and to the better sort of principles in the law of evidence. Let these be shortly examined.

The first English case recorded is that of Spadwell v. ——, which arose before Chief Baron Reynolds, in 1730, where the declarations of an aunt as to pedigree were rejected because made after dispute had arisen. 4 Camp. 410. Thirty-six years afterwards came Hayward v. Firmin, before Lord Camden, where the declarations of a mother as to her marriage, though made subsequently to the commencement of the suit, were received after objection taken and debate had. Judge Washington remarks that Lord Camden's decision, being later in point of time, over-rules that of Chief Baron Reynolds; and so truly it would do, but that it appears that the decision of Chief Baron Reynolds was not brought to the notice of Lord Camden, and, for aught that we can perceive, was unknown to him. Id. 417. Both cases are nisi prius decisions, and neither is very copiously reported; they cannot, I think, be taken as of much significance, nor as settling a great deal either way. In 1741, Duke of Athol v. Wilding occurred (2 Strange, 1151), where a special verdict given many years before against other defendants, was offered in evidence to prove pedigree. The court (Wright, J., dissenting) rejected it as being res inter alios acta, and because, for aught that appeared, the evidence on which the verdict was founded, could, itself, be procured. In that case the right to admit as declaration what was inadmissible as deposition was a refinement of ingenuity to which the talent of neither court nor counsel was able to reach; and so the matter of post litem motam was not discussed. So far, however, as the decision is concerned, it is clearly against the offer made here. This case is supposed by some to have been over-ruled. The idea is founded on what occurs in Buller's Nisi Prius, where it is said: "Another case in which this exception (res inter alios acta) ought not to be allowed, is, where the fact to be proven is such whereof hearsay and reputation are evidence; and therefore a special verdict between other parties stating a pedigree would be evidence to prove a descent.....And of this opinion was Mr. Justice Wright, &c., which opinion is generally approved, though the determination by the rest of the court was contrary; perhaps founding themselves on the Case of Sir William Clarges, &c., &c." London Ed. 1793, p. 233. The Case of Sir Wm. Clarges, which the author proceeds to state, would appear to me a very proper one for the judges on which to found themselves. It is to be observed that no case is referred to but the Duke of Athol's: no precedent nor any practice is cited to contradict that case: we are told simply that Wright's opinion "is generally approved." Opposed to this evidence of approval, we have, however, the experience of Baron Wood, who says in 1814, that it had been the "general rule," so far back as his experience and knowledge went, to reject declarations made post litem motam; and though his Brother Graham had not become acquainted with any such rule in any book that ever came within his reading, and thought that if it were a rule at all, it was one confined to the breasts of a few particularly conversant with the business of nisi prius; we find Mr. Justice Lawrence declaring that in his experience and practice, "an experience of nearly forty years," whenever a witness admitted that what he was going to state, he had learned after the commence-

ment of a controversy, his testimony had been uniformly rejected. With him agrees Mr. Justice Heath, who says: "In the course of my long experience, in all the circuits I have gone, I never heard till now of such evidence being receivable. When the objection that the declaration was post litem motam has been taken, it has been constantly acquiesced in;" and Lord Eldon, who tells us: "I have known no instance in which declarations post litem motam had been received;" and Lord Redesdale, who can take upon himself to say, that the practice of the Western circuit was to reject such declarations; and that circuit, he remarks, was supposed by those who travelled it, to be more correct on subjects of evidence than any other.

The first edition of Buller's Nisi Prius appeared in 1772; and the direct or indirect experience of some of the judges just cited reached near the time to which the author must be taken to refer. I therefore presume that the statement made in it, that the dissenting opinion of Wright, J., was "generally approved," in opposition to a decision of the court, must be taken as a misapprehension as to the precise extent of professional approbation. I may here add, what is not always remembered in citing Buller's Nisi Prius, that though the book bears on its title the name of Francis Buller, it was printed pretty much from the note-book of Lord Chancellor Apsley, by whom it was published, and to whom it was originally inscribed. Several of its dicta have been over-ruled. No other case worthy of note occurs to me as having been decided prior to our Declaration of Independence. In the year 1777 we have Goodright v. Moss, Cowp. 591, before the Earl of Mansfield; a case which Lord Eldon informs us that Lord Thurlow was "most studious to contradict." Mr. Justice Lawrence, referring to that case, says: "Notwithstanding what is said in Goodright v. Moss, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury;" and Lord Eldon acceded to the case "as it has been practised and acted upon." For myself, I confess that it does appear to me to evolve the dry point which occurs in the case before us; but I think that it was a point which escaped inconsiderately, and only along with others which carried it through. Certainly it was one not necessary to be decided; and the question of lis mota was not taken nor argued either on the bench or at the bar. Thus stood the law at the beginning of the present century. I may say that the precise question of lis mota does not seem to have been greatly agitated: that is, the books do not often speak of it; though it may have been discussed at nisi prius, on the circuits. I regard all that is recorded as not very decided one way or the other.

With the beginning of this century we have much more perfect lights. In 1807 came Whitelocke v. Baker, 13 Ves. 511, 514; a case not having, to be sure, any thing to do with pedigree, but yet stating some salutary rules by which chancery is guided in the reception of evidence. It is in this case we find that expression of Lord Eldon's, which every one must have noted, that the statements should be "the natural effusions" of a party. Two years further on we have a decision of Sir W. Grant at the rolls. The question was as to the admissibility of a pedigree found among a lady's papers after death, and which she had made after doubts had arisen as to the descent. The evidence was rejected. Edwards v. Harvey, Coop. 39, 40.[2] We now come in sequence to a case vastly more laboured, more important and more entirely conclusive than any which preceded it; which excited great interest; was argued by distinguished counsel, and on which we have a decision of the house of lords after a full expression of opinion, only not unanimous, from ten very able judges; Mr. Justice Chambre, who had heard the argument, but was absent when the opinions were delivered, agreeing, in addition, with the majority. The Berkeley Peerage Case (decided in 1811) 4 Camp. 401, 422, has settled the law in England on foundations not to be disturbed nor relaid. I need, therefore, not refer to subsequent cases otherwise than succinctly. Rex v. Cotton, 3 Camp. 444, was ruled by a judge who did not sit in the Berkeley Peerage Case; but he agrees with it, and on principle. Another judge has gone yet further than either of these cases. In 1834 Baron Alderson ruled that less than the existence of actual controversy is enough; that in intendment of law, a controversy is moved whenever that state of facts arises on which the claim is founded (Walker v. Countess of Beauchamp, 6 Car. & P. 552, etc.), and rejected evidence accordingly. And though Lord Brougham did not go so far as this in Monkton v. Attorney General, 2

[2] This case was an application to Sir W. Grant for a new trial of an issue which he had directed and which had been once tried before Baron Graham, who had likewise rejected the evidence. Mr. Hubback, in his recent valuable work on the Evidence of Succession, &c. remarks of the paper, that "it is not clear whether it was rejected upon the ground that it had been made after the doubts had arisen as to the pedigree, or because the person who made it had, herself, an interest in establishing the relationship." Page 661. And he notes the fact that in the Berkeley Peerage Case, decided only four years after this, Baron Graham disclaimed all knowledge of the rule of lis mota; and hence appears to doubt if the case of Edwards v. Harvey is an authority on that subject. It is to be remarked, however, that though Cooper's report is deficient in fulness, the circumstance of lis mota does make a considerable figure in it; and as it is not at all necessary that Sir W. Grant should have rejected the evidence for the same reason which may have most impressed Baron Graham, we may perhaps regard Mr. Justice Baldwin's citation of the case, as not without good ground.

Russ. & M. 147, he did most clearly acknowledge the rule of the Berkeley Peerage Case. Observe his language: "One restriction, however, clearly must be imposed: the declarations must be ante litem motam. If there be lis mota, or any thing which has precisely the same effect upon a person's mind with litis contestatio, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says, is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others, of Whitelocke v. Baker." There is nothing contradicting this authority in Slaney v. Wade, 1 Mylne & C. 338, nor in any other case known to me. What is to be regarded as a lis pendens, in the understanding of law, is a point about which some of the later cases are not consentient; but the principle of the Berkeley Peerage Case (the only principle in the question before me) I take to be ineradicably fixed, in England. This indeed Judge Washington admits; but says that Whitelocke v. Baker and the Berkeley Peerage Case [supra], having been decided since our Revolution, are not authorities; that the question must be, how has the point been understood in this country before and since that event? and remarks that as the nisi prius decisions referred to by the judges in the Berkeley Peerage Case (the decisions, I presume, of Chief Baron Reynolds and Lord Camden) were never in print, they could not have influenced the law in this country. This statement proceeds on a misapprehension of fact. Chief Baron Reynolds' decision, excluding evidence post litem motam, was in print, though I am not aware that the same thing is true of Lord Camden's admitting it. In Viner's Abridgment, the first edition of which was printed before 1776, (a book which, if we may infer from the number of American subscribers to the second edition, was very popular in this country,) we have the following passage, which occurs in speaking about a statement made by a certain woman as to the birth of a child: "Objection was made," says Viner, "that the declaration of this woman was not evidence, seeing it was &c. when there was a discourse about this matter; *but what this woman said soon after the birth* (the italicising is Viner's) *was allowed in evidence, when there was no prospect of a controversy;* per Reynolds, C. B., at Devon. Assizes, Lent, 1731." Vin. Abr. tit. "Evidence, T," b. 91.

But what, at all events, is the state of the decisions in this country prior to Boudereau v. Montgomery [Case No. 1,694]? The oldest one known to me is in our own state; the case of Strickland's Lessee v. Poole, 1 Dall. [1 U. S.] 14, decided in 1765; a case which, remarkable to say, does not appear to have been remembered either by counsel or by the court in Boudereau v. Montgomery. That decision does make the absence of any controversy an element of the case in which hearsay is admissible. The report is thus: "To prove pedigree, evidence permitted to be given of hearsay a great while ago—before any dispute stirred." In Hurst v. Jones, A. D. 1801, the court evidently took a distinction between ante and post litem motam, and admitted the declaration because, as was declared, a controversy had not been raised. Coming nearer to the decision in question, we have an opinion of the supreme court of Connecticut, as delivered by Chief Justice Swift. Speaking of declarations concerning pedigree the chief justice says: "When they are made for the express purpose of being given in evidence on a question of pedigree, they will not be received. If a person were to take up a Bible, and, having the idea that it was afterwards to be produced in evidence, were to write down, at once, the births and deaths of his children; such an entry would not be admissible." Chapman v. Chapman, 2 Conn. 347, 349. This case was not cited before Judge Washington; but certainly the distinction is stated, though I admit that it was not the point in issue.

Now, I know not of any decisions contradicting these. In the cases quoted by counsel before Judge Washington, the question of lis mota does not appear to have been agitated: they relate rather to the effect of verdicts between parties, privies, and strangers. Such are the cases, if I understand them, from Henning and Munford, and from Munford; while the additional references by the court give us nothing very pertinent on the subject; and, indeed, are cited for their general language only. Two of them, the one from 1 Yeates, and that from 8 Johnson, assert only that in matters of pedigree, the rules of evidence are greatly relaxed; a doctrine not disputable: the other is from Swift's Law of Evidence, and, I presume, to the same general effect. We have at all events, the opinion of that writer specifically declared to us from the bench. Judge Washington, with the candour natural to him, says, that he "had no opportunity of looking into the American cases." Had this opportunity been allowed, I cannot think, that even with the decisions to be found in 1821, when Boudereau v. Montgomery was decided, he would have added, as he did: "But I am strongly inclined to think, from expressions to be met with in many of the state decisions, that the rule of post litem motam has never been recognized in the United States."

My limited reading suggests nothing from which I can infer that the main current of decisions since 1821, has gone in a course different from what it did prior to that date.

In Morgan v. Purnell, 4 Hawks, 95, the supreme court of North Carolina went so far as to reject a deposition because it was not clear that it was made ante litem motam. "It must appear," says one of the justices, "that such declarations have not been made at a time or with a view to serve any particular purpose. In this case it does not appear when Mrs. M. told the witness that she and Mr. M. were married: it might have been, for aught that appears, before or after the commencement of this suit. For these reasons I cannot say that the judge erred in the rejection of this deposition."...."It is necessary," says another member of the court, "that they (st. declarations concerning pedigree) should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have when there is no motive to declare the contrary. The person therefore who offers such declarations must shew that they were made under such circumstances: it is a pre-requisite to their admissibility.....The depositions must be rejected." The chief justice assenting, the judgment of the court below, which had likewise rejected the depositions, was unanimously affirmed. This case went farther than I was disposed to do on a recent trial;[3] though, indeed, the case just cited was not there brought before the court; and there was, too, in that case another circumstance which on reflection occurred to me:—that the fact of heirship was in dispute only incidentally; the main defence having been adverse possession. The North Carolina case, just quoted, was in 1825. It was affirmed, as of course, in 1837; the court having moreover changed. Dancy v. Sugg, 2 Dev. & B. 515.

But is not the question concluded in all inferiour courts of the United States, by the decision of the supreme court in Stein v. Bowman? made in 1839 (13 Pet. [38 U. S.] 209, 220); though I did not entirely agree with the majority of the court on some other points, not important to be mentioned, of the opinion there delivered. After going through some of the errours assigned to the action of the district court below, Mr. Justice McLean proceeds: "But there is another ground on which the opinion of the district court can be sustained, and it is proper to state it. The declarations offered as evidence were made subsequent to the commencement of the controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired. It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time and under circumstances when the person making them could have no motive to misrepresent the facts." I have gone through all the cases on my notes or which memory suggests. There may be others, in the multiplication of modern books, which I do not recall, but I presume that they are not numerous. How then does the question appear to stand? In England we have opinions from Lords Eldon, Redesdale, Ellenborough, Brougham; from Chief Baron MacDonald, Barons Wood and Alderson; from Sir William Grant, M. R.; and from Justices Bayley, Lawrence, Heath, Chambre and Dampier. In our own country, from the supreme court of the United States, the supreme court of Pennsylvania, the supreme court of Connecticut, the supreme court of North Carolina (twice) and from the circuit court of this circuit as organized in 1801–2; a court which consisted of Chief Justice Tilghman of Pennsylvania, Justice Griffith of New Jersey (an able man,) and Justice Basset of Delaware. All these judges and courts speak more or less fully, and all give it as their opinion that the declarations, to be admissible, must be before a controversy stirred.

The rule of the civil law is sufficiently known, and is thus given by Mascard, in his learned work "De Probationibus:" "Nec vero tantummodo debent esse personae graves, sed etiam debent deponere se audivisse ea quae asserunt, ante litem motam: quod si post litem motam deponerent, non solum non probarent, sed nec ullam fidem facerent; quia facile contingere potest ut quispiam id audiverit ab alio, qui illud protulit in fraudem, vel quod lis ipsi mota traxerit istam famam." I am far from meaning to cite a civilian as authority; but in a question concerning the safety of a practical rule, the experience of old and corrupter countries is a source of information not wholly without value. It is not necessary to place this matter upon the technical ground that the case of Boudereau v. Montgomery [supra], has been over-ruled by Stein v. Bowman [supra]. I am willing to look at it with more comprehension. We do then certainly find a power of authority and of judicial declaration not to be resisted. If the doctrine could not stand on principle, no judge could sustain himself against so commanding a body of names. They embrace the great masters of law and of thought for more than fifty years together: I must bow to them.

It is scarcely needful that I say much as to general principles. They have been so fully discussed in the leading case quoted by me, that I will only refer to what is there said. I need not repeat it. I cannot improve it. Whomsoever the Berkeley Peer-

[3] [See Dussert v. Roe, Case No. 4,200.]

age Case leaves unconvinced I should not hope to satisfy. Necessity is the principal argument for admitting this sort of evidence. On this point only I will say, that this is a thing very easy to assume, whether it exist or not. I apprehend that if parties understand that they must bring purer evidence, the necessity will disappear; and if in a few cases the rule operates with severity upon individuals, it is in this, as in many other cases, only the sacrifice that is to be made to a greater and more general good. My sincere respect for the learning and wisdom of Mr. Justice Washington, and the force with which on a former occasion (though before the decision in Stein v. Bowman) his ruling was pressed on me, have made me go thus at large into the subject. I need not, perhaps, have said so much; for the depositions in this case are inadmissible on another ground, and on that I prefer to decide the point:—There is no evidence that Hall is dead, or that his deposition could not be had in a more regular way.

The life of a person once shown to exist is intended to continue till the contrary is proved, or is to be presumed from the nature of the case. Direct proof is not here offered. Are the facts which are shown sufficient to supply its place? The witness, if alive, is eighty years old; an age that we may admit is an advanced one; but is yet one to which life is occasionally, nay, not unfrequently prolonged. The court cannot, therefore, presume, as of course, that Hall has not reached it. Lord Hale has indeed said that it shall be presumed life will not exceed ninety-nine years. Weale v. Lower, Poll. 55, 67. And it may be inferred that a man, if of any age already, will not live eighty years besides. Napper v. Sanders, Hut. 118; Keeble's Case, Litt. 370. But Chief Baron Reynolds refused to presume a witness dead, who had been examined sixty years before; there having been no proper searches or inquiry made after him. Benson v. Olive, 2 Strange, 920. Neither does the circumstance that the witness was in bad health in 1822, infer, as necessary consequence, that he is now dead. The difficulty is here:—that the expression "bad health" is indeterminate. There are manifold sorts of bad health, and many degrees in most of them. Shew me that Hall was the subject of some quick consuming disease, or of any specifick malady at all, and you will change the case. Suppose that his bad health was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterwards: that depends entirely upon the nature of his disorder, and mode of treatment, and the vigour of his constitution. And the valetudinarian often prolongs an existence beyond him who, in the carelessness of health, may be suddenly cut down. In the case cited from 13 Vesey, the health was "very bad," (the chancellor speaks of it as "desperate,") and the man was to have been heard of in six months after he went away; several years before. The case from Nevile & Perry goes only to shew that the presumption of life or death is a question of fact entirely. With both cases I agree. Is the case essentially changed by the inquiries made at the post-office? This difficulty occurs: that there is nothing to shew that Hall was a person likely to be known there; that he was in the habit of receiving letters, or that he was a person of any note or consequence. It is no presumption of law that the runners of the post-office know, so as to answer at first inquiry, the name and residence of every person in a populous city. Remarks of a similar sort apply to the inference which would be drawn from the absence of the name from the directory. Indeed, in the insignificance of advanced old age, a man has generally ceased to make impression on the busy world, or to be enrolled in the register of its active concerns.

It seems to me difficult to suppose that direct evidence cannot be given of a death which, if it has occurred, has occurred close to us, and since 1822. Or did Hall ever leave the place of his former residence? let this fact be shewn; and that his friends have not heard of him for seven years. Had he no friends? let that fact be shewn. The difficulty is, that the plaintiff don't shew that he has made proper search or inquiry for Hall. Had he done this, and been unable to hear any thing of the person, I should be of opinion to receive the testimony. But there is a meagerness about all this part of the case, which is unsatisfactory; to use no harsher adjective. It shuts up the access to presumption which would have otherwise been easy. The case is much like that of Benson v. Olive, already referred to. In short I see nothing in any of the circumstances shewn, nor in all of them together, which, in the absence of proper inquiry, brings that weight and conclusiveness which ought to exist before you set aside a wise and deep-laid rule of law.

Case No. 5,925.

HALL v. AUSTIN.

[Deady, 104.] [1]

District Court, D. Oregon. Dec. 10, 1864.

PLEADING—REDUNDANCY — EQUITABLE INTEREST AS DEFENSE IN EJECTMENT—DOUBLE PLEAS.

1. Under the Oregon Code, a defendant in ejectment cannot avail himself of an estate in the premises, in himself or another as a defence, unless the fact is pleaded.

2. A detailed statement of matters which might be evidence in support of a plea of title in the defendant, is not a proper or sufficient

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

plea of such title, and will be stricken out on motion, as redundant.

[Cited in Bank of British North America v. Ellis, Case No. 859; Drexler v. Smith, 30 Fed. 755.]

3. An alleged equitable interest or right in the defendant in an action of ejectment, is no defence to such action.

4. Section 72 of the Oregon Civil Code, which gives the defendant a right to plead as many several defences to an action as he may have, is similar to 4 Anne, c. 16, § 4, allowing double pleas, and should be similarly construed, so as to permit the defendant to plead inconsistent or contradictory defences to the same action.

[Suit at law by John T. Hall against Isaiah Austin.]

W. W. Page, for plaintiff.
Aaron E. Wait, for defendant.

DEADY, District Judge. This is an action to recover possession of real property, to wit: lots 5 and 6 in block 38 in the town of Portland. The complaint alleges that the plaintiff is seized in fee of the premises, and is entitled to the possession thereof. The answer of the defendant, specifically denies the allegations of the complaint, and also contains what purports to be, six other pleas or defences to the action. The plaintiff moves to strike out all but the sixth of the special pleas, because the facts stated therein are irrelevant and redundant. The first plea substantially states that the premises have been patented by the United States to the corporate authorities of Portland, in trust for the use and benefit of the occupants thereof, under the act of congress of May 23, 1844 [5 Stat. 657], commonly called the "Town Site Law"; and that the defendant has been in the possession and occupancy of the premises for two and a half years, and together with those under whom he claims, for fourteen years, and that he claims the premises by virtue of such occupancy and act of congress. The second plea sets forth a series of conveyances of the premises, commencing with a deed from Nathaniel Crosby and Thomas Smith, to Oliver Colbourne, dated November 15, 1850, and ending with one from John Thompson to the defendant, dated April 11, 1862; and states, substantially, that at the date of the conveyance from Crosby and Smith, to Colbourne, the grantors therein, as the defendant is informed and believed, were the owners in whole or in part, of the premises, or were the agents of the plaintiff, duly authorized to convey the same, and thereby did convey all the right and interest of the plaintiff in the premises, as well as that of Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman, the three proprietors of the Portland land claim. The third plea is the same in effect as the second one, except that it alleges that said Crosby and Smith, at the date of their deed to Colbourne, possessed all the right and title that said Lownsdale, Coffin and Chapman at any time had in the premises. The fourth plea does not differ from the third, except that it alleges that on November 15, 1850, said Crosby and Smith had and possessed an undivided one half of the premises with the proprietors aforesaid. The fifth plea is like the fourth, except that it alleges that Crosby and Smith were the agents of the plaintiff, and authorized by him to make the deed aforesaid, to Colbourne.

Under the Code (Code Or. 226), a defendant in ejectment, cannot give in evidence any estate in himself or another, in the property in controversy, unless the same is pleaded in his answer, stating therein the nature and duration of the estate. At common law, the plea in this action was simply not guilty, under which the defendant might not only controvert the plaintiff's alleged right directly, but might also prove an estate in the premises in himself, or a third person, except where he, or those under whom he claimed, entered under the plaintiff. The first plea in the answer which contains a specific denial of the allegations of the complaint, is equivalent to the plea of not guilty at common law, and puts the plaintiff upon the proof of his title and right of possession. If the defendant desires to make a further affirmative defence of an estate in himself, or a third person, he must plead the fact specially, and state in the plea whether such estate is in fee, for life, or for a term of years.

A mere statement in detail of facts and transactions, which tend to show that the defendant had any such estate in the premises, is not a good or sufficient pleading. Instead of pleading an estate in the party, it is a setting forth the evidence of title—an attempt to convert the action at law into a suit in equity. The plea should simply state that the defendant has an estate in the premises, either in fee, for life, or for years, and if either of the latter two, for whose life, or what term of years, as the case may be. In pleading an estate in fee, it was never necessary at law, to do more than to aver the fact, but in case of a lesser estate, the rule required that in all pleadings subsequent to the declaration, its commencement and mode of derivation should be especially stated. Gould, Pl. 60. The Code expressly requires that the answer of the defendant, when it contains a plea of a particular estate in himself, should state for whose life, or what term of years such estate is held.

The motion to strike out must prevail. Tried by these rules, these pleas are objectionable as being either impertinent or redundant. It is not alleged in any of them that the defendant is seized or possessed of any estate in the premises. One and all, they are simply a prolix story of buyings and sellings, or other transactions, with the conclusion that the defendant thereby acquired either all or half the interest of the plaintiff, or all the interest of the three alleged town proprietors on November 16, 1850, whatever that may be or have been. Whatever effect the matters contained in these pleas might

have as evidence, they are not proper to be stated in a plea or answer. To avail himself of the defence of an estate in the premises in himself, the defendant must plead the fact directly and positively, and the statement of a series of transactions or circumstances, from which the same is sought to be inferred, is not sufficient.

As to the plea founded upon the town site law, it is not necessary now to consider the question of whether such law was in force in Oregon before July 17, 1854, when it was specially extended here by act of that date (10 Stat. 305). Lownsdale v. Portland [Case No. 8,578]. Admitting that the law was in force since the date of the organic act, August 14, 1848 [9 Stat. 323], the plea is still liable to the objection of redundancy, being a mere detailed statement, of what is supposed to be sufficient evidence of title or estate in the defendant under that act. Neither is it clear from these pleas what kind of an interest the defendant claims in the premises. It is not alleged in any of them, either in terms or effect, that he has any legal interest in the lots in controversy, and from the argument it appears that if he has any interest it is some kind of an equitable one. In this action the plaintiff claims to have the legal estate in the premises, and an equitable interest or a right in equity to have the legal estate is no defence thereto. In such a case the defendant's remedy is in equity, and his alleged right cannot be determined at law.

A question has been made in the argument, whether under the Code, a defendant could plead inconsistent or contradictory defences in the same answer. At common law a defendant could plead but one defence to an action. But this rule operating hardly in some instances, led to the enactment of 4 Anne, c. 16, § 4, which allowed the defendant by leave of the court, "to plead as many several matters to an action as he might think necessary for his defence." Under the construction given to this statute, each plea was to be considered and have effect as if it were pleaded alone. In the language of Lord Ch. J. Willis, one plea "cannot be taken in to help or destroy another," but that "every plea must stand or fall by itself." With this statute of Anne and this construction of it the Code agrees. Code Or. 157. It provides that "the defendant may set forth by answer as many defences * * * as he may have. They shall each be separately stated and refer to the causes of action, which they are intended to answer, in such a manner that they may be intelligibly distinguished." A defence under the Code separately stated, is nothing more or less than a plea at common law, and "must stand or fall by itself."

While upon this subject it may be proper to notice that some of the allegations in these pleas are made upon information and belief. This form of allegation is not authorized by the Code, and to say the least, only makes the pleadings unnecessarily prolix. The allegation must not be upon hearsay. The verification makes no distinction between the allegations of a pleading—it being to the effect that the party believes the pleading to be true. Code Or. 156, 158. Order that the motion to strike out be allowed, with costs.

HALL (BARRETT v.). See Case No. 1,047.

Case No. 5,926.

HALL v. BIRD.

[6 Blatchf. 438; 3 Fish. Pat. Cas. 595; Merw. Pat. Inv. 667.] [1]

Circuit Court, S. D. New York. June 4, 1869.

PATENTS—PATENTABILITY WHERE PRIOR MACHINE HAD EXISTED, BUT WAS ABANDONED.

1. The object to be attained by the use of the machine described in letters patent granted to Charles Hall, August 30th, 1864, for an "improved machine for stretching chains," explained.

2. Where it is shown that a prior machine was constructed and used, and did not bodily disappear from view, but its existence and use were not made public, and the knowledge and use of it did not exist in a manner accessible to the public, and it had been substantially abandoned, and had substantially passed away from the memory of those who used it, until recalled to their memory by the success of a like machine, which was subsequently invented by another, the invention embodied in the latter machine cannot be regarded as having been previously known or used, within the meaning of the 6th section of the act of July 4, 1836 (5 Stat. 119).

[Cited in Wilson v. Coon, 6 Fed. 627; Davis v. Brown, 9 Fed. 656; Electric Accumulator Co. v. Julien Electric Co., 38 Fed. 128.]

3. The first claim of the Hall patent claims the use of tongs or clamps which have a provision for grasping firmly the link or links to be stretched in the chain, without injuring other links; and any prior machine, to be an answer to such first claim, must be shown to have contained tongs or clamps having such provision.

4. The plaintiff being entitled to recover, but not having proved any specific amount of damages, six cents damages were awarded to him.

This was an action on the case [against James Bird] for the infringement of letters patent [No. 43,987] granted to the plaintiff [Charles Hall], August 30th, 1864, for an "improved machine for stretching chains." It was tried before the court, without a jury.

Charles M. Keller, for plaintiff.

Robert D. Holmes and James F. Malcolm, for defendant.

BLATCHFORD, District Judge. The specification of the plaintiff's patent says: "This invention relates to a new and useful device for stretching chains, those which are designed for working over pulleys, whereby the links are all brought to an uniform length, so that they will all engage with the teeth on the pulleys, or fit properly or snugly

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 3 Fish. Pat. Cas. 595; and here republished by permission. Merw. Pat. Inv. 677, contains only a partial report.]

in recesses made therein. The great difficulty of driving machinery or shafting by means of pulleys and chains, has hitherto been owing to the variation in the links, some being shorter than others, so that many would not engage with the teeth of the pulleys, or fit properly in recesses made in the peripheries of the pulleys to receive them." The improved machine is described as follows: A framing is made, composed of two uprights, at some distance from each other, attached to a suitable base, and connected, near their upper ends, by a horizontal bar. To one side of this bar there is attached a gauge, composed of a bar having a groove made longitudinally in its upper surface, and curved notches at each side of the upper part of such groove, the notches being all of the same size, and at equal distances apart, corresponding precisely to the alternate links of an uniform and perfect chain. The ends of the handles of a pair of tongs are connected by links to a ring fitted on a hook in one of the uprights. The ends of the handles of a similar pair of tongs are connected by links to a ring which has a chain secured to it. The jaws of the two pairs of tongs have grooves made in their ends to receive the horizontal links of the chain to be stretched, the portions of the jaws at each side of the grooves grasping the upright links. By this means, the tongs are enabled to grasp firmly the chain to be stretched. The chain before spoken of as secured to the ring last mentioned, is fitted on a hook on the end of a swivel on a screw which passes horizontally through a nut attached to the other upright, the screw having a crank on its outer end. A portion of the chain to be stretched which has links of different sizes or lengths is fitted between the tongs, the chain on the hook is put in place, the screw is turned, and the portion of the chain between the tongs stretches, the pull or tension causing the tongs to grasp the chain firmly. Any portion of the chain, from one to any number of links, may be thus stretched, where necessary. The gauge is used for testing the chain after being stretched, in order to insure correctness and uniformity in the links, the groove receiving the vertical links and the notches the horizontal ones. By this arrangement chains may be stretched so that their links will be of uniform length to work perfectly over pulleys. The claims are: (1st) The employment or use of the two pairs of tongs, or other suitable clamps, in connection with the screw, or its equivalent, arranged substantially as and for the purpose specified; (2d) the chain, or its equivalent, in connection with the swivel, for conveniently connecting one of the two pairs of tongs to the screw, as set forth; (3d) the gauge, when used in combination with the two pairs of tongs and the screw, or its equivalent, for the purpose specified.

This suit was commenced on the 24th of December, 1866. The notice of special matter of defence sets forth, that, at the time of the commencement of the suit, and for four years prior thereto, the defendant was using, for the purpose of stretching chains for pulley blocks, the same machine which the plaintiff claims to be an infringement on his patent, and that, for a period of eighteen years prior to August, 1862, the same machine, or one of the like kind that the defendant is using, was used for the purpose of stretching chains for pulley blocks by the deceased father of the defendant.

It is apparent, from the specification, that the plaintiff's machine is designed to stretch the links of a chain, so as to make all the links of the chain of a uniform length, that they may fit snugly in the recesses in pulleys. It is not designed to stretch the entire chain indiscriminately, or any given portion of it, without reference to the length of any particular link before or after such stretching, but it is designed to stretch each particular link which is, before such stretching, shorter than a prescribed length, while it is so arranged that no link shall be stretched which is not shorter than such prescribed length. This necessity requires, (1st,) that the two points where the chain is to be grasped for stretching it, shall not be always at a fixed distance apart, but shall be capable of being varied in their distance apart, so as, if required, to stretch a single short link that may be found interposed between two links of the proper length; (2d,) that the jaws of the tongs shall be so constructed, by being grooved or otherwise, as to grasp firmly any particular link, without injuring it or any other link. The great utility of the invention is beyond question. The evidence shows that it is impossible practically to make, by hand, the links of a uniform length, and that. if made thus uniform by hand, they will stretch in use, and stretch unequally, so as to produce difficulty in using the chain on a pulley with uniform recesses, and that the only feasible method of making a chain for use on such a pulley is to make the links shorter than the required length, and then take out the stretch of the metal by stretching each separate link to the proper gauged measure, by a machine like the plaintiff's.

It is in evidence that the defendant's father, in 1852, procured to be constructed in New York, a machine for stretching chains, which had two pairs of tongs that grasped the chain, so that, by applying power, by means of a crank at one end, the chain was stretched. This machine he placed in a cellar, where he used it, keeping it concealed, however, from persons in general. The door of the cellar was kept locked, and, so far as appears, the existence of the machine was known only to the machinist who put it up, to the defendant's father, to the defendant's brother, and to the defendant himself. The defendant states, in his testimony, that the machine was locked up to keep people from seeing it; that his father always locked the

door of the basement or cellar where it was, when he came out; that the machine was kept secret; that it was not used very often, perhaps not once in a month, or six months, or a year; that finally he took from off the machine a pair of boxes, which he wished to use for another purpose; and that the machine thereafter remained in the cellar unused until it was removed from there by him, his father having died in 1862. It also appears, that the machine was removed from this cellar into the defendant's shop in July, 1865; that, when taken out, it was in a rusty condition; that, prior to its being so taken out, the defendant, in making chains which required the links to be of equal lengths, stretched the links by hand, by means of a hammer and an anvil, and not by any machine; that, during 1864, the plaintiff's machine was described to the defendant by a workman who was at the time in his employ, and who had previously been in the plaintiff's employ and used his machine; and that thereafter the rusty machine was exhumed from the cellar, and cleaned and fitted up in the defendant's shop, and used to stretch the links of chains. It does not satisfactorily appear that, during the time that the machine in the cellar was used by the defendant's father, he made any chains which required the links to be stretched to a uniform length, or that he used the machine to stretch the links of chains to a uniform length.

On the foregoing facts, I think that this case fairly falls within the case of Gayler v. Wilder, 10 How. [51 U. S.] 477, even assuming that the old machine, in the condition in which it was while in the cellar, was substantially identical in construction with the machine as used by the defendant after July, 1865, and with the plaintiff's machine. In the case of Gayler v. Wilder [supra], one Conner had constructed, for his own private use, a safe substantially like the one patented to Fitzgerald, some time before Fitzgerald invented his safe, and had used it as a safe, for more than six years, in the counting-room of a type foundry. Its existence and use were known to the persons who worked in the foundry, although its particular internal construction, which was the point of the invention, does not appear to have been known to them. It then passed into other hands, but what became of it did not appear. Conner made but one such safe, and, after that one passed out of his hands, he used other safes, of a different construction. At the trial, before Mr. Justice Nelson, the court charged the jury, that if Conner had not made his discovery public, but had used the safe simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use was not an obstacle to the taking out of a patent subsequently, by another person, for a safe of like construction, if he was an original, though not the first, inventor of such a safe. The jury having found in favor of the patent, the case was carried to the supreme court, by writ of error, and that court held, Chief Justice Taney delivering its opinion, that the prior knowledge and use spoken of in the 6th section of the patent act of July 4, 1836 (5 Stat. 119), as necessary to invalidate a patent, must be a "knowledge and use existing in a manner accessible to the public." The chief justice says: "If the Conner safe had passed away from the memory of Conner himself, and of those who had seen it, and the safe itself had disappeared, the knowledge of the improvement was as completely lost as if it had never been discovered. The public could derive no benefit from it, until it was discovered by another inventor. And if Fitzgerald made his discovery by his own efforts, without any knowledge of Conner's, he invented an improvement which was then new, and, at that time, unknown; and it was not the less new and unknown because Conner's safe was recalled to his memory by the success of Fitzgerald's." The court affirmed the correctness of the instruction to the jury above mentioned. Now, although the old machine, in the present case, was constructed in 1852, and had been kept in the cellar of the defendant's father, under the circumstances stated, and had been occasionally used there, and although it had not bodily disappeared from view, yet its existence and use were not made public, the knowledge and use of it did not exist in a manner accessible to the public, it had been substantially abandoned, and it had substantially passed away from the memory of those who used it, as is shown by the fact that, when they were called on to stretch the links of chains to a uniform length—a purpose to which it is not shown that the defendant's father ever applied the machine—it did not occur to them to use the machine for the purpose, until after they had learned of the existence and use of the plaintiff's machine. The knowledge of the machine was, therefore, as effectually lost as if it had never been constructed, and the public could derive no benefit from the invention embodied in it, until such invention should be discovered by another inventor. As it clearly appears that the plaintiff made his invention by his own efforts, without any knowledge of the machine in the cellar of the defendant's father, he invented an improvement which was then new, and was at the time unknown; and it was not the less new and unknown because the old machine was recalled to the memory of the defendant and of his brother, and of the machinist who put it up, by the success of the plaintiff's machine.

But, independently of this view, the defendant has failed to establish satisfactorily the identity of the old machine with the machine as used by him after its removal from the cellar, in an important particular. The specification of the plaintiff's patent states that the jaws of his tongs have grooves made in their ends to receive the horizontal links

of the chain, the portions of the jaws at each side of the grooves grasping the upright links, and that, by this means, the tongs are enabled to grasp the chain firmly. In the use of the machine, this provision of the grooves is shown to be important, not merely to grasp firmly the link that is being grasped, but to avoid injuring it, or any other link. A like provision, by equivalent means, is found in the jaws of the tongs in the machine as used by the defendant since July, 1865; but such provision, so far as appears, was wholly wanting in the old machine, as it was while in the cellar. The proper construction of the first claim of the plaintiff's patent is, that it claims the use of the tongs, or other suitable clamps, embodying such a provision as is described in the plaintiff's specification, and as is found in the machine of the defendant, and as is not shown to have existed in the latter machine before July, 1865, for grasping the proper link firmly, without injury to it, or to any other link, in connection with the screw, or its equivalent, arranged substantially as and for the purpose specified.

On the evidence, the plaintiff is entitled to recover. The machine used by the defendant infringes the first claim of the plaintiff's patent. But, as the plaintiff has failed to prove any specific amount of damages, the finding will be for only six cents damages.

HALL (BROWN v.). See Case No. 2,008.

Case No. 5,927.

HALL v. The BUFFALO.

[Newb. 115.] [1]

District Court, D. Michigan. 1856.

COLLISION—SAILING AND STEAM VESSELS—COURSES OF—LIGHTS—EVIDENCE—WITNESSES ON LAND AND ON THE VESSEL.

1. The rule is well settled, that a sailing vessel must keep her course in approaching a steam vessel, and the latter must keep out of the way of the former.

[See Baker v. City of New York, Case No. 765.]

2. In collision cases, the master of the vessel whose situation is described, while standing upon the deck of his own vessel, has a more eligible situation for reliable observation, than a witness upon the approaching vessel.

3. The act of 1849 [9 Stat. 380] provides that, sailing vessels "going off large" or "before the wind," must show a white light. Under this act, a vessel "under way," with the wind "abaft the beam," must show a white light.

[Cited in The Golden Grove, 13 Fed. 691.]

4. A vessel in nautical technicality is "going off large," when the wind blows from some point "abaft the beam," is going "before the wind," when the wind is "free," comes over the stern, and the yards of the ship are braced square across.

5. Where a steam propeller was descending the river St. Clair, in a night so dark that objects could be seen but a short distance, at a speed of eight miles an hour, and had discovered below her the lights of a number of vessels; *held*, that she was in fault for not slackening her speed until she had passed.

[Cited in The Free State, Case No. 5,090.]

6. When two witnesses were examined by deposition, were subsequently examined in court, and contradicted each other, reliance is to be given to the one who is sustained by his previous testimony, rather than the other. And although the depositions were not offered by the parties, yet the court when apprised of their being on file, may call for their production.

7. In collision cases, witnesses observing passing events from different positions, cannot be expected to agree, as to locality of objects, or the relative change of position; much more must this be the case where the one making the observations is under rapid motion.

[This was a suit in admiralty by Johnson L. Hall, owner of the bark Indiana, against the propeller Buffalo, for damages caused by the collision of the Buffalo with the Indiana on the St. Clair river.]

Moore & Blackmar, for libelant.

Walker & Russell, for respondent.

WILKINS, District Judge. The libel charges a collision, between the bark Indiana and the propeller in the St. Clair river on the night of the 16th of August last. It alleges, "that the bark was sailing slowly up the river, with a fair wind after: that she kept to the right, had proper lights, was fully equipped and manned, and while thus continuing her course, using all due skill and caution, she was negligently run into and greatly damaged by the propeller: that the said propeller was descending the river and keeping to the right: that within a short distance of the bark she recklessly changed her course, and in attempting to cross the channel she collided with the bark, and caused the damage: and that, had she not changed her course, the collision would not have taken place."

The respondent has filed two answers, one on September 10th, 1855, and the other as an amendment, on the 24th of October, following. In the first, the respondent states: "That during midnight (at the time specified), the propeller was sailing slowly down the river, at the speed of eight miles an hour, with all her lights displayed: that the night was dark and without moon: and that she kept the American side of the channel: that about two miles above the place of collision, numerous vessels were observed lying in shore with proper lights, at anchor: that the propeller blew her whistle for more than a mile before the collision: and that a look-out was kept by the captain and the mate on the pilot-house: that the white light of the bark Indiana was observed on the starboard bow, apparently at anchor, a short distance above the place of collision near the American shore: that about fifteen minutes afterwards, as the propeller neared the bark and could see her canvas, it was discovered that the bark was heading diagonally across the riv-

[1] [Reported by John S. Newberry, Esq.]

er, and but five or six rods distant: that the respondent then hailed the bark, and inquired, whether she was under way or at anchor, and on receiving the reply, 'that she was under way,' he immediately rang his bell to stop the engine, but that it was then too late to avoid a collision: that the big anchor of the bark hanging at her side, as she came round with great violence, raked the side of the propeller, and did her considerable damage: that the propeller was proceeding at a cautious rate of speed: that she stopped her engine as soon as she discovered the bark in motion: and that the collision was caused from no omission on the part of the propeller, but because the bark did not continue headed up the stream, as manifested by her light; and because she ought not to have weighed anchor when a large steam craft was descending the river, and suddenly swing out into the stream and across the propeller's track." This narrative of the transaction, and careful consideration of the incidents which caused the misfortune, was given by the captain of the propeller on the 8th of September, about three weeks after the event. The amended answer does not vary this account in any important particular, and re-asserts the grossest want of ordinary care on the part of the bark, in displaying her white light, when she had a free wind and should have headed up, and not across the stream, when she must have known by the whistle, that a large steamer was descending.

The general rule is well settled in admiralty, that a sailing vessel must keep her course when approaching a steamer, and that the latter must keep out of the way of the former. There is but one exception, which, however, does not apply to the facts in this case as set forth by the respondent. Where the steamer, could by no exercise of diligence and watchfulness, discover the sailing vessel at a sufficient distance to avoid her, by changing her course, she is not responsible. In this case, as the answer discloses, though the night was dark, yet the light of the bark, with other similar lights, was discovered more than a mile distant, and for more than a quarter of an hour before the vessels collided. In the case of Peck v. Sanderson, 17 How. [58 U. S. 178], the steamer had no time to change her course when the Mission was discovered.

There are three allegations contained in this libel, which if sustained by the proofs, exonerate the bark from all blame, and fix the responsibility upon the steamer. They are: (1) That the bark was heading up the river with a free wind, and consequently had her proper light, indicating that she was "at large" or "before the wind"; (2) that she was properly manned; and (3) that the propeller recklessly changed her course.

As to the first and last allegations, there can be no doubt, if credit be given to the testimony of Captain Faulkner and his crew, who all testify "that the bark had taken her course up the river, and kept in that course, with a fair wind abaft the beam, with a proper white light on her pawl bit, and did not change until the collision occurred." Captain Faulkner says that when he first heard the whistle, and saw the lights of the propeller, he was under way, heading up the river. "The propeller was rapidly descending toward us, and on our larboard side, and about a mile distant." That, as she approached nearer, he gave the order to port, and the bark was kept in her course. When the propeller approached within a few rods, her captain cried out: "Are you under way, or at anchor?" and on being informed that the bark was under way, the order was given, on board the steamer, "Hard a-starboard;" in obedience to which the steamer swung across the bow of the bark and struck her about midships.

This important testimony is measurably contradicted by Captain Conkey and those of the crew of the propeller who witnessed the transaction, which discrepancy imposes upon the court the reluctant duty of discrediting one or the other. Where one witness is contradicted by another, reliance is to be given to the statement of the one above that of the other, if both having been previously examined in regard to the same matter, the one is sustained by his previous testimony, while the impeaching witness is himself thereby impeached in material points. Captain Faulkner's deposition before the commissioner corresponds with his testimony in court. Captain Conkey's is otherwise. And although these depositions were not offered during the trial, yet, on being apprised that such were on file, they were called for by the court, which avenue to the discovery of the truth is not to be closed by either a technical adherence to rule, or the omission of parties to introduce them in evidence. The testimony of Conkey is not only variant from that to which he testified on the trial, but his deposition is most glaringly inconsistent with his amended answer, and incongruous throughout. Thus he swears, that when he first saw the bark, she "was from five to ten rods off." And then subsequently states that "the bark was then heading right up stream," and that he "didn't see her change her course after that:" and that when he "first saw her sails she was lying diagonally across the river on our starboard bow:" and lastly, "when the bell was rung, the vessels were from three to five rods apart; and the collision took place ten minutes after the bell was rung, and two minutes after my last order 'to hard a-port:' and as soon as I saw her sails, I hailed her, to learn whether she was under way or not."

By the testimony of the mate, the propeller's speed was between eight and ten miles: the answer alleges the same fact; which is, evidently, grossly inconsistent with the statement that the collision took place ten minutes after the signal bell was rung; and so is

the statement as to his distance when he first saw the bark, and that she afterwards did not change her course, with his other statement that "she was lying diagonally across the river." It is obvious that if the steamer's speed was at the rate of a mile in seven minutes, and the signal bell was rung when they were but five rods off, the collision must have occurred in as many seconds as he has mentioned minutes. But, moreover, the statement of Faulkner is corroborated by his crew; while the adverse narrative of Conkey is not so sustained. Conkey swears that the bark lay diagonally across the stream. This could not have been her position if his other statement be true, that when he first saw her she was heading up the stream, and did not afterwards change her course. Now, Captain Faulkner testifies, that as the propeller approached, he saw all her lights; and this, from the time he first saw her, until the collision. In cases of this description, there will be much discrepancy in the testimony. Witnesses observing passing events from different positions, cannot be expected to agree either as to locality of objects, or relative changes of parties and things. Much more must this be the case when a rapid movement is made and making by the observing party toward the object whose true and relative position he undertakes to describe. Without the ascription of moral dereliction, a witness, under such circumstances may, with propriety, be rejected, in favor of a contrary statement, by one occupying a more eligible position for truthful observation. Captain Faulkner was better situated to state the true position of the vessel whose decks he trod, than Captain Conkey, on the propeller, approaching at the rate of eight or ten miles an hour. And Captain Faulkner's statement is self-consistent, and in accordance with the evidence of the expert testimony as to the inevitable conclusion to be drawn from the character of the collision itself.

It is alleged in the answer, that from the force of the collision, the bark being turned, her big anchor (hanging at her starboard bows) raked the entire side of the propeller. Such is the fact unquestioned. Now Conkey and his men swear that the two vessels struck each other at an angle, a little less than a right angle, and that, the speed of the propeller "slewed" the head of the bark down the stream, and consequently, if so, this anchor could not have performed this extraordinary feat, being on the side of the bark most distant from the propeller. This was evident, as well from the exhibition of the models, as from the positive testimony of Captain Ward, who testified that, if such was the position of the two vessels when they came into collision, this anchor could not have been carried away, or even touched the propeller.

Without further analysis, the court has no hesitation in declaring its judgment to be, that, as to this prominent and important fact, the preponderance of the testimony is with the allegation of the libelant, and that the bark was heading up stream, and not diagonally across. If so, she exhibited her proper light and was not at fault. By the act of congress of 1849, steamers and sail vessels navigating the western lakes and rivers, are directed at night to exhibit certain lights, to indicate their course when under way, and when at anchor. Vessels going off large, or before the wind, or at anchor, must show a white light. There is, in nautical technicality, a difference between "going off large" and going "before the wind." "Going off large," is when the wind blows from some point abaft the beam, or over the quarter of the ship. Going "before the wind" is when the wind is free, comes over the stern, and the ship's yards are braced square across. Sailors and mariners may recognize the distinction, but the statute makes none, as the signal of the "white light" is applied to both exigencies. In this case, the bark was clearly not on her starboard tack, because the entire testimony is, that the wind was fair, up the river, and in the language of some of the witnesses, "abaft the beam." Her bow might have had a slight tendency to the shore, from the force of the current, but nevertheless, heading up stream, and therefore she displayed the right light. That the propeller recklessly changed her course, when at a dangerous proximity to the bark, appears manifest from the testimony of Captain Conkey, more minutely given in his deposition, than in court. After the propeller had approached so near as to hail the bark, and the response was given "that the bark was under way," the captain ordered his vessel "hard a-starboard" and immediately afterwards, as if in confusion, when the vessels came near, "hard a-port." Had he kept his course, the collision would not have occurred. Independent of these circumstances, which are conclusive as to where the fault is attributable, the propeller was at too great a speed in descending the river at night, when it was so dark that he could not discern objects on the deck of a vessel but a few rods off, and when, fifteen minutes before he observed a number of vessels lying at anchor. He should have slackened his speed when he first discovered the lights at the distance of a mile off. As was stated in the case of The Rose [2 Wm. Rob. Adm. 3], adopted by the supreme court, in the case of Newton v. Stebbins [10 How. (51 U. S.) 586]: "It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered." The propeller should have cautiously felt her way, until she passed all the lights which she had discerned in the distance. By so doing, she would have ascertained the true position of the bark and have avoided the collision. The light being considered as according to the

statute, and no contest as to the competency of the officers and crew of the bark, there is no fault adjudged on the part of the libelant. As to the jurisdiction of the matter, the tonnage and ownership of the vessels being admitted, no proof is deemed necessary. The libelant was in possession, and exercised ownership. The testimony of Faulkner and Osborne is sufficient as to this objection.

The libelant being entitled, from this view of the case, to recover, yet no other damages than those actually sustained, can be allowed. Speculative damages, embracing probable profits, cannot be decreed. Upon this point, there have been variant decisions among the American courts, but as at present advised, this court will refrain to sanction such a rule, based as it is, upon what might have been, i. e. upon an uncertainty. Decree for $495.06.

HALL (CAPELLE v.). See Case No. 2,391.

Case No. 5,928.

HALL et al. v. COOLEY et al.

[3 N. Y. Leg. Obs. (1845) 282.]

District Court, N. D. New York.

BANKRUPTCY—LIVERY STABLE KEEPER—TRADING.

1. Livery stable keepers, as such, are not liable to be proceeded against on the petition of creditors, under the late bankrupt act [of 1841 (5 Stat. 440)], as "persons being merchants, or using the trade of merchandize, or retailers of merchandize."

[Cited in Re Smith, Case No. 12,981.]

2. The owner of timber lands who cuts down his trees and manufactures them into lumber for sale, merely as a means of deriving profit for his real estate, as such, does not thereby constitute himself a merchant or trader within the act. But if he carries on this business upon a large scale, substantially and independently as a trade, the course of decision in the English courts strongly favors the conclusion that this would be sufficient to bring him within the act; and if it further appears that he has from time to time bought timber lands, for the express purpose of manufacturing, and does manufacture lumber from the trees growing thereon, for sale, and in one instance erected a saw-mill on the land purchased, and in another instance, in connection with the purchase of timber land, also purchased a large lot of sawed lumber for sale; the case is clear.

This was a petition for a compulsory decree of bankruptcy, and came before the court for hearing on the petition, answer and depositions. Several other questions arising in the case, having already, in the earlier stages of the controversy, been disposed of, the main, and in fact the only contested question now was, whether the respondents were "merchants, or persons using the trade of merchandize, or retailers of merchandize," in the sense in which these terms are used in the first section of the bankrupt act.

The state of the case with respect to this question was substantially as follows: The petitioners [Samuel Hall and others] allege that the respondents [Levi J. Cooley and Samuel H. Maxwell], at the time of committing the several acts of bankruptcy charged against them, (the most important of which was committed on the 4th of January, 1843,) were "lumber merchants, and using the trade of purchasing lumber and logs, and manufacturing, shipping and selling lumber at wholesale and retail," and that they were "engaged in the purchase and exchange of horses and carriages and in the purchase of hay and provender, in the keeping of said horses, and in letting horses and carriages for hire." The respondents in their answer admit that on the 4th of January, 1843, and for more than a year previous thereto, they "were the owners of a certain saw-mill with the appurtenances, and were interested as owners in certain timber lands in the town of Caton, Steuben county, upon which lands said mill was situated, and were interested as part owners of two other saw mills in Jackson, Tioga county, Pennsylvania, and in about three hundred and fifty acres of timber land, upon a part of which said saw-mills are situate." And they further admit that they cut down trees on these lands, and, at their mills, manufactured the logs into lumber, to the extent of about 400,000 feet; of which they shipped and sold at wholesale about 250,000, and sold the residue at retail at Elmira, where they resided and kept a lumber yard. And they deny that they were in any other manner lumber merchants.

The respondents in their answer further admit that on the said fourth day of January, 1843, and for more than a year previous thereto, they were the "owners of several horses and carriages which were kept by them and let by them for hire; that when a horse or carriage became worn out or otherwise rendered unfit for use, they sold and disposed of the said horse or carriage, or exchanged the same for a horse fit for use in their said business; and that they occasionally purchased a horse, or a pair of horses and carriage, to use in said business and let to hire." And they deny that they in any other manner were dealers in horses or carriages.

The depositions show that "in the spring of 1841, the respondents and one James Miller, purchased of one Shepherd some timber land with a saw-mill thereon, together with over 100,000 feet of pine boards and plank. This was called the 'Chidesder Mill.'" They afterwards became interested jointly with Miller in two other saw-mills on the same stream, one called "Frind's Mill," and the other "Mitchell's Mill." These mills were managed and worked by Miller. The business consisted in sawing logs cut on the land bought of Shepherd, and in custom work. The witness Stowel who run the Chidesder mill testifies that Miller sometimes bought lumber of customers after it was sawed. The testimony further shows that in the fall of 1841 the respondents bought a lot of timber land with a steam saw mill thereon in

the town of Elmira; that after keeping the mill in operation at Elmira from October, 1841, to March, 1842, they removed it to the town of Caton in the county of Steuben, and there set it up in June or July, 1842, and put it in operation in September of that year.

The evidence in regard to the business of the respondents as livery stable keepers is in substantial accordance with their answer, except that one of the witnesses swears to the sale of several horses; which in his opinion were fit for their business as livery stable keepers; one of which he states was sold soon after it was purchased, at an advance of thirty dollars. The amount of capital employed in this business was about $4,000, and they usually had on hand from 15 to 20 horses, and from 12 to 15 carriages of various descriptions. It is further shown by the evidence that previous to June, 1841, they were extensively concerned in contracts for the transportation of the mail, and received from the government about $10,000 a year for this service. For the purpose of carrying on this business, and that of conveying passengers, they kept a large additional number of horses—about 80 in all. Their stage business ceased, except as to one route, in June, 1841. At that time they had a large quantity of oats on hand, which they sold, and had a sign up inviting purchasers. Oats were at that time dear; after harvest, when oats were cheap, they began again to purchase for their livery horses. In the prosecution of their business as stage proprietors and livery stable keepers, they were obliged to purchase large quantities of hay and oats, for which they sometimes paid cash, and at other times gave their notes payable at a future day. Between the 24th of February, 1838, and the 31st of December, 1842, the respondents obtained loans, on accommodation notes, from the Chemung Canal Bank, amounting in the aggregate to $21,241.

P. G. Clark, for petitioners.
W. H. Seward, for respondents.

CONKLING, District Judge. The case turns upon the question whether the respondents, at the date of the several acts of bankruptcy charged against them, were, in the language of the late bankrupt act, "persons being merchants, or using the trade of merchandize, or retailers of merchandize." Looking in a general and summary way at their extensive and diversified business, and the manner in which it was conducted, it is difficult for a mind familiar with the policy of the compulsory provisions of the act, to resist the conviction that it was at least intended to embrace cases like this. But whether it does so in fact, is a question juris positivi, and depends upon the just construction of the terms of the act. The policy of the compulsory branch of the American act is in accordance with that of the correspondent provisions of the English bankrupt laws. The preamble of the first English bankrupt statute (34 Wm. VIII. c. 4) recites that, "divers persons craftily obtaining into their hands great substance of other men's goods, do suddenly fly to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their debts and duties, but at their own wills and pleasures consume their substance obtained by credit of other men." The statute of 21 Jac. I., c. 19, (differing in this respect but little from other intermediate acts,) provides that all persons who "use the trade of merchandize by way of bargaining, exchange, bartry, chevizance, or otherwise in gross or by retail, or seeking his, her, or their trade of living by buying and selling, upon committing acts of bankruptcy, shall be accounted and adjudged bankrupts." The first of these extracts from the English bankrupt act indicates their principle; the second, (so far the largest class of persons embraced by them, and so far as the present questions are concerned,) defines their scope. In this court, and, it is believed also, in the other national courts, the decisions of the English courts illustrative of this principle, and tending to show who are to be considered as belonging to the denomination of persons who "use the trade of merchandize," have been regarded as applicable to cases of this character arising under our own act. To this test, therefore, I propose to subject the present case.

1. Prior to the act of 6 Geo. IV., c. 16, (passed in 1825,) by which the scope of the antecedent acts, interpreted by the courts, was defined and to some extent enlarged, and which, in addition to those embraced in the previous acts, designates "persons who seek their living by buying and letting for hire," livery stable keepers as such, do not appear ever to have been considered subject to such liability. It was only by adjudging them to be persons "using the trade of merchandize," or, as such persons are usually styled in the English courts, "traders," that they could have been brought within the earlier acts. But to constitute a trader, selling as well as buying was always held to be indispensable; and it was justly considered that the occasional sale of horses and carriages that had become unfit for use, was but a necessary incident to the main business of letting for hire, and did not constitute the trade of merchandize. If, therefore, they are liable to be decreed bankrupts on account of their course of dealing in the prosecution of this branch of their business, it must be on the ground of their having transcended its ordinary and just limits in selling horses and oats. But the just inference from the evidence is that their sales of horses were at most only occasional and rare, and that they did not intend to deal generally, or hold themselves out as dealers, in horses, except so far as the exigencies of their other business required. And such oc-

casional acts by persons not in a line of life to subject them to the bankrupt laws, have been held insufficient for this purpose, as being only ancillary to their main business. With respect to their sales of oats, it appears that these oats had been purchased by them to be consumed in the prosecution of their business as stage proprietors and mail contractors, and that the sales were made in consequence of their abandonment of this business; and it has repeatedly been decided in the English courts that a sale of surplus commodities not purchased with a view to sale, was not such a dealing as would render the vendor liable to prosecution as a bankrupt. The fact relied on by the counsel for the petitioners of the respondents having been obliged to purchase oats again after harvest for their livery horses, I am of opinion ought to make no difference. At the time of the sale they had a large surplus, and they had a right to dispose of it. That they were able then to obtain a high price, and afterwards to purchase at a lower rate was but a fortunate accident. Upon the whole, therefore, my opinion is that the respondents are not liable to be decreed bankrupts in this compulsory proceeding, as dealers in horses, carriages or provender.

To prevent misapprehension, it may not be amiss to notice the case of Martin v. Nightingale, 3 Bing. 421, cited and relied on at the argument by the counsel for the petitioners, in which a livery stable keeper was subjected in the bankrupt law. This case was decided in 1826, which was the next year after the passage of the act of Geo. IV., already referred to. The only report of it I have it in my power to consult, is a mere statement of the point decided, in 17 C. L. 33. Neither from this imperfect report, nor from the citations of the case I have met with in elementary works, does it satisfactorily appear what were the precise grounds of the decision. But the tenor of antecedent decisions clearly infers either that this case arose after and was governed by the new act, or that it turned on the fact stated, that the party "occasionally sold horses to customers." That the provision of the act of Geo. IV., by which all those who seek their living by buying and letting for hire were subjected to its operation, was intended to bring in an additional class of persons, does not admit of a doubt. Such is unhesitatingly assumed to have been its design and effect by Mr. Sanders, in his treatise on the Law of Pleading and Evidence (volume 1, p. 218), where, speaking of this clause of the new act, he remarks that "this provision will include a large class of persons, such as jobmasters, livery stable keepers, hackney-men, furniture brokers, &c.," and in support of his position he cites Deac. 27. Congress not having seen fit to adopt this provision, it is entirely clear that any decisions founded on it are inapplicable here.

2. It remains therefore to be decided, whether the respondents are liable as lumber merchants. Their liability on this ground was denied by their counsel, because, as he insisted, the lumber sold by them was manufactured from trees which had grown on their own lands. That the manufacture and sale, by a person, of the produce of his own land does not constitute such person a trader within the purview of the English bankrupt law, as a general proposition, is true. But it is a proposition subject to exceptions. "This question," says Lord Henley, (formerly Mr. Eden,) in the last edition of his Digest of the Bankrupt Law, "whether a person making bricks for sale is liable to the bankrupt law, was formerly much and most unsatisfactorily discussed. The point has since come under consideration, and the general doctrine as extracted from the modern cases, may now be stated as follows: When the business of brick-making is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law; but where it is carried on substantially and independently as a trade, it will do so; and there is no difference whether the party is a termer or entitled to the freehold. The same general doctrine applies to the case of a person manufacturing alum, burning lime, or selling minerals from his own quarry."

I have carefully examined all the cases within my reach, cited by this writer on this point, and such others as I have been able to find. I abstain however from attempting a particular analysis of them, because I am of opinion that the present case does not require so elaborate an undertaking. Suffice it to say, that although there is some apparent discrepancy among them, they seem to me to warrant the inference drawn from them by Lord Henley. It will be observed he does not mention the case of the manufacture of lumber. Indeed, that case would seem to be in one respect distinguishable from most if not all of the cases mentioned by him, on the ground that in these, other materials are to be bought and mixed with the produce of the land; and in order to constitute a using of the trade of merchandize, there must be a buying of some commodity, and a selling of the same commodity, either in the same or in an altered state. But be this as it may, it cannot be doubted that the purchase of trees, whether felled or standing, and the manufacture and sale of lumber therefrom, would be equivalent to the purchase and sale of lumber already manufactured by another; nor that a lumber merchant is as much subject to the bankrupt law, as a merchant of any other description. This was distinctly decided in the case of Holroyd v. Gwynne, 2 Taunt. 176. In that case the bankrupt had purchased 347 oaks, and 11 ash trees, standing, which he converted into timber, laths, &c., a part of which he had sold. It was proved also that he attended public auctions of timber, and that he subsequently bought, but did not pay for, another parcel. The court considered it

a clear case of trading. It is true the bankrupt in that case purchased only the timber, and that in the present case the respondents purchased the lands as well as the timber growing thereon. And it is true also as a general principle that dealings in real estate do not make a man a trader. But whether the respondents can claim exemption on this ground, may well be doubted. It is the duty of courts to regard not so much the mere forms as the substance of things. The respondents were extensively engaged in the manufacture and sale of lumber. They obtained the raw material chiefly by successive purchases of timber lands, in different places, remote from the place of their residence, and which they do not appear to have used, or contemplated using, for any other purpose. It was virtually therefore by the purchase of growing trees; and if it was necessary to decide the question, I should feel much hesitation, notwithstanding the old case of Port v. Turton, 2 Wils. 169, relied on by the counsel for the respondents, in adopting the conclusion that the character of their transactions were essentially changed by the fact of their having also acquired a title to the lands, on which the timber was growing. But what in my judgment places the case beyond all reasonable doubt is the fact that they also purchased and sold lumber already sawed. To say nothing of the evidence of other purchases, they in partnership with Miller, in the spring of 1841, bought of Shepherd 100,000 feet of pine boards and plank. This purchase alone would bring them directly within the case of Holroyd v. Gwynne, and stamp them with the character of lumber merchants. Several minor purchases were also made by their partner, Miller, who had charge of the mills in which the three were jointly interested, and although it does not expressly appear that the respondents knew of these purchases at the time, yet, as Miller was their agent as well as partner, and as there is no evidence of dissent on their part, I think they are legally responsible for his acts. It was insisted also with considerable plausibility by the counsel for the petitioner, that the evidence shows a large excess of sales during the season of 1842, over the quantity of lumber manufactured, and that this excess can in no otherwise be satisfactorily accounted for, than by the supposition that considerable purchases were in fact made of which no particular account is given.

The idea that the range of inquiry as to the transactions of the respondents was by the terms of the order limited to the period of three months next preceding the 4th of January, 1843, was wholly fallacious. The nature of the respondents' occupation at that date, could be satisfactorily determined only by ascertaining what it had been during a considerable period before. If they had in fact abandoned their business as lumber merchants, they had a right to show it. But there being no such evidence, the law will presume its continuance—and indeed, the evidence clearly shows that it was continued.

Upon the whole, therefore, while I concede the general principles laid down by the counsel for the respondents, in his learned and able argument, I am of opinion that a decree of bankruptcy ought to be entered against the respondents. The strenuous and persevering opposition which has been made to this petition, under the circumstances of the case, and on the grounds assumed, would seem to infer an impression on the part of the respondents that preferences given in direct contravention of the second section of the bankrupt act, and which it expressly declares to be fraudulent and void, can be so declared only when brought directly under the cognizance of the national courts, by a proceeding either voluntary or compulsory under the act. For such an impression no sufficient color is afforded either by judicial decisions, so far as they have come to my knowledge, or by any just view of the policy of the act. The provisions to which I have referred, are in terms unlimited as to persons, and being the supreme law of the land, are obligatory alike upon the state and national courts.

HALL (CUNNINGHAM v.). See Cases Nos. 3,481 and 3,482.

Case No. 5,929.

HALL et al. v. DEXTER et al.

[3 Sawy. 434.] [1]

Circuit Court, D. California. Sept. 13, 1875.

ENTRY ON LANDS AFTER ACTION COMMENCED — EFFECT OF JUDGMENT — MARSHAL HAS NO JUDICIAL POWER TO DETERMINE TITLE — MARSHAL MAY REQUIRE INDEMNITY BOND — TAX SALE AFTER SUIT BROUGHT.

1. Prima facie, all parties entering upon land after suit in ejectment brought for its recovery, are in possession in subordination to the defendant, and are equally liable to be removed by the writ issued upon the judgment recovered against him.

2. But parties thus entering after suit brought by title existing previously, adverse to that of the parties, are not affected in their rights by the judgment recovered.

3. The determination of the question whether parties thus entering have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant.

4. When such a party claims to have a title anterior to the suit the marshal may require from the plaintiff a bond of indemnity before proceeding to remove the party from the premises, or give a reasonable time to the party to apply to the court for a modification of the writ so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no dif-

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

ferent order is made in the manner indicated, the duty of the marshal is only discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants.

5. A party asserting title under a tax sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation.

[This was an action at law to recover possession of lands by Laura S. Hall and others against Henry S. Dexter and others. After judgment for plaintiffs (Case No. 5,949), the plaintiffs took a writ to obtain possession of the lands, which the marshal would not execute because the persons then in possession claimed title under a tax sale subsequent to the bringing of the suit. Plaintiffs now tender a bond of indemnity, and pray that the marshal be directed to enforce the writ.]

Philip G. Galpin, for plaintiffs.

Charles L. Low, for defendants.

FIELD, Circuit Justice. In November, 1867, the plaintiff recovered judgment for the possession of the premises in controversy, which are situated in the city of San Francisco. In 1873 the judgment was affirmed by the supreme court, and on filing its mandate in the circuit court in June last, a writ for the possession of the premises was issued to the marshal of the district.

The writ directs that officer to place the plaintiff in the quiet and peaceable possession of the premises, but he refuses to execute it on the alleged ground that the person occupying the premises is a tenant under a party claiming to own them, by a deed executed upon a sale for unpaid taxes made since the recovery of the judgment. The plaintiff having tendered a bond of indemnity to the marshal, prays that he be directed to proceed to enforce the writ, and be punished for refusing to obey its command. The refusal of the marshal is not made in any contumacious spirit, but from a desire to avoid the commission of a possible wrong to the contestant.

A judgment in ejectment binds as to the title only parties to the action, and parties claiming under them. But prima facie all parties entering after suit brought are in possession in subordination to the defendant, and are liable to be removed equally with him by the writ. No alienation or abandonment by him of the premises, and the entry by another, with or without his assent, not having a title antedating the commencement of the suit, can prejudice the plaintiff in his recovery. This doctrine is established to prevent collusive transfers from defeating the action.

Persons entering after suit by title existing previously adverse to that of the parties, stand in a different position. Their title is in no respect affected by the judgment. But the determination of the question whether parties thus entering into possession have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant. The most that he can do when such a party claims to have a title anterior to the suit, is to require from the plaintiff a bond of indemnity, or give a reasonable time for the party to apply to the court for a modification of the writ, so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ, or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal will only be discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants. A party asserting title under a tax-sale made since suit brought, stands in no better position than one asserting an anterior title. He must apply to the court, if he would stay the enforcement of the writ. The marshal cannot control its operation.

There is here no application of the purchaser of the tax title, and from the facts disclosed in the affidavits, it is by no means clear that the entry of his tenant was not by the assent of the tenant of the defendants. There is nothing in the objection that the description of the premises in the writ is uncertain, and if the fees of the marshal have not been tendered as asserted, he may require their payment before proceeding further.

It appears that the time for the return of the writ already issued has expired; but this opinion will serve as a guide to the officer, on the issue of an alias writ.

Case No. 5,930.

HALL v. EASTWICK et al.

[1 Lowell, 456.] [1]

District Court, D. Massachusetts. July, 1870.

DEMURRAGE.

Under a bill of lading stipulating for demurrage after a certain time from the arrival of the vessel and notice thereof, none will be payable for any days that the vessel was detained through the fault or negligence of her master or officers.

Demurrage. In this bill of lading there was a special clause concerning demurrage, lately adopted by the owners of colliers, as follows: "And twenty-four hours after the arrival at the above-named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays excepted, for every hundred tons thereof, after which the cargo, consignee or assignee shall pay demurrage at the rate of eight cents per ton upon the full

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

amount of the cargo as per this bill of lading for each and every day's detention beyond the days above specified until the cargo is fully discharged, which demurrage shall be a lien upon said cargo." The vessel brought 288 tons of coal consigned to the respondents, and the arrival was notified to them on Monday, September 6th, at 9 o'clock, a. m.; on Tuesday the master [Gershom Hall] left the vessel in charge of the mate; on Wednesday, the eighth, at 8 o'clock, a. m., the consignees notified the mate to go to the wharf of the Boston and Albany Railroad Company to discharge the cargo, but, for some unexplained reason, he failed to do so. On Friday, the tenth, the master returned to Boston, and in the afternoon of that day took the schooner to the designated wharf and found the berths occupied, which detained him for some days longer, though precisely how long he was in getting a berth and how long in discharging he could not remember. He was fully discharged on the afternoon of Thursday, the sixteenth of September. He demanded demurrage for six days and a half, besides his freight. The answer admitted that freight was due, and averred that the respondents [C. J. Eastwick and others] had been always ready to pay it, and that the delay was wholly caused by the libellant's fault.

P. H. Hutchinson, for libellant.
D. Thaxter, for respondent.

LOWELL, District Judge. The contract gives four days from notice of arrival for discharging the cargo, and ten had elapsed before the delivery was complete. The libellant contends that this fact establishes his right to recover six days' demurrage unless bad faith on his part is proved, because the contract in this respect, as he contends, merely establishes a mode of computing freight or compensation in the nature of freight for the use of his vessel during the period of detention, whatever may have been the cause of the delay. His voyage was completed, he says, at the expiration of twenty-four hours after notice of his arrival in the port, and the lay-days ended three days thereafter. It seems to me to be the fair construction of this contract as applied to the coal trade of this port, that the twenty-four hours is intended for the reasonable time in which the consignee is to notify the master where to go to discharge and for the master to get to that place, and that if the vessel fails without good excuse to obey the order to go to the wharf, the lay-days will not begin to run until her arrival at the wharf. The notice of arrival implies a readiness to deliver the cargo, and if the vessel is not in a situation to do this, the days of her unreadiness cannot be counted in her favor. On this ground three days must be added to the four which the bill of lading allows for discharging.

The respondent goes further, and contends that I must assume, in the absence of evidence to the contrary, that if the vessel had been moved on the first order, the berths would have been free, and no delay at all would have occurred. I think it is dangerous to undertake to conjecture what might have happened in a state of circumstances different from what actually occurred. The bill of lading evidently intends to throw a loss of time which may arise from a want of berths on the consignee, and not on the vessel, and there was such a loss here. The vessel was at the prescribed wharf and ready to unload on Friday afternoon, and her cargo was all out on the following Thursday. It is impossible to say whether this delay would have occurred if the libellant had moved his schooner on Wednesday, and equally impossible to say what would have happened if the wharf had been designated within twenty-four hours after arrival as the bill of lading contemplates. The true rule appears to be to compute the days for unloading, without including those during which the schooner was lying useless by the fault of her own people; or, which in this case amounts to the same thing, to begin to count the lay-days from the arrival of the schooner at the wharf. This computation gives two days' demurrage besides the freight.

Decree for freight, $648; demurrage, $46.08; interest at six per cent from 16th September, 1869, $34.36; total, $728.44; and costs.

Case No. 5,931.

HALL et al. v. EQUATOR MINING & SMELTING CO. et al.[1]

[Morr. Min. Rights, (3d Ed., 1879) 282.]

Circuit Court, D. Colorado.[2]

MINES AND MINING — INTERFERING LOCATIONS — PRELIMINARY INJUNCTIONS — PRIORITY OF PATENT—INTERSECTING AND UNITING VEINS — CONFLICTING STATUTES.

[1. A preliminary injunction preserving mining property in statu quo will not be dissolved where there is a strong controversy in which the right of neither party as yet clearly appears.]

[2. In the case of interfering locations, for which patents have lawfully issued upon due notice to adverse parties, priority of right is determined by priority of patent, and not by priority of location.]

[3. The rights of owners of cross or intersecting veins or lodes are determined, not by Rev. St. § 2322, but by section 2336, which, as section 14 of the original act of 1872 (17 Stat. 96), came last in order of arrangement. Therefore the party having priority of title (even by patent) cannot take all the ore of the cross vein found within his lines, but is limited to that contained in the space of intersection.]

[4. The rights of parties owning veins which unite in their downward course are also controlled by Rev. St. § 2336, and in such case the

[1] [See note at end of case.]

[2] [For proceedings in supreme court, see note at end of case.]

oldest patent will take the vein below the point of union, including the space of intersection.]

[5. As between conflicting sections of the same statute, the last in order of arrangement will control.]

[This was a bill in equity by George W. Hall and others against the Equator Mining & Smelting Company and others. Heard on motion to dissolve an injunction.]

HALLETT, District Judge. Plaintiffs own the Colorado Central Lode by deed from Wm. P. Linn, to whom a patent for the lode was issued July 21st, 1875. The entry and purchase of the lode in the local land office was on the 4th day of August, 1874. Defendants hold the Equator Lode by the like title, which originated in the local office on the 2d day of November, 1875. They aver that their lode was discovered and located in the year 1866, long before the Central Lode was known, and that they have occupied and worked it since that time. And this appears to be conceded by plaintiffs, so that defendants have the senior location, while plaintiffs have the senior patent. These locations are in the form usual in Griffith district, 50 feet in width; and one of them is 1400 feet in length and the other 1500 feet in length. Their general course is from east to west, but they have a difference in direction of about 12 degrees. The east end of the Colorado Central overlaps the west end of the Equator, so as to have some small part of each projecting beyond the north side-line of the other. As delineated on the plats filed in the cause, it appears that the Equator projects in this manner rather more than the Central; but it is sufficiently accurate for any purpose we have now in view to say, that each lode extends beyond the north side-line of the other location about 240 feet. From this explanation it will be seen that these locations were made as and for different lodes, crossing each other with an acute angle of about 12 degrees, and each extending beyond the line of the other for a distance of more than 200 feet. When Linn, who is plaintiff's grantor, applied for a patent for the Central Lode, some controversy arose between him and the Equator Company as to the ground included in both locations, and Linn was successful in that controversy, so far as to obtain title to the tract in dispute. The effect of the patent in that particular, is a question to be considered on this motion.

The present controversy relates to a body of ore found in or under the east end of the Central location, and extending thence westward to and across the intersection with the Equator location. Some parts of this ore body appear to the north and south of the side lines of the Central location, but the main part of it is situated in that location. This circumstance is not controlling if it belongs to a lode which has its top and apex elsewhere, for by the act relating to mines, veins and lodes may be pursued in their downward course into the adjoining territory. Rev. St. § 2322. As to the linear course of the lode, the rule is otherwise, and the claimant is in that respect restricted to the lines of his survey. Patterson v. Hitchcock, 3 Colo. 533; Wolfley v. Lebanon Min. Co., 4 Colo. 112. But as to all veins that come to the surface and have anything like a vertical position in the earth, it is undoubtedly true that ownership of the outcrop will carry all that may be found below in the same vein or lode however it may depart from the territory described in the patent, so that a principal question of fact and perhaps the only one of importance in this case, is the position of the top or apex of the lode, of which the body of ore in dispute is a part, with reference to the territory described in the patents. On this point, the pleadings and affidavits on file are not at all satisfactory. In the first place, it is to be observed that the statements there made have not been subjected to the test of the cross examination. What is now distinctly affirmed on each side may be very much modified when that test shall be applied. And this seems to be necessary, in order to collect the truth from the conflicting statements. Plaintiffs maintain that they have a lode in their territory which extends beyond their east line, and at a point 80 feet or more therefrom, it is divided into two parts one of which was discovered and located by defendants as the Equator Lode. That defendants' location covers only a branch or offshoot of the true fissure, which lies some distance to the north of their discovery shaft. Defendants have put in affidavits to show that through and by many shafts and levels they have ascertained that their lode follows the line of their location. And that, in particular, the shaft and level through which they have reached the body of ore in dispute, follows the south wall of a lode which clearly comes to the surface in their territory. As was anticipated when the bill was removed into this court, there is no agreement between the parties as to the structure of the lode or lodes and their outcrop. The affidavits suggest several theories without giving certainty to any of them. There may be two veins uniting in their onward course at some point east of the Central location, and thence going westward as one vein, with an outcrop in that location, or south of it; and the vein may be so wide at the top as to enter both locations at the point where this controversy arose; and there may be two veins uniting on this strike, or on this dip, at the very place in dispute. But as to all this, it is only necessary to say that the facts are not sufficiently stated to lead to a just conclusion; and if they were so stated, the consideration of them primarily belongs to another forum, although we could consider them with a view to ascertain whether there is ground for equitable jurisdiction.

As the case is now presented, we have only to await the result of the action of ejectment;

and we do not, meanwhile, nicely balance theories and probabilities, with a view to determine the right to this injunction. It is enough that there is a strong controversy in which the right of neither party clearly appears. On that alone we interfere to preserve the property for him who may at law prove his right to it. What has been said, relates mainly to a question of fact, which it is the opinion of the court should be tried by a jury. Some general remarks in addition, as to the proper construction of the act of congress, may assist the parties in that investigation. As already stated, these locations specify and define lodes crossing each other, without other connection than such as arises from the intersection. Assuming that these are lodes crossing each other in the manner indicated by the locations the question arises, what right has each of the parties within the lines of both locations? And here we must recall the fact that plaintiff's grantor although his lode was not first discovered, was the first to apply for and obtain a patent. In that way he secured the exclusive right to the surface ground described in the patent and all lodes having their out-crop in that domain which would by the terms of the act pass with the grant. If the proceedings to obtain the patent were regular and without fraud in the patentee that instrument is in his hands and in the hands of the grantee full evidence of title as against all antecedent claims to the same property.

By the act respecting mines (Rev. St. § 2325) notice for patent is required to be given to adverse claimants by posting over the claims and through the columns of a newspaper, and opportunity is given to such claimants to contest with the applicant the title of the property. Section 2326. The object of these provisions is to secure a settlement and adjustment of all controversies respecting the property in order that the patent may be issued to the rightful owner; and it is declared in the act that if no adverse claim shall be filed within the time specified for giving notice it shall be assumed that no such claim exists. Without such declaration the meaning of the statute would be clear enough, for when it is required that notice shall be given and notice is given accordingly no one having an interest in the subject can be allowed to disregard it. With that provision there is no room for discussion as to the conclusive effect of a patent on all questions affecting the title which are pending at the time it is issued. Eureka [Consol. Min. Co. v. Richmond Consol. Min. Co., Case No. 4,548]; Wolfley v. Lebanon Min. Co., 4 Colo. 112.

In this instance it is said that suit was brought against Linn to recover the ground included in both locations, and plaintiff suffered a non-suit. But that is not a circumstance to be considered; unless it shall be alleged that the result of the suit was favorable to the Equator Company the land office disregarded it in issuing the patent. The patent furnishes at least prima facie evidence that notice was given as the act requires, and that every other necessary step towards procuring it was properly taken. And if notice was given the defendant company was embraced in it, and whether they neglected to assert their claim, or asserted it unsuccessfully, the result is the same; in either case they cannot now impeach the patent upon the ground that they have a better title to the property described in it than the patentee. This rule extends as well to the date of the discovery and location of the claim as to other matters affecting the title. Of two adverse locations made, that which is prior in time is undoubtedly prior in right. But this must be shown at the time and in the manner pointed out by the statute or the right will be waived. And after patent the patentee will be regarded as having the elder as well as the better title in all respects. This is true as to all things that are the subject of the grant but there still remains a question as to how much and what part of cross and intersecting veins are embraced in a patent.

The general language of section 2322 seems to comprehend all lodes having their tops and apexes in the territory described in the patent whether the same lie transversely or collateral to the principal lode on which the location was made. Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross-lodes, which is of different import. It was numbered 14 in the original act of 1872 [17 Stat. 96],—section 2336, Rev. St. (2d Ed.),—and is as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection: but the subsequent location shall have the right of way through the space of intersection for the purposes of convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." It will be observed that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection to the exclusion of the remainder of such lodes and veins lying within his own territory. So far this section is in conflict with section 2322, before mentioned, and the matter of precedence between them is settled by an arbitrary rule established long ago. As between conflicting statutes, the latest in date will prevail, so between conflicting sections of the same statute, the last in the order of arrangement will control. Bac. Abr. Stat. D; Dwarris, 156, note; Brown v. County Com'rs, 21 Pa. St. 37; Smith v. Moore, 26 Ill. 392.

The presumption that one section of a

statute was adopted before another seems to be very slight, and perhaps this rule has no other merit than to afford the means of solving a difficult question. But the rule appears to be well established, and to be applicable to the present case. It gives to section 2336, Rev. St., or section 14 as it stood in the original act, a controlling effect over the prior section, and limits the right of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the plaintiffs having the elder title by patent have the better right, but it is limited as last stated. So much as to the theory that there are two lodes intersecting in their onward course. And if there are two veins uniting in their downward course the same section is applicable with the addition of what has been said relating to the patents. If it shall appear that there is but one lode at the point in dispute, it will depend on the out-crop of that lode. If it shall be found within the lines of one of the patents and without the lines of another, the rule will be plain. He who can claim the top and apex of the lode will also have good right to all that lies below, although it may enter the land adjoining. If there is but one lode with an out-crop extending into both locations, questions will be presented which have not been discussed and should not now be considered. As to the latter, it can be better determined when the fact shall be shown.

The motion will be denied with leave to defendants to renew it, if there shall be any delay in prosecuting the action of ejectment.

[NOTE. On the trial of the action of ejectment by Hall and Marshall against the Equator Mining & Smelting Company judgment was given for defendant (unreported; cited in dissenting opinion of Boreman, J., in Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co., Utah, 11 Pac. 515, 536). Thereupon plaintiffs moved for and obtained a new trial as of right. Upon this second trial, judgment was given for plaintiffs after Miller, Circuit Justice, had charged the jury in the following words, which are here published from the records of the court: "The court charges the jury: That here is introduced, both by plaintiffs and defendant, evidence tending to prove that the claims of both parties are located on the same vein or lode of mineral-bearing rock in place, the general apex or upper surface of which is about one hundred feet wide. If the jury believe this to be true, then I instruct you as the law of this case that plaintiffs having the prior title from the United States to that portion of this lode within the lines of their patent, extended vertically downwards to the earth's center, and the defendant having contested plaintiffs' right to receive a patent for the parts of the lode in controversy in the court of the territory according to the act of congress on that subject, and failed in that contest, and having accepted and read in evidence a patent for their own claim which expressly excepts out of its granting clause the interfering part in plaintiffs' said patent, the law of the case is for the plaintiffs, and they are entitled to all the mineral found within the side lines of their patent extended vertically downward." Cited in dissenting opinion of Boreman, J., in Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co., supra.

[Thereupon defendant moved for a new trial as of right. Upon the question whether this motion should be granted under the Colorado Code the circuit justice and the district judge were divided in opinion, and certified the matter to the supreme court, after overruling the motion (unreported). Defendant also sued out a writ of error. The supreme court ruled that the defendant could demand a new trial as of right, and reversed the judgment of the circuit court for error in overruling the defendant's motion, and remanded the cause for a new trial, without considering the defendant's assignments of error. 1 Sup. Ct. 128, 106 U. S. 86. The proceedings upon the third trial are not reported.]

HALL (FELLOWS v.). See Cases Nos. 4,722 and 4,723.

Case No. 5,932.

HALL v. FOX.

[3 Cranch, C. C. 64.][1]

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

WITNESSES—INTERESTED WITNESS—RELEASE.

1. An interested witness who has been sworn in chief and examined, and whose interest is disclosed upon cross-examination, may be released, and re-examined.

2. A release of a witness may be executed by the party, leaving a blank, for the name of the witness, to be filled up by the party's attorney.

[This was a suit by Hall, for the use of Carter, against Fox.]

A. T. F. Bill was examined on his voir dire, and said he was not interested, and was, thereupon, sworn in chief for the plaintiff. Upon his cross-examination his interest was disclosed, and the plaintiff then offered to release and re-examine him.

But THE COURT refused to permit him to be re-examined after tender of the release; saying that as he had already given his testimony, he was interested by all the pains and penalties of perjury, to affirm what he had already testified. But upon looking into 4 Starkie, Ev. 758; Callow v. Mince, 2 Vern. 472; Sikes v. Marshal, 2 Esp. 708; Heyl v. Burling, 1 Caines, 14; Doty v. Wilson, 14 Johns. 378; City Council v. Haywood, 2 Nott & McC. 308,—THE COURT (nem. con.) said it was an objection to the credit, and not to the competency of the witness. The release had been sent to Mr. C. Cox, upon his request by letter, in which he mentioned the name of the witness who was to be released. The release was signed and sealed without a subscribing witness, and a blank left for the name of the witness who was to be released, and inclosed in a letter from Mr. Carter to Mr. Cox, in which he approved of his suggestion to release the witness. Mr. Cox testified to these facts, and that he was acquainted with the handwriting of Mr. Carter, having received many letters from him,

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

in answer to his own, upon business, but had not seen him write. He believed the release and its signature to be in the handwriting of Mr. Carter. He filled up the blank, as he thought himself authorized to do.

THE COURT said that the execution of the release was sufficiently proved; and permitted the witness to be re-examined.

Case No. 5,933.

HALL v. HAYNER et al.

[3 Chi. Leg. News (1871), 402.]

Circuit Court, W. D. Wisconsin.

BANKRUPTCY—PREFERENTIAL MORTGAGE.

[It seems that a mortgage executed by the bankrupt more than four months before the filing of the petition in bankruptcy cannot be set aside at the suit of the assignee, on the ground that it operates as a preference.]

[This was a bill in equity by Hall, as assignee of Leonard Lakin, against Andrew P. Hayner and others, to set aside a mortgage executed by the bankrupt, upon the ground that it was given in violation of the bankrupt act.]

Finches, Lynde & Miller, for complainant.
Cassoday & Merrill, for defendants.

HOPKINS, District Judge. This is a bill in equity filed by the complainant, as assignee in bankruptcy of the estate of Leonard Lakin, to set aside a mortgage executed by the bankrupt on the 27th day of August, 1869, to Andrew P. Hayner, to secure the payment of an existing debt for the sum of $3,276, on the ground that the bankrupt was insolvent when he gave it, and that it was executed to him with a view of giving the mortgagee a preference over his other creditors, and that the mortgagee had reasonable cause to believe that the bankrupt was insolvent when he gave it, and that it was given in fraud of the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. It was further alleged in the bill that it was given without consideration, and with a view to defraud the creditors of the bankrupt. Testimony to a large amount was taken in the case upon the issue joined in these propositions.

The petition in the bankruptcy proceedings was filed on the 8th day of January, 1870, and on the hearing the defendants' counsel raised the objection that, as the proceedings in bankruptcy were not commenced until after four months from the execution and delivery of the mortgage, it could not be set aside or invalidated as contrary to the provisions of that act. That in order to avoid a preference as contrary to the provisions of that act, it was necessary that the proceedings in bankruptcy should be commenced within four months after the giving of the preference, otherwise it could not be questioned. On that point he cited sections 14, 35, of the bankrupt act; In re Hunt [Case No. 6,881]; Potter v. Coggswell [Id. 11,322]; Babbit v. Walbrum [Id. 694]; Bean v. Brookmire [Id. 1,168]; Maurer v. Frantz [8 Phila. 505].

The counsel for the complainant, after hearing the argument of the defendants' counsel and the authorities presented by him in support of it, stated to the court that he thought the point well taken, and declined to argue the case, as that to him seemed fatal, thereby, as I understood him, yielding the case on that point, and as he was satisfied that he was not entitled to the relief, I do not deem it necessary for me to do more than to accept that as the law in the case; and as there was no evidence to warrant a decree on the ground that the mortgage was given without consideration, or to defraud the creditors of the bankrupt, I direct that the bill be dismissed, with costs to be paid by the complainant out of the estate of the bankrupt in his hands.

Case No. 5,934.

HALL v. HOYT.

[2 Hunt, Mer. Mag. 342.]

Circuit Court, S. D. New York. July 20, 1840.

CUSTOMS DUTIES—CLASSIFICATION—ACT 1832—"HOSIERY."

[1. Knit shirts and drawers, faced with cloth having buttons and buttonholes, in readiness for wear, were dutiable under the tariff act of 1832 [4 Stat. 583], as "ready-made clothing," unless they were known, in trade and commerce, at the date of the act, as "hosiery"; and whether they were so known is a question of fact for the jury.]

[2. "Hosiery," as used in the tariff act of 1832, is of more general meaning than "stockings," in the act of 1816 [3 Stat. 310], for which it was substituted, and signifies a class or description of goods.]

[Cited in Hadden v. Hoyt, Case No. 5,891.]

At law. This action was brought to recover back the excess of duties demanded by the defendant, collector of New York, upon knit shirts and drawers. The defendant [Jesse Hoyt] had demanded duty on them as "ready-made clothing"; the plaintiff [James Hall] insisted that they were subject to duty as "hosiery," and that he was entitled to recover back the excess. Samples of the article were exhibited; the shirts had a piece of cotton cloth sewed upon the opening in front, with two or three buttons sewed on upon one side and buttonholes worked on the other. The drawers had waist-bands sewed on, with buttons and buttonholes, and tapes at the bottom. They were fit for wearing without farther work, and had been prepared before importation. The plaintiff proved that the articles were made by hosiery manufacturers, upon the stocking frame. That they were dealt in by dealers in hosiery in England, and were there known as "hosiery"; that the cotton cloth was sewed on, buttonholes made, etc., by persons connected with the manufacturer, and as part of his busi-

ness; also, the plaintiff proved that in the United States in the year 1832, and prior to it, they were imported from England and were known as "hosiery goods"; that they were kept by hosiery dealers for sale; that they would be furnished upon an order for "hosiery," but not on an order for "ready-made clothing"; that they did not go in commerce under that name; that in invoices they were called "shirts and drawers," "woolen or cotton shirts and drawers," "knit shirts and drawers," and "hosiery shirts and drawers." They were not usually kept in ready-made clothing stores, but sometimes were. "Ready-made clothing" meant clothing cut from cloth to fit, and made by tailors' sewing. On the part of the defendant, evidence was given, that the articles were kept by some dealers in ready-made clothing; that they were by some called ready-made clothing; that at the custom house, in 1832, and for some years before, duty had been demanded on these goods as on ready-made clothing, which duties, prior to the act of 1832, was acquiesced in.

M. Bidwell and D. Lord, Jr., for plaintiff.
B. F. Butler, Dist. Atty., for defendant.

BETTS, District Judge (charging jury). The act of congress, in its use of the terms "hosiery" and "ready-made clothing," must be construed in reference to the common use and meaning of the terms, unless they appeared to have acquired a separate and different meaning in commerce. If they had, that meaning was to prevail; and they must look to the meaning of the terms at the date of the act, and not at the present time, or as changed after the act was passed. That the practice of the custom house was only to be looked at as part of the evidence of the acceptance of the words by merchants dealing there; and, if the terms did not in commerce bear the sense there put upon them, the practice of the custom house could not govern the construction.

That in the present case the articles were clothing, and were ready made; they were therefore liable to duty as such, unless the jury should find that they were known in commerce under some other name, and charged with duty under such other name. That if they were known under the name of "hosiery," then, as that description of goods had been in the same section of the law charged with a lighter duty, it would not be subject to the heavier duty of ready-made clothing. That "hosiery" was a word of more general signification than "stockings," which was the word of the act of 1816, which was dropped in the act of 1828 [4 Stat. 270], and the word "hosiery" introduced. It signified a class or description of goods; and if the jury found that these goods were among importers and vendors and purchasers generally known in 1832 (the date of the act,) as "hosiery," they would be liable only to the duty on hosiery, and the plaintiff was entitled to recover; otherwise, they were liable as ready-made clothing, and the defendant must have a verdict.

Verdict for plaintiff for $3,473.

Case No. 5,935.

HALL v. HUDSON.

[2 Spr. 65.] [1]

District Court, D. Massachusetts. Feb., 1863.

ADMIRALTY—LIBEL FOR SUPPLIES BY PART-OWNERS—JURISDICTION—STATUTE OF LIMITATIONS.

1. Equitable ownership in a vessel, or ownership pro hac vice, need not be shown by a bill of sale or registry.

[Cited in U. S. v. The Fideliter, Case No. 15,088.]

2. Equitable co-owners of a vessel who are also material men, cannot maintain a libel in admiralty against the other co-owners to recover their bill for supplies, if their claim constitutes a portion of the accounts of the part-owners. In such case admiralty has no jurisdiction.

[Cited in The H. E. Willard, 52 Fed. 388; Id., 53 Fed. 601.]

3. Proof of a custom to pay the mechanic part-owner his bill without awaiting the general settlement of accounts, will not avail, if it also appear that such bills do await the settlement of what is known as the outward account of the voyage.

4. This court is not bound by the Massachusetts statute of limitations, but is inclined to follow its analogies.

5. Where more than six years have elapsed since a cause of action has accrued, the commencement within that time of a suit in equity, which was subsequently discontinued, in the state court, will not excuse the delay, especially where the other owners may have been prejudiced by the delay.

This was a libel against the owners of the bark Clara Bell, for the blacksmith bill of her second voyage, in 1856. It was resisted by the respondents on various grounds; viz. that they had severally paid their shares of the outfit to R. L. Barstow, the agent, in 1856; that the libellants were in fact co-owners in the voyage; that the court had no jurisdiction; and that the claim was stale.

R. C. Pitman and C. T. Bonney, for libellants.

T. M. Stetson, for respondents.

SPRAGUE, District Judge. The libellants claim that they were not co-owners, and that only one of them, Martin Hall, owned in the bark. This is confirmed by the bill of sale, so far as the strictly legal title is concerned; but the evidence shows that the firm were charged with expenses and credited with profits of the one sixty-fourth part of the vessel at the request of both of them, and it appears that the senior libellant, Larnet Hall, once expressed considerable feeling at finding that his name was left out of the registry and bill of sale. There is other evidence as to the way this ownership was re-

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

garded, and, upon the whole, I am satisfied that the one sixty-fourth in question belonged to both the libellants, that they both were its equitable owners; owners so far as this enterprise is concerned, although possibly not so in respect to third parties. The registry acts and the act of 1850 for recording conveyances of vessels (9 Stat. 440) have no applicability to the issue on trial. This is a question of equitable ownership, of ownership pro hac vice, and need not be specified by the agent even in his registry oath, unless aliens are interested.

I therefore hold that the libellants are to be deemed co-owners for this voyage, and if their claim constitutes a portion of the accounts of the part-owners and enters into the same, then this court has no jurisdiction concerning it. The libellants try to avoid this result by claiming that this contract was an independent one, and was to be paid without reference to their account as owners. Much evidence has been offered on this point. They do not thus claim under any express contract, but by an alleged custom in Mattapoisett and New Bedford to pay the mechanic part-owner his bill without waiting the general settlement of accounts. Perhaps their witnesses do prove this, but they also prove that such bills of part-owners do await the settlement of the outward account, there being in a whaling voyage two accountings. Such bills are credited in such outward account, and balances are sometimes paid, but not the specific bills. It appears, then, that such bills are settled in an accounting of part-owners, with which admiralty has nothing to do. It does not aid the libellants to show that the agent had retained their share of the former voyage. This merely adds, if any thing, another item to the account, and makes it none the less an accounting.

2. I think the libellants' claim must be deemed stale. This court is not bound by the Massachusetts law of limitations, though it inclines to follow the analogies of that statute. So much time has elapsed that the libellants ought to plead and prove some excuse for their delay. They show that in 1861 they notified Abner H. Davis, the agent of the ship, that they should sue, and soon after, in 1861, did commence a suit in equity in the supreme court of Massachusetts, which suit they subsequently discontinued. These acts do not excuse the delay. Besides, the libellants' witnesses prove a custom for owners to pay their share of the outward account in a few months after sailing. The libellants must therefore be taken to have known that the respondents so paid early in 1856 to R. L. Barstow. They often in his life, after that, claimed of him, and often told him that they did not release the other owners. But they never told the other owners so, till after his death and the insolvency of his estate. Is it right for them now to pursue the other owners? Certainly not. Why did they not make Barstow pay when they knew he had the owners' money? I think they wished to stand well with him for their own benefit, in getting his business, &c., and they must bear the consequences. Decree for respondents.

Case No. 5,936.

HALL et al. v. HURLBUT.

[Taney, 589.] [1]

Circuit Court, D. Maryland. April Term, 1858.

ADMIRALTY—CHARTER-PARTY—MASTER OF VESSEL NOT A COMPETENT WITNESS WHEN INTERESTED ON PROFITS—DAMAGES FOR DELAY.

1. On the 21st of September, 1854, the libellants, who were residents of Boston, chartered their vessel, then in the port of New York, to the respondent, for a voyage from the port of Franklin, in Louisiana, to Baltimore; the respondent to load her with sugar and molasses, as specified in the charter-party, and upon the freight therein mentioned; the charter to commence when the vessel was ready to receive cargo at the place of loading, and notice thereof given to the charterer or his agent. The charter-party contained a provision that the vessel was to have the privilege of proceeding to a southern port, and load a cargo of lumber for the West Indies, and on the discharge of the cargo, to proceed direct to Franklin; under this provision, the owners, on the 23d of September, while the vessel was still at New York, chartered her to another person, for a voyage from Wilmington, in North Carolina, to Basseterre, in the island of Guadeloupe, with a load of lumber. She sailed from New York on the 4th of October, arrived at Wilmington on the 8th of October, and sailed thence on the 2d of November, with a cargo of lumber for Basseterre; on the 5th of November, she was overtaken by a storm, and compelled to put into Nassau for repairs, and was detained there till the 4th of February, 1855; on that day, she sailed for Basseterre, and after discharging her cargo, sailed thence for Franklin, and arrived at Pattersonville, a few miles below Franklin, on the 13th of April, 1855. As soon as she arrived, the master called on the consignee, who was the agent of the respondent, and asked for his cargo; the agent told him he had no cargo, but would see if he could get one, and the master then commenced getting ready to take the cargo on board; in a few days, he notified the agent that the ship was ready to receive cargo, to which he replied, that he did not think the charter-party binding, and that he had no cargo for him; after receiving this answer, the vessel remained six or seven days at Pattersonville, and then sailed for Baltimore. By the terms of the charter-party the respondent was entitled to twenty running days to load the vessel, but she did not remain at Pattersonville more than half that time, and sailed for Baltimore in consequence of the answer received from the consignee: but for the delay at Nassau, the vessel would have arrived at Franklin during the usual season for shipping sugar and molasses from that region, which commences in November, and was proved by some witnesses to end by the 1st of March, and by others to continue during that month; and with regard to the delay at Nassau, the persons who surveyed the vessel when she arrived there, and those who repaired her, and assisted in landing her cargo, and in reshipping it, and fitting her to sail again, were examined, and testified that there was no unnecessary delay.

2. On libel filed in the admiralty by the owners of the vessel, against the charterer, to recover

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

damages for the refusal to furnish the vessel with cargo: *Held*, that although there was no stipulation as to the time of sailing from New York, or as to the time to be consumed in the intermediate voyage, the law implied a covenant on the part of the ship-owners, that she would proceed to the port of destination with convenient speed, and use reasonable and proper exertions to reach it as early as practicable.

3. If the vessel wasted more time than was necessary in the intermediate voyage, or at any of the ports she entered, whether in repairing, or receiving or delivering cargo, the owners have no right to complain of a failure on the part of the shipper to furnish her with a cargo, if his inability to do so were caused by such unnecessary waste of time.

4. The circumstances above stated indicate no want of proper diligence on the part of the owners, or the master.

5. In the absence of any fault on their part, the unusual delay of the vessel, and her arrival at the port where she was to take in cargo, after the season for shipping it had gone by, did not release the charterer from the obligation to furnish the cargo stipulated for by the charter-party.

6. In considering the question of delay for repairs at Nassau, no comparison ought to be made between the time occupied at Nassau, and the time that would be occupied in similar work in Baltimore, because the time required must depend upon the facilities which the port affords for landing and reshipping cargo and repairing damages.

7. Where the charter-party contains no stipulation that the vessel shall arrive at the port of shipment by a particular day, the shipper takes the risk of delay or detention by any superior force which the vessel could not resist or overcome.

8. The omission of the vessel to remain at Franklin the number of lay-days mentioned in the charter-party, after the master had been informed that a cargo would not be furnished, and the binding effect of the contract was denied, is no bar to the libellant's claim.

9. The fact that in making charter-parties for the sugar and molasses trade, it is the usage to make them with reference to the season, cannot affect the legal construction of the written contract.

10. In a case like the present, at common law, the plaintiffs would be entitled to recover the full amount of freight that would have been earned if the cargo agreed on had been furnished.

11. But in an admiralty proceeding, where the equity as well as the law of the case is before the court, the omission to give notice of the disaster which detained the vessel so long beyond her time, must exercise a serious influence in estimating the damages which the libellants are justly and equitably entitled to, and throw upon them a portion of the loss occasioned by such omission.

[Cited in Watts v. Camors, 115 U. S. 361, 6 Sup. Ct. 94.]

12. The master of the vessel was incompetent to testify to there having been no unnecessary delay in the voyage; because by contract with the owners he was to have half the gross profits of the voyage, and man and victual the ship, and pay half the port-charges, and therefore was interested in the result of the suit.

13. His becoming disabled, and employing another master to complete the voyage, did not render him competent, as it did not release him from the obligation to man and victual the vessel for the residue of the voyage; the person employed by him to act as master being merely his substitute and agent, for whose wages he would be responsible; and he, and not his substitute, being entitled to one-half the gross profits.

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

[This was a suit in admiralty by Isaac C. Hall, James H. Myrick, and others against Samuel Hurlbut.]

S. T. Wallis and R. S. Matthews, for appellants.

David Stewart and John Stewart, for appellee.

TANEY, Circuit Justice. This is a case of some difficulty, arising from circumstances which obviously were not contemplated on either side, when the charter-party was executed. These unforeseen circumstances have disappointed the expectations of both parties, and the question is, who must bear the loss? The charter-party was executed at New York, on the 21st of September, 1854; the owners live in Boston, to which port the vessel belongs; and the charterer resides in Baltimore; the vessel was then lying in the port of New York. The owners, by their duly authorized agent, agreed to charter and freight the brig Monte Christo to the respondent, for a voyage from the port of Franklin, in Louisiana, to Baltimore; the respondent to load her with sugar and molasses, as specified in the charter-party, and upon the freight therein mentioned; the charter to commence when the vessel was ready to receive cargo at her place of loading, and notice thereof given to the charterer or his agent. There is a further provision in the instrument, that the vessel was to have the privilege of proceeding to a southern port, and load a cargo of lumber for the West Indies, and on the discharge of the cargo, to proceed direct to Franklin. Under this last-mentioned stipulation, the owners, on the 23d of September, while the vessel was still in New York, chartered her to another person, for a voyage from Wilmington, in North Carolina, to Basseterre, in the island of Guadeloupe, with a load of lumber.

The brig proceeded on this last-mentioned voyage, and after taking on board a cargo of lumber, sailed for Basseterre, on the 2d of November; on the 5th of November she encountered a storm, and suffered so much that it became necessary to put into Nassau to repair the damage. Upon her arrival at Nassau, the brig, upon survey, was found to be so much injured from the storm, that it was necessary to land her cargo, in order to make the repairs required to fit her for the sea; this was accordingly done, and the proper repairs made, and the cargo again placed on board; but she did not leave Nassau for Basseterre, until the 5th of February, 1855. She then proceeded on her voyage without further accident, and after discharging the lumber at her port of destination, she sailed directly for Franklin, and arrived at Pattersonville, a few miles below Franklin, on the 13th of April 1855; she was pre-

vented from going up to Franklin by the shallowness of the water. Wood, the master, who made the charter-party, because sick at Nassau, and was unable to proceed further, and Robert Dorritie, a competent ship-master for the voyage, was employed by Wood to take his place, with the approbation of the American consul. As soon as the brig arrived at Pattersonville, Dorritie called on Edwin Walters, to whom the brig was consigned, and who was the agent of Hurlbut, the respondent, presented his charter-party, and asked for his cargo; Walters answered, that he had no cargo, but would try and see what cargo he could get, to give him to Baltimore; Dorritie thereupon landed his ballast, to be ready to receive cargo. Some two or three days afterwards, Walters went to New Orleans, and returned in five or six days; and upon his return, Dorritie informed him his vessel was then ready to take the cargo on board; to which Walters replied, that he did not think the charter-party binding, and he had no cargo for him. After receiving this answer, Dorritie remained six or seven days at Pattersonville, and then sailed for Baltimore, where he arrived about the latter end of April or beginning of May, 1855.

By the terms of the charter-party, the respondent was entitled to twenty running days to load the vessel, and it is admitted, she did not remain at Pattersonville, ready to receive cargo, more than about half that time, and sailed for Baltimore in consequence of the answer received from the consignee. Before he sailed, Dorritie made a formal written demand upon the agent for the cargo, and upon receiving the answer above mentioned, made his protest, which substantially agrees with his testimony as given under the commission. Indeed, the agent for the respondent, in his testimony, agrees in all material respects with the testimony of the master as to what passed between them.

It will be seen by this statement, that nearly seven months elapsed after the charter-party was signed, before the brig arrived at Franklin, where the cargo was to be furnished and the charter to commence. I speak of her arrival at Franklin, because I regard her stoppage at Pattersonville as substantially the same thing; she was stopped, in the first instance, by the want of water in the river, and after the master's interview with Walters, he was absolved from the necessity of going there, as there was no cargo to be shipped.

It appears by the proofs in the case, that the voyages mentioned in the two charter-parties, which occupied nearly seven months, ought to be performed in about two, where proper preparations and efforts are made, and no accident interrupts them. And the first inquiry is, whether this unusual delay was occasioned by the negligence or the want of proper exertions on the part of the vessel; for although there is no particular stipulation as to the time the brig should sail from New York, or as to the time she might consume in the intermediate voyage, the law implies a covenant on the part of the ship-owner, that he will proceed to the port of destination, with convenient speed, and use reasonable and proper exertions to reach it as early as practicable. And if the Monte Christo wasted more time than was necessary, in the intermediate voyage, or at any of the ports she entered, whether she was repairing, or receiving or delivering cargo, the libellants are not entitled to recover; for they have no right to complain, if the inability of the merchant to furnish a cargo was occasioned by the non-performance on their part of the condition precedent.

In determining whether reasonable and proper exertions were made by the ship, it is proper to say, that I put aside the testimony of Captain Wood, as he is clearly interested in the issue of this suit; he states, that by his contract with the owners, he was to have half the gross profits, and to man and victual the ship, and pay half the port-charges. He says he expects nothing; that may be very true, for it is probable that the expenses of manning and victualling the ship, and employing the master, will consume more than one-half the gross profits, even if the libellants succeed to the full amount of their claim. But his inability to hold the command and proceed on the voyage, certainly did not, by operation of law, dissolve the contract or release him from the obligation to man and victual the vessel for the residue of the voyage; and it is evident, that there was no agreement between him and the owners to dissolve it. On the contrary, he (as it was his duty to do, under the circumstances) employed Dorritie, and agreed with him as to his wages, and Dorritie was nothing more than his substitute and his agent, and for whose wages Wood was responsible; and Wood, and not Dorritie, was entitled to one-half the gross amount of the freight. His contract with the ship-owners was in full force, and he has a direct interest in the issue of this suit, and is incompetent as a witness.

But putting aside his testimony, I think that the libellants have shown that reasonable and proper exertions were made by the brig, and that it does not appear that the delay was occasioned by any neglect of duty on her part, but by circumstances beyond the control of the master and crew.

It is true, that although the charter-party was executed on the 21st of September, she did not leave the port of New York until the 4th of October. But there is no covenant by the ship-owners that she should sail with convenient speed on the voyage contemplated, nor even a covenant that she is ready for sea; it is merely stated, that she was lying in the port of New York at the time, and that the owners had the privilege of entering into another charter-party for an intermediate voyage. She required time to make this second

agreement; and after it was made, naturally required time to prepare and equip the vessel for these two voyages; the period between the 21st of September and the 4th of October, in the absence of any proof to the contrary, can hardly be regarded as proof of negligence or waste of time.

She arrived at Wilmington on the 8th of October, where she took in the lumber and sailed for Basseterre on the 2d of November; on the 5th, she was overtaken by a storm, and compelled to put into Nassau to repair and refit, where she arrived on the 12th, and did not leave that port for Basseterre until the 4th of February, 1855, as I have already stated. Up to the time of her arrival at Nassau, the log-book contains a history of her proceedings; and the court see nothing in them of which the respondent has a right to complain. The stay in Wilmington, in receiving and taking in the cargo, does not appear to have been prolonged by the fault or negligence of the master of the vessel; nor indeed, does the charter-party with the respondent require the vessel to use any extraordinary exertions to shorten the time to be occupied in the intermediate voyage. She sailed for Basseterre, from Wilmington, on the 2d of November, and if no casualty had happened, she had abundant time to reach Franklin, long before the usual season for shipping sugars and molasses was over. The delay at Nassau, however, was a very prolonged one, and it is incumbent on the libellants to show that it was not occasioned by the default of the master, and that he used every effort in his power to have the brig speedily repaired.

I think the testimony of the libellants establishes this fact. The persons who surveyed her when she arrived, and those who repaired her, and assisted in landing her cargo, and in reshipping it, and fitting her to sail again, have been examined, and they all testify that there was no unnecessary delay; they are witnesses who testify to what they saw, and in relation to matters in which they were personally engaged; and there is nothing in the record to contradict them, or to impair their credit. It is true, when we compare the time occupied at Nassau with the time that would be occupied in similar work in Baltimore, it would appear to have been unreasonably long; but such a comparison ought not to influence the judgment of the court, because the time required must depend upon the facilities which the port affords for landing and reshipping cargo, and repairing damages; and what may be done in a few days in one port, may require a month in another. Besides, the master of the Monte Christo had the strongest inducements of interest to urge on the work as speedily as possible; he was bound to victual and man the ship at his own expense, and every day's delay brought with it a heavy charge upon him personally, for which the owners were not bound to repay him. With such strong inducements on his part to press on the work, and with the testimony of the witnesses above mentioned, I think the libellants have sufficiently established the fact, that the long delay at Nassau was unavoidable, and occasioned by circumstances beyond their control. As to the time occupied in the voyage to Basseterre, and thence to Franklin, no objection has been taken, and the proof by the libellants is abundantly sufficient.

Tracking the brig, therefore, from the date of the charter-party to her arrival at Franklin, the court think that there was no unnecessary delay on the part of the vessel; and that reasonable and proper exertions were made to arrive at the port of shipment, within the time ordinarily occupied in the voyages described in the two charter-parties.

This being the case, and looking only to the language of the written charter-party, the unavoidable delay did not forfeit the right of the ship owners to demand cargo upon the arrival of the brig at the port of shipment. The written contract contains no stipulation on their part that the vessel shall arrive at or before a particular day; the law implies no other condition than that reasonable and proper exertions shall be made, to perform the voyages contemplated by the charter-party, as speedily as practicable; and the shipper takes the risk of delay or detention, by any superior force which the vessel could not resist or overcome; whether it be an embargo by the government, or a storm on the ocean. The case of Hadley v. Clarke, 8 Term R. 259, and the cases of Schilizzi v. Derry, 4 El. & Bl. 873, and Hurst v. Osborne, 18 C. B. 144, were decided upon this principle; and the last-mentioned case, in all its facts and circumstances, strikingly resembles the one before the court.

Neither is the omission of the brig to remain at Franklin the number of lay-days mentioned in the charter, a bar to this claim. She was there, prepared to receive cargo, gave notice of it to the agent of the respondent, and remained there until she received the answer hereinbefore mentioned; the lay-days are expressly introduced into the charter-party, to give the shipper convenient time to furnish the cargo; and when the master was informed that a cargo would not be furnished, and that the binding obligation of the contract was denied, any further delay at that port would have been a useless and improper waste of time, and of no service to any one. The principle which is so familiar in cases of insurance, applies with equal force to this; in case of a loss, the party insured is usually bound by his contract to produce his preliminary proof of loss, and the insurer is entitled to a certain number of days, after this proof, in which he is to pay the money. But if the insurer informs the assured that he denies his right to recover for the loss, and that he will not pay the money, the assured may sue at once, with-

out preliminary proof, and without waiting for the expiration of the time allowed to the insurer for paying; his refusal dispenses with the performance of the condition. And upon the same principle, the positive refusal to furnish cargo, dispenses with the obligation of waiting to receive it.

The case of Avery v. Bowden, 6 El. & Bl. 953, has been referred to as deciding a contrary principle. But that case was decided upon a very strict and narrow construction of the words used by the party; the court held that these did not amount to an absolute and positive refusal; and this is perhaps a sufficient answer to this case; yet, it is proper for me to say, that I should have put a different construction upon them, and held that they dispensed the ship-owners from any further delay, and should not follow that decision, if the words were the same in the case before me.

Upon the written contract, then, speaking for itself, I think the libellants are not entitled to recover. But evidence has been offered of an established and proven usage in this trade, which it is supposed ought to influence the construction of the charter-party; but the court see nothing in the usage proved by the testimony, which can be regarded as material in this case. Some of the witnesses say, that the known and usual season for shipping sugar and molasses from the Attakapas, in which Franklin is situated, begins in November, and ends with March; and that charter-parties for that trade are always understood to be made with reference to that season, unless otherwise specially provided; other witnesses limit the duration of the season to the first of March. But it is not easy to see how the usage of making the charter-party with reference to the season, can affect its construction. No doubt, when sugar and molasses are to be imported from Attakapas, and the charter-parties are made in other cities, they are made at a period of time when, according to the ordinary course of the voyage, the vessel will arrive at the season when these articles are usually exported from that country; this present charter-party was evidently made with reference to that season; and both parties expected at the time, that the vessel would arrive before the usual time for exportation was over. But how does that affect the construction of the written contract? None of the witnesses say that, by the usage, the ship-owner forfeits his right to the freight contracted for, if, by events beyond his control, the voyage has been protracted beyond the time contemplated by the parties; none of the witnesses say that, upon a contract of this kind, the ship-owner, by the usage, takes upon himself the risk of delay from unavoidable casualties; nor that the usage implies a stipulation on his part to arrive within the usual season for shipping; and that the performance of this stipulation is a condition precedent to his right to demand the cargo and freight which the shipper contracts to furnish. Indeed, if even a usage to that extent had been proved by these witnesses, it could hardly be allowed to engraft a new stipulation into the contract, inconsistent with the legal construction of the written instrument. But certainly, as far as the usage is proved, none of the witnesses say that it would, in any degree, influence the construction of a charter-party like the one before the court, or affect the rights of the parties under it.

It follows from what I have said, that the refusal of the respondent to furnish a cargo, was a breach of his covenant, for which the libellants are entitled to recover damages; and the remaining question is, by what rule are these damages to be measured? If it were a suit at common law, were legal rights and legal obligations are alone the subjects of consideration, and equitable claims cannot be brought into the view of the court, the result, undoubtedly, would be, that the libellants must recover the full amount of the freight that would have been earned, if the cargo agreed on had been furnished. This was the case in the suits on the charter-parties above referred to, in the English courts; they were all suits at common law, and no equitable circumstances could, therefore, be introduced in mitigation of damages.

But this is a proceeding in admiralty, and the equity, as well as the law of the case, is before the court; and I think the omission to give notice of the disaster which detained the vessel so long at Nassau, must exercise a serious influence in estimating the damages to which the libellants are justly and equitably entitled. The proof shows that the master had frequent opportunities to give this notice. It is true, that there is no stipulation in the charter-party that the ship-owner shall give notice to the shipper of any interruption or delay in the voyage, which may be occasioned by storm or otherwise; every voyage is liable to more or less delay, from contrary winds or the dangers of the sea; and the possibilities of delays, and occasional interruptions for a few days, or even a week or two, must always be in the contemplation of the parties when a charter-party is made, and no notice of any such delay is required, unless expressly provided for by the instrument itself. But the delay in this case was entirely outside of the ordinary events of such a voyage, and is probably without example in the history of the trade. It obviously could not have been in the contemplation of either of the parties to the contract; and it was an event, therefore, for which the charter-party did not intend to provide.

Now, the master of the Monte Christo knew that the shipper would expect him to arrive in the ordinary period of such voyage; that his cargo would be prepared accordingly; that a long delay in keeping it on hand, and daily expecting this brig, might expose him to

inconvenience and loss; and that he might conclude after such a lapse of time, without hearing from her, that she was lost, or had wilfully broken the contract; and would probably, under this impression, ship all the sugar and molasses under his control, and have no cargo to ship when the brig unexpectedly arrived. With this knowledge, and knowing that such a long delay was not contemplated by either party, and on that account not provided for in the contract, good faith and justice required that he should, as soon as practicable, apprise the shipper of the event which had so unexpectedly happened, and of the probable time of his detention at Nassau. He could not, without great injustice to the shipper, withhold from him the knowledge that his voyage would be delayed nearly three months beyond the time contemplated, and leave to the shipper to conjecture the cause of this delay, and embarrass him in his shipments during all that time. The inability of the shipper to provide a cargo, was evidently occasioned by this want of notice, and the ship owners must share in the loss occasioned by their omission to perform a duty, which justice and fair dealing evidently required. On the other hand, it is equally true, that the shipper ought not to have disabled himself from fulfilling his contract, without having first sought information as to the condition of the vessel, and the cause of the unexpected delay. I am not, however, prepared at this time to say, what amount of freight would have been earned, if the cargo had been supplied; nor the precise proportion of the loss which the libellants should bear. I shall, therefore, refer the papers in the case to a commissioner, with directions to state an account, and to receive any further evidence that either party may offer to enhance or diminish the damages. It will be remembered, however, that the testimony of Captain Wood is not in the case, he being an incompetent witness.

Case No. 5,937.

HALL et al. v. JONES et al.

[3 Ban. & A. 455;[1] 14 O. G. 378.]

Circuit Court, D. New Jersey. Sept. 24, 1878.

PATENTS—WHEN REISSUED—PATENTABILITY.

The reissued patent No. 5,366, granted to complainants April 22d, 1873, for improvement in hubs for vehicles (the original letters patent, numbered 61,900, having been granted to Alma Warner, February 5th, 1867), *held* to be valid, and the invention therein claimed to be patentable, and that said reissued patent is infringed by the defendants.

[See note at end of case.]

[This was a suit in equity by Elihu Hall and others against Phineas Jones and others for an injunction, account, profits, and damages for an infringement of certain letters patent granted to the complainants April 22, 1873, for improvement in hubs for vehicles.]

Thomas P. How, for complainants.
Charles F. Blake, for defendants.

NIXON, District Judge. This suit is brought by the complainant, a joint stock company, against the defendants, who are partners in business, for an injunction, account, profits and damages for infringement of certain reissued letters patent No. 5,366, granted to the complainants April 22d, 1873, for improvement in hubs for vehicles; the original letters patent, numbered 61,900, being granted to Alma Warner, February 5th, 1867. The answer of the defendants alleges: 1. That the reissue is void because it contains and claims other and different things than were described and claimed in the original patent; 2, that Warner was not the original and first inventor; and 3, that the defendants have not infringed any of the legal or equitable rights of the complainants.

The matter in controversy concerns the construction of wagon-wheels. The Warner invention is claimed by the complainants to be a patentable improvement upon the Sarven wheel, which may be briefly described to consist of a wooden hub, mortised to receive each alternate tenoned spoke, and the other alternate spokes being shaped at the base in the form of a wedge to fit between the alternate spokes first mentioned, the end of the wedge being cut off and a shallow corresponding notch being cut in the hub to receive it. Circular angle-irons are then driven upon the hub, on each side of the plane of the spokes, and are fastened together with small bolts through the spokes. There is thus formed around the outside of the hub, by the arrangement of the spokes, a continuous belt of solid wood. Strength is given to the structure by the two radial bands arranged on each side of the spokes, flanged so as to rest upon the surface of the hub, and to bear against the face of the spokes, and firmly united together by the bolts through the spokes as aforesaid.

It is claimed that the complainants' patent, the Warner invention, differs from this in important particulars: It has the mortised central hub; it has the metallic ring surrounding it—not two rings held together by bolts, but a single ring with its flanges united by means of webs that form the tapering sockets, into which the shoulders of the spokes are driven. The complainants insist that the annulus thus constructed produces a result which the rings of the Sarven patent are not capable of producing. The spokes that enter these tapering sockets do not rest upon the hub. The end support which they receive is not derived from the hub, but from the sockets, arising from their cuneiform shape, and hence the strain caused by the use of the

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

wheel is not transmitted to the hub, as it is in the Sarven invention. An equally strong wheel is thus obtained from a much smaller hub by the use of the Warner patent. The Warner wheel is further claimed to be an improvement upon the Sarven patent, inasmuch as the web cast between the flanges of the ring separates the spokes and gives to each a firm metallic support, and, dispensing with the bolts, imparts to every spoke the capacity of self-tightening in case of the shrinkage of the wood.

I am not to decide whether the Warner patent in any respect infringes the Sarven. If that were the question I should not hesitate to follow the late Judge Woodruff, of the Second circuit, who held that the second claim of the Sarven reissue was for a combination of three old devices, to wit; a wooden hub, tenoned spokes and flanges on each side of the spokes bolted together to assist in resisting lateral strain, and that the combination was infringed by the Warner wheel. But the question is whether there is any peculiar patentable quality in the invention of the complainants, outside of the Sarven combination, which the defendants have infringed, and from the continued use of which they should be enjoined. The case is not clear from difficulty, but the difficulty arises more in ascertaining the extent than the fact of the infringement. In other words, it is not easy to decide, in a controversy between other parties, how much of the merits and value of the Warner wheel is due to the invention of Sarven, and how much is due to the invention of Warner. That matter, however, may be inquired into on the reference.

It would serve no useful purpose to exhibit in detail the reason for the conclusions to which I have arrived. Let it suffice, that I have given the testimony, the exhibits, and the very able arguments of the respective counsel an earnest consideration, and that I am of the opinion: 1. That there is a distinct though, perhaps, narrow ground that the Warner patent may occupy, which is not covered by the Sarven invention. 2. That there is enough disclosed in the specifications, drawings, and model of the original Warner patent to authorize and justify the claims of the second reissue. 3. That the structures manufactured and sold by the defendants infringe the first, second, and third claims of the said reissue. 4. That there should be a decree for the complainants for an injunction and an account, and it is ordered accordingly.

[NOTE. In Sarven v. Hall, Case No. 12,369, Woodruff, Circuit Judge, held that the Warner patent was an infringement upon the second claim of letters patent granted to James D. Sarven, June 9, 1857, and reissued August 11, 1868. In a subsequent proceeding between the parties, the same judge issued an injunction, restraining the defendants from manufacturing the wheels, although a change had been made in the construction, which it was claimed avoided the former decree, and the patent itself. Case No. 12,370.]

Case No. 5,938.

HALL v. KIMBARK et al.

[6 Chi. Leg. News (1874) 306.]

Circuit Court, E. D. Missouri.

SALE—OFFER BY CIRCULAR—ACCEPTANCE.

[Sending a circular naming "present price" of an article is an offer to sell at that price, and an order based thereon, sent upon the receipt of the circular by one of the parties to whom it was addressed, if reasonable in amount, is an acceptance of the offer, and the contract is complete when the order is received.]

On or about the 5th day of February, 1873, Hall, Kimbark & Co., wholesale iron merchants of Chicago, caused to be published the following:

"Our present price for blue seat springs is as follows: On orders for 100 pairs and over in one shipment:

1¼x2x24 inch, }
1⅜x2x25 " } $1.00 per pair.
1½x2x26 " }

"We continue the warranty, and for every spring which may fail from fair ordinary usage, we will furnish a new one. All sales at the above price will be for cash on receipt of invoice, or within 15 days. Hall, [Seneca D.] Kimbark & Co. Chicago, Feb. 5, 1873."

—Of which, by direction of that firm, from 3,000 to 5,000 copies were distributed to the hardware and iron trade in the Northwest. These price lists or circulars were so distributed by clerks of the firm, under its instruction to make such distribution general, and from lists prepared from books of the commercial agencies, or for the general purpose of issuing circulars by such clerks. They were mailed in an open envelope, to the address of the persons named in such lists. One copy in such course, came to the hand of George D. Hall, wholesale iron merchant of St. Louis. Upon its receipt, and on the 8th day of February, 1873, George D. Hall caused to be sent to Hall, Kimbark & Co., the following telegraphic order:

"St. Louis, Feb. 8, 1873. Mess. Hall, Kimbark & Co.:—Ship me two thousand pairs one and a half, one thousand pairs one and three-eighths Jenk's seat springs at one dollar. Answer. Geo. D. Hall."

This dispatch was received on the day of its date, and to the same the following reply was sent by mail on that day:

"Chicago, Feb. 8, 1873. Geo. D. Hall, Esq., St. Louis, Mo.: Dear Sir:—We are in receipt of your telegraphic order for 3000 pairs of seat springs, which being for a speculative quantity, we have submitted it to the manufacturers, who have an agency in your city, and may be affected by an overstock in your market. If they consent, we will ship them to you on following conditions: First. That they are declared by you to be bought for your own legitimate sales. Second. That none of them shall be sold or delivered to any manufacturer of seat springs, nor to any of their agents or representatives. Third.

That when springs are advanced you will promptly follow; and that the springs you buy from us shall not be used to undersell us. Our opinion is that there is no speculation in seat springs at this price, for it will probably hold a year, and knowing this, you may prefer to buy in smaller quantities. Our motive in placing them at a dollar is of course, a selfish one, and we propose to manage this affair so that the benefit shall fall in our own lap. Our precautionary measure may be unnecessary for your case, but before our circulars were mailed, our neighbors commenced a speculative run on us for springs, which we are obliged to check or defeat our own object. Yours respectfully, (Signed) Hall, Kimbark & Co."

The letter last referred to elicited the following reply by mail, which was received on the 11th day of February, 1873:

"St. Louis, Feb. 10, 1873. Messrs. Hall, Kimbark & Co., Chicago. Gentlemen: Yours 8th duly received. In reply we beg to state that the order, 3000 pairs springs, is made in good faith, and for our own legitimate sales in regular business, and not for account profit, purchase, or interest of any other person or persons whatever. We beg further to state that any advance that may take place in springs, will be taken advantage of by us for our own profit. Should springs advance to-morrow, we will likewise advance. Your circular was a free and open offer, without any reservations such as you now name; immediately upon receipt of which we entered the order; we have therefore a right to expect execution of same. The quantity ordered we do not think looks very much like anything suspicious, or like bad faith on our part; we are at least able to state that we made the order in the most perfect good faith, and for our own legitimate wants, which exceed 3000 pairs per six months. We suppose your circular to have been sent to us in perfect good faith; was it not? Very truly, Geo. D. Hall. We freely agree not to hand over or sell any of your springs to any manf. of springs—this addition to what we have written may be unnecessary. G. D. H."

Prior to the receipt of the above letter and on the 10th day of February, 1873, Hall, Kimbark & Co. mailed to George D. Hall the following, which was received by him on the following day:

"Chicago, Feb. 10, 1873. Geo. D. Hall, Esq., St. Louis, Mo. Dear Sir: We learn to-day that you have a contract with Messrs. P. & W., of this city, for 4,000 pr. seat springs, for this year's delivery, which is about double the quantity which you bought last year. Therefore we conclude that you will not expect us to ship the springs after you receive our letter of Saturday. We inclose telegram from the prest. of Cleveland Spring Co., in reply to our dispatch, asking whether we should accept your order. Yours truly, Hall, Kimbark & Co."

Telegram enclosed: "Cleveland, O., Feb. 8, 1873. Hall, Kimbark & Co.: Telegram received. Would advise not to sell; think it speculation. E. H. Bourne."

Other correspondence subsequently passed between the parties, but none of such character as to vary or modify the positions which they occupied on the 11th day of February, 1873. Subsequent to the issuing of the circular of February 5, 1873, the firm of Hall, Kimbark & Co. filled numbers of orders received in response thereto, selling in one week 32,000 pairs, and one which exceeded the amount mentioned in Hall's telegram. Hall, Kimbark & Co. could have filled his order if they had wished. The market price of seat springs at Chicago on and after February 14th, 1873, was about $1.45 per pair; prior to that date it remained at $1. The foregoing are the substantial facts of the above entitled case as they were shown upon the trial. Testimony of several leading Chicago merchants, to the effect that the custom of merchants was to accept or decline orders based upon similar circulars for such reasons as might prompt themselves, was excluded by the court as irrelevant to the issue.

TREAT, District Judge (charging jury). By the circular sent to plaintiff, Hall, Kimbark & Co. offered to sell to the plaintiff the articles mentioned on the terms therein stated. If in reply thereto the plaintiff ordered 3,000 pairs of springs on the terms stated, and if Hall, Kimbark & Co. had that amount on hand at the receipt of the order, and said amount ordered was not unreasonable, considering the trade in which said co-partnership was engaged, then said order of the plaintiff, when received, was notice that the offer by circular of Feb. 5th, 1873, had been accepted, and the contract was then complete. It was competent for the parties thereto afterwards to modify the terms, and if no such modification was made, then the plaintiff was entitled to receive the 3,000 pairs at the price stated in the circular of Feb. 5th, 1873. For a breach of the contract the measure of damages would be the difference between the contract and the market price of the springs. By "market price" is meant that at which plaintiff could have bought the same at the time of the final refusal to deliver, or within a reasonable time thereafter, in the open market.

And upon which a verdict for the plaintiff of $1350 was rendered. Upon overruling the motion for a new trial, Judge TREAT, without giving reasons, adhered to his former rulings.

Where the contract of parties has been expressed in writing, courts do not suffer the terms of the instrument to be varied or modified by parol or extrinsic evidence. This is a familiar rule of law applicable in all courts, and needs no citation of authority to support it. Equally familiar and sustained is

the rule that where, in a written contract or instrument, ambiguous or technical words or phrases are used, resort may be had to oral proof to explain them—not to vary or change. They stand as used, but their meaning may be the subject of inquiry. And upon such inquiry, the circumstances under which the terms were used, the purpose to be reached by the use of them may be shown. Having these rules in mind, the first suggestion upon reading the circular of February 5, 1873, is, are the words "our present price," as therein used, ambiguous, or have they a defined and settled meaning? For example, B writes to A, "At what rate will you sell me wheat?" A, in reply, writes, "My present price is $1.00 per bushel." In such case the language of A construed in reference to that of B is an offer to sell. On the other hand, B writes to A, "What are the rates at which wheat is selling?" A, in reply writes, "Our present price is $1.00 per bushel." A's reply is simply a quotation; he does not offer to sell, and it is not certain whether or not B wishes to buy or sell. The term then has no absolute import, its meaning depends upon the circumstances attending its use, and is therefore a subject of inquiry and explanation.

When, as in this case, used without reference to any former act or communication, when not addressed exclusively to one person, when issued in a public or general manner, when the instrument containing it falls into the plaintiff's hands as one of many, without immediate design on the part of the defendants, it was at least the duty of the court to submit to the jury the question of whether the circular constituted an offer on the part of Hall, Kimbark & Co. to sell to Geo. D. Hall. It is perhaps more reasonable to say that it having been shown to be a mere circular, the court should have instructed the jury that as a circular according to universal mercantile custom and practice, it should not, in the absence of aiding circumstances, be construed as an offer. To those accustomed to the ordinary newspaper advertisements, to the current quotations or lists issued by houses at centres of trade, this circular would in general have but suggested an intent to state the condition of the market as "we are selling;" "we quote," "we note the rate," and as furnishing a basis for a direct negotiation to be opened and consummated if both parties should thereafter concur. Hall, in his letter of Feb. 10, in which he twice refers to it as "your circular," evidently understood its character; yet the court allowed the jury to consider none of the conditions; to weigh nothing; it said to the jury, the circular was "an offer to sell:" the telegraphic dispatch was "an acceptance and order," and thereby closed all discussion. It also ignored the relations of the parties arising out of the letters of the 8th, 10th and 11th days of February, and the effect of the word "answer" in Hall's dispatch.

The questions of the measure of damages, or the reasonableness of the order are minor, and it is not proposed to discuss them here. It is difficult to see, however, why the measure of damages was fixed as of February 14th, and not as of an earlier date. The main question is not one of an acceptance by letter, but whether an offer was made by the circular, or if made, whether coupled with a reservation of right on the part of the senders to exercise their discretion in regard to filling any order which should be based upon it, and which discretion was given to them by virtue of long established usage—so far entering into and constituting an element of the circular, that the receiver was obliged to take notice of, and was bounden thereby. The custom of issuing similar circulars has arisen from the enterprise of merchants, and has found favor not only for its convenience, but also for its aid toward intelligent conduct of business. The rules which it is here contended should be applied upon such circulars, derive reason from the nature of them, and are a necessity to their existence. It is for the interest of all that courts should administer as usage has established them.

Case No. 5,939.

HALL et al. v. LITTLE et al.

[2 Flip. 153; 18 Alb. Law J. 151; 6 Reporter, 577; 2 Tex. Law J. 54; 24 Int. Rev. Rec. 314, 374; 3 Cin. Law Bul. 598, 942.] [1]

Circuit Court, D. Kentucky. April 13, 1878.

COLLISION—THE VESSEL IN FAULT — NEGLIGENCE —BURTHEN OF PROOFS—TRUE RULE AS TO NEGLIGENCE—COLLISION IN DAY LIGHT — PRESUMPTION — PILOT—ACCIDENT UNAVOIDABLE —WHAT NEGLIGENCE PLAINTIFFS MUST SHOW.

1. The result of the authorities, English and American, is that when a collision occurs between a vessel in motion propelled by steam or sail, and a vessel or other thing at rest, the vessel in motion is prima facie in fault; that it can excuse itself only by showing the cause of the disaster, and that it must appear on such showing that the cause was not one of the ordinary forces of nature, but something unexpected, as a sudden storm, an unknown current or unexpected derangement of machinery, which could not have been anticipated or guarded against by the exercise of ordinary nautical skill.

2. Neither in a civil nor criminal case does the burthen of proof ever shift. It remains on the party on whom it rested in the beginning.

3. When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

4. When the collision occurs in broad day light the legal presumption is that the accident was occasioned by the fault of the vessel in motion.

5. The proof as to how the pilot turned his wheel, and that his management was proper under the circumstances, by himself and others

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 6 Reporter, 577, contains a condensed report.]

—and that proper nautical skill was used, is a very different thing from showing that he was skillful, and in the emergency did, in his opinion, exercise his best skill and judgment. The fact that the pilot did what his best judgment dictated may prove his want of judgment, but not that the act was unavoidable.

6. To entitle plaintiffs to recover it is not incumbent on them to show the specific act of negligence committed by defendants. It is superfluous to inquire wherein the steamboat was not managed with proper nautical skill when the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision. It is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is for the defendant to show it.

[This was a suit in admiralty by Hall & Eddy against William Little and others to recover for the breaking and loss of a raft of logs in the Ohio river, attached to the Kentucky shore, opposite Louisville, with which the steamboat Brilliant, owned by the defendants, collided.]

John Mason Brown, Isaac Caldwell, and G. C. Wharton, for plaintiffs.

Bijur & Davie, for defendants.

BALLARD, District Judge. This cause was tried by the court without a jury, in virtue of a written agreement of the parties. On the 1st of August, 1875, the steamboat Brilliant, owned by the defendants, landed a heavy tow on the south side of the "Towhead" or island in front of Louisville, and about three hundred or three hundred and fifty feet below its head or upper end. The tow consisted of two rafts which were lashed together, and two barges. One of the rafts—that is, the one which lay out in the stream—was composed of five strings of logs, and the other of six strings, and in front of the rafts constituting a part of the tow were two barges loaded with coal and bricks. The tow was more than three hundred feet long, and was very heavy. It was, however, landed without difficulty and with safety, though the river was rising rapidly and there was a strong current running diagonally from the point or head of the "Towhead" to the Kentucky shore. The channel between the "Towhead" and the Kentucky shore is not much used by steamboats, but is extensively used as a safe deposit for flat-boats and rafts, which lie along and are attached to either shore. At the time the Brilliant landed her tow, as above mentioned, the plaintiffs had a large raft lying attached to the Kentucky shore, very nearly opposite to—perhaps a little below—the tow, and there were lying along the same shore below the raft of the plaintiffs many other rafts. There were also lying along the shore of the "Towhead" below the tow many rafts, the first of which was distant from the tow three hundred and six feet.

After the Brilliant had landed her tow in safety, and had notified the owners thereof, said owners, apprehending danger to their logs from the rising river, employed the Brilliant to remove a portion of the tow, that is, the outer raft or five strings of logs, to their mill, situated on the Kentucky shore about a mile below. The precise time when the Brilliant undertook to perform this task does not very satisfactorily appear; but, giving due weight to the conjectures of witnesses, and to all that transpired, I think it fair to assume that about one hour elapsed between the first landing of the Brilliant with its tow and this attempt.

In the performance of its undertaking the steamboat seems to have been utterly powerless. It seems to have been entirely at the mercy of the current. The pilot was unable to steer it. Though the raft lying below was plainly visible he could not or did not so steer his boat as to avoid it. He allowed his boat and tow to drift or be forced by the current against this raft. The consequence was that the boat, which was attached to the upper end of its tow, was driven across the channel and it and its tow coming in contact with the plaintiff's raft broke therefrom a large number of logs, many of which were never recovered. The value of the logs wholly lost amounts to $1,800.

The pilot of the Brilliant was possessed of competent skill, and the boat was, at the time of the accident, in all respects properly manned. The pilot testifies that he used his best skill to avoid the obstruction below, and to get his boat and tow into the current, but he failed. He had but a short time before so steered his boat in the same current as to manage and safely land a large and heavy tow, and he did not doubt his ability, with the same boat, to manage less than half the original tow in bulk and much less than the half in weight. There is no direct evidence as to the quantity of steam the boat was carrying. The engineer was not called to testify. He has not been for some time connected with the boat. He has gone South, and it seems his testimony could not have been procured without much difficulty, if at all. The pilot, however, testifies that the engineer was subject to his orders—that his duty was not to reduce the steam without his order, to by given by the ringing of a bell; that he gave no such order, and that when the boat moved off, it "felt and moved" as if it were supplied with sufficient steam. How the pilot steered his boat; what precise manoeuver he made does not satisfactorily appear. All that appears is that he steered his boat in that way which he thought was best calculated to bring his tow into the stream and avoid the obstruction below.

The plaintiffs claim that they have sustained loss through the negligence of the defendants. Their action is grounded on negligence, and in my opinion, the burden is on them to establish the negligence. But having shown the circumstances under which the injury was sustained; having shown that

their logs were lying at the shore; that the defendants' boat, in daylight, unaffected by any wind, ran into or came in contact with them, and inflicted the injury complained of, I think the plaintiffs have established a prima facie case of negligence, which is not affected by any testimony or explanation offered by the defendants. I do not say the plaintiffs, having shown certain facts, that the burden of proof which was on them in the beginning has shifted to the defendants. I have heretofore repeatedly said that, in my opinion, the burden of proof never shifts in either a civil or a criminal case, and that it remains on the party on whom it rests in the beginning. What I do say, however, is that the plaintiffs, having shown the circumstances under which the injury complained of was inflicted, I should conclude they have established a prima facie case of negligence which entitled them to judgment unless I shall conclude that the facts, proven by the defendants, established that the accident arose from a cause other than the want of care.

The true rule is, I think, to be found in the case of Scott v. London & St. K. Docks Co., 3 Hurl. & C. 596. It is there said that "when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

To the same effect are many other cases. In Bowas v. Pioneer Tow-Line Co. [Case No. 1,713], the court says, "The collision occurred in broad daylight. * * * The legal presumption * * * is that the accident was occasioned by the fault of the vessel in motion," etc. In the case of The Scioto [Id. 12,508], Judge Ware says: "It may be assumed as a general rule that when a collision takes place between a vessel under sail and a vessel not under sail, the prima facie presumption is, that the fault is imputable to the vessel in motion." See Strout v. Foster, 1 How. [42 U. S.] 89.

It is unnecessary to further illustrate this doctrine. Defendants' counsel admits its correctness; but they claim that they have met the plaintiffs' prima facie case. They claim they have shown that their boat was properly equipped and manned; that it was supplied with sufficient power or steam; that it was properly navigated; that there was a strong current running from the place where it lay to the place where plaintiffs' raft was lying, and that there was an eddy formed at the bow of their tow, the tendency of whose current was to force the head of the tow towards the island and the obstruction below.

I cannot admit that the plaintiffs have shown to my satisfaction all which they claim to have shown. It is not shown to my satisfaction that the boat was properly navigated, and it is very far from being shown that it was supplied with sufficient steam. It is one thing to prove by the pilot what he did, how he turned or managed his wheel, and by him and others that such management was proper under the circumstances, such as was demanded by the exercise of proper nautical skill, and quite a different thing to show that the pilot is skillful, and that in the emergency he did, in his opinion, exercise his best skill and judgment. To adopt the language of Judge Grier in the case of The Louisiana, 3 Wall. [70 U. S.] 174: "The fact that the pilot did what his best judgment dictated may prove his want of judgment, but not that the accident was unavoidable." It may prove that however skillful he was ordinarily he was on this occasion wanting in skill.

In respect to the boat being supplied with sufficient steam, it has been seen the defendants offered no direct testimony. The engineer to whom only the fact was known was not called. The pilot is the only witness produced by defendants who speaks to the fact. He, however, does not speak to the fact itself. He could not speak to it because it was not within his knowledge. He speaks only of other facts, on whose existence he bases his argument and conclusion that there was sufficient steam. On the other hand, Hall and other witnesses produced by the plaintiffs, testify to facts on which they base their argument and conclusion that there was not sufficient steam. They testify that the steamer did not have sufficient steam. They do not mean to be understood as saying that they examined the steam gauge. They mean only that from what they saw, the landing in safety by the steamer, a short time before, of a tow much heavier than that which it under took to move; the utter inability and failure of the boat to control the lighter tow; the drifting of the boat and tow with the current, they concluded that the steamer was powerless. In my opinion, the facts proven by these witnesses, which facts are confirmed by all the witnesses who have been before me, are quite as significant as those testified to by defendants' pilot, and, in my judgment, the conclusion deduced from them by the witnesses is much more fully justified that the conclusion of the pilot. Upon precisely similar testimony the supreme court in the case of Culbertson v. Shaw, 18 How. [59 U. S.] 586, assume the steamer Southern Belle was not supplied with sufficient steam.

It follows as a necessary deduction from the rules of law hereinbefore stated, that to entitle the plaintiffs to recover it is not incumbent on them to show the specific act of negligence committed by the defendants. It is, however, not necessary that such a conclusion should be left to be inferred; it is distinctly and directly declared by the supreme court, in the case of The Granite State, 3 Wall. [70 U. S.] 314, and by the court of exchequer in England, in the case of Skin-

ner v. London, B. & S. C. Ry. Co., 5 Exch. 786. In the first case the court say, "Under such circumstances we are not called upon to inquire wherein the steamboat was not managed with proper nautical skill. * * * Such inquiry is superfluous when the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision." In the latter case the court say, "it is not necessary for the plaintiffs to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is for the defendants to show it." But were it incumbent on the plaintiffs to trace the specific act of negligence which caused the collision, I should be inclined to say they have sufficiently done so. I should be inclined to say they have established, by the weight of evidence, that the collision arose from the fact that the steamer was not at the time supplied with sufficient power or steam. In no other way than on this assumption can I understand why the steamer did not yield to the skill of the pilot, if, indeed, he used his usual skill. In no other way can I account for the boat drifting as helplessly as the raft itself would have drifted without her.

But the defendants contend that their boat did not drift. They insist that it was driven by the cross current, which was due to the great height of water, against the plaintiffs' raft, in spite of the fact that it had sufficient steam and was skillfully navigated. They insist that, as it was not shown affirmatively that their boat was either unskillfully navigated or insufficiently supplied with steam, and it was shown that it was obliged to encounter a strong cross current, the court must ascribe the catastrophe wholly to the irresistible action of the current, and cannot impute to the boat any want of care.

The fallacy of this contention lies in the fact that the current, though violent, was not unusual. It was the usual current incident to the state of water. It was the same current on which the defendants had first landed their heavy tow, and which they had thus demonstrated might be guarded against by the exercise of proper skill. Boats which navigate the Ohio river, in either high or low water, must be held to a knowledge of the currents incident to the state of water, and they must be held responsible if they allow themselves to be driven by such currents to the infliction of injury to the property of others.

The books are full of cases which establish the correctness of this position. The Margaret, 94 U. S. 494; The Louisiana, 3 Wall. [70 U. S.] 173; The Granite State, Id. 310; Ure v. Coffman, 19 How. [60 U. S.] 56; Rogers v. Steamer St. Charles, Id., 108; New York & V. S. S. Co. v. Calderwood, Id. 241; The Clarita, 23 Wall. [90 U. S.] 13; The Sea Gull, Id. 165; The Great Republic, Id. 29; Culbertson v. Shaw, 18 How. [59 U. S.] 584; Niles Works v. Page, 24 How. [65 U. S.] 228; [Union Steamship Co. v. N. Y. & Va. Steamship Co.] Id. 313.

Notwithstanding this array of authorities to which many more, both English and American might be added, the counsel of defendants rely with apparent confidence on the case of The Farragut, 10 Wall. [77 U. S.] 334. The facts of this case are not stated either by the reporter or the court. The respective allegations of the libel and answer only are given. By the libel it was sought to recover of the Farragut for the benefit of the Buckeye Mutual Insurance Company the loss which its assured had incurred by the alleged careless navigation of the Farragut in towing the canal boat Ajax through the railroad bridge which spans the Illinois river at Meredosia. The answer denied the negligence and set out what occasioned the loss.

Both the circuit and district courts found that the defense was sustained by the evidence. The proctor of the libellants in his argument imputed to the boat only one act of negligence, to wit; its failure to have a proper lookout. The court throughout nearly the whole of its opinion confines itself to the consideration of the libellants' proposition, and, in the last paragraph, which consists of four lines only, it says "it is also evident that the loss was occasioned by the violence of the cross current, which was due to the great height of water prevailing at the time, and was therefore the result of one of the ordinary dangers of navigation."

It is quite evident the court considered that as the insurance company had insured the Ajax against the "dangers of the river," and the Farragut had, by its contract, exempted itself from responsibility for loss arising from the usual dangers and hazards of river navigation, the loss should be borne by the insurance company which undertook to pay such loss, and not by the Farragut, which had attempted by contract to exempt itself from loss occasioned by one of the ordinary dangers of the river.

The court does not discuss, and I do not think it even considered, how far it is the duty of steamers navigating our rivers to guard against the ordinary effect of known currents. I take it to be the result of all the authorities, English and American, that, when a collision occurs between a vessel in motion propelled by sail or steam, and a vessel or other thing at rest, the vessel in motion is prima facie in fault; that it can excuse itself only by showing the cause of the disaster; and that it must appear on such showing that the cause was not one of the ordinary forces of nature, but something unexpected; such as a sudden storm, an unknown current, or an unexpected derangement of machinery, which could not have been anticipated or guarded against by the exercise of ordinary nautical skill.

Here, as we have seen, the plaintiff's raft

was at rest; the defendants boat was in motion propelled by steam. There was no storm, no sudden wind, no derangement of machinery, no unknown current, in short, nothing to excuse the disaster. The irresistible conclusion is that the steamboat should be condemned as in fault, even if the evidence touching the specific act of neglect—its failure to have sufficient steam—were less satisfactory. The plaintiffs may have judgment for $1,800 damages and their costs, and the attachment granted by the state court before the cause was removed into this court must be sustained.

HALL (LYNN v.). See Case No. 8,641.

Case No. 5,940.

HALL v. NASHVILLE & C. R. CO.

[3 Am. Law T. Rep. U. S. Cts. 79.]

Circuit Court, E. D. Tennessee. April, 1870.

INSURANCE—COMMON CARRIER—TO WHAT EXTENT INSURANCE COMPANIES ARE SUBROGATED TO RIGHTS OF THE INSURED—NEGLIGENCE—DELIVERY.

1. Delivery is completed when there is nothing left to be done to finish the transportation.

2. Common carriers and insurance companies are alike insurers, and the former may be held responsible to the latter for loss occasioned by negligence.

3. Both the carrier and the insurance company are responsible to the owner or consignee, and, in case of loss, the owner or consignee may elect against which he will proceed.

4. If he recover of the insurance company, and the company seeks to indemnify itself by proceeding against the carrier, it must show negligence in order to recover.

This was an action brought by the plaintiffs to recover the value of forty-one bales of cotton, part of two hundred and fifty-five bales shipped from Macon, Georgia, destined for Louisville, Ky. The cotton was the property of Rogers, Garrett & Co., and shipped by them from Macon to care of the agent of the Louisville and Nashville Railroad at Nashville, and ultimately consigned to Hall & Long, factors at Louisville, Ky. The Macon and Western Railroad executed their receipts for the cotton, and recited that the cotton was marked "R. G. & Co., and shipped care of agent Louisville and Nashville Railroad Company, Nashville, Tennessee. Messrs. Rogers, Garrett & Co. notified Hall & Long of the consignment of the cotton to them, and instructed them to insure, which they did. The policy was an open one, effected by Hall & Long with the Kentucky Marine and Fire Insurance Company of Louisville, Ky. It did not appear from the proof in whose name the policy was taken, but it did appear that Hall & Long received the insurance upon the lost cotton from the insurance company and paid it over to Rogers, Garrett & Co., the owners. The two hundred and fourteen bales not destroyed passed through Hall & Long's house. It further appeared from proof that Rogers, Garrett & Co., in their letter notifying Hall & Long of the consignment of the cotton to them, instructed them to sell at fifty-five cents or to ship to New York, and to insure the cotton from place of shipment to destination. No bill of lading was given, or none was in proof, and no receipt other than the one above described. A pencil memorandum of the manifest was in proof, which showed marks "R. G. & Co., to Ag't of L. & N. R. R. Co., Nashville," number of cars, &c. The cotton was shipped from Macon in October, 1865, was delivered to the Western and Atlantic Railroad, at Atlanta, Ga. The cotton reached Chattanooga on the night of the 24th of October, and was run in open flat cars into the Western and Atlantic Railroad yard. On the morning of the 25th, at about 9 o'clock it was run out on the Y by an engine of the Western and Atlantic Railroad. The Y was built and owned by the Nashville and Chattanooga Railroad, and was the place where freights were delivered by both roads. It was the custom, after cars were run on the Y, for the road receiving the goods to take the cars with their engine to the transfer platform, where the goods, in the presence of transfer clerks, were checked and transferred to their cars. About three hours after the cotton was run on the Y by the Western and Atlantic Railroad engine, a train of cars of the Nashville and Chattanooga Railroad ran by the cotton while the engine, with open stack and throttle, was exhausting and working heavily. Proof was that it was customary for engines, in running by cotton on open cars, to shut off steam, as it was hazardous to run by with steam on and with open stacked engines About fifteen minutes after the Nashville and Chattanooga Railroad train passed, the cotton was found to be on fire, burning rapidly. The hands of the Nashville and Chattanooga Railroad separated the cars and extinguished the fire, but not until the greater part of forty-one bales was destroyed. The injured cotton was taken possession of by the agent of the Nashville and Chattanooga Railroad, and sold by him. The freight on the burnt cotton was paid by the Nashville and Chattanooga Railroad. These are substantially the facts of the case.

The declaration contained three counts. The first and second counts alleged a delivery to the Nashville and Chattanooga Railroad, and failure to transport safely to Nashville. The third count alleged that the Nashville and Chattanooga Railroad, while the cotton on open cars was standing on the Y, carelessly ran a heavy train of cars near by, and set fire to the cotton with sparks from their engine, through which gross negligence the cotton was destroyed.

TRIGG, District Judge (charging jury). This is an action which it is very important

you should decide correctly. It is an important case—important to the defendant as measuring the liability which the law imposes upon railroads as common carriers, and important to the public as fixing their rights as shippers. The law imposes upon railroads as common carriers great responsibilities. They have great privileges, as you well know, and in consideration of such privileges the law holds them to a strict account for all property delivered to their care. They are excused from accounting for the property injured or destroyed by the act of God, or by public enemies; but the law does not excuse them from liability for any other cause. While transporting goods they may be overcome by a superior force of robbers or plunderers, and the goods be taken from them, but that will not excuse them. It may seem hard to you that they should be held to such strict accountability, but that is law.

In this case the plaintiff claims a recovery from the defendant upon two grounds. In the first and second counts of the declaration it is alleged that the cotton which was destroyed was delivered to the defendant, and was then destroyed by the carelessness and negligence of the defendant. And, second, that it was delivered, but was not safely transported to Nashville, as the defendant was bound to do. Now, in both counts, a delivery of the goods is alleged to have been made to the defendant, and you must therefore be satisfied from the proof that such delivery was made, or else you can not hold it responsible. It is for you, gentlemen of the jury, to determine what these facts are that tend to show a delivery; but what it takes to constitute a delivery is a question of law which the court must determine. In order to constitute a delivery in this case, it must appear that the Western and Atlantic Railroad did everything that was necessary on its part to complete the transportation of the cotton in question. What these two roads considered a delivery of freights from one to the other, you may determine in two ways. To make a delivery upon the Y, you must be satisfied that there was a special contract or agreement to that effect. No attempt has been made here by the plaintiffs to prove any such contract, and you therefore cannot conclude that there was any such agreement to that effect. But you may find, if the facts warrant it, that an agreement, founded upon custom and usage, existed, by which the delivery of goods upon the Y was treated by both roads as a delivery. You may infer this from circumstances. If it appears to you that the Y, upon which the cars were run, was owned and constructed by the N. & C. R. R. for their convenience, and for the convenience of the other roads, and that it was the custom of the two roads, when freight was to be delivered by one to the other, to place the cars containing it on this Y; this would be a circumstance to show that there was an understanding that a delivery there was a delivery into the possession and control of the road which was to receive it. It may often happen that some such a place for running cars is agreed upon by connecting roads for the convenience of all parties; for it frequently occurs that when the one is ready to deliver, the other may not be ready to receive, and vice versa. Now, under such circumstances it may, and perhaps often does happen, that common carriers agree upon some place where cars shall be delivered, until it is convenient for them to unload them. If it shall appear from the proof that when cars were thus left in the Y, it was the custom for the road receiving them to run those cars with their own engine to their transfer platform, and there with their own hands and clerks, to unload the cars and check and transfer the goods, that would be a strong circumstance tending to show that the placing of the cars on the Y was by usage and custom considered a delivery, and an agreement to that effect might be inferred. If it shall appear to you, gentlemen, that when the road to deliver goods was in the habit of running cars down on the Y, and that when they were left there that the delivering road did nothing more in the way of moving the cars, or handling the freights, that would be a circumstance from which not only to infer an agreement, but also tending to show that a delivery on the Y was considered a complete delivery. The unlocking of cars and counting of packages were minor things. They were observed to protect the company receiving freights, from loss, etc. It did not effect the delivery, for of course no goods were delivered except such as were contained in the cars. It could hardly be said that, because some parcels were missing, there was no delivery at all. The delivery was good only as to the goods actually in the car. The delivery was complete when there was nothing left to do to finish the transportation. The unlocking of cars and checking on the books were minor acts which did not effect the delivery. Now, if there was a delivery, and the cotton was destroyed while it was in the defendant's possession, the plaintiffs are entitled to recover on the first and second counts, unless the defendants show it was destroyed by the act of God, or the public enemy—which is not claimed. If you are satisfied, gentlemen of the jury, that there was no delivery, but that while the cotton was standing on the Y the defendant run its cars and engines by it in such a careless manner that the cotton was set on fire and destroyed, then the plaintiffs would be entitled to recover. But before you can find for the plaintiffs you must be satisfied that the defendant was guilty of negligence in running its engine by the cotton, and again, that the cotton took fire and was destroyed from the sparks which flew from the defendant's engine. If it took fire the day before, or at any time, from the care-

lessness of the Western and Atlantic Railroad, either from its engine, or because it run the cotton out on the Y, and concealed it by cars, and failed to give the defendant notice that the cotton was there, so it might be on its guard, then, of course, you could not find for the plaintiffs.

As to the legal questions raised by the counsel for the defendant upon the right of the plaintiffs to maintain this action, I have had, I confess, serious doubts. I have given the subject, however, all the care and investigation I could, and will give the conclusions to which I have arrived. It is a well settled principle of law that a consignee of goods is prima facie the owner, and can maintain an action for any damage done to them while in his possession, or while in transit. He is by law considered the owner of the goods, and could protect them. He could, even if not the owner, sue for damage done to the property while in possession or in transit, but the recovery would be for his benefit only to the extent of his interest. If the recovery exceeded his interest, he would hold the balance in trust for the owner of the goods. But the consignee is not the only one who could sue. The owner of the goods has a right of action for damages done to his goods while in transit. He can maintain an action therefor as well as the consignee. It is also well settled in law, that an insurance company is subrogated to the rights of the insured. But the insurance company when so subrogated can not always recover where the insured might recover. For example: common carriers are carriers and insurers both. They are insurers against every loss but such as result from the act of God or the public enemies. They are responsible for every loss resulting from their own negligence. They are in law, liable to shippers for losses resulting from every cause save the acts of God or public enemies, whether such loss result from their negligence or not. But I do not think an insurance company, in such a case as this, can recover from a common carrier for any losses, except those resulting from the negligence of the carrier. That is, a plaintiff—a consignor or consignee—who sues for the use of an insurance company, cannot recover from a common carrier unless the damage complained of resulted from the negligence of the carrier. They are both insurers. If the insurance company could be subrogated to all the rights of the owner, and recover of the carrier for all losses, whether arising from negligence or otherwise, then the former would really be no insurer at all, or rather would incur no risk as such, except the mere insolvency of the carrier. For it would only have to pay the losses to the assured, if called upon, and then at once recover them back from the carrier. What does the insurance company insure against, if it has such remedies? The carrier should be responsible to insurers for losses resulting from negligence, for that is something against which it can guard; but for other losses not arising from negligence, one insurer cannot recover of another. Such a proposition, in my judgment, is not in accordance with the principles of common justice, and ought not to be recognized. The carrier and the insurance company are both insurers for the safe delivery of the goods, and in the event of their loss or destruction, without any fault or negligence on the part of the carrier, I cannot see upon what fair principle of right it is that the carrier shall be the only sufferer. Both the carrier and the insurance company are paid for the risk which they take, and, in case of loss, the party assured may look to either for indemnity. If the carrier exercise proper care and diligence in respect to the goods in his charge, and the same should, without any fault or negligence on the part of the carrier, be injured or destroyed, why should the carrier be regarded in any light different from the insurance company. The carrier has done no wrong, and the injury to the property results from circumstances over which he had no control and could not have provided against. The carrier, in such case, is as innocent of wrong as the insurance company, and in equity and good conscience they should both stand upon an equal footing. In case of loss under such circumstances both would be liable to the owner for indemnity, the carrier upon his undertaking as such, and the insurer upon his special contract for indemnity. The owner of the goods lost may make his election, and assert his right to indemnity against either. And after the election is made, and the insurance company pays up the losses, I am at a loss to perceive upon what principle of equity it is that the insurance company can claim to be reimbursed by the carrier, who is as blameless in respect to the injury as the insurance company. They are both paid for the risk they take, and where the one is not more at fault than the other, I cannot see how, in equity, the carrier should be required to reimburse the insurer any more than the insurer should be required to reimburse the carrier.

If, therefore, the jury is satisfied from the evidence that the cotton in dispute was burned by the carelessness and negligence of the defendant, they should find for the plaintiffs; but if they shall be satisfied that the loss was occasioned, not by any negligence on the part of the defendant or its agents, they must return their verdict in favor of the defendant. The plaintiffs in this case can maintain this action for the use of the insurance company, to the extent of their interest, and to that extent can recover of the defendant, if this loss was the result of negligence on the part of the defendant, but they can recover no more. It does not appear what the extent of that interest is. There is nothing in the proof from which you can determine this fact, and I am therefore com-

pelled to decide that the plaintiffs, under the circumstances, and upon the proof, cannot maintain this action, and you must therefore find for the defendant.

The plaintiffs, before the jury returned their verdict, in view of the charge of the court and the facts developed by the trial, took a nonsuit.

HALL (NELSON v.). See Case No. 10,107.

HALL (OFFUT v.). See Case No. 10,447.

HALL (OFFUTT v.). See Cases Nos. 10,449 and 10,450.

HALL (O'HARRA v.). See Case No. 10,468.

Case No. 5,941.

HALL v. The PAQUET BOT DE CAYENNE.

[27 Leg. Int. (1870) 364;[1] 7 Phila. 550.]

Circuit Court, D. Delaware.

SALVAGE—COMPENSATION—DERELICT.

[1. The old rule or usage giving to salvors one-half the value of the property saved in cases of derelict is no longer in force; and the amount is to be determined, in the sound discretion of the court, upon the same considerations as in other cases, except that the fact of the property being derelict makes out a prima facie case of extreme danger of total loss, and thus enhances the reward.]

[2. Where a schooner, without special risk or danger, or unusual expenditure of skill, picked up and towed in a derelict bark found near the mouth of Delaware Bay and drifting toward the shoals with the tide, but under a reasonable probability of being again carried to sea, before she struck, by the adverse tide, where she would in all probability have been saved by some of the numerous passing vessels, an allowance of $1,500 salvage on a valuation of $9,570.90, after payment of all costs and expenses, is a reasonable amount, and the award of one-half the valuation by the district court was excessive.]

Appeal from the district court of the United States for the district of Delaware.

[In admiralty. Libel by Hall and others, being the owner, master, and crew of the schooner Joseph P. Comegys, against the derelict barque Paquet Bot de Cayenne, Bordeaux, to recover salvage. The district court allowed the salvors one-half the value of the derelict, and the claimants and underwriters appealed therefrom. Modified.]

T. F. Bayard and James Gray, for salvors.

Henry Flanders, for owners and underwriters.

STRONG, Circuit Justice. That the libellants are entitled to salvage is plain, and indeed it is not controverted. The only question for my consideration, is what sum should be awarded, and this I must determine without the aid of any fixed rule, and in view of the circumstances of the case. It is doubtless true that salvage service is considered by courts of admiralty as eminently meritorious. In determining to what reward a salvor is entitled, he is never treated as a mere creditor for work and labor done. From a regard for public policy, and to encourage brave and humane efforts to save property at hazard on the seas, the long-settled practice has been to make allowances for salvage services much beyond the intrinsic value of the services themselves. Other things are considered, and enter into the estimate of the fitting allowance. Thus the value of the property saved; the degree of danger for (from) which it has been rescued; the hazard to the lives or property of the salvors incurred in their efforts to save; reasonable apprehensions of danger to life or property; the skill and labor put forth, and the duration of the service, are all proper subjects to be weighed in fixing the amount which should be decreed. In view of all these things, and with regard to the circumstances of each case, a sound discretion is to be exercised, and care taken that while the allowance made shall be liberal, it shall also be reasonable; that while the salvors shall be compensated for their labor, and encouraged by reward for their heroism and humanity, they shall not be allowed to profit inordinately from the misfortunes of others. Such an adjustment is to be sought for in all cases. It was undoubtedly, at one time, if not a rule, at least an usage, to give to salvors one-half the value of the property saved, when that property was derelict, or had been abandoned; and many cases have been decided on that principle. But I regard it as settled now, both in this country and in England, that the extent of the reward is to be measured in derelict cases as in all others. I will not go over the cases. It is sufficient to refer to The Florence, 20 Eng. Law & Eq. 607, and Post v. Jones, 19 How. [60 U. S.] 150. In the former of these cases, Dr. Lushington said "that the reward in derelict cases should be governed by the same principles as other salvage cases,—namely, danger to property, value, risk of life, skill, labor, and duration of service." He added "that no valid reason can be assigned for fixing a reward for salving derelict property at a moiety, or any given proportion, and that the true principle is adequate reward according to the circumstances of the case." With this the supreme court of the United States concurred in Post v. Jones [supra]. The doctrine appears to me to be eminently reasonable and just. I have said danger is one of the reasons why salvage is allowed, and that it is measured in part by the degree of danger. There often is as much danger of total loss of a vessel not abandoned, as there is of total loss of a derelict, and there is as much hazard to the salvors in the rescue of one as in salving the other. It is not easy to see why the reward, so far as it is enhanced by considerations of the danger, should not be computed in the same way. Similar remarks may be made respecting every consideration that en-

[1] [Reprinted from 27 Leg. Int. 364, by permission.]

ters into fixing the amount of salvage. I agree that always it is an important inquiry whether the property saved was a derelict, if for no other reason than this, that, if it was, there is a prima facie case of extreme danger; but still the circumstances of the case are to be considered. There are very different degrees of danger of final loss to the owner in case of derelict. A vessel abandoned in a land-locked harbor is more likely to be recovered by the owners than one abandoned in mid-ocean, or on a rocky and stormy coast. Drifting ashore is a means of safety to some species of property, while to others it is certain destruction. How can salvage in these cases be equally meritorious, or how can its value be determined by a fixed rule applicable to them all alike?

The facts of this case, as they are exhibited by the pleadings and proof, are easily understood. The libellants are the owner (and) the master and crew of the schooner Joseph P. Comegys. On Sunday, the 17th of September last, on her way from Boston to her port in the Delaware, when she was approaching the mouth of Delaware Bay, and was about twenty-five miles from the New Jersey coast, the barque Paquet Bot de Cayenne, Bordeaux was seen by her master about ten miles distant, and between the schooner and the coast. This was about nine o'clock in the morning. The wind was blowing a wholesale breeze from east-northeast, and a considerable sea was running. The wind and the sea had been so heavy the night before that the schooner was compelled to lay to, but on Sunday morning the wind moderated, though continuing to blow a stiff breeze. Something in the position or movements of the barque attracted the attention of the master of the schooner. His testimony is that he "thought she was not in the position she ought to be; that is, she was in an unusual position for a square-rigged vessel; that a vessel drawing a big draught of water never goes in where she was; and that because he thought her in danger he approached her." The schooner reached the barque about ten o'clock in the forenoon, when she was found to be entirely abandoned. Her main-sail, main-top sail, fore-sail, and lower fore-top-sail were set. Two stay sails had also been set, but they were principally blown away. The port side of the upper fore-top-sail was started. Her bowsprit was gone, and, with the hear-gear attached to it, was hanging under her port bow, dragging in the water (the head-gear being held by chains and ropes). The mate of the schooner and one seaman were put on board. The evidence is, that at this time she was headed towards the great shoals, off the Capes, then about eight miles distant, over which the sea was breaking; that she was moving about two or two and a half miles an hour, and that if she had gone upon the shoals she must have been broken up. After the mate and seamen went on board it was found that the barque had little water in her, and that she would obey her helm. An attempt was made by the schooner to tow her so as to avoid the shoals, but the towing line broke. She was, however, gradually worked in some ten miles from the place where she was picked up, and anchored in six fathoms water about four miles from the Delaware breakwater. This was at three o'clock in the afternoon. A signal was then set on the schooner for a tug, and about six o'clock in the evening the tug America came out. After some negotiation, a bargain was made with the tug to tow the schooner and barque up to quarantine for five hundred dollars. The barque was then taken in tow and brought up to New Castle without serious difficulty, the mate and the seaman remaining on board of her. The schooner got under weigh at ten o'clock; and (the wind then blowing heavily north-northwest) put into the breakwater, and was compelled to let go both anchors. Undoubtedly the barque was a derelict when she was boarded by the libellants. Unless picked up by them, or some other vessel, she would inevitably have been totally lost. Whether she would have gone upon the great shoals between the Capes is not clear to my mind. As I have stated, when the mate went on board of her at ten o'clock, the wind was blowing freshly east-northeast. This would have carried her outside the shoals towards the open sea or the Delaware coast. But the tide was running west, and this carried her toward the shoals. The tide continued to flow west until half past two. What the combined effects of the wind and tide would have been is not quite clear. The captain and mate of the schooner express the opinion that she would have drifted on to the shoals, and one of the seamen testifies that if she had held on the course on which she was going when boarded, and had the wind and the tide remained the same, she would have gone ashore had she not received assistance. On the other hand, Captain Marshall, of the pilot boat, Thomas Howard, who saw where the barque was when she was boarded, and who came up to offer assistance, states that there was not time for her to drift onto the shoals before the tide turned, and that as the wind veered to the northward with the change of tide, she must have drifted out to sea. Captain Young and Captain Duncan, both experienced navigators, and well acquainted with the coast and shoals along the Capes, express the same opinion. They, however, judge not from personal observation of the position of the barque, but from the statements made by the other witnesses respecting her position. In either event, whether she would have gone upon the shoals if not assisted, or whether she would have drifted past the shoals and gone out to sea, there was no inconsiderable chance of her rescue without the agency of the Joseph R. Comegys. She was discovered in the morning. She was near the entrance to Delaware Bay, in plain sight of the track follow-

ed by many vessels. Other vessels were passing into and out of the bay during that Sunday. She was without any helmsman, dragging her bowsprit and head-gear in the water, coming up into the wind, shaking a little and falling off. It is fairly to be presumed that her strange movements would have attracted the attention of other vessels than the Comegys, in time to enable them to aid her, before she could have struck the shoals, or drifted entirely out to sea. In fact, she was seen from the pilot-boat Thomas Howard almost as soon as she was discovered by the libellants, and was overhauled by the boat three quarters of an hour afterwards. I cannot but feel, therefore, that though she was a derelict, hers was not a case of the extremest danger. Her situation would have been much more hopeless had she been abandoned in mid-ocean, with little chance of being seen by passing vessels. I am not unmindful of the language of Judge Story in the case of The Henry Ewbank [Case No. 6,376], reiterated in Evans v. The Charles [Id. 4,556]. In speaking of the possibility of the derelict's having been saved without the intervention of the salvors, Judge Story said: "The fact that she was thus saved is clear; the presumption that she might have been otherwise saved * * * is mere matter of conjecture, in nubibus. It is not the habit of any courts of justice to yield themselves up in matters of right to mere conjectures and possibilities; and least of all do courts of admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might in some possible way, have been saved from all calamity, and therefore, that the salvors have little or no merit." This was said in a case where the derelict was found in mid-ocean, in latitude 40, and longitude 5° 4′ W., where she had been drifting about 19 days after her abandonment, and where there was but a very remote possibility of her being seen had the salvors neglected to aid her. I agree that in such a case the chance of rescue by other salvors, was too small to be considered. And I agree that the merit of salvors in rescuing a derelict is not less, because it may happen that a rescue might have been effected without their agency. But if danger of the loss of property is to be considered in determining what reward shall be given to salvors, if the reward should be in any degree proportioned to the danger, it is impossible to hold that it is immaterial whether the derelict be found in an unfrequented neighborhood or in the midst of a fleet surrounded by those who have the power to help, and who are urged to render assistance not only by motives of common humanity, but by the prospect of securing a liberal reward. I must therefore be influenced by what I believe to be the fact, that there was a very considerable probability the Cayenne would have been saved by some vessel had the schooner of the salvors passed her by. Captain Young gives me, as his opinion, that she was in the usual track of commerce, and that there were certainly seventy-five chances out of an hundred she would have been fallen in with before 12 o'clock that day, though he adds, it is not every captain who picks up a vessel. Derelict, then, as she was, she was not in the extremest danger of destruction. The duration of the service rendered by the salvors was brief, not longer than five hours from the time the Cayenne was boarded until she was anchored; though the Joseph P. Comegys remained by her until six in the afternoon, when the tug took her in tow, and the mate and one seaman went in her from the Capes up to New Castle. The danger incurred by the salvors was slight. Their vessel was worth from sixteen to eighteen thousand dollars, but I cannot discover that she was imperilled, unless putting two men on the barque left her short of hands. And she was very near the breakwater, a place of safety. Nor do I see that there was any extraordinary risk of life, or expenditure of skill and labor, or any well-grounded reason for apprehension by the salvors of danger to themselves or their property.

Entertaining such opinion of the law and of the facts of the case, I am unable to concur with the learned judge of the district court in fixing the sum which should be awarded for salvage. The appraised value of the property saved is $9,570.90. Of this the district court awarded to the libellants a moiety, after first deducting from the entire amount, the costs of the proceedings and all expenses incurred in the seizure and detention of the barque, and in the discharge of the cargo, and in the appraisement of the vessel and cargo; and also all duties imposed by the laws of the United States upon the merchandize composing the cargo. I have the highest respect for the judgment of the judge of the district court, and in a matter resting so much in sound discretion I would not make an award different from his without reasons that I must consider very cogent. But I am thoroughly convinced the sum allowed for salvage was too great. The salvors assumed to pay five hundred dollars to the tug America for towing the barque from the place where she was anchored to quarantine. That sum may properly be considered as expense incurred in effecting the salvage. I think fifteen hundred dollars in addition is a liberal and reasonable allowance. I therefore direct that the costs of the proceedings in this and the district court, including the cost of the appraisement made, be paid out of the money deposited in the registry, and that the sum of two thousand dollars be allowed thereout to the libellants for salvage.

Case No. 5,942.

HALL v. PEROTT et al.

[Baldw. 123.]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

PRACTICE—JURY LIST VENIRE.

If a special jury list has been struck by the parties before the marshal, and the list has been lost by him, so that no venire had issued, the court will direct the striking anew from the same list, and a venire to issue returnable ten days thereafter during the term.

[Cited in McDermott v. Hoffman, 70 Pa. St. 49.]

This case was marked for trial by special jury, under a rule for trial or non pros. at the present term, and a list of the special jurors had been made out and regularly struck before the marshal, but was lost by accident before it was returned to the office of the clerk, so that no venire issued. On a copy of the same list of jurors which had been struck being found, Mr. C. J. Ingersoll, for the defendants [Perott and Cabot], moved for and obtained a rule to show cause why the list should not be struck, and a venire issued, returnable during the term. On the argument of the rule:

C. J. Ingersoll, for defendants.

Under the rule for trial, or non pros., the defendants have a right to a trial at this term, unless the plaintiff assigns a legal reason for continuance. The loss of the struck list was an accident by which the court will not permit him to suffer, when a remedy is in their power. By the twenty-ninth section of the judiciary act [of 1789 (1 Stat. 73)], jurors may be returned from time to time as occasion requires. 1 Story, Laws, 63. The thirty-second section gives the court unlimited power to make such amendments, and cures such defects of process as to meet the justice of the case. Here a jury had been struck by both parties, the list whereof the marshal was bound to return to the clerk, for a venire to issue pursuant to the state law providing for special juries, which was adopted by the act of 1802. 2 Story, Laws, 862 [2 Stat. 156]. The act of 1785 gave either party a right to trial by special jury, and ordered those not struck to be summoned. 2 Dall. Laws, 267, § 17. The mode of striking therein prescribed was complied with, which gave the parties a right to have the jurors before the court; no venire is necessary, a summons to the juror is sufficient. 3 Bl. Comm. 353; Troub. & H. Pr. 172, 176. The want of a venire is cured by verdict. Cro. Eliz. 259, 429. Where one is required, a venire facias de novo will be awarded where the former one is defective. Cro. Jac. 670. Defects in the venire are amendable by the statute of jeofails. Tr. P. P. 63, 74; 1 Bac. Abr. 99; Tidd, Prac. 277; Selw. N. P. 432, introd. 68. The only use of a venire is as a writ to the sheriff to summon a jury; but under the state law, the jurors are summoned before the venire issues; it is a mere matter of form; if jurors do not attend, the court may fine them, and may, in all cases where there is no jury, direct a tales,—1 Story, Laws, 64, § 29 [1 Stat. 88],—as well of special jurors as others,—Anonymous [Case No. 443]. It is enough if one juror attend. Cro. Jac. 316. If none attend, a habeas corpora juratorum with a decem tales is awarded. Cro. Eliz. 502. If when the tales is awarded, the panel stands, but is afterwards quashed, the tales may be for the whole jury. 10 Coke, 102b, 104b. In this case some, if not all the jurors do attend, and the court may direct them to serve. A venire, if necessary, may be returnable during the term. The court may adjourn from time to time, till the next term. In England the venire is not of course returnable on any return day, but is at the discretion of the court. So it was held in this court in Lushington v. Smith, the marshal, in 1816, where the venire and return were set aside on motion, and a venire facias de novo directed, returnable during the term. Since the repeal of the eighteenth section of the state law of 1785, the time of striking a jury is a matter to be regulated only by practice, a rule of court, or according to its discretion.

Mr. Lowber and Mr. Chauncey, for plaintiff.

A venire is requisite by the acts of congress,—1 Story, Laws, 63 [1 Stat. 88],—and by the law of the state,—Purd. Dig. 437. The jurors must appear in pursuance thereof, or the court cannot try the cause for the want of jurisdiction; if no juror so appears, there can be no tales awarded, because "non sunt quales." 10 Coke, 104b. Though a defective venire or its defective execution is amendable, there can be no amendment in this case, as there is nothing to amend, and nothing to amend by; there is no precedent for what is now asked. In Lushington v. Smith, there was a venire returned, the jurors attended; when it was set aside, an order was granted for a new one, but it never issued, and as it does not appear that the matter was argued or opposed, it may have been by consent. In case of a special jury the venire issues for the twenty-four not struck off, but here none can issue for the names are not known, nor can the court amend so as to supply what is lost by accident, or put on record a writ which never issued; the variance of one name would be fatal, and the court cannot order the plaintiff to strike; it must be done according to the rules of court. The twenty-ninth section must be construed with reference to the state laws then in force; the word "occasion" refers to the regular session of the court for the trial of issues, not at special sessions to be directed by them. The process act—1 Story, Laws, 257 [1 Stat. 93]—adopts the forms of writs and process used in the states, which the federal courts must follow as a limitation of their powers.

By the laws of the state there are certain return days for all process. 1 Dall. Laws, 171; 3 Dall. Laws, 769. Venires are made

returnable to the first day of the term. 2 Dall. Laws, 262, etc. The seventeenth section, which adopted the English practice then prevailing as to the striking special juries, directs them "to be summoned as aforesaid," which means by a venire so returnable on a general return day. Tidd, Prac. 839. A distringas; or habeas corpus juratorum, never issues for trials at bar; the jury are always called by the appropriate writ, returnable the first day of the term, or on the last return day. 3 Bl. Comm. 353, 354; Tidd, Prac. 836; Salk. 454; 2 Ld. Raym. 1143. As there is no act of congress to authorize the court to make special return days, they must be governed by the practice prevailing in 1789,—Craig's Case [Case No. 3,325],—and cannot direct special returns of jury process,—[U. S. v. Hamilton] 3 Dall. [3 U. S.] 17, 18 [U. S. v. The Insurgents] Id. 513. Whenever the law refers to a return of process, it means the general return days. When the venire goes, the party has a right of trial by jurors not expunged at the striking according to the rule; the court can enforce no other mode than what it has prescribed; of course there can be no new striking during the term. The old state practice was to have a venire in each case; now a general venire issues, but the forms are the same; they are returnable on the general return day. Gray. Forms, 314, 315. It is a writ directed to the sheriff before the term, which the court cannot direct to be filed as a matter of form, as a fieri facias to ground a testatum,—[Ewing v. McNair] 2 Dall. [2 U. S.] 269,—or a venire to ground a distringas,—4 Yeates, 185. The common law gives no discretion to the court to make special returns; nor does the twenty-ninth section, which gives a discretion only as to the place whence the jury shall come, in order to secure an impartial trial. The application now made is in effect to ask the court to appoint a special session for the trial of the cause, which the court cannot do; this power is applied to criminal cases only. 1 Story, Laws, 54, 55 [1 Stat. 74].

The opinion of the court was delivered by BALDWIN, Circuit Justice.

By the twenty-ninth section of the judiciary act, jurors in all cases to serve in the courts of the United States, shall be designated and formed according to the laws of the states, so far as is practicable. Special juries were accordingly selected by the clerk till the act of 1802 transferred this power to the marshal, who was directed thereby, "to return special juries in the same manner and form as by the laws of the respective states the said clerks were required to return the same." 2 Story, Laws, 862 [1 Stat. 156]. By this act the whole duties of the clerk in relation to special jurors, were devolved on the marshal, including the return. By the seventeenth section of the jury law of this state, passed in 1785, either party in a civil suit might enter a rule for trial by special jury, to be struck before the clerk of the court, "in such manner as special juries have heretofore been struck, which jury so struck shall be summoned in manner aforesaid, and shall attend and serve under such penalties," &c. By a proviso in the eighteenth section it was required that the jury should be struck thirty days before the return day of the process for summoning them; the service of a copy of the rule for a special jury, and a copy of the list of jurors, and notice to attend the striking, was also directed. 2 Dall. Laws, 267, 268. This section was repealed by the act of March, 1789; Id. 691. By the same law the right of a defendant to a special jury in the supreme court or at nisi prius, was confined to cases where the title to real estate was in question, or an affidavit of defence filed. The seventeenth section of the act of 1785 is therefore no longer controlled by the proviso, and furnishes the rule by which special juries were to be designated and formed at the passage of the judiciary act; it also remains the rule under the act of 1802, as no state law intervened. The state law of 1805, relating to juries, is a process act, not binding on the federal courts, unless it has been adopted by a rule of court. [Wayman v. Southard] 10 Wheat. [23 U. S.] 20, 51, etc. The rule of this court is silent on this subject; we must therefore be governed by the law of 1785. They are to be struck as they have "heretofore been struck," that is, according to the English practice and the statutes (3 Geo. II.; 6 Ruffh. St. 25, etc.; 24 Geo. II.; 7 Ruffh. St. 327), except so far as it is altered by the repealing act of 1789. In the common pleas, a rule for trial by special jury was of course. Barnes, Notes Cas. 449, 61, 88; 5 Durn. & E. [5 Term R.] 464. Now it is discretionary. 4 Taunt. 471. In the king's bench, it was discretionary, on cause shown. Style, 477; 8 Mod. 248; 2 Ld. Raym. 1364; And. 52; 2 Lil. Reg. 154, 155; Complete Juryman, 66. It could be entered at the term at which a cause was for trial at the sittings, if entered before the return of the venire facias. Barnes, Notes Cas. 488; Tidd. Prac. 844–846. The facility of attaining the rule, and the delay attending it led to a rule of the king's bench in 1808, and the common pleas in 1812, limiting the time within which it should be applied for. 10 East, 1; 4 Taunt. 600. In this state the right was restricted by the act of 1789. In the eighth section of St. 3 Geo. II., prescribing the mode of summoning juries, special juries are excepted. 6 Ruffh. St. 27. So that the method of proceeding by special juries is in no respect altered. 5 Durn. & E. [5 Term R.] 463, cited. The same exception is made in the act of 1785, §§ 4–6; 2 Dall. Laws, 263. The seventeenth section merely directs that the jury "shall be summoned as aforesaid;" which, by the eighth section, is directed to be ten days before the return of the writ or process. The twentieth section authorizes the imposition of a fine for non attendance.

A venire is but as a summons to the jury.

Dalt. Sher. 160. Where for a special jury it is a special writ (2 Lil. Reg. 779), returnable at the discretion of the court (2 Tidd, Prac. 844). No time is fixed for the service of the summons; in Sayer, 31, Foster, J., thought it ought to be six days; it must be a sufficient time to allow them to appear at the trial. Id. The court may direct a trial in term time. 4 Taunt. 471. The repeal of the eighteenth section of the act of 1785 has removed the restriction as to the time of striking a special jury. By the twenty-ninth section of the judiciary act, juries may be "returned as there may be occasion for them, from time to time;" and the court may award tales to supply the defect of jurors. This act has been held to apply to special jurors in this court. Anonymous [Case No. 443]. The same construction has been put on the act of 1785 by the courts of the state. 2 Yeates, 133; 4 Yeates, 236. There is nothing therefore to control the discretion of this court; the mode and time of striking, and the return of the venire, are matters of practice regulated by rules; the rule of this court directs that no venire shall issue unless the jury is struck ten days before the return, and the handing the jury list to the clerk at the proper time, entitles either party to have a venire for the names not expunged.

In this case the jury was regularly struck. It was the duty of the marshal by the act of 1802 to summon and return the jurors not expunged; a venire was a matter of course by the common law, and of right by our rule; the defendants had a right of trial at this term under their rule to try, or non pros. They will be deprived of it by an accident, for which they are not responsible, if we refuse to make the rule absolute. We cannot doubt our power or the justice of its exercise; a copy of the general list is found and proved to contain the same names as in the list which was struck. No injustice is done the plaintiff by directing a new striking, on reasonable notice; and our rules are complied with by directing a venire to issue returnable ten days thereafter. Rule made absolute.

HALL (PITTS v.). See Cases Nos. 11,192 and 11,193.

HALL (ROBINSON v.). See Case No. 11,952.

HALL (ROSSITER v.). See Case No. 12,082.

Case No. 5,943.

HALL v. RUSSELL et al.

[3 Sawy. 506.] [1]

Circuit Court, D. Oregon. Nov. 12, 1875.[2]

ESTATE OF SETTLER UNDER DONATION ACT — ESTATE OF WIDOW AND HEIRS — STATUTE OF LIMITATIONS — APPLICATION OF STATUTE TO A SUIT IN EQUITY.

1. A settler under the donation act of Oregon before the completion of the residence and cultivation required by the act, had neither a descendible nor devisable estate in the donation; and upon his death prior to such completion, his interest in the premises ceased, and the same was granted by section 8 of said act to the heirs and widow, where one was left, of such settler, who took the land not as the heirs of the settler, but as the donees of the United States.

[Cited in Stubblefield v. Menzies, 11 Fed. 270.]

[Cited in Burch v. M'Daniel (Wash. T.) 3 Pac. 588.]

[See note at end of case.]

2. In April, 1852, L., who had been a resident of Oregon prior to December 1, 1850, became a settler under the donation act upon the public lands, and made the necessary notification and proof of the commencement of his residence, and died in January, 1853: *Held*, that upon the death of L. the premises passed, by virtue of section 8 of the donation act, to the heirs of L. as the donees of the United States, and that his devisees took no interest in the property.

[See note at end of case.]

3. In cases of concurrent jurisdiction, equity follows the law as to the statute of limitations; but in cases of purely equitable rights and titles equity is not bound by the statute, and only acts in analogy to it.

[Cited in Town v. De Haven, Case No. 14,113; Manning v. Hayden, Id. 9,043; Stevens v. Sharp, Id. 13,410; Etting v. Marx, 4 Fed. 678; Trauer v. Tribou, 15 Fed. 28; Hickox v. Elliott, 22 Fed. 18; Allen v. O'Donald, 28 Fed. 24; Gest v. Packwood, 39 Fed. 535; U. S. v. Wallamet V. & C. M. Wagon Road Co., 42 Fed. 358; Id., 44 Fed. 241.]

4. The limitations of the several states in regard to actions at law are made applicable to like actions in the national courts by section 721 of the Revised Statutes, but this does not include special limitations concerning suits in equity, and therefore section 378 of the Oregon Civil Code prescribing a limitation of five years as to a suit in equity to affect a patent to land is not binding upon this court.

5. In May, 1866, a patent was issued to W. H. and J. Delay for the premises settled upon by L. in April, 1852, as the heirs of Joshua Delay, in pursuance of an alleged settlement upon the land by said J. D. subsequent to the death of L., in January, 1853; and in October, 1875, the devisees of said L. brought suit to charge the defendants, the assignees of said patentees, as trustees of the plaintiff, and to compel them to convey the premises to them as the successors in interest to L., the true and first settler; and it not appearing that the plaintiffs had ever been misled or deceived by the defendants or induced to forbear the assertion of their alleged rights, or that any relation of trust or confidence ever in fact existed between the parties, but it appearing that they claim under titles adverse in their origin: *Held*, that the limitation provided by section 378 of the Oregon Civil Code to suits in equity in the state court affecting a patent, ought to be applied to the suit in this court.

[This was a suit in equity by Lydia C. Hall and others against Edwin Russell and wife, W. W. Page and wife, and George H. Williams to have the defendants decreed trustees for the plaintiffs of a donation of land in Oregon.]

W. W. Chapman and James G. Chapman, for complainants.

W. W. Page and G. W. Yokum, for defendants.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

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

[2] [Affirmed in 101 U. S. 503.]

BY THE COURT (DEADY, District Judge). The plaintiffs, the widow and children of Samuel Parker Hall, deceased, and W. W. Chapman, the administrator, with the will annexed, of the estate of J. L. Loring, deceased, bring this suit to have the defendants, Edwin Russell and wife, W. W. Page and wife, and George H. Williams, declared the trustees of the plaintiffs in regard to a donation situated in Multnomah county, being parts of sections 26 and 27 of T. 1, R. 1 E., in Wallamet district, and containing 289.47 acres.

Among other things the bill states, that at Cincinnati, on August 20, 1849, said Loring made his last will, by which he devised all the property, except certain legacies, of which he might die seised or possessed to said Samuel Parker Hall; that before December 1, 1850, Loring became a resident of Oregon, and in April, 1852, became a settler under the donation act of September 27, 1850, upon the tract of land aforesaid, and during the same month notified the surveyor-general thereof, and made the necessary proof of the commencement of his residence and cultivation, and that the same was for his own use; that Loring continued to reside thereon until his death in January, 1853, having up to said time, complied with said donation act in all respects; that a few weeks before his death Loring took Joshua Delay and Sarah his wife to live upon the premises with him as a tenant or cropper, where they remained as such until the death of Loring, after which said Joshua claimed the premises as a settler, thereon under said donation act, and afterwards, said Joshua and Sarah having died in the meantime, on May 9, 1866, a patent was issued to W. H. and Joseph Delay for the premises, as the heirs at law of said Joshua and Sarah, that said patent was issued upon the fraudulent representations of said Delay and his heirs, and in fraud of the rights of the heirs of said Loring, to whom it should have issued—of all which the defendants, and those through whom they claim, had notice. That in October, 1871, the heirs at law of said Loring brought suit to recover the premises from the defendants in this suit upon the ground that said patent was wrongfully issued to said Delay heirs, as aforesaid; and thereupon, in October, 1872, said heirs in consideration of the sum of $5,000, conveyed all their interest in the premises to the defendants; that the true value of said premises is $100,000, and the rights of said Loring heirs therein are subordinate to those of his devisees, of which the defendants had notice.

That at the death of said Loring the existence of the will aforesaid was not known in Oregon, and said W. W. Chapman was duly appointed administrator of said Loring's estate, and as such made proof, under section 8 of the donation act, of the compliance of said Loring as a settler upon said premises with said act up to the time of his death before the proper land office, whereupon the register and receiver thereof, on October 27, 1864, issued a certificate for said donation to the heirs at law of said Loring, and disallowed the adverse claim of the Delay heirs thereto; that the commissioner of the general land office, affirmed this action of the local land office, but the same was set aside by the secretary of the interior, and the patent was issued to the Delay heirs as above stated; and that on July 20, 1871, said will was duly admitted to probate in the county court of Clackamas county, and said Chapman appointed administrator, with the will annexed, of the estate of said Loring.

The defendants demur to the bill, and assign several causes of demurrer. But two of them will be considered: 1. The plaintiffs have no interest in the subject-matter of the suit, and cannot maintain any suit concerning it; and, 2. The statute of limitations.

The demurrer admits that at the time of his death, Loring was a settler upon the premises under the donation act for a less period than four years, but that up to the time of such death he had complied with all the provisions of the act, and that the patent which issued to the Delay heirs was procured by the fraudulent representations of Delay and his sons. If, then, the plaintiffs are the successors in interest of Loring, they are entitled to the relief sought, unless the lapse of time shall be considered a bar to it.

Under section 4 of the donation act, Loring was qualified to take 320 acres of the public land in Oregon. The donation was made by the act in words of present grant, subject to the performance of the conditions of four years' residence and cultivation and proof of the same. Until the performance of these conditions, the estate granted being a defeasible one, was liable to revert to the donor, except where the performance became impossible by the death of the settler, in which case the common law would have excused the failure to comply with the act, and thereupon the estate would have become absolute and descended to his heirs as a fee simple. 2 Bl. Comm. 156; 4 Kent. Comm. 127; Delay v. Chapman, 3 Or. 462.

Now this contingency was not left by the donation act to the operation of the general law, but was provided for in section 8 of the act as follows: "Upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act, shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

In view of this provision of the act, had

Loring a devisable estate in the premises? We think not. His interest therein terminated with his death, and thereafter he had nothing to dispose of. Upon his death, without leaving a widow, and before the completion of his residence and cultivation, this section of the act limited the property over to his heirs—said it should descend to them—in effect gave it to them in consideration of the service and death of their ancestor. They are not in as the successors in interest of Loring, but take the land as the donees of the United States. The patent issues to them by name or by some descriptive phrase—as, "the heirs of Loring," under which they are collectively included. The test cited by Jarm. Wills, 88, applies. An estate not descendible is not devisable. Nor could Loring have disposed of this property by sale in his lifetime. The third proviso to section 4, which was in force during his residence on the land, declared void all future contracts made by a settler prior to the receipt of his patent, for the sale of his donation. And independent even of this prohibition any contract for or sale of the land before the completion of his residence and cultivation, would have been of no further force or effect upon the happening of the contingency provided for in said section 8.

Nor is there anything in the general policy or purpose of the act tending to show that it was the intention of congress to permit a settler to devise his donation before it had become unconditionally his, by the completion of his residence and cultivation. The act (section 4) authorizes or recognizes the right of two classes of persons to dispose of their donations by will: 1. Married persons, who are settlers under said section and have complied with the provisions of the act and die before patent issues; and, 2. Alien settlers who die before their naturalization is completed. As to the first of these classes, the act merely recognizes the right of the donee to make a testamentary disposition of the property according to the laws of Oregon in cases where the act has been complied with. It does not confer it, but assumes that it exists by the local law. The donation having become indefeasibly vested in the donees, it follows that they could have disposed of it by will, if authorized by the law of Oregon, although the act had been silent upon the subject. In short, as to such married persons, the act appears to recognize their right to dispose of their donations by will according to the local law, and only provides for its disposition in cases where they die intestate and before the patent issues.

As to the second class, it is admitted that the language of the act is general enough to include the case of an alien settler dying before the completion of his residence and cultivation. But provision being expressly made by section 8 that "upon the death of any settler before the expiration of the four years' continued possession required by this act," that the donation shall go to his heirs, the general language of this clause in regard to alien settlers ought to be construed, if it reasonably can, so as not to interfere with the specific provision of this section.

This clause in regard to aliens occurs in that part of section 4 which provides for the disposition of a donation where the donee dies after the completion of the residence and cultivation, and before the issue of a patent; and is a proviso to such part. The manifest purpose of the proviso is to provide for the contingency of the death of an alien settler after he had declared his intentions and before he had completed his naturalization. This might happen in a case where the four years' possession had expired. Upon declaring his intention to become a citizen an alien might become a settler; might reside upon and cultivate his donation for four years and make proof of the same and die without completing his naturalization. The failure to complete his naturalization might be the result of neglect on his part or want of time or opportunity. For instance, an alien, who was an occupant of a tract of the public land for four years prior to the passage of the donation act, might under section 4 at once declare his intentions and make his notification and proofs, but could not complete his naturalization for two years thereafter, in which time he might die. Under these circumstances a patent could not issue for the donation to any one, for the settler not having completed his naturalization had not complied with the act making the grant, and it would revert to the United States.

But having performed the essential service of residence and cultivation upon the land, in consideration of which the donation was made, congress might well excuse his failure to complete his naturalization, which by his very death would become immaterial and of no consequence to any one, and to permit him to devise his donation, or in default of that provide that it should go to his heirs. But if such alien died "before the expiration of the four years' possession required by the act," with or without having completed his naturalization, then the case falls within section 8, and the property is not permitted to pass to his devisees, but is given directly to his heirs and widow. This construction of this proviso makes the various provisions of the act concerning the disposition of the donation upon the death of the settler before the issuing of the patent harmonize. It goes upon the reasonable and just theory that a settler having completed his four years' residence and cultivation—the material consideration for the grant—he had thereby acquired the jus disponendi of his donation, and might devise it in accordance with the local law as he saw proper; but that when a settler has not performed the conditions of residence and cultivation, such right of disposal did not attach to him, and therefore congress might justly dispose of

the donation at his death. It also places all settlers upon the same footing, and avoids the absurdity of supposing that congress intended to provide that an alien who had not completed his occupation of the land might, nevertheless, dispose of it by will, while a citizen should not.

But counsel for plaintiffs insists that the grant to Loring, taking sections 4 and 8 together, and considering that he died before he had occupied the land four years, leaving no widow, amounts in effect to this, and ought to be so construed: The premises are hereby granted to Loring for life, with the remainder to his heirs at law; and that such a grant is within the rule in Shelly's Case, which was then and now in force in this state, and therefore the whole estate or unconditional fee of the premises vested in the first taker, Loring, from the date of his settlement, and he might dispose of it by will in disregard of the remainder to his heirs. This argument assumes that by virtue of section 8, the heirs at law of a settler dying intestate, before the completion of his residence and cultivation, take or inherit from him as heirs. But this is clearly not so. The language of the section is open to criticism, but the manifest intention of congress was to grant the premises occupied by the deceased settler to his heirs. It declares that the rights of the settler under the act shall descend to his heirs.

What were the rights of such settler at the time of his death is not apparent. To all intents and purposes his interest on the premises terminated with his decease. But in any event, the word "descend" as here used evidently means nothing more than pass or go. Stephenson v. Hagan, 15 B. Mon. 315. The heirs could not take in conjunction with the widow and take as heirs, because they would then take less than an heir. Fields v. Squires [Case No. 4,776].

Neither was this a grant to Loring for life with remainder to heirs in fee. But it was a grant to Loring in fee but upon conditions, and also a contingent or alternate grant of the same premises to his heirs in case he should fail, by reason of his death, to perform the conditions. The settler and heirs in case of his death are thus brought in juxtaposition with regard to the premises, but there is no transmission of the property in the same from the one to the other, as from an ancestor to an heir. The term "heirs" is used merely as a designatio personarum, who are to receive the gift. Congress could as well have given it to John Doe and Richard Roe as to the heirs. But in consideration of the partial performance of the ancestor, congress gave the donation anew to his heirs and widow. They then take the property as the direct donees of the United States, and are in by purchase and not descent. But they must claim the donation, and make proof of the compliance of the ancestor with the act up to the time of his death, and their relation to him. Delay v. Chapman, 3 Or. 464. The interest of the settler terminated with his death and the act—which is a law and not a mere conveyance, and therefore is to take effect according to its intention, whether in accord with the rule in Shelly's Case or not—granted the property directly to the heirs, and provided that a patent should issue to them upon making proof of the facts. Loring settled upon the donation, understanding that if he died before the completion of his residence thereon, that the act provided to whom it should go, and that, therefore, he had no power to dispose of it otherwise by will. Loring not having a devisable estate in the premises at the time of his death, his interest having terminated with his death, neither his devisees nor his administrator have any interest in the property, and cannot therefore maintain this suit. Upon this point the demurrer is well taken.

We also think that the suit ought not to be maintained on account of the lapse of time. By section 378 of the Oregon Civil Code, it is provided that no suit in equity "shall be maintained to set aside, cancel or annul, or otherwise effect a patent to lands issued by the United States. * * * or to compel any person claiming or holding under any such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust to, or for, the use and benefit of such plaintiff for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent, unless such suit is commenced within five years from the date of such patent, or within one year from the passage of this act." It has been held that the defense of the statute of limitations could not be made by demurrer, but must be interposed by plea or answer, so as to give the plaintiff an opportunity to reply the facts and circumstances which, in equity, exclude the statute. 3 Atk. 225. But the rule appears now to be well settled, and with reason, that whenever a bill is so framed as to present the objection of the lapse of time, a demurrer for that cause will lie. Story, Eq. Pl. §§ 503, 760.

In cases of concurrent jurisdiction, such as matters of account, etc., where the party may proceed either at law or in equity, the statute of limitations applies with equal force in both courts. In such cases courts of equity consider themselves within the spirit of the statute and act in obedience to it, but in the consideration of purely equitable rights and titles, they act in analogy to the statute, but are not bound by it. Robinson v. Hook [Case No. 11,956]; Pratt v. Northam [Id. 11,376]; Sherwood v. Sutton [Id. 12,782]; 2 Story, Eq. Jur. § 1520. For instance: When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same

property. So, in cases of implied or constructive trust, where it is sought for the purpose of maintaining the remedy, to force upon the defendant the character of trustee, courts will apply the same limitation as provided for actions at law. Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 176; Miller v. McIntyre, 6 Pet. [31 U. S.] 66; Beaubien v. Beaubien, 23 How. [64 U. S.] 207. The case before the court is one of this class. The right of the plaintiffs, admitting that the devisees under the will took the donation in preference to the donees under section 8 of the donation act, depends upon the establishment of an implied trust, to be raised by the law out of the circumstances of the case, and notwithstanding the adverse origin of the defendants' title and the like possession thereunder.

But when it is said that a court of equity will follow the statute of limitations, it is understood that it is a statute of the same forum or jurisdiction, and not that of another state or country. The statutes of limitations of the several states are made the rules of decision in the United States courts, in trials at common law. Rev. St. § 721; Shelby v. Guy, 11 Wheat. [24 U. S.] 361; McCleeney v. Silliman, 3 Pet. [28 U. S.] 276. Now, thereby, these statutes become practically laws of the United States, and the national courts sitting in equity follow them as laws of their own forum or jurisdiction. But the limitation here invoked as a bar to this suit is no part of the laws of the United States. By its terms, it only applies to suits in equity in the courts of the state. Therefore it does not come within the purview of section 721, supra, nor become in any sense the law of this forum. It is a singular case. Our attention has not been called to another like it or to any authority directly bearing upon it.

An action at law to recover possession of this property would not be barred by the laws of this state under twenty years. Whether the court shall follow that statute or the limitations of five years contained in section 378, supra, is the question. It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reason, apply a longer or a shorter time in bar of a suit. There is nothing in the circumstances of this case or the period fixed by the statute which requires the court to lengthen the term, but rather the contrary.

The patent was issued nearly ten years ago. The limitation of five years upon a suit of this kind in the state court was enacted on October 22, 1870, and took effect January 24, 1871, nearly five years before the commencement of this suit, October 2, 1875. No reason is given for the delay, nor does it appear that the plaintiffs have been deceived or misled in any way by the defendants, or in any wise induced to forbear the assertion of their alleged rights. There never was any actual relation of trust or confidence between these parties. They claim under titles adverse in their origin, and have always occupied the attitude of adverse claimants. Under these circumstances we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the national and state courts. We think in this case the court may safely adopt the limitation prescribed by the laws of the state in its courts in like cases. Admitting then, that the devise to the plaintiffs was sufficient to invest them with the title to the premises, they must be denied the relief sought on account of the lapse of time.

A decree will be entered dismissing the bill for want of equity, and because of the delay in bringing the suit.

[NOTE. An appeal was then taken to the supreme court by the plaintiffs, and the decree affirmed in an opinion by Mr. Chief Justice Waite, who said that Loring, having died before the conditions requisite for vesting the title in him had been fulfilled, had no devisable interest in the land. 101 U. S. 503.]

HALL (SARVEN v.). See Cases Nos. 12,369 and 12,370.

Case No. 5,944.

HALL v. SAVAGE et ux.

[4 Mason, 273.] [1]

Circuit Court, D. Massachusetts. October Term, 1826.

DOWER — ASSENT BY THE WIFE TO THE CONVEYANCE BY THE HUSBAND.

Where a deed was executed in Massachusetts by a husband, of lands owned by him in that state, in March, 1808; and afterwards, in November, 1808, his wife signed and sealed the same deed, with the following words written over her signature: "I agree in the above conveyance. In witness whereof," &c. giving the date, &c. it was *held*, that, by the local law, such a conveyance did not operate as a release of her dower in the estate so conveyed.

[Cited in Smith v. Handy, 16 Ohio, 234; Greenough v. Turner, 11 Gray, 334.]

Writ of dower. In this cause, the following facts were admitted by the parties. (1) That the plaintiff, Tryphena Hall, was the wife of Ezra Hall, and that the said Ezra Hall had deceased. (2) That Ezra Hall was lawfully seised during coverture, of the premises described in the demandant's writ. (3) That the demand of dower had been legally made on the tenants. (4) That Ezra Hall conveyed in his life time, by deed, a good title from himself of all his interest in the premises, to Gideon Wheeler, whose title had wholly passed to said John Savage and Ruth, the defendants, who were now entitled to all the rights of said Gideon Wheeler. (5) That the said Tryphena Hall executed the following writing on the same paper with the deed of said Ezra Hall, viz.: "I agree in the above conveyance. In witness whereof I have

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

hereunto set my hand and seal, the 11th of November, 1808. Tryphena Hall. (L. S.) In presence of Calvin Hubbell, Luther Washburn." (6) That the deed of said Ezra Hall, and said Tryphena Hall, made a part of the admitted facts, and a true copy of the same was annexed. (7) That if the demandant was entitled to any damages for detaining her dower, the sum of seventy-five dollars would be the reasonable sum to be paid by the year for the use of the same.

W. Sullivan, for plaintiff.

P. O. Thatcher, for defendants.

The cases in 9 Mass. 218, and 13 Mass. 223, were cited.

STORY, Circuit Justice. Upon the facts stated in this case, it appears to me clear, that by the local law of Massachusetts the demandant is not barred of her dower. The instrument sealed by her was executed long after the principal deed purports to have been executed by her husband. If, in its terms, the instrument had purported expressly to release her right of dower, I do not think that it would have been, under such circumstances, a bar by our law. The principles applicable to this point were fully considered in Powell v. Payne [Case No. 11,358], in this court, and it is not necessary to do more than refer to them.

But I think also, independent of this point, that the instrument cannot be deemed, in construction of law, a release of dower. It does not purport to be such a release. The words are, "I agree in the above conveyance." This can mean no more than her assent to her husband's deed, and that he may sell. But it cannot be interpreted to mean, that she thereby released her dower. If such an instrument had been good, there would have been no reason to hold, that a signature of the wife in blank to the deed of her husband, ought not to be held to operate a release of her dower, because it can have no rational interpretation, but as an assent to the deed. The rule of law appears to me plain, that the wife cannot release her dower, except there be apt words to express such intention. Doubtful words ought never to be construed to have such an effect. The demandant is, therefore, entitled to judgment.

HALL v. SCHNEIDER. See Case No. 11,952.

Case No. 5,945.

HALL v. SCOVEL.

[10 N. B. R. 295.] [1]

District Court, E. D. Tennessee. 1874.

BANKRUPTCY—TITLE OF ASSIGNEE TO LANDS PARTLY PAID FOR—RIGHT OF PURCHASER TO RENT AFTER ASSIGNEE'S SALE.

1. Where a bankrupt owned property which he had only partly paid for, and left the possession and rent of it in the seller, under an agreement that the seller was to apply the rent in the reduction of the purchase-money; this does not convey such an interest in the property back to the vendor, as will prevent the full title from vesting in the assignee in bankruptcy.

2. Where property is sold by an assignee in bankruptcy without an order of the court, the purchaser will be entitled to the rents and profits of the property from the day of sale, and not from the day of confirmation of the sale by the court.

Before JOHN RUHM, Register.

From the petition, and answer, and the proof, I report as follows:

First. The defendant, H. G. Scovel, has collected the rents of the land described in the pleadings since the 19th of February, 1868, the day of adjudication, to the 1st of January, 1873, and for a period of three months in the year 1873, at the rate of ten dollars per month, being in all the sum of six hundred and thirteen dollars and thirty-three and one-third cents.

Second. The sale of the property by the assignee took place on the 15th day of September, 1870, but it has never been confirmed by the court. Defendant Scovel collected three hundred and nine dollars to date of sale, and three hundred and four dollars and thirty-three and one-half cents since said date.

Third. Defendant Scovel received the rents since the adjudication as he had before the bankruptcy. It appears that William Dismukes, the father of D. J. Dismukes, but who was not the authorized agent of the latter (D. J. Dismukes, the bankrupt), met Scovel some time in 1867, upon the street. The elder Dismukes told Scovel in that conversation, in response to Scovel's statement, that he had an opportunity of renting the lots; that his son, the bankrupt, was absent South, and that he, the father, would agree for the son, that the rent should go to a credit on the notes for the unpaid purchase-money. The said elder Dismukes further states, that he does not remember ever having mentioned the subject to his son after his return, and before the bankruptcy. The son, D. J., the owner of the lots, denies that his father was his agent for the lots, or that he ever consented to or knew of the agreement. The assignee expressly alleges in his petition, that on his being appointed assignee, he called on Scovel and had an interview with him in regard to the lots, and as to the advisability of a sale, and further, that he placed the lots in the hands of Scovel as real estate agent, with instructions to offer them for sale and collect the rents. Scovel, in his answer, admits that the assignee called to see about the sale of the lots, but denies that he agreed to collect the rents as agent of said assignee; he further says, respondent, by no word or act, promised to pay one dollar of rent to him. In his deposition, Scovel reiterates the averments in his answer, and adds, that owing to length of time elapsed since his conversation with assignee, he does not remem-

[1] [Reprinted by permission.]

ber what was said. In the absence of any proof to the contrary, the allegations in the petition, which are not denied, must be taken as true. While Scovel denies having agreed to collect the rents, as agent of the assignee, he does not deny the allegation of the assignee, to the effect that he (the assignee), placed the lots in Scovel's hands for sale, and to collect the rents as real estate agent. Scovel moreover states, that the assignee has paid the taxes accruing since the bankruptcy. I therefore report, that Scovel received the rents after the adjudication without an express agreement on his part to collect them as agent, but with notice from the assignee that he claimed the rents and profits of the land for the benefit of the general creditors, and with notice of the bankruptcy.

Fourth. The sale of the property was postponed by the assignee at the instance of H. G. Scovel, who represented to the assignee that it was an unfavorable time; when the sale was finally made it was done by consent of said Scovel and with his approval.

Fifth. In the absence of proof I report that H. G. Scovel is entitled, as real estate agent, to a commission of 10 per cent. on the rents collected since the adjudication, that being the customary commission paid in the city of Nashville.

Sixth. I am clearly of opinion, from the facts as they appear, that the assignee is entitled to the rents since the filing of the petition to the time of the confirmation of the sale to Scovel. The proof does not show to me that the elder Dismukes was the agent of D. J. Dismukes, the bankrupt. It does not show that Scovel had any authority from the latter to apply the rents collected for a credit on the notes. But having reduced the rents so collected to possession, he is, of course, as far as the rents before the bankruptcy are concerned, entitled to set them off on the notes due him. When the said Dismukes was declared a bankrupt, all his property, of whatsoever nature, real, personal, and mixed, choses in action, equitable and legal estates, became vested in the assignee, and the assignment relates back to the day of the filing of the petition by operation of law. Now even if the elder Dismukes were the authorized agent of Dismukes the bankrupt, even if he had authority to agree with Scovel, that the rents by him collected should go to the payment of the purchase-money pro tanto, such agreement, voluntary and gratuitous as it was, if it existed at all, could be determined at the pleasure of the grantor, but the proof does not show that he was the authorized agent. Nor does it show that even the agreement of the father was made to last forever, or that it should not be recorded. I am of opinion that with the assignment, the agreement, if it existed, terminated, that the rents and profits of the land vested in the assignee, that the assignee had not even the right in law to agree that the old agreement should continue, if ever such agreement existed. But, moreover, he gave Scovel notice that he claimed the rents, and that certainly ends the controversy. It is insisted by defendant that he had an equitable lien on the profits of the land by virtue of the vendor's lien, especially retained in the deed. It is further insisted by defendant's counsel, that being in possession of the land his case was analogous to that of a mortgagee in possession, who was only liable to account for the rents when a bill to redeem is filed. But that is clearly erroneous. Had Scovel before the bankruptcy filed a bill in the state court to foreclose the lien, and had he alleged therein that the land was not sufficient to pay his debt, and asked for the appointment of a receiver, he would, under the state law, from the date of the filing of the bill have been entitled to a lien on the rents. But he did not choose to foreclose, and waited until the assignee insisted on a sale; he has therefore no lien except that to which he is entitled as the vendor of the property. Nor was he in possession; the land consists in a vacant, unimproved tract. The assignee came into constructive possession as soon as he gave notice to the vendor, or as soon as the assignment was executed. The sale by the assignee is a judicial sale. The owner of land sold at a judicial sale is not entitled to receive the rents until confirmation; the result is, that the assignee is entitled to all the rents collected by Scovel since the filing of the petition, less ten per cent. commission as real estate agent.

Seventh. I further report that there was due Scovel, as purchase-money on the lots, on the date of filing of the petition, as follows:

Whole amount of purchase-money..	$2,000 00
Payment on account.....	500 00
	$1,500 00
Interest from day of sale to day of filing the petition.....	718 75
Total	$2,218 75

The solicitor for defendant has insisted in argument on the following averments in his answer as a plea of the statute barring actions by assignees, if not brought within two years from the time in which the cause of action accrued. On the contrary, the petitioner, as assignee of Dismukes, has lain by for a period of over two years without notifying respondent that he would have to account for the rent. The order of reference does not contain a direction to me to report on this subject. But being called upon by both parties to give my opinion thereon, I decide that this casual averment in the answer is not a sufficient plea of the statute. It does not, moreover, appear, that the assignee did give the defendant notice immediately on his appointment and after the assignment was executed.

I have also been called upon by the parties to state my opinion on that part of the petition, praying that the sale to Scovel be set

aside for the reasons as set out in the petition. Property belonging to the estate of a bankrupt, upon which there is a lien, can only be sold by the assignee upon application to the court, and upon notice thereof to the party claiming the lien. It is true, in this case there was an order of court; but the lien holder (Scovel) is the only person who can object to the sale. He is satisfied and gave his consent to the sale. The assignee is estopped from going back on his act done by his consent and approval of Scovel. He must execute a deed to Scovel as soon as the court confirms his report of sale. Scovel will be suffered to prove the balance due him after giving credit for his bid of one thousand dollars, and all other credits against the estate of the bankrupt.

TRIGG, District Judge. The report of the register is confirmed in all things, except this, that the owner of the land is entitled to the rents until the day of sale to Scovel, and not till the day of confirmation of the sale. The purchaser at assignee's sale takes the rents accrued since the day of sale. Decree for assignee accordingly, with costs against the defendant. The sale to Scovel is confirmed.

HALL (SHERWOOD v.). See Case No. 12,777.

Case No. 5,946.

HALL v. SINGER et al.

[3 McLean, 17.] [1]

Circuit Court, D. Illinois. June Term, 1842.

PRACTICE—CAPIAS—BAIL BOND—PLEADING.

1. A writ, by virtue of which a bail bond was taken, will not be set aside on motion, after judgment in the original action and suit on the bond.

2. A plea cannot contradict the record.

3. Errors in the original suit should have been corrected as they occurred, or by writ of error.

4. It is too late to correct such errors by plea, or after action brought on the bail bond.

[At law. Suit upon a bail bond. Defendants moved to set aside the capias.]

Mr. Butterfield, for plaintiff.

Logan & Goodrich, for defendants.

OPINION OF THE COURT. This is an action on a bail bond, taken by the marshal, in October, 1840. A judgment was obtained in that suit, at December term, 1840. And a motion is now made to set aside the capias in that case, on the ground that no affidavit was made, as required by the statute of Illinois, to hold to bail. If the irregularity exist, it is too late now to correct it by motion. The case has passed into judgment, and it can only be reviewed and reversed by a writ of error, if the amount in controversy shall authorise such writ.

The declaration in this case sets out the writ, the indorsement on it, and the bail bond in the usual form. To this the defendants plead, 1st. There was no affidavit on which the writ could issue. 2d. That there was no writ; and, 3d. That there was no indorsement upon it, as the statute requires. The plaintiff demurred to the plea, and assigned as causes of demurrer: 1st. That the plea is double. 2d. That it puts in issue matters of record and of fact. 3d. That the plea should have concluded to the country. 4th. That the bail bond is a recognizance, and that defendants cannot go behind it. 5th. That the bail cannot plead any irregularity in the proceedings of the former case. By their plea the defendants seek to take advantage of a defect in the affidavit, on which the capias was issued, and by virtue of which the bail bond under consideration was taken. There was in fact an affidavit, a writ, and an indorsement of it; and we think, that for any formal defects in any of these requisites, objection cannot be made to a suit on the bail bond. The bond is in the nature of a recognizance, and no error in the proceedings prior to it, can be pleaded to an action on the bond. Advantage should have been taken of the alleged errors, at the time they occurred, by a motion to set aside the affidavit, the writ, or the indorsement, as the correction of the error might require. For any defect in the writ, oyer should have been prayed of the writ, and the defect specially stated. A plea cannot contradict the record, and this is done by the plea, in this case, in every essential particular. The demurrer to the plea is sustained, and judgment.

Case No. 5,947.

HALL v. SPEER et al.

[1 Pittsb. Rep. 513; 6 Pittsb. Leg. J. 403.]

Circuit Court, W. D. Pennsylvania. March 10, 1859.

PATENTS—INJUNCTION—UNRECORDED ASSIGNMENT OF PATENT.

1. Where a party is in possession and use of an invention, and has been so for a long period of time, adverse to the title of complainant, and under color and claim of right, a court of equity will not interpose the extraordinary writ of injunction to restrain him.

2. The failure to record an assignment at the patent office does not impair its validity as between parties, and against strangers, and is only necessary by way of notice to purchasers. Pitts v. Whitman [Case No. 11,196].

This was a bill in chancery, filed by John Hall, assignee of John S. Hall, against James A. Speer and John C. Bidwell, to prevent the defendants from the further use of two certain patents, obtained by John S. Hall, for an improvement in plows. The complainants filed their bill, and at the same time moved the court for a preliminary injunction, to prevent the defendants from manu-

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

facturing any plows upon the principle of the complainant's patents.

Shaler & Woods, for complainant.
Marshall & McConnell, for respondents.

McCANDLESS, District Judge. The bill and exhibits show, that patents for an improvement in the manufacture of plows were granted to John S. Hall, dated respectively, the 7th day of February, and the 1st day of August, 1854. John S. Hall assigned to John Hall, the complainant, "all the right, title and interest which I have in said improvement, as secured to me by said letters patent, for and in the county of Allegheny, in the state of Pennsylvania, and in no other place or places." The bill charges that, in violation of complainant's rights, thus secured to him by the patents, and an assignment which has been duly recorded in the patent office, the respondents are manufacturing large numbers of plows, amounting to three thousand annually.

To the prayer, for a preliminary injunction, the respondents interposed the affidavits of James A. Speer and Charles French, claiming substantially that the complainant is not the sole and exclusive owner of the said patents; that the money necessary to procure the same was advanced by James A. Speer to John S. Hall, and that the latter assigned to Speer an equal interest in said patents, throughout the United States; that as joint owners with said patentee, the said Speer, in conjunction with his partner Bidwell, at great expense, both before and since the issue of said letters patent, caused the necessary patterns to be made for the purpose of manufacturing plows, upon the approved design of the said patentee. That for more than two years after the grant of the said letters, and before the assignment to complainant, with the consent and approbation of said patentee, the respondents continued to manufacture and sell the same exclusively; and that, during the time, the complainant was frequently in the shop where the plows were being manufactured, and was informed by the patentee himself, that the said James A. Speer was a joint owner with him, in said patents, and that the same would never have been issued, but for the pecuniary advances made by said Speer.

In addition to this, the respondents exhibit a receipt from patentee dated the 3d of November, 1853, for two hundred dollars, "to be applied to the use of patent rights of the double moldboard and single moldboard plow, now in the patent office of the United States"—"to be applied to the use of John S. Hall and James A. Speer, if granted by the United States." It thus appears that from the date of the said letters patent, up to the date of the assignment to complainant, in October, 1856, and from that date to the 16th of February, 1859, the date of the filing of this bill, the respondents have been by color of title, in the sole and exclusive enjoyment of said patents, with the assent of the patentee, and with at least the passive acquiescence of the complainant. They alone, by their enterprise and capital, have furnished the public with tangible evidence of the existence of such a new and useful improvement, thereby enhancing the benefit, not only to the public, but the patentee.

As the rule on which courts of equity act, by granting or refusing an injunction, in the first instance, is to leave the parties in the same position as it finds them, when the application for relief is made, Brightly, N. P. 261; it will not be necessary to decide upon the relative legal and equitable rights of the parties, until after answer and final hearing. The respondents are in possession and use of the invention, and have been for a long period of time, adverse to the title of complainant, and under claim and color of right. In such case a court of equity will not interpose the extraordinary writ of injunction to restrain them.

There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending, or threatened: Bonaparte v. Camden & Amboy R. Co. [Case No. 1,617]; neither of which characterize the present case; for if it issues erroneously, an irreparable injury is inflicted for which there can be no redress; it being the act of a court, not of the party who prays for it. It will be refused till the court is satisfied, that the case before them is of a right about to be destroyed, irreparably injured, or that great and lasting injury is about to be done by an illegal act. We will not prejudice the case at this stage, by the declaration of an opinion, as to the legal effect of the paper of the 3d November, 1853. Courts of equity do not regard the forms of instruments; but they look to the intent, and give to the acts of the parties, the construction which that intent justifies and requires, as far as consistently with general principles it can be done: Flagg v. Mann [Case No. 4,847].

Mr. Justice Story decides that the failure to record an assignment at the patent office, does not impair its validity, as between the parties and against strangers, and is only necessary by way of notice to purchasers: Pitts v. Whitman [Case No. 11,196]; Curt. Pat. 288. The proof by the affidavits is clear, that complainant had actual notice of respondents' claim, if not of this paper, before his purchase from the patentee; and for more than two years, without asserting his rights, he acquiesced in it. The effect

of this and the proper construction to be given to the paper, will be determined after answer and upon final hearing. At present, "the right is not clear," and we must decline to interpose. Injunction refused.

Case No. 5,948.

HALL et al. v. SULLIVAN R. CO.

[1 Brunner, Col. Cas. 613;[1] 21 Law Rep. 138.]

Circuit Court, D. New Hampshire. May Term, 1857.

CORPORATE FRANCHISES — TRANSFERABILITY OF — MORTGAGE — POWER OF SALE DOES NOT SUPERSEDE RIGHT TO FORECLOSE—PARTIES—RULES AS TO, HOW GOVERNED.

1. A corporation cannot, in general, transfer its franchise; but where a mortgage of a franchise by a corporation has been recognized as valid by the legislature, it is good between the parties.

[Cited in Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (74 U. S.) 415. Followed in Union Pac. R. Co. v. Lincoln Co., Case No. 14,378; Sweatt v. Boston, H. & E. R. Co., Id. 13,684; Adams v. Boston, H. & E. R. Co., Id. 47; Memphis & L. R. R. Co. v. Railroad Com'rs, 112 U. S. 619, 5 Sup. Ct. 299; New Orleans, Ft. S. & L. R. Co. v. Delamore, 114 U. S. 508, 5 Sup. Ct. 1012.]

2. The insertion of a power of sale in a mortgage to trustees for the benefit of bondholders does not supersede the right of foreclosure by bill in equity.

3. The court will not allow a rule respecting parties, adopted for convenience, to operate so as to defeat the ends of justice.

[Cited in Richards v. Merrimack & C. R. R., 44 N. H. 136; Richardson v. Sibley, 11 Allen, 67.]

[In equity. This was a bill by Andrew T. Hall and others against the Sullivan Railroad Company, asking for the transfer to the plaintiffs, as trustees, of certain franchises of the defendant. The defendant company gave a mortgage to the plaintiffs as trustees, according to the terms of which certain portions of the railroad were to be transferred to plaintiffs upon default by the defendant. After default the defendant company resisted the transfer. Heard on demurrer to the bill.]

H. M. Parker and Joel Parker, for complainants.

S. E. Sewall and J. J. Gilchrist, for respondent.

CURTIS, Circuit Justice. This is a bill in equity brought by certain citizens of the state of Massachusetts against the Sullivan Railroad Company, a corporation created by a law of the state of New Hampshire, and against George Olcott, a citizen of the last-mentioned state. It is founded on a mortgage, a copy of which is annexed to the bill, which purports to have been executed under the corporate seal pursuant to certain votes of the corporation which are therein recited; and this mortgage conveys unto the complainants as trustees "the railroad and franchise of the said company in the towns of Walpole, Charlestown, Claremont, and Cornish, in the county of Sullivan and state of New Hampshire, as the same is now legally established, constructed, or improved, or as the same may be at any time hereafter legally established, constructed, and improved, from its junction with the Cheshire Railroad Company to its junction with the Vermont Central Railroad Company, with all the lands, buildings, and fixtures of every kind thereto belonging, together with all the locomotive engines, passenger, freight, dirt, and hand cars, and all the other personal property of the said company, as the same now is in use by the said company, or as the same may be hereafter changed or surrendered by the said company." Habendum to the said trustees, and "provided, nevertheless, and the foregoing deed is made upon the following trusts and conditions." Then follow the trusts and conditions, which will be more fully adverted to hereafter; but it should be here stated that the general purpose of the mortgage was to secure the payment of the interest and principal of certain bonds issued by the corporation, the interest whereon had become due before this bill was filed, and is unpaid. The bill prays, first, that the trustees may be put into possession of the railroad franchise and property conveyed by the deed, and may be directed by the court in its management and in the execution of their trust, and that the company may be restrained from intermeddling therewith; second, that an account may be taken of what is due to bondholders, and the company ordered to pay the same by a fixed day, and in default thereof that the company may be forever debarred and foreclosed from all equity of redemption of the mortgaged property; third, that a receiver may be appointed, for certain purposes which it is not necessary here to specify; fourth, that a sale may be made of the franchise and property mortgaged; fifth, for relief generally; under which last prayer complainant's counsel, at the hearing, ask for a foreclosure by sale, instead of a strict foreclosure, as specially prayed for, provided the court should be of opinion that a foreclosure by sale would be more equitable.

The railroad corporation has demurred to the bill, and I will now state my opinion upon the several questions which have been argued, so far as they are necessarily raised by the demurrer. The first is whether the mortgage is valid and competent to convey what it purports to convey. The objection made by the respondents is, that the grant by the state of the franchise to be a corporation and to build, own, and work a railroad, and take tolls thereon, is attended with an obligation on the part of the company to exercise these franchises for the public benefit; that consequently the corporation cannot divest itself of its railroad and all the other necessary means of discharging its public duty; and as these franchises were confided

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

to the particular political person, they can be exercised by that person alone, and any attempt to delegate them to others is inoperative and void, upon grounds of public policy. Many authorities have been cited in support of this position, the principal of which are Winch v. Birkenhead, L. & C. J. Ry. Co., 13 Eng. Law & Eq. 506; South Yorkshire Ry. Co. v. Great Northern Ry. Co., 19 Eng. Law & Eq. 518; Beman v. Rufford, 6 Eng. Law. & Eq. 106; Shrewsbury & B. Ry. Co. v. London & N. W. & S. U. Ry. Co., 21 Eng. Law & Eq. 319; Troy & R. R. Co. v. Kerr, 17 Barb. 581; State v. Rives, 5 Ired. 297.

These authorities are sufficient to show that in England the law is as the defendants assert it to be in New Hampshire. To a certain extent it needs no authority to show that the position must be well founded in New Hampshire. Among the franchises of the company is that of being a body politic with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being, only the law can create; and when created, it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable. Com. Dig. "Grant," C; Peter v. Kendal, 6 Barn. & C. 703.

Whether, when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation in order to obtain means to carry out the purpose of its existence, must depend upon the terms in which they are granted, or, in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purpose it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state. There is nothing in the particular terms of the grant of these franchises to the Sullivan Railroad Corporation which expressly restrains their exercise to that corporation alone. The question whether they can be exercised by any other person than the corporation, depending upon the public policy of the state of New Hampshire, to be deduced from an examination not merely of this charter, but of the general course of the legislation of the state on this and similar subjects, it is eminently proper that this court should, if possible, follow and not precede the supreme court of New Hampshire in its conclusions respecting this question. In the absence of any decision by that court I should enter upon an examination of it with great reluctance. In the manuscript opinion of the supreme court of New Hampshire in the case of Pierce v. Emery [32 N. H. 484], which has been produced at the bar, Mr. Chief Justice Perley has stated some views on this question. If it were necessary for me, in this case, to come to any conclusion concerning it, I should probably assent to the views therein expressed, though I do not understand the question whether a corporation can mortgage its railroad and its franchises to own and manage and take toll on it, came directly into decision in that case. But I do not find myself under the necessity of deciding this question, because I am of opinion that the legislature of the state of New Hampshire has so far recognized the validity of this mortgage, that it is not now to be deemed invalid, as being contrary to the public policy of the state.

On the 14th day of July, 1855, the legislature of New Hampshire passed an act, the title and first two sections of which are as follows:—

"An Act Relating to the Sullivan Railroad Company.

"Sec. 1. Be it enacted, etc. That for the purpose of enabling the Sullivan Railroad Company to pay and satisfy its debts, and thereby to have greater power and means to provide for the public travel and transportation over its road, the said corporation is authorized to create and issue a new stock to the amount of six hundred thousand dollars, to be issued and disposed of in the manner herein provided; which stock shall have all the rights and privileges and incidents attached to any stock in said corporation, and shall, moreover, as a preferred stock, have attached to it the rights and privileges specially conferred by this act.

"Sec. 2. Upon the adoption of the act, by two thirds of the stockholders, at a meeting duly called for that purpose, the corporation shall proceed to create such stock to the amount aforesaid, in shares of one hundred dollars each, and shall offer the same to the mortgage creditors of the company, who shall have the right to take the same in manner following, to wit: The several creditors holding bonds under the mortgage made by said company on the 13th day of February, 1850, may subscribe for and take of said stock an amount equal to eighty per cent. of the principal sum of the bonds held by them respectively, and pay therefor in their bonds, which shall be received in payment thereof, the holders surrendering all outstanding coupons thereon. Those holding bonds issued under the mortgage made by the said company on

the 1st of August, 1851, may subscribe and take of said stock an amount equal to fifty per cent. of the principal sum of the bonds held by them respectively, and pay therefor in said bonds, at that rate, surrendering the coupons as aforesaid. So much of said stock as shall remain after satisfying the bonds issued under the security of said mortgages, in the manner provided by this act, may be issued to any parties who shall in consideration thereof pay off, satisfy, and extinguish all debts due from said company, which are not within the security of either of said mortgages, and which shall exist against the company at the time when the stock hereby authorized shall be created."

And on the same day the following act was passed:—

"An Act in Relation to the Sullivan Railroad.

"Be it enacted, etc.

"Sec. 1. That if it shall become necessary at any time for the trustees of the mortgage bonds issued by the Sullivan Railroad Company to take possession of said railroad, and to operate the same for the benefit of the bondholders, and said trustees shall actually take possession thereof, and operate the same, such trustees shall not, by reason of their operating said railroad, as aforesaid, incur any personal liability except such as they shall assume by contract.

"Sec. 2. This act shall take effect from its passage."

By the first of these acts, the legislature recognize the existence of the mortgage now in question, and confer on the corporation new powers to enable it to pay the debts secured by the mortgage, and it is expressly declared that this was done to enable the corporation to have greater power and means to provide for the public travel and transportation over its railroad. By the second of these acts, not only the existence of the mortgage and the power of the trustees to take possession of the railroad and operate it for the benefit of the bondholders, are recognized, but the responsibility to be incurred by the trustees in the exercise of these powers to take possession of and operate the road, is regulated and limited. After the legislature had thus granted to the corporation new powers, to enable it the better to accomplish its duties to the public by paying off this mortgage, and had interposed to facilitate the exercise of the powers of the trustees under the mortgage, by regulating and restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the mortgage itself is void, because contrary to the public policy of the state. The will of the legislature, while acting within the powers conferred by the people of the state, constitutes the public policy of the state; and so far from manifesting its will to have this mortgage void and inoperative, it has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to declare that a mortgage was contrary to the public policy of the state, after the legislature has directly interposed to aid the mortgagees to act under it. I am therefore of opinion that this mortgage, so far as it purports to convey to the trustees the tangible property of the company, and the right to manage and work the road and take toll thereon, is not void as being contrary to the public policy of the state.

The next question I have considered is, whether the trustees are entitled, upon the case made by the bill, to a decree of foreclosure, either by a strict foreclosure or by a sale. It is insisted by the defendants that the only mode of foreclosing this mortgage is by a sale in pursuance of the fourth article; and though it is not denied that this power of sale may be executed under the direction of a court of equity, upon a bill framed for that purpose, yet it is objected that this bill does not show that a case exists for the exercise of that power; because it does not appear that the holders of two thirds of the amount of the bonds have requested the trustees to sell. The right to foreclose is incident to all mortgages, save Welsh mortgages; and there is no ground for maintaining that this is a Welsh mortgage. For the conveyance is a collateral security for the bonds of the company, the interest and principal of which are payable at fixed times, and the failure to pay such principal or interest is a breach of the second express condition in the deed. Balfe v. Lord, 2 Dru. & War. 480.

Without undertaking to say that the parties may not restrict the right of foreclosure, I consider it quite clear that the insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction, in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and a strict foreclosure would be inequitable. In Slade v. Rigg, 3 Hare, 35, Sir James Wigram, V. C., decreed a strict foreclosure, though the deed contained a power of sale, and it was argued that the execution of that power was the only remedy for the mortgagee. In Wayne v. Hanham, 4 Eng. Law & Eq. 147, the deed contained a power of sale. The mortgagee brought a bill for a strict foreclosure. The mortgagor resisted, and insisted that the mortgagee could only have a decree for a sale. Sir George Turner, V. C., reviewed the case of Slade v. Rigg, approved it, and decreed a strict foreclosure. These were mortgages of personalty, which increased the difficulty of ordering a strict foreclosure; but that, as well as the existence of the power of sale, was held to be insufficient to confine the mortgagee to an exercise of the power of sale contained in the deed. I think the true distinction is taken in Jenkin v. Row, 11 Eng. Law & Eq.

297; it is between deeds containing a mere trust for a sale to secure money advanced, and a mortgage. The former must, of course, be executed as declared, and there the remedy stops. But if the deed be a mortgage, the right to a foreclosure arises from the nature of the security, and is entirely consistent with the existence of another right, viz., a power to sell in pais, which the mortgagor cannot compel the mortgagee to execute. It is inserted for the benefit of the mortgagee, and he may avail himself of it, or not, at his own will. It was argued, in the case at bar, that it could not have been intended that a right to foreclose should exist, because, after foreclosure, the trustees would still hold as trustees, and so the whole matter would stand as before. It is true they would hold the absolute estate as trustees; but it would be as trustees for the bondholders, and subject to such disposition thereof, as their rights and interest might require. In the case of Shaw v. Norfolk Co. R. Co., the supreme court of Massachusetts had a similar mortgage before them, and held that the power of sale did not supersede the right to foreclose by bill in equity. 5 Gray, 162.

My opinion is, therefore, that upon the case stated in this bill the trustees have a right to come into a court of equity to foreclose this mortgage. In what manner it is to be foreclosed, whether by a strict foreclosure, or by a sale, it would be premature now to decide. Whether the statute law of New Hampshire defining the rights and methods of foreclosure so affects the right itself that only a strict foreclosure, substantially such as is there provided for, can be decreed by a court of equity; or whether the grant of equity jurisdiction to the supreme court of that state can be considered as having affected the right of foreclosure, by superadding those principles of equity respecting foreclosure which are administered in courts of equity; or how far this court is to regard either of these considerations, and what particular method of foreclosure the principles of equity require in this case,—can only be properly decided at the hearing, when the merits of the case shall be before the court upon the allegations and proofs of both parties. For the purpose of this demurrer, it is enough that upon the case, as stated in the bill, the complainants appear to be entitled to some decree of foreclosure. And inasmuch as the demurrer, being taken to the whole bill, must be overruled, if the bill for any purpose is sustainable, it is not necessary to decide whether the complainants are entitled to the aid of a court of equity to put them in possession, either in the course of or independent of a process of foreclosure. This question also may best be decided at the hearing. If the complainants merely sought possession of tangible property of the company, not for the purpose of foreclosing the mortgage, but to enable them to take its profits, there might be no sufficient reason for the interposition of a court of equity. On the other hand, if they also need to be quieted and protected in the enjoyment of incorporeal rights, the nature of the rights and their liability to numerous interruptions and infringements might render the powers of a court of equity indispensable to their effectual protection. See Croton Turnpike-Road Co. v. Ryder, 1 Johns. Ch. 611; Newburgh & Cochecton Turnpike-Road Co. v. Miller, 5 Johns. Ch. 101; Boston Water-Power Co. v. Boston & W. R. Co., 16 Pick. 525. When the whole case is before the court, it can be seen what the rights of the parties are, and how far and for what purposes the complainants need the aid of the court.

The remaining question is, whether it was necessary for the trustees to make the bondholders parties. Generally when a mortgage is made to a trustee for the benefit of a cestui que trust, I apprehend that the question whether the cestui que trust ought to be made a party, depends on the purpose of the trust. If the trustee is the proper party to receive and continue to hold the money for the benefit of the cestui que trust, so that the object of the suit is merely to reduce the trust fund to possession, that the trustee may hold it in trust, the cestui que trust is not a necessary party. For I take the general rule to be, that to a suit by a trustee to obtain possession of the trust fund, the cestui que trust need not be made a party. See Calv. Parties, 212–215, and cases there cited; Allen v. Knight, 5 Hare, 272. But where a trustee is interposed between a lender and a borrower merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred on him by the mortgage, and the lender is the proper party to receive the money, he should be made a party to a bill for foreclosure. It is, in truth, between him and the mortgagor that the account is to be taken, and he ought to be before the court for the purpose of taking the account, as well as to receive the money if paid. See Story, Eq. Pl. § 201. But this requirement of the presence of the cestui que trust must give way to the absolute impossibility, or even to the excessive inconvenience of complying with it. And the case at bar undoubtedly presents an instance of such excessive inconvenience, if not of absolute impossibility. The bill shows that the number of different bonds secured by this mortgage was seven hundred and five, amounting to the sum of five hundred thousand dollars. They were not issued until after the execution of the mortgage; of course their original holders are not parties to the deed. It is a notorious fact, and recognized in various ways by the legislation of most states where railroad corporations have issued such bonds, and manifestly contemplated by the deed in question, that these bonds were to be sold in the market and pass from hand to hand. Consequently it must have been impossible for the trustees to know who were the holders when the bill was filed; and if then known, there would be no probability that

they would continue in the same hands during any considerable time. To require the trustees to make the holders parties, would amount to a prohibition to sue; and it is now too well settled to require a reference to authorities to show that courts of equity do not allow a rule respecting parties, adopted for purposes of convenience and safety, to operate so as to defeat entirely the purposes of justice. Nor is this a case in which it could answer any beneficial purpose to make some of the bondholders parties, in behalf of themselves and all others. The trustees are competent, and it is their duty, to represent all. Powell v. Wright, 7 Beav. 444. The deed so treats them. In the cases of a sale, or possession taken of the road for purposes of managing it and receiving the income, the deed looks to the trustees to ascertain who are holders of bonds, and to pay to each his aliquot part. And it is in the power of the court, by directing the proper inquiries before a master, to have the holders of the bonds before the court at the moment when the account is to be taken, and thus afford all needful security, as well to them as to the mortgagors and the trustees. See Story, Eq. Pl. § 207a; Williams v. Gibbes, 17 How. [58 U. S.] 239; Gooding v. Oliver, Id. 274. It was stated at the bar that the supreme court of Massachusetts came to this same conclusion in reference to parties, in Shaw v. Norfolk Co. R. Co., above referred to, but that no report of the decision, on that point, has been made. 5 Gray, 170. My opinion is that the objection for the want of parties is not tenable.

The demurrer is overruled, and the defendants ordered to answer the bill.

NOTE. Franchises of corporations are not generally the subject of sale or transfer, unless specially made so by some positive provision in them. See Adams v. Boston, H. & E. R. Co. [Case No. 47]; Sweatt v. Boston, H. & E. R. Co. [Id. 13,684]; Richardson v. Sibley, 11 Allen, 67; Abbott v. Johnstown, G. & K. H. R. Co., 80 N. Y. 29, citing case in text, and approving doctrine as there laid down. Corporations as parties to a suit. See Railroad Co. v. Howard, 7 Wall. [74 U. S.] 415, citing case in text.

Case No. 5,949.

HALL v. UNGER.

[4 Sawy. 672; 2 Abb. (U. S.) 507.][1]

Circuit Court, D. California. Nov. 8, 1867.[2]

SAN FRANCISCO ALCALDE TITLES — DERANGEMENT ON ONE SUBJECT CONSISTENT WITH CAPACITY TO ACT ON OTHER SUBJECTS—MENTAL CAPACITY TO EXECUTE POWER OF ATTORNEY — PRESUMPTION OF LAW AS TO SANITY — BURDEN OF PROOF — PRESUMPTION OF THE LAW WHERE HABITUAL INSANITY IS SHOWN — INSANITY INFERRED FROM CIRCUMSTANCES—DUTY OF OFFICER TAKING ACKNOWLEDGMENT.

1. The operation of the Van Ness ordinance of the city of San Francisco and the confirmatory legislation of the state of California, and the action of congress, was to give to the holders of San Francisco alcalde grants, such as are mentioned in the ordinance, an absolute and indefeasible estate.

2. The law recognizes the fact that there may be derangement of the mind as to particular subjects, and yet capacity to act on other subjects. In determining, therefore, the ability of a person alleged to be insane to execute any particular act, the inquiry should first be what degree of mental capacity is essential to the proper execution of the act in question, and then whether the party possessed at the time such capacity.

3. For a valid execution of a power of attorney to convey land, it is essential that the party executing the power should at the time possess sufficient mind and memory to understand the nature of the business he is engaged in, to know the character and location of the property, and the object and effect of the act he is doing; in other words, it is essential that he should recollect that he is the owner of the property mentioned, the place where such property is situated, and that the instrument conferred authority for the sale of the same.

[See note at end of case.]

4. The law presumes that every adult man is sane, and possessed of the absolute right to sell and dispose of his property in whatever way he may choose; his will, in every case, standing as the reason of his conduct. Whoever denies his sanity must establish the position; the burden of proof rests upon the party who alleges the mental derangement. If the validity of a particular act is assailed, the assailant must establish that at the time the act was done the insanity existed.

5. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise, where such habitual insanity is shown to have existed; then the presumption is that the party was insane at the time, and the burden of proof rests with those who allege the party's competency.

[Cited in Parkhurst v. Hosford, 21 Fed. 833.]

6. In considering whether a particular act assailed for the alleged insanity of the party was valid or not, regard must be had, in the absence of direct testimony on the point to all the attending circumstances, the reasonableness of the act in itself, and its approval by the family and relations of the party.

7. It is the duty of an officer authorized to take the acknowledgment of an instrument to satisfy himself, before he signs his certificate, of the competency of the party to execute the instrument, and the presumption of capacity is therefore strengthened by the attestation of the officer.

This was an action to recover possession of lands. It was originally commenced by Mary K. Hall, who was the widow, and four other plaintiffs, who were the children of John Hall, deceased; from whom the plaintiffs claimed to inherit the premises in question. Mary K. Hall died during the proceedings, after which the action was prosecuted by the other plaintiffs. The action was originally brought against Adolph Unger, and seventeen other defendants; but the plaintiffs discontinued against Unger and several other defendants, and prosecuted the action against Henry S. Dexter and six others.[3] The leading question of general inter-

[1] [Reported by L. S. B. Sawyer, Esq., and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Sawy. 672, and the statement is from 2 Abb. (U. S.) 507.]

[2] [Affirmed in 15 Wall. (82 U. S.) 9.]

[3] Notwithstanding the change of parties, the action was known, throughout proceedings in

est, presented upon the trial, related to the mental capacity of John Hall to execute a certain power of attorney. The facts, so far as are necessary to present this question, were as follows: The land in question was a lot situated upon Bryant-street, in San Francisco. The plaintiffs claimed it as heirs of John Hall; and they proved a grant of the land to Hall from an alcalde in San Francisco, and subsequently confirmed by the legislation of the state and of the United States, which vested the title in him; the relationship of the plaintiffs to Hall; his death; the possession of the lands by the defendants, and other facts requisite to make out a presumptive right to recover. To meet the case thus presented, the defendants gave in evidence a power of attorney, purporting to be executed by John Hall, on December 27, 1852, to one James W. Harris, empowering him to sell and convey the real property in controversy, and also to appoint a substitute to act for him. This power bore a certificate of due acknowledgment before a commissioner of California, resident in Pennsylvania. They also produced a substitution of the power to one David B. Rising, and a conveyance of the premises by Rising, acting under this substitution, to Daniel D. Page, under whom they claimed title. This power of attorney, and the acts done under it, the plaintiffs assailed, contending that, at the time it purported to have been executed, Hall was insane, and incapable, by reason of his insanity, from attending to any business. Many witnesses were examined upon this question; but the recapitulation of their testimony given in the judge's charge is sufficient to explain his general instructions.

Hall, McAllister & Galpin, for plaintiffs.

J. P. Hoge and Sol. A. Sharp, for defendants.

FIELD, Circuit Justice (charging jury). This is an action of ejectment to recover the possession of a 100-vara lot, situated on the northerly side of Bryant street, near First street, in this city. The plaintiffs claim the property as the heirs of John Hall, deceased. In support of their claim they have produced a grant of the premises issued to Hall by Alcalde Leavenworth, on the thirtieth of December, 1848, and have proved its genuineness and due execution; they have shown the marriage of Hall with their mother, Mary K. Hall, and that they are the children of this marriage. John Hall died in September, 1860, and Mary K. Hall has died during the pendency of the present action. At the death of their father the plaintiffs were all minors, the eldest being twenty years, and the youngest nine years of age. The property granted, assuming that the grant was valid, was the separate property of Hall, and by the law of descents and distributions of this state whatever interest he then possessed passed upon his death, one-third to his surviving wife, and the remainder in equal shares to the children. On the death of the wife her interest also went to the children, so that now the entire estate which he possessed in this property at his decease, assuming that he possessed any, is vested in the plaintiffs.

It is not necessary to consider whether originally American alcaldes in the city of San Francisco, after the cession of California to the United States, possessed any power to make grants of land. So far as this case is concerned it is immaterial whether they did or did not possess such power. The subsequent action of the authorities of the city of San Francisco, and the confirmatory legislation of the state, together with the action of congress, have given to the holders under alcalde grants, recorded like the one in suit, an absolute and indefeasible estate, even if they acquired originally no title whatever by the grants.

By the ordinance of the common council of the city of San Francisco, commonly designated, from the name of its reputed author, the "Van Ness Ordinance," the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; but at the same time the ordinance declared that all persons who held title to lands within said charter limits, lying east of Larkin street and north-east of Johnson street, by virtue of any grant made by any ayuntamiento, town council, or alcalde of the pueblo, after the seventh of July, 1846, and before the incorporation of the city, which grant, or the material portion thereof, was registered or recorded in a proper book of records—deposited in the office or custody or control of the recorder of the county of San Francisco—on or before April 3, 1850, should for all the purposes contemplated by the ordinance "be decreed to be possessors of the land" granted, although the land might be in the actual occupancy of persons holding the same adverse to the grantees. In other words, the ordinance declared that the title of the city, whatever it may have been, should go to the parties in actual possession at a designated period, and that the holders under alcalde grants, which were, previous to April 3, 1850, registered or noted in books deposited in the recorder's office, should be deemed such possessors for the purposes of the ordinance.

In this case it has been shown that the

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the circuit court, as Hall v. Unger. But subsequent proceedings on error were instituted under the title Dexter v. Hall [15 Wall. (82 U. S.) 9.]

grant was registered in a proper book at the time or soon after its execution, in 1848, and that this book was deposited in the office of the recorder on its establishment in April, 1850. The Van Ness ordinance did, therefore, if it were valid, transfer to and vest in John Hall (had he not previously disposed of the premises) all the right and title of the city. But lest the action of the common council, in passing this ordinance, might have been in excess of their authority, application was made to the legislature of the state for its confirmation, and on the eleventh of March, 1858, the legislature ratified and confirmed it.

But notwithstanding this legislation, there were numerous persons—some of them among our ablest lawyers—who denied that there was any title in the city which she could relinquish, and insisted that all the lands within the corporate limits belonged to the United States. The framers of the ordinance also appear to have entertained some doubts on this subject, for they provided in the tenth section that application should be made, not merely to the legislature of the state for confirmation, but to congress, "to relinquish all the right and title of the United States to the said lands for the uses and purposes" mentioned in the ordinance.

Affected by similar doubts, and in order to give quiet and security to the parties holding under the Van Ness ordinance, one of our senators introduced a bill into congress containing a clause relating to these lands. The bill became a law on the first of July, 1864, and by it all the right and title of the United States to lands within the corporate limits of the city, as defined by the charter of 1851, with certain reservations not material to this case, were ceded to the city and its successors for the uses and purposes specified in the Van Ness ordinance.

Thus, gentlemen, you will perceive that all the possible sources of title of lands, namely, the city as successor to the pueblo, the state, and the United States, have united to vest an absolute and indefeasible estate in the claimant under the alcalde grant in question. The defendants being in possession of the premises when this action was instituted, the case of the plaintiff is thus prima facie made.

To meet the case thus presented, the defendants have produced and given in evidence a power of attorney, purporting to be executed by John Hall, on the twenty-seventh of December, 1852, to one James W. Harris, empowering him to sell and convey the real property in controversy, and also to appoint a substitute to act for him. This power bears a certificate of due acknowledgment before a commissioner of California, resident in Pennsylvania. They have also produced a substitution of the power to one David B. Rising, and a conveyance of the premises by Rising, acting under this substitution, to Daniel D. Page, under whom they claim. This power the plaintiffs assail, contending that, at the time it purports to have been executed, Hall was insane, and incapable, by reason of his insanity, from attending to any business.

Gentlemen:—I do not propose to attempt any nice or philosophical exposition of the subject of insanity. I should certainly fail if I made the attempt; and if I could succeed, the result would not be of any service to you in determining this case. Any elaborate and extended dissertation, if it were possible for me to present such a one, would only tend to perplex and confuse your minds. I shall make a few observations on the subject, and refer to the rules laid down by the authorities to guide you in considering it, and then call your attention briefly to the evidence in the case.

The physicians who have been examined, and the text writers, declare that it is impossible to give any consistent definition of insanity; that no words can comprise the different forms and characters which this malady may assume. The most common forms in which it presents itself, are those of mania, monomania, and dementia. All these imply a derangement of the faculties of the mind from their normal or natural condition. Idiocy, which is usually classed under the general designation of insanity, is more properly the absence of mind than the derangement of its faculties; it is congenital, that is, existing in birth, and consists not in the loss or derangement of the mental powers, but in the destitution of powers never possessed.

Mania is that form of insanity where the mental derangement is accompanied with more or less of excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred, and of things which do not exist, and acts more or less in conformity with his belief in these particulars. The mania may be general, and affect all or most of the operations of the mind; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed monomania.

Dementia is that form of insanity where the mental derangement is accompanied with a general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. "In dementia," says Ray, a celebrated writer on medical jurisprudence, "the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak; events the most recent and most

nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat insulated words and phrases without the slightest meaning."

These common forms of insanity, mania, monomania, and dementia, present themselves in an infinite variety of ways, seldom exhibiting themselves in any two cases exactly in the same manner. Mania sometimes affects, as already observed, all the operations of the mind; and sometimes the mental derangement appears to be limited to particular subjects. An absence of reason on one matter, indeed, on many matters, may exist, and at the same time the patient may exhibit a high degree of intelligence and wisdom on other matters. The books are full of such cases. Many of them have been cited to you by counsel on the argument. They show, indeed, a want of entire soundness of mind; they show partial insanity; but this does not necessarily unfit the individuals affected for the transaction of business on all subjects. In a case which arose in the prerogative court of England (Dew v. Clark, 3 Addams, Ecc. 79), it was said by counsel that partial insanity was something unknown to the law of England. To this suggestion the court replied: "If he meant by this that the law of England never deems a person both sane and insane at the same time upon one and the same subject, the assertion is a mere truism. But if by that position it be meant and intended that the law of England never deems a party both sane and insane at different times on the same subject, and both sane and insane at the same time on different subjects, there can scarcely be a position more destitute of legal foundation, or rather there can scarcely be one more adverse to the current of legal authority." In that case the court cited the language of Locke, that "a man who is very sober and of right understanding in all other things, may, in one particular, be as frantic as any man in Bedlam;" and of Lord Hale, who says, "There is a partial insanity of mind and a total insanity; in the first, as it respects particular things or persons, or in respect of degrees, which is the condition with very many, especially melancholy persons, who for the most part discover their defect in excessive fears and grief, and yet are not wholly destitute of the use of reason."

So, too, in dementia, where there is a general enfeeblement of the mental powers, there is not usually equal weakness exhibited on all subjects, nor in all the faculties. Those matters which, previous to the existence of the malady, the patient frequently thought of and turned over in his mind, are generally retained with greater clearness than less familiar objects. One faculty may be greatly impaired,—the memory, for example,—while other faculties retain some portion of their original vigor. The disease is of all degrees, from slight weakness to absolute loss of reason. The enfeeblement usually progresses gradually—through a twilight, as it were, of reason, before the darkness of night settles upon the mind.

It is important to bear these observations in mind; for it does not follow from the fact that mania or dementia be shown, that there may not be reason or capacity for business on some subjects. In determining the ability of the alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question; and then whether such capacity was possessed at the time by the party. It is evident that a very different degree of capacity is required for the execution of a complicated contract, and a single transaction of a simple character, like the purchase or sale of a lot.

The act done in the case at bar was the execution of a power of attorney to sell three lots in San Francisco. The act required no greater exercise of reason than is essential to the valid execution of a will of real property; and the authorities which determine the degree of capacity essential in such cases may properly be relied upon as furnishing the proper rule in this case. And those authorities concur, especially the later authorities, substantially in this; that it is only necessary to the validity of the will that the testator had sufficient mind and memory to understand the business upon which he was engaged, and the effect of the act he was doing. "He must," in the language of Judge Washington, in Harrison v. Rowan [Case No. 6,141], "have a sound and disposing mind and memory. In other words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged —a recollection of the property he means to dispose of—of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal forms. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed—the distribution of his property in its simple forms. It is the business of the testator to dictate the purposes of his mind, and of the scrivener to express them in legal form."

It is true, as stated by counsel, that the authorities generally go to the extent that it requires less intelligence and reason to make a will than to execute a contract; but for the execution of an act of a simple character, not involving complicated details and provisions, the rule laid down by Judge Washington is sufficiently stringent.

According to that rule, it was material to the valid execution of the power in this case,

that Hall should, at the time, have possessed sufficient mind and memory to understand the nature of the business he was engaged in, to know the character and location of the property, and the object and effect of the act he was doing; in other words, it was essential that he should recollect that he was the owner of the property mentioned, that such property was situated in the city of San Francisco, and that the instrument conferred authority for the sale of the same.

In considering this case, it is to be remembered that the law presumes that every adult man is sane, and possessed of the absolute right to sell and dispose of his property in whatever way he may choose; his will in every case standing as the reason of his conduct. Whoever denies his sanity must establish the position; the burden of proof rests upon the party who alleges the mental derangement. And if, as in the present case, the validity of a particular act is assailed, the assailant must establish that at the time the act was done the insanity existed. Testimony as to previous or subsequent insanity will not answer, unless the insanity be shown to be habitual—that is, such as is in its nature continuous and chronic. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise, when such habitual insanity is shown to have existed; then the presumption is that the party was insane at the time, and the burden of proof rests with those who allege the party's competency.

Again, in considering whether a particular act assailed for the alleged insanity of the party was valid or not, regard must be had, in the absence of direct testimony on the point, to all the attending circumstances—the reasonableness of the act in itself, and its approval by the family and relations of the party. The reasonableness of the act and the approval of the family will not render the act valid, if the party were at the same time insane, but they are circumstances tending to show that the party was not at the time incompetent, and that his family and relatives did not so regard and treat him.

In this case it appears that the lot in controversy was at the time in the adverse possession of others, and that the supreme court of the state had decided that alcalde grants conferred no title. A sale of his interest, if anything could be obtained for it, under the circumstances, would seem to have been a judicious and a wise step.

The only testimony which relates directly to the time of the execution of the power is that of Broadhead, the witness to the instrument, and the officer before whom it was acknowledged. It was the duty of this officer to satisfy himself of the competency of Hall before attesting the instrument. As said by the supreme court of Pennsylvania, in Werstler v. Custer, 46 Pa. St. 503, "No honest man will subscribe as a witness to a will or any other instrument executed by an insane man, an imbecile, an idiot, or a person manifestly incompetent for any reason to perform, with legal effect, the act in question. A duty attaches to the witness to satisfy himself of the competency of the party before he lends his name to attest the act. Like the magistrate who takes the acknowledgment of a deed, he is to be reasonably assured of the facts he undertakes to verify, else he makes himself instrumental in a fraud upon the public. And, therefore, the legal presumption, always favorable to competency, is greatly strengthened by the fact of attestation by witnesses."

Such is the general effect of the attestation of a witness and officer; but whether the attestation in the present case, under the peculiar circumstances in which it was made, can add anything to the legal presumption of competency, may well be doubted. It is a circumstance worthy of consideration, whether the commissioner should have gone to the asylum to take the acknowledgment of an inmate of the institution, with whom he had no previous acquaintance, without information from the officers of the institution that the patient at the time was in possession of sufficient reason to understand the business which it was proposed he should execute.

Broadhead testifies that he went to the Frankfort Asylum to take the acknowledgment of Hall, with whom he was not previously acquainted; that he read the power to Hall, and handed it to him to read, and asked him if he understood it; that Hall replied "perfectly," or words to that effect; and that the property was valuable, and that he wanted it sold for the benefit of his wife and children. The commissioner also testifies, that he could not have believed Hall was on all subjects of sound mind, from the simple fact that he was an inmate of the asylum; but that, as to the power of attorney, Hall was clear as to what he was giving; that there was nothing in his appearance which led the commissioner to suppose he was insane, and from the fact that he stated that he wanted the property to be sold, the commissioner was led to believe he had a lucid interval. The witness adds, that he would not have permitted Hall to execute the instrument, and he would not himself have taken the acknowledgment, unless Hall had been of sufficient mind, memory, judgment, and understanding, to execute such a paper.

Aside from the peculiar circumstances under which the commissioner acted, there is one fact in his testimony which should be considered by you as throwing possibly some light on the condition of Hall's mind, at the time, somewhat in conflict with the commissioner's own opinion. He states that Hall

at first wrote something besides his signature to the instrument. The instrument itself shows that there has been an erasure of something near the signature. The commissioner states, as his impression, that Hall wrote some other name than his own. This is at least a singular circumstance, if, as stated by the commissioner, he had heard the instrument read, and perfectly understood its purport.

We will now briefly refer to the testimony produced by the plaintiffs, to show the general insanity of Hall at the time he executed the power in question. If he was then insane, and his insanity was general, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of John Hall than if he was dead at the time of its execution.

It appears from the testimony produced by the plaintiffs, that John Hall was a lieutenant in the United States navy, and at one time had the command of a vessel of war; that he was, in 1848, on this coast; that whilst here, the alcalde grant was issued to him; that in 1849 he became unwell, and his health was so much affected that he was sent to the eastern states under the charge of a physician; that he arrived in New York and joined his family in June, 1849; that he remained with his family until June, 1851—two years; that during this period, there were such indications of insanity that, upon the advice of his consulting and family physicians, he was sent to the asylum at Frankfort; that he remained there, under treatment for insanity, until January 25, 1854, when he was removed to the state insane asylum; and that he died an inmate of this latter institution, in September, 1860.

The witnesses produced by the plaintiffs are either the physicians attending, or persons immediately surrounding Hall, both before his entry into the asylum and afterwards. The testimony discloses the possession by him of hallucinations and illusions on many subjects. Mr. Wright states, that whilst in New Jersey, after his return, he was at times greatly incensed at his neighbors, asserting that they had destroyed his garden—which they had not—and complained of noises in his ears, which he said arose from a train of cars running through his head.

Miss Harris testified that he was subject to fits of abstraction; had strange fancies; thought he had been to heaven, and said so, and finding his wife was not there, had returned; that he complained much of confusion in his head, and thought trains of cars were running through it; and would object to a light in the evening, as being painful to his head and setting it on fire; that he would work in his garden sometimes for a whole day without food, giving as an excuse that he was obliged to work for his living; that he would plant vegetables and flowers and soon dig them up, and then charge his neighbors with killing his plants; he would get excited and threaten to shoot any one who came on his place; that there was a spring of water in the cellar, which was drained through a vacant lot, and that he at one time took a fancy to fill up the drain, and then, when the water rose, he spent hours in trying to bail it out. He did this repeatedly. He would fill up the drain in the daytime, and his wife would hire a man to open it after night. When remonstrated with for his conduct, he said it was God's will it should be done. He would sometimes fancy himself the Creator, and want parties to address him as such; at other times he would use the most blasphemous language. He would buy the most unnecessary things, posts and rails, for which he had no use. He took great dislike to certain persons, and would not permit them to come to the house. He would sometimes sit at the table, with a vacant stare, and neither eat himself or help others. He took no notice of his children and no care of his family, although before that he was a devoted husband and affectionate to his children. At times he would treat visitors very insolently, fancying they came to injure him. He would expose himself all day to the hot sun, and if called in, he would say he was too busy, and obliged to work. He fancied he owned everything he saw at the stores, and could not understand why he could not help himself to what he liked.

After Hall was sent to the asylum, it appears he continued subject to hallucinations. Wright testifies that it was impossible to hold any connected conversation with him, or to keep his mind centered on any one subject; that he fancied his fellow patients were distinguished historical characters, and desired to introduce them to the witness. He had scars upon his wrists and arms, and said he had been tattooing himself, a beautiful art he had acquired at the Sandwich Islands, and desired to tattoo the witness, stating that the operation was perfectly painless. Miss Harris states that when she visited him at the asylum, he imagined he was employed to fit out a fleet, and said he was oppressed with care he was so occupied with his business.

Wistar, the steward at Frankfort Asylum, from May, 1852, to September, 1853, testifies that Hall had a great many singular propensities. When awake he spent a great deal of his time in indistinct mutterings and murmurings. He had a propensity for weaving wire and fish bones into his arms and legs, through the flesh and under the skin, very much as a woman would darn a stocking. This resulted in sores, which fes-

tered and discharged. He was in the habit of heaping up his bed-clothes in his bed daily in the form of a hay-cock or pyramid, and would then cap the same with the chamber utensil. He had a fancy of putting on his clothing in a way not designed to be worn. He tore his clothing and bedding. He was very profane and obscene in his language, and spent a good deal of time in what he termed prayer, which in a sane man would have been blasphemy of the worst kind. The testimony of Mrs. Wistar is to the same effect.

Dr. Fithian, the family physician of Hall from June, 1849, until he went to the hospital, pronounces his malady insanity, and says that it was accompanied with unnatural excitement, restlessness, irritability; that he was incoherent, and had want of connection of thought and expression. He adds that the disease was acute mania, rather than dementia, into which acute mania is apt to run.

Dr. Evans, who was one of the physicians of Hall, both before and after he was at the asylum, states as his recollection of the disease, that he was laboring under chronic inflammation of the meninges of the brain, producing mania, and resulting in dementia, and that whilst at the asylum he gradually deteriorated and grew worse, and that he (the doctor) considered him hopelessly insane.

Dr. Worthington, the medical superintendent, pronounces the disease of Hall mania, with a tendency to dementia, and states that he had various delusions, and among others, believed he was the Son of God. I have stated the most important matters testified to by the witnesses, from which you must draw your conclusions as to the sanity or insanity of Hall at the time the power was executed. I do not refer to the testimony as to Hall's condition after his removal from the asylum at Frankfort to the state asylum. It is not pretended that after that period he was possessed of lucid intervals, but, on the contrary, he gradually sank from one degree of weakness to another until his death.

You will perceive that the physicians of Hall state that the malady of which he was suffering was originally acute mania, and that it ended in dementia. You will observe that he was affected by similar hallucinations and illusions, both before and after he went to the asylum; and you will remember, as already stated, in speaking of mania, that it is characterized by hallucinations or delusions; the patient believing and acting upon the supposed reality of facts and events which have never occurred, or do not exist. The testimony of all the witnesses is that the malady from the commencement continually increased, the patient gradually sinking from one degree of enfeeblement to another. Now, there may have been lucid intervals with the patient arising from an intermission in the operation of the disease. If there was any such intermission and consequent lucid interval in this case, it is for you to determine. In considering this matter, you will remember that the malady in this case arose from a disease of the lining membrane of the brain, from what Dr. Evans designates chronic inflammation of the meninges of the brain; that it had continued with more or less intensity for over three years when the power of attorney was executed. If, therefore, you should come to the conclusion that he was, as asserted by his physicians, insane before he entered the asylum, and that his malady continued to grow worse afterward, you will be justified in finding that it had attained that character which the books designate as habitual insanity, which is continued and settled derangement. If you come to this conclusion, you will then look for proof of his having had a lucid interval when he executed the power. The burden of proof, in that event, that is to say, if habitual insanity be established, lies upon the party who alleges that a lucid interval existed.

Several very able physicians in this city have been called to state their opinions founded upon the evidence of the plaintiffs—that of Broadhead being excluded—as to the probability of lucid intervals in the condition in which Hall is shown to have been. They all express the opinion that such lucid intervals were probable; indeed, their testimony goes so far as to state that in their judgment his insanity was not, previous to 1853, of such severe and general character as to render him at all times incapable of transacting business on some subjects.

I will only observe, that the opinions of physicians are received in evidence from their superior knowledge of matters connected with their profession. It would be difficult to present in an intelligible way to a jury all the grounds upon which learned professional men may base their judgments. The law, therefore, allows their opinions to be received, but at the same time, where professional men are of equal standing and intelligence, it awards much higher consideration to those opinions which are based upon personal observation and examination of the patient.

The case, gentlemen, is one of great interest, and is of much importance to the parties. It has been tried with great ability by counsel, and I doubt not that after the patient consideration which you have given to their arguments and to the evidence, you will, under the instructions of the court, readily reach a wise and just verdict.

The jury returned a verdict for plaintiffs and judgment was entered accordingly in their favor. Afterward defendants sued out a writ of error, and the case was taken to the United States supreme court, where the judgment was affirmed. It will be found reported under the title of Dexter v. Hall, 15 Wall. [82 U. S.] 9.

[NOTE. The defendants then brought error, and the supreme court affirmed the judgment

in an opinion by Mr. Justice Strong, who held that the power of attorney of a lunatic or of one non compos mentis was void. 15 Wall. (82 U. S.) 9.

[The mandate having been filed in circuit court, and a writ of possession issued, the marshal refused to execute it, because the person in possession claimed title under a tax sale subsequent to judgment. Mr. Justice Field held that the marshal might require security from plaintiff, or give time to defendant to apply to the court for a modification of the writ so as to exclude him. When such security is tendered, and no application is made, the duty of the marshal is to put the plaintiff in possession. Case No. 5,929.]

Case No. 5,950.

HALL et al. v. UNION PAC. R. CO.

[3 Dill. 515; 6 Chi. Leg. News, 307; 8 Am. Law Rev. 775.] [1]

Circuit Court, D. Iowa. 1875.[2]

JURISDICTION OF UNITED STATES CIRCUIT COURT IN MANDAMUS CASES—WHEN PRIVATE PERSON MAY INSTITUTE PROCEEDINGS.

1. The act of March 3, 1873 (17 Stat. 509), gives to the proper circuit court jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act.

[Cited in People v. Colorado Cent. R. Co., 42 Fed. 641.]

2. Whether the circuit court for the district of Iowa can acquire jurisdiction over the company under this act, quaere.

3. Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law, may institute proceedings under the act of March 3, 1873, supra, without the sanction of the attorney general.

[See note at end of case.]

4. Cases in which the attorney general must, and in which private citizens may, apply for the writ, considered.

A petition or statement under oath, is filed in the court, by Samuel E. Hall and John W. Morse, citizens of the United States, and of the state of Iowa, asking for a writ of mandamus to be directed to the Union Pacific Railroad Company to compel it to operate its trains over the whole of its road as one continuous line, from Council Bluffs westward, and to desist from operating its bridge over the Missouri river between Council Bluffs and Omaha, as an independent and separate line or portion of its road. The nature of the statements made by the prosecutors, and of their interests, and of the particular duty which it is sought hereby to compel the respondent to perform, appear more at large in U. S. v. Union Pac. R. Co. [Case No. 16,599]. The decision then made settled the mode of procedure herein to be in accordance with the practice at common law, and the counsel for the prosecutors or relators now move for an alternative writ of mandamus to be directed to the Union Pacific Railroad Company, commanding it to operate the whole of its line of road to and from Council Bluffs, etc., as above stated. A notice of the application was served upon a general agent of the company at Council Bluffs. No appearance is made by the company, but counsel in its interest have been heard to make suggestions against the granting of the alternative writ.

John N. Rogers, Sapp, Lyman & Hanna, and A. V. Larimer, for prosecutors.

James M. Woolworth and A. J. Poppleton, contra.

DILLON, Circuit Judge. On March 3d, 1873, it was enacted by congress that the "proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law." 17 Stat. 509. This act is the basis of the present proceeding, and the proper practice under it has been already determined. U. S. v. Union Pac. R. Co. [supra]. The question before us at this time is whether an alternative writ shall be ordered.

The relator's counsel have been heard in support of the motion for the writ; and in a matter of so much importance we willingly granted the application of counsel to be heard in opposition, although they do not enter an appearance for the respondent. Two leading objections have been urged against awarding the writ. The one relates to the jurisdiction of the court over the company; the other to the form of the proceeding.

Whether the circuit court for the district of Iowa is the "proper circuit court" to hear and determine the case made by the relators, need not, and perhaps can not, now be determined. If the writ be awarded, but can not be served on the respondent so as to give the court jurisdiction over it, then, unless there is a voluntary appearance, the proceeding will necessarily fail. The petition or information sets out that the eastern terminus of the respondent's road is in this state; and we are not prepared now to say as a matter of law arising from statutes of which we take judicial notice, that it appears that in no event can this court obtain jurisdiction under the act of 1873, over the company, to compel it to operate its road as required by law. If it was admitted or appeared that no part of the road was in the district, and that the company had no principal place of business therein, we might have the data, perhaps, to decide whether in any event this court could acquire jurisdiction over it. Under the circumstances, we reserve the question as to jurisdiction until we see whether the company appears, or until the character of the service of the writ upon it, is known to us.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 8 Am. Law Rev. 775, contains only a partial report.]

[2] [Affirmed in 91 U. S. 343.]

Whether the facts stated by the relators show a failure by the company to operate the road according to law, is a question which may arise on demurrer to the alternative writ, or on the return thereto, in case the court shall acquire jurisdiction over the respondent, but which we do not consider at this stage of the proceeding.

This brings us to the objections which relate to the form of the proceeding. It is contended that the affidavits should be filed, or the writ moved for, by the public law officer of the United States,—either the attorney general or the district attorney. In other words, as the duty here sought to be enforced is one which the company owes to the public at large, and one in which the relators have no special interest distinct from other citizens, it is maintained that the law officers of the United States have the sole right to apply to the courts to enforce its performance; and that private persons can only have or move for the writ of mandamus when it is the appropriate remedy to enforce some individual or private right.

The affidavit or petition on which the writ is asked states that the failure of the company to operate its road according to law "causes great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to the petitioners, who are merchants doing business in Council Bluffs, and who are constantly obliged to ship and receive goods transported over said road." This is the only special interest set forth by the prosecutors; and it was conceded by their learned counsel that the duty here sought to be enforced was a public duty, or at least one in the performance of which the relators had no more interest than any citizen who had frequent occasion to ship and receive goods over the respondent's road.

There is no legislation of congress specifically making it either the duty of the attorney general or the district attorney to institute proceedings like the present; and so the question whether they must be instituted by one of these officers, or may be instituted by private persons, and the writ moved for by private counsel, must be determined on general principles having reference in their application to the particular nature of the defendant corporation, and the particular duty which it is here sought to make it discharge.

The act of March 3, 1873, gives to the proper circuit court jurisdiction in mandamus to compel the road to be operated according to law, but the act is silent as to who shall institute or set on foot the proceeding. This is more significant because as respects other duties and supposed liabilities of the company, the attorney general is expressly directed to institute the necessary legal proceedings to protect the interests of the United States. Act March 3, 1873 (17 Stat. 509); Act April 10, 1869 (16 Stat. 56).

There is, therefore, as respects the duty of operating its road as one continuous line (which is the particular duty the performance of which is here sought to be compelled), no declaration of the will of congress as to who shall or may commence the necessary proceeding in mandamus.

It will conduce to a proper solution of the question before us to advert briefly to the character of the Union Pacific Railroad Company. It was chartered by congress and aided by money and lands. It is a private corporation in the sense that its capital stock is owned by the stockholders, who are declared to constitute the corporate body. Both from the title of the incorporating statute and from express declaration in the body of act (section 18), it appears that the object of congress in chartering and aiding the company, was to promote the public interest and welfare, and secure to the government the use of the road for postal, military and other purposes. The government has also a lien on the railroad and its property, to secure the bonds it issued to the company. By the act of July 2, 1864 (13 Stat. 356, § 15), "the several companies are required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one continuous line."

Throughout the legislation of congress respecting this company, the fact is recognized that it sustains a special or peculiar relation to the United States in their political capacity and also a relation to the people at large or the general public. Now so far as the company owes duties to the general government of a nature to be enforced by mandamus, it is clear that private persons cannot institute or set on foot the proceedings. This would be a duty devolved upon the attorney general by express enactment, or resulting from his station. Such is not this case. And it may be admitted that where, as in the present instance, the duty charged to be neglected by the company is one which concerns the public at large as distinguished from the government, that the attorney general in his official capacity, alone, or on the relation of private persons, might file the necessary suggestion or affidavits and move for the writ.

But where the duty said to be neglected is one which the company owes to the public, and where individuals who suffer from such neglect complain of it, must the court refuse the writ solely because the attorney general does not move for it? Upon principle and authority this question must, in our opinion, be answered in the negative. By the practice at common law "the writ is ordinarily obtained on the motion of counsel to the court of king's bench, at Westminster, during the term, supported by a suggestion, on the oath of the party injured (prosecutor) of his right, and of the denial of justice by the defendant, whereupon a rule nisi is made," etc. Tapp. Mand. 5. "The application to the court of B. R. for a rule for a

writ of mandamus in all matters affecting the public is ex debito justitiae. * * * Where, however, the right or power is of a private nature, as in the case of many officers, etc., in which the public are not primarily concerned, it is discretionary in the court, in the first instance, either to grant or refuse the application. * * * In general all those who are legally capable of bringing an action are also equally capable of applying to the court of B. R. for the writ of mandamus," etc. Id. 287, 288.

It is clear that the affidavits upon which the writ is applied for may be made by any person cognizant of the facts, and those affidavits should not be entitled as of the cause, for none is yet pending, and the government only becomes a party in form when the writ issues. Tapp. Mand. 413; Haight v. Turner, 2 Johns. 371; People v. Tioga Common Pleas, 1 Wend. 291.

So that the question is reduced to this: Must the writ be applied for by the attorney general? And must it be refused in a case otherwise proper for it, unless this officer makes or sanctions the application? A thorough examination of the English books has satisfied us that it is the constant practice of the queen's bench to entertain applications by private persons, on the motion of private counsel, for writs of mandamus to public officers and companies to enforce the performance of public duties. This is well illustrated by the case of Rex v. Severn & W. Ry. Co., 2 Barn. & Ald. 646, which, in principle, is analogous to the case at the bar. In the case just cited, upon the affidavit of a private prosecutor (Taunton), and on the motion of private counsel, without the presence or sanction of the attorney general, the king's bench granted a mandamus to compel the railway company to reinstate and lay down again the track which it had taken up; and the writ thus applied for was ordered on the distinct ground that the public, of which the prosecutor was one, and interested probably in the mines which the railway accommodated, had a right to the use of the road. See, also, Rex v. Commissioners of Dean Inclosure, 2 Maule & S. 80; Rex v. Bristol Dock Co., 6 Barn. & C. 181; Clarke v. Leicestershire & N. Union Canal, 6 Adol. & E. (N. S.) 898; Reg. v. Fall, 1 Adol. & E. (N. S.) 636; Reg. v. Trustees, etc., of Turnpike Road, 12 Adol. & E. (N. S.) 448; Reg. v. Archbishop of Canterbury, 11 Adol. & E. (N. S.) 578. And on principle, where a statute enjoins a duty for the benefit of the entire public, why may not any one of the public injured by its non-performance complain of it to the proper court, and ask it to compel the observance of the duty? Why should such a person be forced to resort to the attorney general, and what is the necessity or propriety for vesting in this officer, whose general duties by reason of the peculiar structure of our government, are quite dissimilar to those of the officer of the same name in England, the sole power to determine whether a judicial inquiry shall be made concerning the discharge by a corporation of duties imposed upon it by law for the public advantage? What answer is it to the present relators to say, "Yes, you are injured by the company's neglect to discharge its duty, but as your injury is the same as that suffered by others, the court cannot hear or redress your complaint." But it may be objected to this view that if one person may apply and have the writ, so equally all may apply, and the result is that the defendant may be vexed with many applications, whereas if the attorney general or some public officer can alone apply, one suit only of the same character will be brought, and the result will be conclusive, both as respects the public and the defendant. An answer to the objection is that the granting of a writ of mandamus is discretionary with the court, and if a case is pending which will test the right or question in controversy, the court may for this reason alone refuse to entertain similar applications by other persons.

Besides, it deserves consideration whether a judgment in a suit in which the attorney general appears, concludes the public, to any greater extent than a similar judgment would in a mandamus proceeding instituted by a private relator, as in each case it is the writ which makes the government formally a party, and the form of the proceeding is the same.

There is some contrariety of opinion in this country whether private persons may be prosecutors or relators in a mandamus proceeding to enforce a public duty, but the decided weight of authority is in favor of the doctrine. The leading case asserting it is People v. Collins (1837) 19 Wend. 56, where the court, after an examination of the English decisions and practice, reaches the conclusion that in a matter of public right, any citizen of the state may, where mandamus is the proper remedy, be a relator to enforce the execution of the common law or an act of the legislature, though it was admitted to be otherwise in cases of private or corporate rights, where the title or right of the relator to relief must appear. To the same effect see, also, Hamilton v. State, 3 Ind. 452; City of Ottawa v. People, 48 Ill. 233; State v. County Judge of Marshall, 7 Iowa, 186, 202; State v. Bailey, 7 Iowa, 390, 397; People v. Halsey, 37 N. Y. 344, 53 Barb. 547; State v. Common Council of Rahway, 33 N. J. Law, 110; Watts v. Carroll Parish, 11 La. Ann. 141; Dill. Mun. Corp. § 695, and cases cited; State v. Zanesville & M. Turnpike Co., 16 Ohio St. 308. Contra, People v. University Regents, 4 Mich. 98; Sanger v. County Commissioners of Kennebec, 25 Me. 291; Heffner v. Com., 28 Pa. St. 108. Compare Com. v. Meeser, 44 Pa. St. 341.

The right to institute mandamus proceedings by private prosecutors is likened by Judge Cowen to the right of private persons to become relators in informations in the

nature of quo warranto. People v. Collins, supra. In substance there is often much resemblance, but in England, an information proper, that is, the suggestion upon which the court acts, is filed by the attorney general as the appropriate officer of the crown, and unlike the affidavits in mandamus, the information cannot be made by private persons, though it may be and often is made upon their relation. While it is usual to join relators, it is not necessary. The object of joining them is that the defendant may not be oppressed, without remedy, by vexatious suits, since the relators are liable to costs, while the crown is not. Per Lord Redesdale, in Attorney General v. Mayor, etc., of Dublin, 1 Bligh (N. S.) 312.

Reserving, as we do, all questions which concern the merits of the controversy, and in order, indeed, that the merits may be better understood, we think our discretion will be more wisely exercised by awarding than by refusing the alternative writ, particularly as in this way the opinion of the supreme court may more certainly be obtained than if the writ were denied. Alternative writ ordered.

See Union Pac. R. Co. v. Hall [91 U. S. 343.]

[NOTE. The railroad company, defendant, put in the return to the alternative mandamus, which was met by an answer filed by the relators, and the cause was then heard on the facts stated in the writ, the return, and the answer, the affirmance of the answer not being controverted; and a peremptory mandamus was ordered. Case unreported. On writ of error this judgment was affirmed by the supreme court, Mr. Justice Strong delivering the opinion. Upon the merits of the controversy it was held that the defendant railroad company is required by law to use its bridge between the cities of Council Bluffs and Omaha as part of its entire road, and as a continuous line connecting with the Iowa roads. In respect to the right of plaintiffs in this action, the learned justice remarked that there is a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce the public duty to the government as such without the intervention of the government law officer. Numerous cases were cited, and the objection that the writ is prerogative in its nature was explained as having no force in this country, and, as the granting of the writ is discretionary with the court, it cannot be objected that it exposes a defendant to be harassed with many suits. In referring to the act of 1873, it was noted that it does not prescribe who shall move for the writ, while the attorney general is directed to institute the necessary proceedings to secure performance of the other duties of the company; thus raising a reasonable implication that congress did not contemplate the intervention of the attorney general in all cases. Mr. Justice Bradley dissented, upon the ground that the Missouri river, the western boundary of Iowa, is, by a fair construction of the charter of the Union Pacific Railroad Company, its eastern terminus, and, as the mandamus requires the company to use the bridge as part of its continuous line, it should not have been granted. 91 U. S. 343.]

HALL v. UNION PAC. R. CO. See Cases Nos. 16,599–16,601.

HALL (UNITED STATES v.). See Cases Nos. 15,281–15,285.

Case No. 5,951.

HALL v. WAGER et al.

[3 Biss. 28;[1] 5 West. Jur. 538; 5 N. B. R. 181; 3 Chi. Leg. News, 401.]

Circuit Court, W. D. Wisconsin. June Term, 1871.[2]

INSOLVENCY — A CONDITION OF FACT, NOT OF BELIEF — CONSTRUCTION OF ACTS OF INSOLVENT — INSOLVENCY CONSTRUED ACCORDING TO PLACE — ACTUAL BELIEF BY CREDITOR OF INSOLVENCY NOT NECESSARY — WHAT CONSTITUTES INSOLVENCY.

1. To render a mortgage void under the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], it is not necessary that the debtor knew or believed himself insolvent. The section treats of insolvency as a condition of fact, not of belief, and with knowledge of which and its consequences he is chargeable in law.

[Approved in Curran v. Munger, Case No. 3,487.]

[See note at end of case.]

2. It follows, as a logical sequence, that when a man insolvent in fact gives a mortgage to one existing creditor he does so with a view to give him a preference.

3. The bankrupt law of 1841 [5 Stat. 440] and the Massachusetts insolvent law and decisions commented upon.

4. The act of 1841 declares void preferences made by a party contemplating bankruptcy; the act of 1867 includes those made by a party being insolvent, and the decisions under the former act are not always applicable to the present statute.

[See note at end of case.]

5. The purpose of the act being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law to secure the full benefit of this cardinal principle of the law.

6. The strict definition of insolvency usually given in commercial centers should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business—the rule should be in harmony with the general custom of the place.

7. If an insolvent give a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the bankrupt act is complete as to both.

[Cited in Michaels v. Post, 21 Wall. (88 U. S.) 398.]

[See note at end of case.]

8. The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent—not what he did believe; the latter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency—that is for the court to determine, the security being attacked.

[Cited in Michaels v. Post, 21 Wall. (88 U. S.) 398; Merchants' Nat. Bank v. Cook, 95 U. S. 342.]

9. Where a debtor had, during two years paid off only a small portion of an overdue debt, had sold out the stock of goods for which the account was made, and transferred a part of the paper received therefor, had applied for extensions and been refused, had previously declined to execute a mortgage on the ground that it

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

[2] [Affirmed in 16 Wall. (83 U. S.) 584.]

would injure his credit, and had been pressed by his different creditors—these facts constitute reasonable cause for belief of insolvency, and the creditor cannot escape from the consequences of knowledge of them.

[Cited in Burpee v. First Nat. Bank of Janesville, Case No. 2,185.]

This was a suit in equity brought by Augustus O. Hall, assignee of Leonard Lakin, bankrupt, to set aside a mortgage given by the bankrupt to the defendants Wager & Fales, on the ground that it was void under the bankrupt act. The mortgage was for $3,000, dated December 15th, 1869, and was given to secure a debt of that amount owing by Lakin to the firm of Wager & Fales for balance due for stoves sold by them in 1867. The stoves were originally sold on four months time, and the debt had been for some time past due before the giving of this mortgage. Five notes for $600 each were then executed, made payable in six, twelve, sixteen, twenty, and twenty-four months respectively, with interest at 10 per cent. The account against the bankrupt was in 1867 about $4,000, and he paid in 1868 about $500, and in July, 1869, $200 more. In February, 1868, he asked for an extension, agreeing to make small payments, but no extension was formally given. In March, 1869, he asked for another extension, but none was given. In July, 1869, the defendants sent their agents to him for settlement, and asked for a mortgage to secure the balance due. He declined then to give it, and wrote defendants, July 9th, 1869, that if he gave a mortgage it would injure his credit. He agreed then to make small remittances, but did not do so, and they, in October, 1869, sent their claim to Richardson, their agent at Janesville, to get it secured by mortgage, and on the 15th of December, through him, they obtained the mortgage in question. In 1868 Lakin built a new store, at a cost of from $6,000 to $8,000, and in the same year sold out his stock of stoves, and gave up the stove business, continuing, however, to do business as a retail hardware merchant with a reasonably fair credit at home, and with his creditors; but he had not met his payments, and owed on the 15th of December about $14,000 or $15,000 [$1,400 or $1,500][3] past due, a portion of which had been due for some time, but part of which [Pierce and Whaling's claim][3] he had secured by a note given by the purchasers of the stoves. He had been harassed for over a year by his creditors, had been borrowing money, obtaining renewals, and had used in his business funds held by him as treasurer and in trust. In August, 1869, he gave a mortgage to secure his father-in-law $3,200 borrowed money.

Finches, Lynde & Miller, for complainant.

Cassoday & Merrill, for defendants, cited In re Hunt [Case No. 6,881]; Potter v. Coggeshall [Id. 11,322]; Babbitt v. Walbrun [Id. 694]; Bean v. Brookmire [Id. 1,168]; Maurer v. Frantz [8 Phila. 505]; Sedgwick v. Place [Case No. 12,622]; Langley v. Perry [Id. 8,067]; In re Gay [Id. 5,279]; In re Locke [Id. 8,439]; Armstrong v. Rickey [Id. 546]; Wright v. Filley [Id. 18,077]; Jones v. Howland, 8 Metc. [Mass.] 377; Morgan v. Mastick [Case No. 9,803]; Doan v. Compton [Id. 3,940]; In re Gregg [Id. 5,797]; Wadsworth v. Tyler [Id. 17,032]; Lee v. Franklin Avenue German Sav. Inst. [Id. 8,188].

HOPKINS, District Judge. Mr Lakin was, beyond all question, I think, insolvent, and had been so for over two years when he gave the mortgage to defendants, although he swears he did not suppose he was, but, on the contrary, he thought he was worth $10,000 over and above all his debts. Soon after giving the mortgage, his other creditors instituted an investigation into his affairs, and it was made apparent that he was insolvent. He then attempted to compromise, but failed to accomplish it; and on the 8th of January, 1870, twenty-four days after giving this mortgage, he filed his petition in bankruptcy.

Mr. Mack, of Sandusky, Ohio, swears that Wager told him in November, 1867, that he thought Lakin insolvent, and that he intended to send out and get a mortgage to secure his claim. Wager denies that he said so, but says that Mack told him at that time that he (Mack) thought he would not stand it long; but that he told him he knew better, and that he was good, and Mr. Wager is partially sustained in his version by a Mr. Spencer, who was present. The defendants swear that they considered him worth $10,000 or $15,000 over his debts when they took the mortgage. The defendants' counsel claim that the facts, as proved, fail entirely to make out a case under the bankrupt act, and contend that to avoid the mortgage it must be shown that Lakin was insolvent when he gave the mortgage, and that he knew it; for if he did not know that he was insolvent he could not be said to have given the mortgage with a view to give the mortgagees a preference, which it would be necessary for the court to find as a question of fact under the thirty-fifth section of the bankrupt act, in order to avoid the mortgage.

The meaning of that part of the section is not entirely clear, and has been construed differently by the courts and judges who have been called upon to pass upon it. But I cannot concur with the defendants' counsel in their interpretation of it. The section does not require the debtor to know his insolvency, or to believe it. It treats of insolvency as a condition of fact, not of belief. He cannot set up his ignorance of that condition to defeat the operation of that section. He is presumed to know, and is chargeable with knowledge of it, and neither ignorance nor willful blindness will exonerate him from the operation of its provisions, so that, being insolvent in fact, and chargeable by law with knowledge of such condition, it would follow, it seems to

[3] [From 5 N. B. R. 181.]

me, as a logical sequence that he gave the mortgage with a view to give the defendants a preference. For not having property to pay all his creditors, the giving the defendants security to pay them in full necessarily operated as a preference, and he should be held as having intended the rational and logical consequences of his acts. This section of the bankrupt act is almost a literal copy of section 89 of the Massachusetts insolvent law, and their court before its adoption by congress had placed this construction upon it. Perhaps if the bankrupt had any reasonable cause to believe himself solvent, it might be held that he did not give the security with intent to give a preference. But treated as a rational man, and looking at the facts of his case as they really were, could Lakin reasonably have believed he was solvent? A case might arise in which a court might hold that a party had reasonable cause to believe himself solvent, when he was in fact insolvent, but it would have to possess some peculiar features, and the party would have to furnish a very satisfactory excuse for want of a knowledge of the fact showing his insolvency. This does not present such a case. From the facts of this case it does not seem possible that he could have believed himself solvent when he gave this mortgage. The case of Jones v. Howland, 8 Metc. [Mass.] 377, relied upon so strenuously by defendants' counsel, arose under the bankrupt act of 1841, and the supreme court of Massachusetts has not followed that as applicable to their insolvent law, from which this section of the bankrupt act of 1867 under consideration was copied. Chief Justice Shaw, in delivering the opinion of that court in Holbrook v. Jackson, 7 Cush. 136, says: "The provision of the bankrupt law of the United States under which the case of Jones v. Howland was decided was very different from the present; it turned on the question of actual belief and intent, and not on reasonable ground to believe." And in the same opinion (page 149) he says: "We do not think it necessary, in order to avoid the conveyance, that the debtors knew they were insolvent, or in fact contemplated proceedings in insolvency; it is enough that they were in fact insolvent, and had no reasonable ground to believe themselves solvent." That court again in Vennard v. McConnell, 11 Allen, 562, says: "The proposition cannot be maintained consistently with the established rules of law that the payment of a debt by a party who is insolvent cannot be regarded as a preference, if made with the hope and expectation by the debtor that he will be able eventually to pay all his debts in full. The adjudicated cases leave no room for doubt on this point. Thompson v. Thompson, 4 Cush. 127; Lee v. Kilburn, 3 Gray, 594; Holbrook v. Jackson, 7 Cush. 136, 149; Barnard v. Crosby, 6 Allen, 327." And in Beals v. Clark, 13 Gray, 21, the court says: "The jury were rightly instructed that it was competent for them to infer from the fact that Clark did give a preference to the plaintiff, that he intended to give it. Denny v. Dana, 2 Cush. 72." These cases abundantly show that the courts of Massachusetts have not regarded the case of Jones v. Howland, supra, as giving a construction of their insolvent law, and I am satisfied that the United States courts which have adopted that interpretation as a proper construction of the provisions of our present bankrupt act have not examined the provisions of the two bankrupt acts critically, nor the insolvent law of Massachusetts and the construction given to their section in regard to preferences by the courts of that state, for if they had they would at once have seen that the provisions of the act of 1841, under which that was given, were entirely different from the present act, and that that decision had uniformly been held there as not applicable to the provisions of their insolvent law.

The weight of authority in the federal courts, I think, is largely in favor of the construction I have given to that section. Campbell v. Traders' Nat. Bank [Case No. 2,370]; Scammon v. Cole [Id. 12,433]; In re Kingsbury [Id. 7,816]; Graham v. Stark [Id. 5,676]; Ahl v. Thorner [Id. 103]; Vogle v. Lathrop [Id. 16,985]; In re Black [Id. 1,457]; Bradshaw v. Klein [Id. 1,790]. The preferences declared void by the second section of the act of 1841 were such as were made by a party contemplating becoming a bankrupt under the act. There the intent of the debtor was the principal question. Under the present act a preference created by a party "being insolvent" is made void, and his intent or belief is not a question. The fact of insolvency being established or admitted, the preference ordinarily as to the debtor is presumed to be void—the presumption being strong or slight according to the circumstance of each case.

But I cannot see that the fact that the debtor knew or did not know of his insolvency at the time of creating the preference has much to do in determining the question as to him. The purpose of the act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption that is permissible according to well settled rules of law to secure the full benefit of this cardinal principle of the law. I would not go so far as to prevent the exercise of a reasonable bona fide effort on the part of an energetic and hopeful debtor struggling with an honest intent to pay all his debts, for it is often the case that a trader may be embarrassed and unable to pay his debts as they mature, but by the exercise of judgment and unreserved frankness with his creditors goes through, pays all, and converts what was almost a calamity into a profitable enterprise. But to allow every embarrassed debtor to thus go on and sustain his acts because he says he thought he could go through, and hold as valid his

payments and securities, would be to defeat altogether the object and provision of the bankrupt act.

I would not apply the strict definition of insolvency that is usually given in commercial centers to traders doing business in smaller country places. In large commercial centers a failure to meet payments as they become due is deemed insolvency, but not so in the country. The custom of traders generally is different there, and a party should be held insolvent there only when he fails to meet his debts according to the usage and custom of the place of his business. But this laxity should not be allowed to that extent as to hold that non-payment for a long time, or continued inability for years to pay and meet obligations should not be regarded as evidence of insolvency. I would not do away with all rule on that subject, but I would adopt a rule in harmony with the general custom of the place in which the party was engaged in business. And testing Lakin even by that rule, I hold that he must be deemed to have been insolvent when he gave this mortgage. He had been behind in his payments for over two years. His business for that time did not yield him the money to pay up. He was urged for payment and could not pay, applied for extensions which were refused, or if given he failed to meet according to the new terms, used trust funds in his business, borrowed money at banks and of his neighbors and clerks, and still was behind a great way in meeting his payments. To say, under such circumstances, that he should not be deemed insolvent, or that he had reasonable cause to believe himself solvent, would be indulging a laxity of business conduct and judgment entirely inconsistent with the views of business men in any community, and such as were never sanctioned by any court. To allow him any benefit of his plea of ignorance of his true condition under the circumstances of this case would do violence to his common intelligence and impeach his business ability to an extent far more damaging to him than to say that he hoped by some fortunate turn of business to get out of his embarrassed situation. I therefore find in this case that Lakin, when he gave this mortgage to the defendants was insolvent, and that he had no reasonable cause to believe himself solvent, that it was given to secure an existing debt, that it gave the defendants a preference over his other creditors, and that in law he should be held to have given it with a view to give them such preference. But in order to grant the relief sought by this bill it is necessary that I should find that the defendants, when they received such mortgage, had reasonable cause to believe that Lakin was insolvent, and that it was made in fraud of the provisions of the bankrupt act. This last proposition, it seems to me, is a necessary conclusion from an affirmative finding upon the facts. If an insolvent debtor gives a mortgage to one of his creditors, whereby he gives him a preference over his other creditors, and the creditor receiving the security has reasonable cause to believe the debtor insolvent when he receives it, the fraud upon the act as to both is complete, and the last proposition, as I have said, is but a logical conclusion rather than an independent fact or proposition necessary to be found in addition to the others, except as it naturally flows therefrom.

Chief Justice Shaw in Holbrook v. Jackson, supra (page 151), says: "It must be reasonable cause on the part of the mortgagee to believe—not actual knowledge or actual belief—that he (the mortgagor) was insolvent." The section itself declares that having reasonable cause to believe—not believing—so that the question is, had they reasonable cause. Viewed in this light, the question as to what they did believe about his condition is immaterial, for if they had reasonable cause to believe he was insolvent, their security was void. They could not close their eyes to the evidence of his insolvency that they had before them. Nor are they constituted the sole judges of the sufficiency of such evidence. That is for the courts to determine when the security is attacked.

Now, in this case I think defendants had reasonable cause to believe Lakin insolvent when they received the mortgage. This is the most difficult question, under the testimony, to decide, but I think, in view of all the facts and circumstances, they had reasonable cause so to believe. This debt was over two years past due. He had been in business all the time, but had only paid in the two preceding years about $700 upon it; had sold out the stock of goods for which the account was made; had transferred a part of the paper received on that sale as collateral security to other of his creditors; had repeatedly applied for extensions which had been refused; had been repeatedly dunned without success; refused in July previous to give them a mortgage as a condition of an extension; wrote them that he thought such mortgage would injure his credit; was told by Mr. Mack in November, at Sandusky, Ohio, that he thought he could not go through. These circumstances constitute, in my mind, a reasonable cause for them to have believed he was insolvent.

I have said before that such facts were evidence of insolvency, and that the law would pronounce a man thus situated an insolvent. These facts were known to them, and I cannot see any way of escape for them from the consequences of such knowledge. They refused all extension without ample security, and insisted upon it, notwithstanding his remonstrance that it would injure his credit. That was sufficient of itself to put them on inquiry. His fear about his credit should have put them upon inquiry as to the situation of it and the necessity for it. But they wholly neglected to investigate, were intent

on security, purposely ignorant and blind, or intending to be, of his circumstances until after they got the security. The giving of the security resulted as he thought it would. It caused an investigation into his affairs by his other creditors, which developed his insolvency, as Lakin must have known all the while it would, and as I think the defendants also had reason to think it would. Again, their agent was at Broadhead in June, 1867, at a time when among the more prominent public and business men of the village his credit was freely canvassed in connection with the defalcation as to trust money, and it is scarcely credible that he could have been there at that time and not heard anything about it, when he had so large a claim and so long past due. I therefore think the defendants had reasonable cause to believe Lakin insolvent when they received this mortgage from him, and that the giving of it was a fraud upon the bankrupt act, and that it is void; and I direct a decree declaring it void, and requiring the defendants to cancel the same upon the records, and if they fail to do so for a period of thirty days from the entering of the decree in this case, that then the register of deeds for Green county, upon recording a copy of the decree in this case, enter upon the records thereof this mortgage canceled by decree of the circuit court of the United States for the Western district of Wisconsin, and that the complainant recover his costs of the defendants, to be taxed.

I do not think this court, in this suit, should exclude the defendants from proving their debt; at all events, I do not feel disposed to pass upon that question in this case. The objection may be taken in the bankrupt court if the creditors wish to exclude the claim of these defendants from participation in the distribution, and that court may allow or reject the claim, as it may see fit, without reference to the result of this suit.

NOTE. For cases of preference, decided since the above opinion, consult In re Lord [Case No. 8,503]; In re Hunt [Id. 6,882]; Darby v. Lucas [Id. 3,572]; Sedgwick v. Millward [Id. 12,618]; Cookinham v. Morgan [Id. 3,183]; Sawyer v. Turpin [Id. 12,410]; Toof v. Martin [13 Wall. (80 U. S.) 40]; Curran v. Munger [Case No. 3,487]; Bingham v. Richmond [Id. 1,415]; In re Forsyth [Id. 4,948]; Warren v. Tenth Nat. Bank [Id. 17,202]; Warren v. Delaware, L. & W. R. R. Co. [Id. 17,194]; Buchanan v. Smith [16 Wall. (83 U. S.) 277]; Tiffany v. Lucas [15 Wall. (82 U. S.) 410]; Gilbert v. Priest [65 Barb. 444]; Seaver v. Spink [65 Ill. 441]; Hyde v. Sontag [Case No. 6,974]; Bean v. Amsink [Id. 1,167].

[This case was, on appeal, affirmed by the supreme court. Mr. Justice Clifford, in delivering the opinion, said: "Three things must be proved, in order to bring the transaction within the prohibition of the bankrupt act: (1) That the preference was made within four months before the filing of the petition in bankruptcy. (2) That the person giving the preference was insolvent, or in contemplation of insolvency, at the time the preference was made. (3) That the person benefited had reasonable cause to believe that the one making the preference was insolvent when the preference was secured, and that it was made in fraud of the bankrupt act." 16 Wall. (83 U. S.) 584.]

Case No. 5,952.

HALL v. WARREN et al.

[2 McLean, 332.] [1]

Circuit Court, D. Ohio. Dec. Term, 1840.

REVENUE LAWS — JURISDICTION OF THE DISTRICT COURT—PLEADING — DUTIES AND LIABILITIES OF THE OFFICER MAKING SEIZURE — MEASURE OF DAMAGES.

1. It is the duty of an officer of the customs, on making a seizure of goods, for having been imported in violation of the revenue laws, to institute proceedings in rem in the district court.

2. The district court has exclusive jurisdiction of forfeitures.

3. Whether the seizure has been rightful or tortious, cannot be ascertained until the matter has been adjudged by that court.

4. If the person making the seizure refuse to proceed in the district court, on application to the court by the owner, he will be compelled to do so, or return the goods.

5. The pendency of the proceedings in rem may be pleaded in abatement, to an action of trespass against the officer.

6. Should the goods be adjudged to be returned by the court, and a certificate of reasonable cause refused, it is final.

7. There can be no justification of the act of seizure, except on a judgment of condemnation, or a certificate of reasonable cause.

8. The officer making the seizure should examine the goods before it is made, and not make it unless there be reasonable cause. Where goods are taken from the possession of the owner, and detained, without reasonable cause, the officer is liable to damages to the full extent of the injury.

9. The circumstances may be proved in mitigation of damages, but not to excuse or justify the seizure.

10. Having possession of the goods, and exercising acts of ownership over them, the plaintiff may sue for a trespass on them in his own name.

At law.

Wright & Fox, for plaintiff.
Mr. Hamer, for defendants.

OPINION OF THE COURT. This is an action of trespass brought by the plaintiff against the defendants for entering his store, in Cincinnati, by force, and removing therefrom, &c., a large amount of merchandize. The defendants pleaded the general issue. They, also, pleaded specially, that the said goods were brought from some foreign port to the said defendants unknown; and that the defendant, Warren, being an officer of the customs, suspected said goods had been unladen and delivered in the vessel in which they had been brought to the port of Cincinnati, without any permit or license from

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

the collector, or any of the competent officers of the customs. And that the said goods did not correspond with the entry thereof, at the custom house; but were entered at a sum less than the actual costs thereof, with a design to evade the duties, &c. And that the said Warren, calling to his assistance the other defendants, who were officers of the police, &c., seized the goods and removed them, as he had a right to do. A notice was also annexed to the general issue stating the facts, substantially, as set out in the special pleas. The plaintiff demurred to the special pleas. And the question arising on the demurrer, must be first considered by the court.

Where a seizure of merchandize is made on suspicion of its having been illegally imported, it is the duty of the officer making the seizure to institute proceedings in rem in the district court, or if the suspicion should prove to be unfounded to return the goods to the owner. By the act of 24th September, 1789 [1 Stat. 73], exclusive original jurisdiction is given to the district courts in all civil causes of admiralty and maritime jurisdiction, including seizures under laws of import, &c. And if the officer making the seizure shall refuse to institute the proper proceedings, on application of the aggrieved party, the court will compel him to proceed to adjudication, or to abandon the seizure. The Ann, 9 Cranch [13 U. S.] 289. This is not a case where the goods have been returned. The pleadings forbid such a supposition. If the goods were imported in violation of law, they are liable to be forfeited; and the district court only can enforce this forfeiture. And it is in view of this result that the proceeding against the goods is required. Whether the seizure has been lawful or not cannot be known or ascertained, until the district court shall have adjudicated on the subject. And in the case of Galston v. Hoyt, 3 Wheat. [16 U. S.] 246, the court remark, "the pendency of the suit in rem ..ould be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then in the former case by the general law, and in the latter case by the special enactment of the statute of the 25th April, 1810, c. 64, § 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal and a denial of such certificate, then the seizure is established conclusively to be tortious; and the party is entitled to his full damages for the injury." That the certificate of condemnation, as also the certificate of acquittal is equally conclusive as to the character of the seizure is clearly established by the authorities. Wilkins v. Despard, 5 Term R. 112, 117; Scott v. Shearman, 2 W. Bl. 977; Henshaw v. Pleasance, Id. 1174; Geyer v. Aguilar, 7 Term R. 681; Slocum v. Maybeˇry, 2 Wheat. [15 U. S.] 1; The Apollon, 9 Wheat. [22 U. S.] 362. The pleas do not state whether the proceeding in rem has been instituted, is pending, or has been terminated. And as the district court is the only court that has jurisdiction to adjudicate on the forfeiture, it clearly follows that until this adjudication is made, or a certificate of reasonable cause has been allowed, no plea of justification can be sustained. And this imposes no hardship on the officer making the seizure. He is not liable, during the pendency of the proceedings against the goods, to enforce a forfeiture. But his justification must alone rest on the decision of the district court. And the pleas, in this respect, are, therefore, fatally defective. Without reference to the proceeding in rem, they set up a justification for the seizure, by alledging grounds of suspicion. And whether there were sufficient grounds or not this court cannot try nor determine, but the district court.

In defence, it is insisted that if the goods had been returned on examination, there being found no sufficient grounds to detain them, the grounds of suspicion may be pleaded as is done in this case. In the case supposed, it may be admitted that the grounds of suspicion might be given in evidence in mitigation of damages, but they could afford no justification. It is very clear they could not be pleaded as such. The demurrers to the pleas are sustained. The jury being impanneled, the plaintiff proved that he occupied a store house on Pearl street, Cincinnati, in the summer of 1839; and that he had from fifty to sixty thousand dollars worth of worsted and other goods. That Warren, accompanied by the other defendants, came to his store and seized the goods, as having been brought into the country in violation of the revenue laws. The plaintiff denied the charge, and proposed, in the presence of several merchants, to unpack his cases and to exhibit all his goods for examination; alledging that on every article of goods chargeable with duty the duty had been paid, and he had evidence of the payment. And he offered to exhibit his papers and to procure the necessary assistance to open and examine his cases. But the defendant, Warren, declined all his propositions; said that he knew his duty and should execute it. It was, also, proved that several merchants present advised the defendant, Warren, to have the goods examined, and admonished him that it was his duty to examine them. But he rejected their advice. Several of them proposed then to become the surety of the plaintiff to deliver the goods in the precise condition they then were the next day. But this proposition was also rejected, and Warren, the defendant, retained the possession of them through the night, in the storehouse, by his agents, and the next day removed them to a place of deposit where they were retained until the order for their restitution was made by the district court.

The plaintiff, also, offered evidence conducing to prove that from the time the goods were thus taken, until they were restored,

they had declined in price from twenty three to twenty five per cent. And that he was obliged to dispose of them at this or a greater loss. He, also, showed the expenses to which he was subjected, from previous engagements, of clerk hire, house rent, insurance, &c. And, also, the expense in attending to the suit in the district court, and in prosecuting the present suit, with other items for moneys paid on the return of the goods, drayage, examiners, &c., &c. The plaintiff, also, proved that the warrant, under which Warren acted in making the seizure, was obtained from a justice of the peace, on his own application and oath. And that he took possession both of the warrant and affidavit. The record of the proceedings in rem, in the district court, was given in evidence by the plaintiff, which showed that the return of the goods had been adjudged, and a certificate of reasonable cause for the seizure denied by the court.

It appeared, also, in evidence, that the plaintiff was a citizen of England, and a stranger in Cincinnati, having but recently commenced business in that city. That he had made a very favorable impression upon the community, as a man of high and correct principles. It was admitted that the defendant, Warren, was the surveyor of the port, at Cincinnati, and that on him devolved the duty to see that the revenue laws were not violated. And in his defence, he first offered a letter received from the secretary of the treasury, inclosing extracts from an anonymous letter, purporting to have been written at Philadelphia, apprising him of contemplated frauds upon the revenue; and particularly informing him that a certain manufacturing house in Leeds, England, had made arrangements to export into this country large amounts of goods without paying the duties; and it was suggested that an importation had been made from the above house to Cincinnati, &c. This evidence the court remarked could not be received, either in excuse or justification of the defendant. But that it might be read for the single purpose of showing that the seizure had not been made from mere wantonness by the defendant; and that the jury might consider it, in connection with the claim of the plaintiff, for vindictive damages. That had this ground been abandoned by the plaintiff's counsel, the evidence would have been rejected.

The defendant, also, proved a conversation he had with one of the witnesses shortly before the seizure, respecting frauds upon the revenue, and in which he was advised by the witness to look into the establishment of the plaintiff. And the court held that for the purpose of rebutting malice or any other improper motive in the proceeding, this might be received in evidence. That under this head the object was to show, by the defendant, that however illegal his acts may have been, they were prompted by an honest motive in the discharge of his duty. And evidence was offered to prove that several of the other defendants were peace officers, and that they accompanied the defendant, at his request, with the view of preserving the peace. But the court rejected the evidence, saying that, in that transaction, as aiding and assisting the defendant, Warren, they must be considered as acting as citizens and not in the official stations which they might ordinarily fill in society. In his answer to the libel, filed by the district attorney, in the district court, the plaintiff stated the goods to belong to a certain firm of which he was one of the partners; and as this action is not brought in the name of the partnership, it was contended that the action could not be sustained. But the court held that having the possession of the goods and exercising acts of ownership over them, the plaintiff might well sue in his own name. And that in addition to this consideration, it appeared that, by the district court, the goods were adjudged to belong to the plaintiff; and they were ordered to be delivered to him as the rightful owner.

In the argument before the jury it was contended that, however illegally the defendant, Warren, may have acted in making the seizure, the other defendants, being citizens and having been called by him as an officer of the government to assist him in the performance of his duties, they cannot be held responsible for his errors. The arguments being closed, the court charged the jury that they had the right, as the evidence might require, to find any one or more of the defendants guilty or not guilty; and to assess, against him or them, the damages which the plaintiff has sustained by the seizure complained of. That the officer making the seizure had a right to call upon citizens to assist him in making it, and they are bound, under certain penalties, to render him assistance. But this affords to them no justification if the proceeding of the officer be illegal. That their justification must depend upon the same ground as that of the officer making the seizure. And that, as in this case, the proper tribunal having decided the goods were not liable to seizure, and that there was no reasonable cause to authorize the proceeding by the officer, the other defendants could have no ground of justification. But the jury were instructed it would be for them to determine, from the evidence, whether there was such a participation in the act of seizure, and the subsequent removal of the goods by the defendants, as would make them responsible for damages. The fact of their being present, as the friends of the officer, unless they aided and assisted him, or gave their advice and countenance to the trespass, they are not liable. They should not be found guilty unless there was such a participation on their part, if not by laying hold of the goods, by their presence and encouragement, as to have influenced, in some degree, the commission of the trespass. That, as regards Warren, his duties are important to the pub-

lic and to individuals, as the proceedings in this case show; and that they should be discharged with a due regard to private as well as to public rights. In so important a trust the action of the officer should always be governed by a sound discretion; and he should always solicit the best lights on the subject within his power. That in entering the store of the plaintiff, after having made known his object, he should have proceeded, as the law requires, to examine the goods to ascertain whether the revenue laws had been violated. That the proposed co-operation of the plaintiff, to have his boxes opened and every piece of his goods examined, without delay, took from the defendant, Warren, every plausible pretext for removing them. It appears, in fact, that a large part of the goods were not dutiable; but they, as well as those on which the duties had been paid, were seized, without examination, and removed, by the defendant. The plaintiff, too, offered to produce evidence of the payment of the duties, and that the importation of the goods, as well in landing as in the invoices, was strictly in conformity to law. This conduct, on the part of the plaintiff, should have been met by the officer with a correspondent course of action on his part, which would have brought the matter to a speedy determination. But, it seems from the evidence, that the defendant, so far from adopting this course, recommended by public policy, and a sense of justice to the government and to the individual, abruptly and insultingly rejected it. He asked no advice from the plaintiff or his friends, he said, and tauntingly observed, in the performance of his duties, would not be governed by their counsel. This would not have been objectionable, if the defendant had been careful to understand what his duties were, before he attempted to execute them. The counsel for the plaintiff insist, that he has not only shown an ignorance of the law under which he acted, but a wantonness which should subject him to exemplary damages. This, the court remarked, they would leave for the consideration and determination of the jury.

That the plaintiff is entitled to damages, which shall compensate him for the injury he received, by reason of the trespass, is clear. In ascertaining the amount of the damages the court instructed the jury that they should take into their consideration the depreciation of the goods, the insurance on them, store rent, (having had to pay rent and insurance,) also, clerk hire, under permanent agreements; the expense of defending the goods in the proceedings before the district court; and, also, in prosecuting this suit for damages; together with expenses paid by him in drayage, &c., on the return of the goods. That no damages could be recovered by the plaintiff, except those shown to have been incurred, prior to the commencement of the suit. The jury found for the plaintiff and assessed his damages at $15,999 95. Judgment.

Case No. 5,953.

HALL v. WASHINGTON.

[4 Cranch. C. C. 722.] [1]

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

GAMING—POWERS OF THE CORPORATION OF WASHINGTON TO PROHIBIT — CONVICTION BY ALDERMEN—JURISDICTION OF JUSTICE OF THE PEACE.

1. A member of the board of aldermen of the city of Washington is not a competent magistrate to convict a person of a violation of the by-laws of the corporation.

2. A justice of the peace may reject a plea of misnomer in abatement. A justice of the peace has jurisdiction of penalties under by-laws, not exceeding $50.

3. The corporation of Washington has authority to restrain and prohibit gaming in the city.

Appeal from the judgment of C. T. Coote, Esq., a justice of the peace for the county of Washington, in an action of debt in the name of the mayor, board of aldermen, and board of common council of the city of Washington, for the penalty of $50, for keeping a faro-bank contrary to a by-law of the corporation.

Mr. Dandridge, for the appellant, objected, (among other things,) that the magistrate was a member of the board of aldermen, and, as such, was a plaintiff in the cause; and cited Ang. & A. Corp. 204; Dunham v. Rochester, 5 Cow. 462; Hesketh v. Braddock, 3 Burrows, 1847–1858; Pearce v. Atwood, 13 Mass. 324, 340; Com. v. Ryan, 5 Mass. 90; 7 Cow. 606.

Mr. Bradley, contra, cited Ang. & A. Corp. 389, 390, c. 17, § 8; Starkie, Ev. pt. 4, pp. 426, 427; Wood v. Mayor, etc., of London, 1 Salk. 397; Norris, Peake, Ev. p. 237, note a, and pages 220, 221, note; Ang. & A. Corp. 199; Falls v. Belknap, 1 Johns. 486; Corwein v. Hames, 11 Johns. 76.

THE COURT reversed the judgment, because the justice was a member of the board of aldermen and, as such, one of the plaintiffs, and therefore incompetent to try the cause.[2]

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

CRANCH, Chief Judge. Appeal from the judgment of a justice of the peace for the penalty of $50, for setting up, keeping, and exhibiting a faro-table, on the 6th of May, 1835, being a device for the purpose of gaming for money, contrary to the act or acts of the corporation. By the by-law of Jan. 12th, 1830, § 1, it is enacted, "that no E. O.; A. B. C.; L. S. D.; faro, rolly-bolly, shuffle-board, equality-table, or other device, to be

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

[2] In the case of Newton v. Corporation of Washington [unreported], at the same term, the judgment was affirmed; the justice, although an inhabitant of the city was not a member of the board of aldermen or common council, nor mayor, and therefore competent to decide the case.

used with cards, balls, dice, coin, or money, or any other game of hazard (except the game of billiards, upon licensed billiard-tables,) for the purpose of playing, or gaming for money or any thing in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under a penalty of fifty dollars for every day or less time that such E. O." &c., "shall be so kept or exhibited, to be recovered before any single magistrate, of the person so setting up, keeping, or exhibiting the same." The warrant was issued against —— Hall, without stating any Christian name, and was served upon the appellant, who appeared before the justice and pleaded in abatement, ore tenus, that his name was Alexander C. Hall, and that the warrant was against —— Hall without any Christian name. The justice overruled the plea; whereupon the defendant by his counsel told the justice that he might render the judgment, and he would appeal. The judgment was thereupon rendered and the defendant appealed.

Mr. Dandridge, for appellant, contended, 1. That the justice should not have overruled the plea in abatement. 2. That the justice had not jurisdiction of a cause in which the penalty exceeded $20. 3. That the justice, being an inhabitant of the city, and an alderman, is interested, as the penalty goes to the city. 4. That congress had no authority to give the corporation power to pass such a by-law. 5. That congress, by the penitentiary act of 1831 [4 Stat. 445], having made the keeping of a faro-bank, or other common gaming-table a penitentiary offence, has thereby virtually repealed so much of the charter which authorizes the corporation of Washington "to restrain or prohibit all kinds of gaming" (see Charter of 1820, § 7), as relates to the keeping a faro-bank; and that the repeal of the power of the corporation to pass such a by-law, is a repeal of the by-law itself.

1st. As to the plea of misnomer. The proceedings before justices of the peace are ore tenus and need not be very formal; and unless the plea offered will enable the magistrate to decide the case according to the law, equity, and the right of the matter, I am of opinion that he may reject it. The plea offered in the present case was merely a dilatory plea. If the justice had allowed it the only effect would have been a very short delay, as he might immediately have issued another warrant against the defendant by his right name. I do not think that this is sufficient ground to reverse the judgment; particularly as the defendant, by confessing the judgment, admitted the merits of the case to be against him.

2d. That the justice had not jurisdiction of the cause. In the case of Ex parte Reed [Case No. 11,634], at the last term, it was decided by this court, upon great consideration, that the justices of the peace had jurisdiction of fines, penalties, and forfeitures under the by-laws of the corporation. But it is now said that their jurisdiction is confined to cases where the fine, penalty, or forfeiture does not exceed $20. It is true that the jurisdiction when first given by the charter of 1802, was thus limited; but the act of March 1st, 1823, which extended the jurisdiction of justices to $50, provides that, "in all cases where the real debt and damages do not exceed the sum of fifty dollars, exclusive of costs, it shall and may be lawful for any one justice of the peace, of each respective county within the District of Columbia, wherein the debtor doth reside, to try, hear, and determine the matter in controversy," &c., "in the same manner and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of $20, exclusive of costs." The justices of the peace had, at that time, jurisdiction of cases under the by-laws, where the penalty did not exceed twenty dollars. This act, therefore, extends their jurisdiction to cases where the penalty does not exceed fifty dollars.

3d. The third objection, is, that the justice was interested, because he was an inhabitant of the city to whose benefit the penalty, in part, accrues; and that he was a member of the board of aldermen, and therefore nominally one of the plaintiffs. It is a general principle, that a judge, who is interested, is incompetent to try the cause; and by the common law, the smallest interest is said to be sufficient to disqualify him. But from the necessity of the case, he must often act in cases in which he is interested. Every citizen of the United States, is interested in every fine that accrues to the United States, yet the jurors and judges are citizens. In the States, the same thing occurs; and the interest increases in proportion to the diminution of the society that is to enjoy the benefit of the fine. Where shall we stop and say that the interest is sufficient to exclude the judge? In the case of Pearce v. Atwood, 13 Mass. 340, Chief Justice Parker said: "Any interest, therefore, however small, has been held sufficient to render a judge incompetent. The only known exception to this broad and general rule, exists where there may be a necessity that the person, so interested, should act, in order to prevent a failure in the administration of justice, as in the case of Com. v. Ryan, 5 Mass. 90." That case was a prosecution for a penalty of $50 accruing to the town of Boston, for keeping a billiard-table. There was a motion to quash the indictment, because the foreman of the grand jury, who found the indictment, was a taxable inhabitant of the town, and therefore interested to convict the defendant. Chief Justice Parsons said: "This interest at common law would be a sufficient objection; and it now is, unless by a necessary construction of our statutes, this ob-

jection is removed. As the municipal court has jurisdiction of the offence, and as it can proceed to indict only by the inhabitants of Boston, if the objection should prevail, that court is, in fact, ousted of its jurisdiction." As the offence could not be prosecuted in any other court, the motion to quash the indictment was overruled. The same point was decided in Hill v. Wells, 6 Pick. 108. The only case cited to the contrary was that of Mayor, &c., of Jonesborough v. McKee, 2 Yerg. 168, which is a very short case, and reported without argument. The court decided "that a magistrate who is a member of an incorporated town, is not thereby disqualified from trying a warrant or suit in which the corporation is a party." Some of the English cases seem to make a difference as to the competency of a corporator as a witness in a case between the corporation and a stranger; and the corporation and a corporator; and also between private and public corporations; but to what extent that difference will affect the competency of a judge, does not appear. In a public corporation, the interest which each inhabitant of the city or town has, is only a common interest, and seems so nearly assimilated to that which every citizen of a state has in a fine or penalty which is to accrue to the state, and which has not been held sufficient to disqualify the witness or the judge, that I am inclined to think that the objection ought not to prevail. But it was said, and not contradicted, that the justice who tried the cause, was a member of the board of aldermen. If so, he was one of the plaintiffs, and could not sit in his own cause; according to the decision of this court, in the case of Barney v. Washington City [Case No. 1,033], at July term, 1805, where one of the reasons given for the reversal of the judgment, was, that it was rendered by Mr. Brent, the mayor, in a case in which he was a party. This objection seems to me to be fatal.

4th. The fourth objection is, that congress had no authority to give the corporation the power to restrain or prohibit gaming. I do not recollect by what argument, or on what ground this position was attempted to be supported, and can imagine none.

The 5th is, that congress by making the keeping of a faro-bank, a penitentiary offence, has virtually repealed so much of the charter, as gives the corporation power to prohibit the keeping of a faro-bank. But the penitentiary law and the by-law are not inconsistent. The penitentiary act punishes the offence generally; that is, when committed in any part of the district. The corporation, for the preservation of the morals of the city, superadd a penalty, when it is committed within their jurisdiction. The one is an offence against the government of the United States; the other is the violation of the by-law of the corporation. I think this objection also should be overruled. But as the justice, who rendered the judgment, was incompetent to try the cause, the judgment ought to be reversed; but without costs.

THRUSTON, Circuit Judge, not having been present at the argument, gave no opinion.

HALL (WATSON v.). See Case No. 17,283.

HALL (WHANN v.). See Case No. 17,478.

Case No. 5,954.

HALL v. WILES.

[2 Blatchf. 194;[1] 1 Fish. Pat. Rep. 433.]

Circuit Court, S. D. New York. April 17, 1851.

PATENTS — INFRINGEMENT — DISCLAIMER—WHEN COSTS NOT ALLOWED UPON DISCLAIMER — PATENTABILITY WHERE COMBINATION IS PART NEW AND PART OLD — PROVINCE OF JURY ON QUESTIONS OF PATENTABILITY—MEASURE OF DAMAGES.

1. Where a patent contains several claims, and the invention covered by one of them is not new, the patentee may, under the 7th and 9th sections of the act of March 3, 1837 (5 Stat. 193, 194), maintain an action for the infringement of the patent, so far as regards the valid claims, although he did not, before the commencement of the action, make or record a disclaimer of so much of the thing patented as he claimed without right; but he will not be entitled to costs.

[Cited in Cahart v. Austin, Case No. 2,288; Tuck v. Bramhill, Id. 14,213; Smith v. Nichols, 21 Wall. (88 U. S.) 117; Burdett v. Estey, Case No. 2,145; Sessions v. Romadka, 145 U. S. 41, 12 Sup. Ct. 802.]

2. Under the 9th section of the act, the question whether there has been unreasonable negligence or delay on the part of the patentee in entering such disclaimer, is a question which goes to his right of action.

[Cited in Dunbar v. Myers, 94 U. S. 194.]

3. A disclaimer is necessary only where the thing claimed without right is a material and substantial part of the thing patented.

[Cited in Peek v. Frame, Case No. 10,904; Worden v. Searls, 21 Fed. 408.]

4. Where the thing claimed without right is a part of the machine, if it is not an essential part, and was not introduced into the patent through the wilful default of the patentee, or with intent to defraud or mislead the public, the want of a disclaimer in regard to it affords no ground for invalidating the patent.

[Cited in Stimpson v. Woodman, 10 Wall. (77 U. S.) 125; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 136.]

5. Where one part of a combination is new, the combination is a new one, though the other parts of the combination may be old.

6. A formal change, such as a change of proportions, a mere change of form, or a different shape, is not, within the meaning of the patent law, a change sufficient to support a patent; but the improvement upon the old contrivance must embody some originality, and something substantial in the change, producing a more useful effect and operation.

7. In determining the question of patentability, the jury have a right to take into consideration, in connection with the change, the result

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

which has been produced; because the result, if greatly more beneficial than it was with the old contrivance, reflects back, and tends to characterize in some degree the importance of the change.

8. In this case it was *held*, that the thing patented, namely, a carriage in a brick-press, was not a combination of materials, within the doctrine of the patent law, and that the principle, that unless the defendant had taken the whole of the combination he was not liable, did not apply.

[Cited in Mabie v. Haskell, Case No. 8,653.]

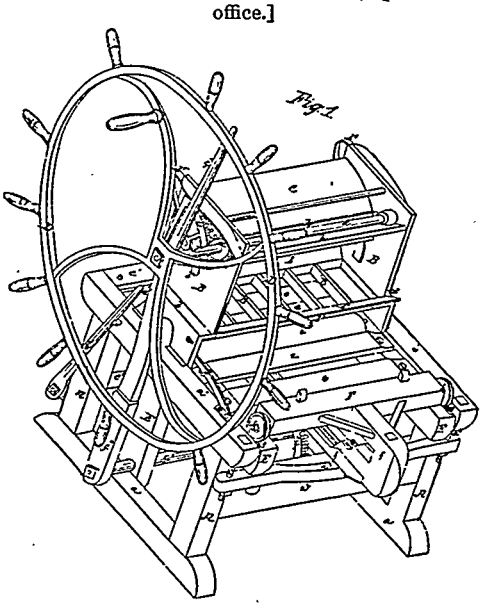
9. The rule of law as to damages, when an infringement is made out, is, to give to the plaintiff the actual loss he has sustained, and nothing more. Exemplary or vindictive damages cannot be given.

[Cited in Perry v. Corning, Case No. 11,003.]

10. In this case it was *held*, that the plaintiff was entitled, if his case was made out, to the profits on all the machines sold by the defendant.

This was an action on the case [by Alfred Hall against John Wiles] tried before Nelson, Circuit Justice, for the infringement of letters patent [No. 2,768], granted to the plaintiff on the 3d of September, 1842, for an "improvement in the construction of the brick-press."[2] The points raised on the trial are stated in the charge of the court.

[Drawings of patent No. 2,768, published from the records of the United States patent office.]



[2] The specification was as follows: "Be it known, that I, Alfred Hall, of Cleveland, in the county of Cuyahoga, and state of Ohio, have invented a new and useful improvement in the machine for moulding bricks, and I do hereby declare, that the following is a full, clear and exact description thereof, reference being had to the accompanying drawing, making a part of this specification, in which Fig. 1 is an isometrical projection, Fig. 2 is a longitudinal vertical section. The nature of my invention consists in constructing a moulding machine, to be attached to a common tempering tub, with revolving knives, of the usual construction, from which the mortar is conducted directly into the moulds, into which it is forced by the press. To this machine, an apparatus is affixed for removing the moulds, and, when obstructed by stones, &c., to relieve them therefrom. The frame of the machine consists of four upright posts, (A,) framed into two sills, (a) and cap-pieces, (a 1,) which are connected by cross-ties, (a 2,) forming a stout frame of proper proportions for containing the machinery. To each of the caps (a 1) are attached metallic plates (B,) on the inside near the centre of the frame. From the lower part of these plates flanges project, which embrace the caps and serve to steady them: these plates have shoulders at (b,) turning inward, from which to the top they are vertical. They are wide enough to form the sides of the hopper, and contain the pressing apparatus hereafter described. A grating, (B 1,) which forms the bottom of the hopper, is attached to the plates (B) at the shoulder, (b,) just high enough to clear the moulds. The bars of this grating correspond with the partitions in the moulds, and must be varied for every different kind of brick; they are chamfered off on their upper edges, and serve to direct the clay into the mould; the back piece of this grating rises at (b 1,) (see Fig. 2,) to the press platen, to prevent the escape of the mortar; there is also a similar projection (b 2) at the front of the grate, having on its upper edge an apron, (b 3,) which rests in the spout of the tempering machine, (shown in dotted lines,) and directs the mortar into the machine. The platen (C) is the segment of a cylinder, its lower surface being fitted to the grate and projection, (b 1;) it does not extend quite out to the plates, (B,) but has a projecting flange (c) at each end, around the periphery, and down the under side, made of metal, which shuts out the mortar from the end of the cylinder segment; on each end of this platen an iron cross-brace is let in, (lettered c 2;) its inner end has a hole through it on which the platen turns on its shaft or fulcrum, (c 3;) from these braces, near the periphery of the platen, studs (c 4) project, which extend out through the plates, (B,) slots (b 4) being cut in them for the studs to play in; these slots are covered when the platen is thrown back, by brass segment slides, (c 5,) which are pushed forward from the platen by means of springs, (c 6,) which bear against studs projecting from the side of the slides let into its ends; when the platen is forced down, these segments strike the grate and are stopped, the spring yielding for that purpose. The platen thus constructed turns on its shaft, (c 3,) which has its bearings in the plates (B) by means of a segment rack (c 7) outside the plates on each side, with which it is connected by the shaft and studs above named; the teeth on these racks mash into pinions (d) on a shaft, (d 1,) which has its bearings in the plates over the platen; on one end of the shaft (d 1) there is a large hand-wheel, (D,) by which the platen is put in motion; between the caps (a 1) of the frame above mentioned, a carriage (E) is placed; it is formed of two side frames, of a T shape, firmly braced, the horizontal part extending out about the length of the caps, and the vertical nearly down to the bottom of the frame; these T frames are connected by a brace (not shown in the drawing) running from one to the other. Just under the grating, three horizontal rollers (e) are placed, having their journals turn in bearings on the upper side of the T frames of the carriage; to these frames, on each side of the roller, slots (e 1) are affixed in the upper side; on these the moulds slide; this carriage is sustained in the frame at the rear end, on a cross-piece (a 3) which is suspended to the end of the cap (a 1) that projects over the post (A) by a rod (a 4) at each end, which can be drawn up by a screw below the cross-piece; the carriage is steadied by a pivot (e 2) projecting from each side, near the end that turns in the posts of the frame, and at the other end by

Francis B. Cutting, for plaintiff.

Seth P. Staples and Ambrose L. Jordan, for defendant.

NELSON, Circuit Justice, (charging the jury). The patentee's description of his invention sets it forth with great particularity and clearness, and models have been produced which render it perfectly intelligible. After describing the various parts of this machine, the patentee closes, as is usual, with a specification of the particular things which he claims to have invented.

The first is, the segment slides, acted on by springs, in combination with the platen and hopper, constructed and arranged as described in the specification. The object of this contrivance is, to close the slot in the end of the press which was before open, and through which the shaft of the press moves, in order to prevent the mortar from being pressed out of the aperture. The patentee next claims the combination of the carriage E, suspended at its rear end in the frame, with the connecting-rods and shaft for freeing the machine from obstructions. He claims, also, the construction of the carriage E so as to free itself from dirt—meaning all the parts used by him, in the construction of this carriage, to effect the purpose intended—that is, to free it from dirt, which seems to have been a difficult thing in these machines; and he claims, also, the carriage E, thus arranged, in combination with the movable carriage F, constructed in the mode pointed out in the specification. These are the things he claims, each of which he supposes to be an improvement on all prior machines in use.

As to the first claim, the defendant insists that, whether original or not, the contrivance is destitute of utility, and could not be carried into practical effect, and was abandoned by the patentee immediately. The defendant's counsel assume the fact to be proved, and then insist that, as this claim is invalid, either from want of originality or utility, the whole patent becomes void. This is a question of law for the court to decide. It is argued by the defendant that, in order to have saved the patent, the patentee should have disclaimed this part of his patent, under the 7th and 9th sections of the act of March 3, 1837 (5 Stat. 193, 194) and that, as he has failed to make this disclaimer and to record it, this suit cannot be maintained and the whole patent is void. Though there is some evidence going to

studs, (e 3;) these are necessary, as the carriage is made smaller than the space between the sides of the frame, so as to give a free passage to any dirt that may collect on the machine, which would tend to clog its operation, (see section 1.) At the front end of the carriage are jointed stout connecting rods, (e 4,) which extend down to a revolving shaft (e 5) which turns in bearings, (e 6,) attached to the front posts of the frame, and which are also connected to the cap by rods (e 7) running from the cap to the bearings, (e 6;) on the upper side of this shaft are short projections, to which the connecting rods are coupled, and by which this end of the carriage is supported; on the end of the shaft (e 5) a lever (e 8) is put, which extends up and rests against a pin in the frame near the lever. It will readily be seen, that by bringing the lever forward, the end of the carriage resting on the shaft will be lowered down; on each side of the carriage an iron rail (e 9) is affixed, extending from the rear end to the rollers; this rail rises a little above the side-pieces, which are cut out on their upper edge, away from it, except at the points of attachment, so as to allow any dirt that may get upon the rail to fall through without clogging the machine; a wheel (f) runs on each side of these rails, which are connected by an axle or movable carriage, (F,) formed of a square straight piece of wood; a piston (f 1) is attached to the back of this carriage, which curves down and runs forward horizontally under the centre of the machine, just below the cross-piece connecting the sides of the carriage, against which, or a friction roller which may be attached thereto, it bears when in motion; on the under side of this piston a rack is formed, which meshes into a segment rack (f 2) on a shaft, which has its bearings in the lower end of the vertical pieces of the carriage above named; to the end of the shaft (f 3) a lever (f 4) is affixed, which rises up beside the shaft, (d 1,) so as to be convenient to work by the operator; the moulds, (G,) which are like those now in use in other machines, are put into the machine opposite that on which the wheel (D) is; they are prevented from being pushed too far through by a spring (g,) which guides them in entering the machine; they are forced under the grating by the movable carriage, (F,) acted on by the lever, (f 4;) when this machine is attached to a "tempering machine," it receives the mortar directly from it into the grating, and into the moulds underneath it; the hand-wheel is then turned, which brings down the platen and forces the mortar into the moulds; the lever (f 4) is then brought forward, and the empty mould which is placed forward in the grating between the full mould and the movable carriage, and forced under the grating, the full mould being driven out on the opposite side, the weight of the mortar in the tempering machine, at the same time, raises the platen by its pressure upon it till the segment (c 7) strike against the springs, (b 5,) which prevent the platen from receding too far. If, when the full mould is being forced out, a stone or other obstruction stops its motion, the lever (f 4) is drawn forward, and the carriage on which the mould rests is lowered till the difficulty is overcome, when it is again raised to its place; over the platen, and between it and the shaft, (d 1,) a brace (h) runs across from one side platen to the other, on the under side of which a scraper (h 2) is affixed, that fits close to the circular side of the platen, and serves to free it from the mortar that adheres to it when run down; just over the scraper a board (h 1) is placed, the lower edge of which rests on the scraper, its upper edge projecting up towards the "tempering machine," at an angle of about 45°; this forms the upper part of the hopper, and confines the mortar while the press acts. What I claim as my invention, and desire to secure by letters patent, are the segment slides (c 5) acted on by springs, in combination with the platen and hopper, constructed and arranged as herein set forth. I further claim the combination of the carriage (E) suspended at its rear end with the connect-rods (e 4) and shaft, (e 5,) for freeing the machine from obstructions, substantially as before specified. Lastly, I claim the construction of the carriage (E) so as to free itself from dirt, that is to say, the pivots and studs for steadying the carriage, the slatted top and railway, set off from the carriage, &c., and, in combination therewith, the movable carriage (F) constructed and operated as herein described."

show that this contrivance may be new, and may not have been used before, yet, perhaps, the weight of it is that it is useless or could not be operated. I have examined the provisions of the statute, and am of opinion that this suit may be maintained, under the two sections referred to, notwithstanding a disclaimer of the first claim has not been made or recorded; but the plaintiff will not be entitled to costs. The provision in the 9th section, that no costs shall be recovered unless a disclaimer of all that part of the thing patented which is claimed without right, is entered before the commencement of the suit, certainly shows that the action may be maintained for other parts of what is patented. If the disclaimer was entered in the patent office before the suit was instituted, the plaintiff recovers costs in the usual way, independently of any question of disclaimer. But if, in the progress of the trial, it turns out that a disclaimer ought to have been made as to part of what is claimed, the plaintiff may recover, but will not be entitled to costs.

Another question arises under the 9th section—whether there has been unreasonable negligence or delay in entering a disclaimer. That is a question which goes to the right of action. If the delay shows great negligence, the jury may say that the patent is void. The provision in question applies only in the case where the part claimed by the patentee, of which he is not the inventor, is a material and substantial part of the thing patented. A disclaimer is necessary, therefore, only where the thing claimed without right is a material and substantial part of the machine invented. The question as to the disclaimer in this case is, therefore, of no importance in the determination of the rights of the parties, unless the slides and springs claimed in the first claim are described as a material and essential part of the machine, or unless they were introduced into the description through the wilful default of the plaintiff, or with intent to defraud or mislead the public. If you find that these slides and springs are not essential to the machine, and were not introduced into the patent through such wilful default or intent to defraud or mislead the public, the want of a disclaimer in regard to them affords no ground for invalidating the patent.

As to the second claim. If the carriage E, which is one part of the combination as arranged by the patentee, is a new and useful improvement, the combination of that with the connecting-rods and shaft, for letting it down and freeing it from obstructions, will be maintained, though the latter may be old. Because, one part of the combination being new, the uniting that with an old contrivance makes the combination necessarily a new one.

I pass now to the third claim, and to the real point in controversy. The arrangement of the carriages E and F is a distinct and independent claim—a material and substantial one—and one without which the substratum of the invention would fail. This brings the case very much to the point, whether the carriage E, constructed as it is described in the specification, is of itself a new improvement, in view of the carriages which had been in use prior to the invention of the plaintiff. It is necessary that it should be new, in order to uphold the third claim; and that, if maintained, will uphold the second. The question is one of fact. A great deal of evidence has been given on both sides, all bearing on the point; and, except that there are some legal principles bearing on the question of fact, and as to which the court may aid you, it is a question which must be determined by the good sense and sound judgment of the jury. Of course, the question is not, whether the plaintiff's was the first bed or carriage that had ever been used; because, it is admitted that carriages and beds had before been used. But the question is, whether the plaintiff's carriage, as constructed by him, is a substantial improvement, for the purpose for which it is used, on all previous carriages. A formal change, such as a change in proportions, a mere change of form, or a different shape, is not a change within the meaning of the law. An improvement upon an old contrivance, in order to be of sufficient importance to be the subject of a patent, must embody some originality, and something substantial in the change producing a more useful effect and operation. And, in determining this question, the jury have a right to take into consideration, in connection with the change, the result which has been produced. Because, the result, if greatly more beneficial than it was with the old contrivance, reflects back, and tends to characterize, in some degree, the importance of the change.

I do not agree with the counsel for the defendant, that the carriage E, as constructed by the patentee, is to be regarded as embracing a combination of materials, within the doctrine of the patent law, and that, unless the defendant has taken the whole of the combination, he is not liable. My opinion is, that that principle does not apply.

If the carriage E, as constructed by the plaintiff, is not a substantial improvement upon all previous constructions, he is not entitled to recover. But, if you arrive at the conclusion that that carriage is a substantial improvement upon all previous constructions, then the question is, whether the carriage used by the defendant is identical with that of the plaintiff. If it is, it is an infringement, and the plaintiff is entitled to recover.

The rule of law as to damages, when an infringement is made out, is, to give to the plaintiff the actual loss which he has sustained, and nothing more. Exemplary or

vindictive damages cannot be given. If the damages are insufficient, there is a provision of law authorizing the court to treble them. The plaintiff is entitled, if his case is made out, to the profits on all the machines sold by the defendant.

The jury found a verdict for the plaintiff for $1,000 damages.[3]

HALL (WOODWARD v.). See Case No. 18,005.

HALL (WOODWORTH v.). See Cases Nos. 18,016 and 18,017.

Case No. 5,955.

HALL v. YAHOOLA RIVER MIN. CO.

[1 Woods, 544.][1]

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

EXECUTION—CLAIMS BY THIRD PARTIES — "CLAIM LAW" OF GEORGIA — JURISDICTION OF FEDERAL COURTS—PRACTICE.

1. The "claim law" of Georgia, so far as the same applies to real estate, provides for equitable relief. It is therefore a remedy which cannot be administered in the federal courts, and is not prescribed to be used therein by the act of congress, approved June 1, 1872, entitled "An act to further the administration of justice" (17 Stat. 197.)

2. In Georgia, when the United States marshal levies an execution against A., upon the real estate of B., and threatens to sell the same, B. must file his bill in equity to stop the sale, and cannot resort to the "claim law" of the state for relief.

This cause was submitted on the motion of the plaintiff, who was judgment creditor of the defendant, to dismiss a proceeding, under the claim law of Georgia, commenced by one Vandyke, who set up title to certain real estate levied on by the marshal as the property of defendant, by virtue of an execution issued in this case.

Amos T. Akerman, for motion.

C. Peeples, George Hillyer, and J. A. Wimpey, contra.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. The Code of Georgia provides that "when a sheriff or other officer shall levy an execution on property claimed by a third person not party to such execution, such person shall make oath to such property and shall give bond to the sheriff or other officer, as the case may be, with good and suffcient security in a sum double the value of the property levied on, conditioned to pay the plaintiff in execution all damages which the jury, on the trial of the right of property, may assess against him, if it shall appear that said claim was made for the purpose of delay only, and that the said oath and bond, having been delivered to the sheriff or other officer making the levy, it shall be his duty to postpone the sale until otherwise ordered. If the person claiming the property shall desire the possession thereof, it shall be the duty of the levying officer to take a bond from the claimant in double the value of the property levied on, for the delivery of the property at the time and place of sale, provided the same shall be found subject to the execution, and such bond being delivered to the sheriff, it shall be his duty to leave the property in possession of the claimant. When the execution is levied on personal property, it shall be the duty of the levying officer to return the same, together with the execution, to the next term of the court from which the execution issued, but if the execution be levied on real property, the levying officer must return the same with the execution and claim to the next term of the superior court of the county in which the land so levied on shall lie. The court to which the claim shall be returned shall cause the right of property to be decided on by a petit jury at the first term thereof, unless continued as other cases at common law, and the jury may give the plaintiff in execution such damages against the claimant, not less than ten per cent., as may seem just, provided it is made to appear that the claim was made for delay only. Either party in claim cases may appeal as in cases at common law." See Irwin's Code Ga. pp. 707–710, tit. 9. c. 1.

By an act approved October 21, 1870, it was provided that "when the claimant is unable to give bond, he may make an affidavit to the effect that he did not interpose the claim for delay; that he claimed title to the property in good faith; that he was advised and believed that his claim would be sustained, and that from poverty he was unable to give the bond as otherwise required by law; and such affidavit, when delivered to the sheriff, shall suspend the sale in the same manner as if bond and security had been given. If the property levied on be personal and the plaintiff claimant unable to give a forthcoming bond, the plaintiff in execution may give such bond; and in that case the levying officer shall deliver the property to said plaintiff; and in the event the claimant is unable and the plaintiff in execution neglects or refuses to give said forthcoming bond, the claimant may apply to the ordinary and procure an order for the sale of the same; and said property shall be advertised and sold in the manner prescribed by the law, and the proceeds shall remain in the hands of the levying officer, subject to the order of the court upon the final hearing of the claim." Acts 1870, pp. 75, 76.

In this state of the statute law an execution was issued on the 28th day of September, 1872, out of the United States court for the

[3] A motion for a new trial in this case was subsequently made before Judges Nelson and Betts, on the ground of alleged errors in the charge, but it was denied.

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

northern district of Georgia, upon a judgment for $2,767, and costs theretofore recovered in that court by Frank W. Hall, against the defendant, the Yahoola River and Cane Creek Hydraulic Hose Mining Company, and the marshal, on the 4th day of October, 1872, levied the execution on certain lands and tenements as the property of the defendant company. Thereupon one M. H. Vandyke, claiming to be the owner of the property so levied on, filed with the marshal the oath and bond required by the above recited acts of the state of Georgia, and the marshal suspended the sale and returned the execution and claim to the court.

A motion is now made to dismiss the claim and to allow the marshal to proceed to sell the property levied on. The argument of the mover is that the claim law of the state of Georgia is not binding upon the United States courts, and is not adopted by the fifth section of the act of congress, approved June 1, 1872, entitled "An act to further the administration of justice." That section declares "that the practice, pleadings and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." 17 Stat. 197. It is obvious to remark that this section excludes from its operation "equity and admiralty causes." The equity practice in the courts of the United States is not controlled by the legislation of the states or rules of the state courts, but is prescribed by the supreme court. The distinction between law and equity as recognized in the constitution, and the principles and procedure which at the period of the formation of the constitution so clearly distinguished legal from equitable remedies have not thus far in our judicial history been unsettled by the blending of law and equity in the courts of the United States; they are still administered as distinct systems of remedial justice. Const. U. S. art. 3, § 2.

In Bennett v. Butterworth, 11 How. [52 U. S.] 674, the supreme court declares that "although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in the same suit," and in Thompson v. Railroad Companies, 6 Wall. [73 U. S.] 137, the same court says: "The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity; not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." So in Payne v. Hook, 7 Wall. [74 U. S.] 425, it is said that "the equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uiform throughout the different states of the union." To the same effect are the following cases: Bodley v. Taylor, 5 Cranch [9 U. S.] 191; Watkins v. Holman, 16 Pet. [41 U. S.] 25; Smith v. McCann, 24 How. [65 U. S.] 398; Loring v. Downer [Case No. 8,513].

It follows then from the terms of the 5th section of the act of June 1, 1872, and the authorities cited above, that if the relief sought by the claimant in this case is equitable relief, he cannot resort to the claim law of Georgia to secure it, for the mode of proceeding prescribed by that act is a legal and not an equitable proceeding. When a marshal or sheriff, having an execution in his hands against the property of A., levies it upon the real estate of B., the latter has both legal and equitable remedies. He may sue the officer, or he may bring ejectment after the sale by the officer to recover possession of his property. These are his remedies at law, but neither of these prevents a sale. His equitable remedy is to file his bill setting up his title, and praying an injunction against the officer to restrain him from proceeding to sell. Now when real estate is levied on, the claim proceeding of the Georgia law is in effect a proceeding in equity. Cox v. Mayor, etc., 17 Ga. 249; Colquitt v. Thomas, 8 Ga. 258; Williams v. Martin, 7 Ga. 380. There is no form of action known to the common law that could stay the sale, and without some statutory provision, the only method of restraining a sale would be by bill in equity. The Georgia claim law therefore, when real estate is levied on, is a substitute for a bill in equity, praying for injunction and relief. It secures equitable relief, prevents irreparable mischief, by a statutory process which provides for a trial jury. This is a mingling of law and equity not permitted by the constitution and laws of the United States. A party who desires to restrain a sale by the marshal of property levied on by him, and to assert his title thereto, has an equitable case, and must resort to the equity side of the court. As the property levied on in this case is real estate, we are of opinion that the claim law of the state is not applicable, and that the marshal must be ordered to sell, notwithstanding the filing of the affidavit and bond prescribed by the claim law. Where the property levied on is personal estate, this course of reasoning will not apply. In the case of personal property, there is a remedy at law that would prevent a sale and restore the property to the claimant, namely, the action of replevin. The claim law, therefore, when applied to personal property, may be

considered as a substitute for the action of replevin, and is not open to the same objection as when real estate is the subject of the levy. Our conclusion, therefore, is that the claim law of this state can not apply when a levy is made upon real estate; but that it does apply to levies upon personal property. As the levy in this case was upon real property, an order may be entered dismissing the claim of Vandyke, and allowing the marshal to proceed with the sale of the property levied on.

HALL, The D. M. v. The JOHN LAND. See Case No. 3,939.

HALL, The FRANK A. See Case No. 5,052.

HALL, The JOSEPH. See Case No. 7,539.

Case No. 5,956.

HALLACK et al. v. TRITCH.

[17 N. B. R. 293;[1] 10 Chi. Leg. News, 219.]

Circuit Court, D. Colorado. 1878.

BANKRUPTCY—JURISDICTION OF CIRCUIT AND DISTRICT COURTS—ASSIGNEES—RIGHT OF CREDITOR TO TAKE GOODS OF INSOLVENT IN EXCHANGE FOR SECURITY.

1. The circuit courts have concurrent jurisdiction with the district courts of all actions by an assignee against persons claiming an adverse interest in the estate of a bankrupt.

[Cited in Clark v. Ewing, 3 Fed. §6.]

[Cited in Seavey v. Naples, 94 Ind. 207.]

2. No suit by an assignee for a sum exceeding five hundred dollars can be prosecuted in a state court.

3. The objection that there was no direction from the bankrupt court to bring the suit, cannot be first raised in the appellate court.

4. In an action brought by an assignee to set aside a sale or transfer of goods, as having been made in violation of the bankrupt act,—section 5128, Rev. St. [14 Stat. 517],—the declaration must set out the facts of the illegal transaction.

5. As between the parties to a chattel mortgage, the circumstance that the mortgagees allowed the mortgagor to retain possession of the mortgaged property, after condition broken, will not affect the validity of the mortgage.

6. When a secured creditor takes goods in fair exchange for the security, the transaction is not in fraud of the bankrupt act.

[At law. This was an action of trover brought by George Tritch, assignee of Wilcox & Watterson, against Hallack & Brother, to recover damages for the wrongful detention of a lot of glass.]

Belden & Powers and Blake & Jacobson, for plaintiffs in error.

Squires & Decker, for defendant in error.

HALLETT, District Judge. This was an action brought in the probate court of Arapahoe county, on the 24th day of December, 1874, during the existence of the late territorial government. Judgment was entered in that court on the 29th day of January, 1875, and the record was immediately removed into the supreme court of the territory by writ of error, and it was pending in that court on the 1st day of August, 1876, when the territory became a state. Upon the establishment of the state government, the supreme court of the state became the successor of the supreme court of the territory as to all cases pending in the latter court, at the date of the admission of the state, which were not properly of federal cognizance. It was supposed by counsel that this case belonged to the class which could properly be determined in the supreme court of the state, and accordingly it was, on the 5th day of April, 1877, submitted to that court upon the errors assigned in the record, but that court afterwards, and on the 21st day of June, 1877, ex mero motu, transferred the case to this court. This was doubtless upon the ground that the case is one of which this court would have had jurisdiction if the court had existed on the 24th day of December, 1874, and in which we may proceed, as the successor of the supreme court of the territory, under the act of congress of June 26, 1876 (19 Stat. 61).

Objection is now made by plaintiff in error to the jurisdiction of this court, on the ground that the case does not appear to be of federal character, or if it is of that description, that it belongs in the district court, and not here. The declaration is in the ordinary form in trover, in which the plaintiff alleges that he, as assignee in bankruptcy of Wilcox & Watterson, was possessed of certain lumber and glass which he casually lost, and which afterwards came to the possession of the defendants by finding. Further on, it will appear that this charge is not supported by the evidence given at the trial, but as to the point now under consideration, it is plain that the plaintiff was suing in a representative character, as assignee of the estate of Wilcox & Watterson. He is described as assignee, and he declares that he held the goods in that capacity. This brings the case exactly within the 2d section of the bankrupt act, or section 4979, as it stands in the Revised Statutes. Under that section, circuit courts have always had concurrent jurisdiction with district courts of all actions by an assignee against persons claiming an adverse interest in the estate of a bankrupt. Lathrop v. Drake, 91 U. S. 516. Such actions are not a part of the bankruptcy proceeding, and therefore it is not at all necessary that they should be prosecuted in the court which has jurisdiction of such proceeding. Wiswall v. Campbell, 93 U. S. 347. This provision of section 2 of the bankrupt act was not in any way restricted by the Revised Statutes, or the act of June 22, 1874, but it was explained, if not enlarged by the latter act. By the 3d section of that act, the words "or owing any debt to such bankrupt," were inserted in the original text, and thus was made plain what was perhaps doubtful until then, that the

[1] [Reprinted from 17 N. B. R. 293, by permission.]

assignee could sue in the circuit court for any debt due the bankrupt. 18 Stat. 178. The 6th clause of section 711 of the Revised Statutes, if at all applicable to suits of this kind, relates to the jurisdiction of federal courts, as distinguished from state courts, and does not in any way affect the relative jurisdiction of circuit and district courts of the United States. Clearly, then, this is a case of which a circuit court of the United States would have had jurisdiction, if the court had been established at the date when the suit was begun, and therefore it was properly transferred to this court under the act of 1876. Further objection is made, however, that at the date when the suit was brought, the courts of the United States were clothed with exclusive jurisdiction of such actions, and the probate court, having no federal jurisdiction, was without authority to proceed therein. It is conceded that the probate court had no federal jurisdiction, for by the organic act that jurisdiction was conferred on the district court and the supreme court of the territory, and it is a necessary implication from the language used, that probate courts had no such jurisdiction. That fact being admitted, it is necessary to ascertain whether, by the Revised Statutes, or the amendment of 1874, exclusive jurisdiction in actions of this kind was vested in courts of the United States; for if that be true, the judgment of the probate court must be void. In Claflin v. Houseman, 93 U. S. 130, it was held that a state court had, prior to the Revised Statutes, jurisdiction of an action by an assignee to recover assets of the bankrupt. It was then doubted whether the 6th clause of section 711, before mentioned, had not given exclusive jurisdiction of such actions to United States courts; but as the question was not then before the court, it was not decided. In the later case of Wiswall v. Campbell, supra, however, the court has reached the conclusion that such suits are no part of the bankruptcy proceeding, which seems to resolve the doubt in the negative. The clause referred to declares that the courts of the United States shall have exclusive jurisdiction "of all matters and proceedings in bankruptcy," and as this is not a matter or proceeding of that kind, but a suit at law, distinct from and wholly independent of the bankruptcy proceeding, it is not at all affected by that clause. The 2d section of the act of 1874 is more significant. It adds to section 1 of the act of 1867, the following proviso: "That the court having charge of the estate of any bankrupt, may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount." 18 Stat. 178. From this declaration, that certain suits may be brought by an assignee in state courts by direction of the bankruptcy court, it results, by necessary implication, that no other can be so prosecuted—"Expressum facit cessare tacitum." Olcott v. Maclean [11 Hun, 394]. The act of 1867 was silent as to the jurisdiction of state courts in this class of actions, and under that act those courts, in virtue of their general authority, could take cognizance of such suits as well as any other. Claflin v. Houseman, supra. But the act of 1874, by giving them jurisdiction of certain actions, seems to exclude all others, and now it must be said that no suit by an assignee, for a sum exceeding five hundred dollars, can be prosecuted in a state court. The probate court was established by the organic act of the territory, and was not, in fact, a state court, but in respect to its jurisdiction, under the laws of the territory, and its want of jurisdiction, under the laws of the United States, it was so like a state court, that it may be regarded as such in deciding the question presented. Returning now to the record, we find that five hundred dollars was demanded in the declaration, and the judgment was for a less sum. This, it will be observed, is within the amount for which an action at law may be brought in a state court by an assignee; and although it does not appear that the bankruptcy court directed the suit to be brought, it seems that the court had jurisdiction of the action. Objection that there was no direction from the bankruptcy court to bring the suit, cannot be first made in this court, for at best it was matter in abatement of the action only. If properly pleaded and allowed, the assignee would still have been at liberty to sue in the same court, on the same cause of action, by direction of the bankruptcy court, and in a federal court without such direction. By pleading to the declaration, plaintiff in error waived the point, and in support of the judgment the matter of the direction from the bankruptcy court must stand as an admitted fact in the case.

The motion to dismiss will, therefore, be denied, and we will now consider the errors assigned on the record.

At the trial it appeared that the bankrupts executed to plaintiffs in error, May 9, 1873, a chattel mortgage on an engine and boiler then owned by them, to secure certain notes, the last of which became due January 1, 1874. On the 25th day of October, 1873, they executed to one Donnell another mortgage on the same property, the consideration for which is not shown. Both of these mortgages were, so far as appears, made in good faith; but neither the plaintiffs in error nor Donnell took possession of the property before or at the time of the sale of certain glass to plaintiffs in error, which will next be stated. In the month of July, 1874, there was due to plaintiffs in error, on this mortgage, the sum of three hundred and fifty dollars and thirteen cents, for which they agreed to accept, and did accept, from the bankrupts a lot of glass, valued at the amount due them,

and they thereupon released the mortgage on the engine and boiler. It is sufficiently proved that the bankrupts were financially embarrassed and unable to go on with their business at the time the glass was transferred, which was well known to plaintiffs in error, and that the bankrupts suspended business within a day or two after the agreement was made, and on the very day the glass was delivered. A question is made whether the glass was taken at a fair price, but this, upon the evidence, was a matter to be finally decided in the court below, and is not a proper subject of discussion here. Taking all the facts, it is obvious that the transaction, if at all forbidden by the bankrupt act, must be an unlawful payment or preference within the meaning of the 35th section (5128). In that view, it is plain that no such case is made in the declaration. It is not alleged that the bankrupts transferred goods to plaintiffs in error in fraud of the act, within four months or any other time next before the bankruptcy, nor is the date of the adjudication against Wilcox & Watterson given. The evidence is equally silent on these substantial points; and therefore the case fails both as to pleadings and proof. The declaration appears to be adapted to the case where goods of the estate may have been taken from the possession of the assignee, or are wrongfully withheld from him by his bailee, rather than to the case where it is sought to set aside a sale or transfer of the goods as having been made in violation of the act. In the case last mentioned, the facts of the illegal transaction should be set out and the evidence should establish the charge. If we could overlook these defects it is by no means clear that the sale of the goods to plaintiffs in error was an unlawful preference. It is true that the sale was not in the ordinary course of the business of the bankrupts, and that it was in satisfaction of a pre-existing debt; but plaintiffs in error then held a mortgage on other property of the bankrupts, which was, as between the parties, a valid instrument. The circumstance that plaintiffs in error allowed the property covered by the mortgage to remain in the possession of the bankrupts after the condition of the mortgage was broken, in no way affected the validity of that instrument as between the parties. Although void as against the creditors of the bankrupts and purchasers from them, it was still a lien on the property in favor of the mortgagees so long as the property should remain in the possession of the bankrupts. Constant v. Matteson, 22 Ill. 546. Plaintiffs in error might have taken possession of the property under the mortgage, and as that instrument was made more than four months before the bankruptcy, and it is not impeached in any way, they could have held the property against the assignee in bankruptcy and all others who may have acquired title after the date of their mortgage. Holding this lien, if the property mortgaged was of sufficient value, plaintiffs in error were secured of their demand, and payment to them, whether made in money or goods at a fair price, was not an unlawful preference.

The reason why a debtor in failing circumstances may not pay an unsecured creditor, is that in so doing he bestows on one that in which all of his creditors are entitled to share. In paying a secured creditor he does not commit this offense, for the secured creditor is at all events entitled to withdraw from the estate the amount of his demand. It cannot make any difference in principle whether payment be made out of the estate covered by the lien, or from some other fund. In either case the creditor is entitled to all that is given him. This principle was recognized and applied in Sawyer v. Turpin, 91 U. S. 114. There a creditor took from his debtor as security for his debt a bill of sale of property which was not in the form required, but was nevertheless a valid instrument as between the parties. Afterwards, and within four months of the bankruptcy of the mortgagor and with knowledge of the insolvency of the latter, he took a mortgage on the same property to secure the same demand. The mortgage was sustained on the ground that by it the creditor took no more than he was entitled to under his bill of sale. Although the bill of sale was valid only against the maker and not against creditors, it was, in fact, an exchange of securities, and not an unlawful preference. So here we may say that if plaintiffs in error took goods in fair exchange for the security they held, the transaction was not in fraud of the act. This is, of course, upon the assumed hypothesis that their debt was fully secured, and that the goods were taken at a fair valuation. If any portion of the demand was not secured there may have been an unlawful preference as to the unsecured part; and if they took the goods greatly below their value, that, of itself, may be evidence of fraud. That the engine and boiler were mortgaged to Donnell is not, in any view of the case, a controlling circumstance. The existence of that instrument could not affect the right of plaintiffs in error to accept payment of their demand, nor could it affect the right of the bankrupts to make such payment. If by holding the mortgaged property or by seeking satisfaction out of it, plaintiffs in error could have protected the general creditors, they were not bound to do so; nor were they concerned in the disposition of the property after they had relinquished this mortgage. Whatever right they held was not at all subject to the control or direction of other creditors. These remarks as to the character of the dealing between the bankrupts and plaintiffs in error, are not intended to preclude discussion of the same matter on the trial which may take place in this court. For the error first mentioned, the judgment will be reversed with costs, and defendant in error will have leave to amend his declaration, after which the cause will stand for trial in this court.

In re HALLE. See Case No. 5,960.

Case No. 5,957.

HALLER v. BEALL.

[2 Cranch, C. C. 227.] [1]

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

REPLEVIN—PRACTICE—SURETY—MOTION TO QUASH WRIT AFTER ISSUE JOINED.

1. After issue joined in replevin, it is too late to move to quash the writ.

2. Semble, that the act of Maryland which requires two sureties in replevin bonds is directory only, and that the writ is not void, if there be only one surety.

Mr. Marbury, for defendant, after issue joined, and the jury was about to be sworn, moved the court to quash the writ of replevin, because the clerk had taken the bond with one surety only. The statute of 11 Geo. II. c. 19, § 23, requires two sureties in all cases of replevin of goods distrained for rent; and the act of Maryland of 1790, c. 53, § 12, provides that "before any clerk shall issue a writ of replevin in virtue of this act, the plaintiff or plaintiffs shall enter into bond, with two sufficient sureties, in double the value of the property, to be replevied in the same manner as in other cases of replevin." And such has always been the practice in the courts of Maryland, as well as in this court.

THE COURT said it was now too late to move to quash the writ; and that they were inclined to think that the statute of Maryland was directory only, and that the writ was not void merely on that account. See the case of Orr v. Ingle [Case No. 10,588].

HALLET (ALLEN v.). See Case No. 223.

Case No. 5,958.

HALLET et al. v. PHOENIX INS. CO.

[2 Wash. C. C. 279.] [2]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

ADMIRALTY — VESSEL NOT HEARD FROM — WHEN PRESUMED TO BE LOST—INTEREST—EVIDENCE OF CUSTOM.

It is a uniform rule, in estimating the loss upon a vessel which has never been heard of, and is therefore considered as lost, to calculate interest after twelve months and thirty days from the last period when the vessel was heard from.

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

Vessel lost, and never since heard of, on a voyage from Curacoa. The question submitted to the court was, from what time interest is to run, and the vessel to be considered as lost? A witness was examined, to prove that it is the uniform and undeviating rule in all cases, even of coasting vessels, to calculate interest twelve months and thirty days from the last time she is heard from. No instance of a case to the contrary was shown, and it was stated to be the custom as to all the offices.

BY THE COURT. Upon this evidence of a uniform usage upon this subject, we shall consider ourselves bound by it, and in this fix the interest to run from twelve months and thirty days, from the last period when the vessel was heard from.

HALLETT (BARBER v.). See Case No. 970.

HALLETT (OH CHOW v.). See Case No. 10,469.

Case No. 5,959.

HALLETT et al. v. SMYTHE.

[5 Int. Rev. Rec. 69.]

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

CUSTOMS DUTIES—CLASSIFICATION—GAMBIA.

Gambia is exempt from duty under the tariff act of 1861 [(12 Stat. 292), under the name of "terra japonica," the two names being synonymous].

Before SMALLEY, District Judge.

This is an action brought [by Henry Hallett and others against Henry A. Smythe] to recover a sum of $913 alleged to have been illegally imposed on an importation of gambia made by the plaintiffs on the bark Fritz & Anton, May, 1866. The importation, gambia, is a designation synonymous with terra japonica in the books. It is a later word than terra japonica, which it appears, however, to have supplanted in commercial phrase, while on the other hand it appears to have been ignored in the tariff, terra japonica only being referred to. The importation in question under the latter designation is exempt from duty, and therefore the imposition of a tax of ten per cent. ad valorem thereon, which was exacted, was paid by the plaintiffs under protest and an appeal made to the secretary of the treasury. The assumed justification for the exaction, and the defence therefore, is based on a decision of the secretary of the treasury, set forth in a circular letter, dated May, 1864, with regard to the proper rate of duty to be assessed on the article known in commerce as gambia. The circular, which is over the signature of the present Chief Justice Chase, states that the article is nowhere designated in any of the tariff acts by name, but has been included under the general term of "terra japonica," a variety of the catechu or cutch. This latter article is lia-

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

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

ble under the provisions of the fifth section of the act of July, 1862 [12 Stat. 546], to an ad valorem duty of ten per cent. and the act was applied under the circular of Secretary Chase, referred to, to the plaintiff's importation of gambia or terra japonica, and it was against this application of the fifth section of the tariff act, and to recover the amount exacted under its operations, the action was brought.

Mr. A. R. Culver, for plaintiff, opened the case, and submitted briefly to the court the law bearing on the issue. The act of March, 1861, provides that terra japonica, catechu or cutch shall be admitted to entry free of duty. The act of July, 1862, provides, that cutch or catechu shall pay a duty of ten per cent. ad valorem, and makes no allusion whatever to the other article, terra japonica, which, therefore, counsel contended, still stands, under the act of 1861, free of duty. Mr. Culver examined a number of witnesses, either at present engaged or lately engaged in importing and dealing in the article gambia or terra japonica, and catechu, or cutch, who clearly proved that in commerce, gambia, or terra japonica, was known as an entirely different and distinct article of trade from cutch or catechu, though to a considerable extent assimilating in their properties and the uses to which they can be applied. The articles, however, are different in origin, being imported from different countries of the East, and sold in the markets here and in England at about one-half the price, gambia being the cheaper article.

Mr. Courtney, U. S. Dist. Atty., called but one witness for the defence, when Judge Smalley said that if there was nothing but cumulative evidence as to what gambia was, and whether it should come under the designation of cutch or catechu, or under that of terra japonica, taking such testimony would be a waste of time. It was clear from the evidence that gambia and terra japonica were synonymous, and that congress, when exempting terra japonica from duty, meant gambia.

THE COURT ordered the jury to return a verdict for the plaintiff in the full amount claimed. Verdict accordingly.

HALLETT (TOY WILLIAM v.). See Case No. 14,123.

Case No. 5,960.

In re HALLIE et al.

[7 Ben. 182.] [1]

District Court, S. D. New York. March, 1874.

TAKING PAPERS FROM FILES.

At the first meeting of creditors of a bankrupt, objection was made to certain proofs of debt which had been filed by three creditors. The register ruled that the proofs were insufficient, and that the creditors could not vote. The counsel for the creditors asked leave to amend the proofs of debt, which was granted. The three creditors afterwards claimed the right to withdraw the proofs of debt from the register's office. *Held*, that the proofs could not be so withdrawn.

[In bankruptcy. In the matter of Abraham Hallie and Bernard Brunner.]

The register certified to the court, in this case, that, before the first meeting of creditors, proofs of debt were filed on behalf of three creditors; that the creditors were put on the list; that, at the first meeting, these creditors were called to vote, when objection was made by other parties; that the register ruled, that the proofs were insufficient; that counsel for the creditors asked leave to amend the proofs of debt, which was granted, but they did not avail themselves of such leave granted; that proceedings were thereafter taken to expunge the claims, whereupon the creditors sought to withdraw the proofs of debt from the register's office—and the register certified the following question: "The proofs of debt having been sworn to, filed, and afterwards, upon objection made to them at the first meeting of creditors, postponed by the register under the 23d section [of the bankrupt act of 1867 (14 Stat. 528)], have the creditors a right to withdraw them, thereupon, from the register's office, upon their mere demand?

BLATCHFORD, District Judge. The question certified is answered in the negative.

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

Case No. 5,961.

The HALLIE JACKSON.

[Blatchf. Pr. Cas. 41.] [1]

District Court, S. D. New York. Aug., 1861.

ADMIRALTY — FLAG WORN DETERMINES CHARACTER OF VESSEL—BLOCKADE—WHAT CONSTITUTES VIOLATION OF.

1. A vessel is clothed with the character of the flag she wears.

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

3. A vessel approaching a blockaded port, with intent to violate the blockade, is not entitled to be warned off.

4. Cargo condemned as enemy property. It was also shipped for an enemy port, with intent to violate the blockade.

[Cited in The Amy Warwick, Case No. 341.]

In admiralty.

BETTS, District Judge. The brig Hallie Jackson, her tackle, &c., and the cargo laden on board, were captured on the 10th day of June, 1861, on the high seas, off the coast of Georgia, near Tybee light, by the United States steamship Union, under the command of J. R. Goldsborough, and have been libelled

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

by the United States and her captors as prize of war, as being enemy's property, and also for attempting to violate and violating the blockade of the port of Savannah, at that time established and existing there, of which the owners of the vessel and cargo had notice. Bernardi Sanchez intervened, and filed his claim as owner of the vessel, but does not state the facts of such ownership, or his residence, or citizenship. He denies the validity of the blockade of the port of Savannah, and although he avoids asserting in terms that he was without notice of the blockade, asserts that the officer who captured the brig seized her "without any previous notification of a blockade," and raises, by exception to the action, the objections alleged in the preceding cases to the authority of the president to declare a blockade or state of war against citizens of the United States, and to the proceedings in the suit. The firm of Arganequi, Gonzales & Co., citizens of Spain, and residents of the island of Cuba, claim the cargo of molasses seized on board the vessel, stating that they chartered the vessel to transport the cargo to Savannah if that port should not be blockaded, and if it was found so, then to some other port of the United States; and they aver that at no time before or at the time of the sailing of the vessel had they any knowledge or notice that the port of Savannah was blockaded.

The register of the vessel at the custom-house, Savannah, on the 20th of April, 1860, was produced in evidence. The proofs, without the aid of that document, are unexceptionably clear that the vessel belonged to a citizen resident in Georgia, and carried impressed upon her more than a constructive character of enemy's property. She had been under the employ of the same owner on voyages between Savannah and Matanzas repeatedly before the one now on inquiry, and in a trade, it seems, under his own direction and for his special account. When she left Savannah, on this last trip, it was after the well-known state of war between the seceding states and the United States was on foot, and the proclamations of the president of April 15, 19, 27, and May 3, 1861, had been issued and were personally known to the ship's company and her owner at Savannah, as appears on the evidence of the first mate upon his examination upon the preparatory interrogatories in this suit, and the expectation of the owner was expressed that the blockade of the Southern ports declared by the president would be directly put in force. The vessel was despatched under the secession flag. She used that flag on her voyage out, in Matanzas when lying in that port, and on her return voyage, until, apprehending it might be perceived by United States vessels, the master ordered the American flag to be substituted. The master, on the approach to him of the capturing vessel, ordered the mate to conceal the secession flag on board the brig, and it was afterwards found on board the brig and given up to the captors. These facts show not only that the vessel belonged to an enemy, but his purpose to navigate her as such, in defiance of the laws and government of the country to which he owed allegiance.

The doctrine that such use of an enemy's flag is a mark and token of her real ownership is strongly maintained in the English prize court (The Vrow Elizabeth, 5 C. Rob. Adm. 4, 5); and Sir William Scott declares it to be the established rule of law that a vessel is clothed with the character of the flag she wears. Id., note. This brig, when she sailed from Georgia, and when she was seized, was thus plainly enemy's property, and she was properly captured as prize of war. The cargo is claimed by the firm of Arganequi & Gonzales, who are represented to be subjects of the queen of Spain, and neutrals. The evidence to prove the property neutral consists of three particulars: 1st. The test oath and claim, both made by an agent of the claimants, and chiefly on the information of the master; 2d, a charter-party, executed between the claimants and the master of the vessel June 1, 1861; 3d, the bill of lading, dated June 4, 1861. The test oath supplies no fact in confirmation of the alleged ownership of the cargo by the claimants. The first mate and Lee, a seaman, testify, on the preparatory examination, their understanding and belief that it belonged to the owner of the vessel, and would be his if delivered according to its destination. The test witness supposes it to belong to the claiming firm, because he was so informed by the master of the vessel; but the master, on his preparatory examination, fails to state any fact going to establish such ownership, further than the formal shipping of it under a charter-party and bill of lading. The claimants, he says, were strangers to him, and he did not know they were residents at Matanzas. Lee, the seaman, says he supposed the cargo belonged to the owner of the vessel, or to him and his brother, residing at Matanzas.

The bill of lading consigns the cargo from the claimants to the owner of the vessel or assigns. If this document imports, prima facie, that the consignors were proprietors of the goods, yet that intendment is so feeble and inconclusive, particularly in prize cases, as to demand, in any equivocal case, explanations by satisfactory proof produced on the part of the consignor. See the preceding case of The General Green [Case No. 5,312a], and the authorities cited. The charter-party, made almost concomitantly with the bill of lading (the one on the 1st of June and the other on the 4th), would seem to aim at but one object, and that was to obviate the necessity of fulfilling the bill of lading literally as to the place of delivery of the cargo, because, in other respects, the bill of lading is made subordinate to the charter-party, and the latter imparts no privileges or powers to the

takers of the charter-party, in respect to the ship or voyage, not consequent upon the ordinary contract of affreightment, and no security or enhancement of freight or stipulation respecting contingencies of the voyage is arranged in behalf of the givers of the charter-party. The charter-party, however, read in the light of public facts existing at the home port of the vessel, manifestly denotes that the instrument was shaped and executed with the purpose to meet a condition of the blockade of the port of Savannah when the brig should arrive there, and provide relief for her in case she should thus be shut out from that port. The terms of the arrangement are, that the brig, "being so loaded, shall therewith proceed to Savannah (United States), or so near thereto as she may safely get, and deliver the same to said charterer's agent." The proximity of Matanzas to Savannah, the exciting events occurring throughout the United States, and particularly the Southern ones, and the large commercial intercourse between Cuba and those ports, would leave, as matter of presumption and constructive notice, no doubt that these parties mutually understood the state and manner of hostilities then pending between the United States and all the ports of Georgia, and that the parties in this charter-party contemplated a state of blockade, then subsisting at the port of Savannah, and meant to provide a resource in this stipulation, in case the vessel should not succeed in evading the blockade. The neutral merchant becomes a participator with the enemy in any undertaking or device to violate a blockade, and his property is thereby made to share a common fate with the enemy's itself. That there was, in fact, an effective blockade established at the port on the arrival of the brig is demonstrated by her arrest there; and that she was not entitled to be warned off, if approaching the port with intent to violate it, is abundantly established by the authorities. Wheat. Capt. Mar. 203, 207; Id., 193, 194.

In my opinion, the vessel captured in this case is subject to condemnation: First, as enemy's property at the time of its seizure; secondly, because the vessel wilfully attempted to violate the blockade of the port of Savannah, with knowledge that such blockade existed at the time; thirdly, that, upon the facts and the law applicable to them, the cargo laden on board the vessel was also the property of her owner, and belonged to the enemy; fourthly, if the cargo, on a review of the case, shall be found to belong to the claimants, it was shipped and directed by the claimants to the port of Savannah, with knowledge of the war and notice of the blockade of that port, and with intent to evade and violate such blockade. Judgment is rendered for the condemnation of vessel and cargo, with costs.

An appeal as to the cargo was taken by the claimants to the circuit court, and is still pending. No appeal was taken as to the vessel.

The HALLIE JACKSON. See Case No. 6,451.

Case No. 5,962.

HALLIHAN v. WASHINGTON.

[4 Cranch, C. C. 304.] [1]

Circuit Court, District of Columbia. March Term, 1833.

ACTIONS — ASSUMPSIT LIES FOR WORK DONE UNDER SEALED INSTRUMENT—OBLIGATION TO TAKE STOCK.

The plaintiff who has completed the work according to his sealed contract, may, in assumpsit recover the balance due to him, although he had covenanted to receive corporation stock in payment, and had not demanded payment in stock, before bringing his action.

The plaintiff's cause of action was for work and labor done under a contract made by a commissioner, (duly authorized to contract,) under the private seal of the commissioner, but in the name of the corporation [of Washington]; by which the plaintiff bound himself to do certain work at certain prices, and to receive payment in the stock of the corporation; but it contained no obligation on the part of the corporation to pay in stock. The declaration had only the common money counts in assumpsit.

R. S. Coxe, for defendants, objected to the contract being given in evidence; contending that the declaration should have been in covenant, on the sealed contract.

Mr. Key and Mr. Bradley, contra.

THE COURT (nem. con., but THRUSTON, Circuit Judge, doubting) admitted the evidence and told the jury, that if they should be satisfied by the evidence that the plaintiff had performed the contract on his part, he had a right to recover in this action for the balance due to him, although there was no evidence of a demand or tender of stock.

HALLOCK (PARKER v.). See Cases Nos. 10,734 and 10,735.

HALLOCK, The JULIA M. See Case No. 7,579.

HALLORAN (UNITED STATES v.). See Case No. 15,286.

HALLOWELL (SEIDENBACH v.). See Case No. 12,635.

HALLOWELL & AUGUSTA BANK (BELLOWS v.). See Case No. 1,279.

HALL'S DEPOSITION. See Case No. 5,924.

Case No. 5,963.

In re HALSEY.

[1 MacA. Pat. Cas. 459.]

Circuit Court, District of Columbia. June, 1856.

PATENTABLE INVENTION—IGNITING CHARGE IN FIRE-ARMS—COMBINATION.

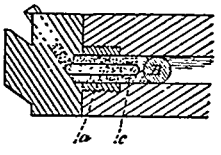
[1. Placing a priming tube running forward in the center of a gunbarrel, so as to conduct the

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

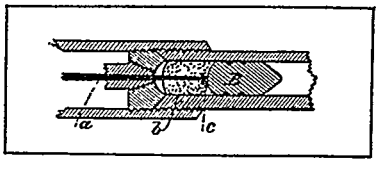
flash from the cap to the forward end of the powder charge, involves patentable invention, although a similar tube had been previously used to cause ignition in the center of a charge placed in a conical cavity at the rear of the ball, and although ignition at the front of the charge had been obtained by means of a needle operating upon a fulminate placed against the rear of the ball.]

[2. Where the invention is of a combination, it is no objection to the patent that the machine, or any parts of it, were previously in use, unless the combination itself has existed before. Moody v. Fiske, Case No. 9,745, approved.]

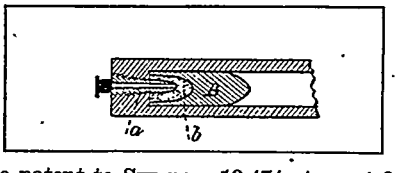
Appeal [by James E. Halsey] from the decision of the commissioner of patents rejecting his application for a patent for a new and useful improvement in igniting the charge in fire-arms.



The applicant's invention will be readily understood from the subjoined cut taken from the patent subsequently issued to him in accordance with this decision, No. 15,292, July 8th, 1856; a represents the priming-tube for conducting the flash of the cap to the forward part of the charge c, and so firing the same at that point and just behind the ball B.



In the Prussian needle-gun, cited as reference, of which an illustration is taken from patent to Polnice, No. 11,835, October, 1854, the charge is fired at the same point, but by different devices. A needle a passes through the charge b, and explodes a fulminate c placed against the rear end of the bullet B.



The patent to Swyney, 13,474, August 21st, 1855, shows a priming-tube a like applicant's, which fires the charge b placed in an excavation in the rear end of the bullet B, at or near its middle part.

Everett & Pollok, for appellants.

MORSELL, Circuit Judge. The commissioner's decision is dated the 20th of October, 1855, in which he states: "The references would seem to present a clear anticipation of the invention; for while the tube of Leroy and Mathiew has perforations throughout its length, it also has one in the end near to or next to the ball, which would communicate fire from the cap to the forward end of the charge of powder; and Swyney's tube is perforated only at the end, though not designed to extend to the forward end of the charge of powder. It is alleged that communicating fire to the forward end of the charge of powder only, produces a different effect from either of the references, and that, therefore, the mode of communicating the fire is patentable, and that the particular device is not deprived of patentable novelty by the device in the Prussian needle-gun for exploding a fulminate at the forward end of the charge of powder. It is true that the devices in the needle-gun and the application are different; but it is not seen clearly that all the advantages of firing the charge at the forward end are not strictly as marked in the needle-gun as the application, or at least that these advantages are not common to both. The effect, therefore, from the invention is not the point on which whatever of patentability it presents must rest; but besides this, the invention is defective from an uncertainty, depending not only on the invention, but the varying volumes of gunpowder in proportion to strength; and this uncertainty reduces the invention simply to the question of degree in its relation to Swyney's patent; that is to say, if for any purpose or from any cause a larger volume of powder or bulk of charge were used with the applicant's tube, it would not communicate the fire to the forward end of the charge, and of course the patent would be inoperative; and if for like reasons, or the use of a cylindrical ball in Swyney's gun, a varying volume of powder were used, the charge might be brought to the level of the end of the tube, and make it communicate the fire exactly to the forward end of the charge."

The appellant assigns as his reasons of appeal—First. Because, on examination of the alleged invention or discovery, it did not appear that the same improvement in igniting fire-arms had been invented or discovered by any other person in this country prior to the invention or discovery thereof by the applicant, the said James E. Halsey, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent and allowance prior to his application, or that an improvement such as this in fire-arms is not sufficiently useful and important to be worthy of a patent. Second. The commissioner erred, "because he did so, without giving satisfactory references; because the references given are insufficiently studied, and not to the point; because he uses arguments which are contradictory and void of foundation, but were suppositions suggested in his own mind upon which no legal refusal can be based, and a refusal like this is vague, insufficient, contrary to law and all

correct practice of the patent office." Upon which application due notice was caused to be given of the time and place of trial. At which time and place the commissioner laid before me the original papers, with the references, models, and drawings in the case, together with the grounds of his decision and the aforegoing reasons of appeal. And the case has been submitted thereon, with the written argument of the appellant.

The ground of the rejection appears to be the want of novelty, or that the invention for which a patent is claimed is substantially the same as those to which references were given—Swyney's and the needle-gun. To entitle the appellant to a patent, it must appear that he was the original and first inventor; and in this case he has sworn he was. But in this as in all cases, the law has imposed on the commissioner the duty of making an examination of the alleged invention; and if on such examination it shall appear to him that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented or discovered or patented or described in any printed publication in this or any foreign country, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application or of altering his specification to embrace only that part of the invention or discovery which is new. This the commissioner has done, and according to that authority decided. An amended specification was then made and filed, on which the appellant persists in his claims for a patent. In this specification he says: "I do not claim igniting the charge in the centre nor in its whole length simultaneously, nor at its forward end when a needle is used to explode a fulminate placed in the ball or between the ball and the powder; but what I do claim as my invention, and desire to secure by letters-patent, is the tube (a), constructed of such a length and placed in such a position that it shall serve as a means of communicating fire from the cap to the forward end of the charge of powder only, substantially as described and for the purpose specified." Does it then appear that the appellant was not the original and first inventor or discoverer of said invention? The appellant, in his argument as to those references, says (as to that of Leroy and Mathiew): "A tube that is perforated through its whole length for the purpose of producing a simultaneous explosion of the whole charge and for expanding the bullet and pressing it laterally into the rifled grooves of the barrel is, beyond all doubt, a different device, a different means, and for a different purpose from that of the appellant, who claims a priming-tube, for the purpose of igniting the charge at the forward end only, producing a pressure upon the bullet in the direction of the axis of the barrel only, as is fully explained in appellant's letters of October 12th and 18th, 1855." As to the needle-gun, he says: "The commissioner has failed to understand or appreciate the advantages of the appellant's improvement as compared with the Prussian gun. The devices are formed upon the same principle; but it is well known that no patent can be granted on an abstract principle, but only for the mode or device by which the same is carried into effect. * * * The appellant's improvement has great and important advantages over the Prussian gun; the needle, which is a very delicate part of the mechanism of the gun, is very liable to injury in clogging or corroding from repeated use. A needle becomes out of order after from thirty to fifty shots; it then requires to be replaced by a new one. It cannot be applied to fire-arms generally, particularly ordnance." He says the appellant's improvement is not liable to the above-mentioned objections, and is applicable to all kinds of fire-arms in use. In one of the letters alluded to, the appellant says that he was the first who thought of constructing a priming channel from the bottom of the bore to the head of the charge only, forming thus a double concentric barrel, the inner one serving only to conduct the flash to the very first layer next to the ball. He further says: "I do not claim, however, the invention of this principle; it has been already successfully introduced in the army of one of the greatest military powers in the world. There the whole arrangement to produce the effect of igniting the powder at the head of the charge differs from anything in use. But what I claim is the production of the same effect by the most simple means, such as to conduct the igniting spark through a sort of tunnel to the head of the charge. * * * The great problem has been to produce the same effect (as the needle-gun) in guns loaded with the ordinary cartridge, or with loose powder, dispensing with the fulminate at the head of the charge."

The commissioner admits that it is true that the devices in the needle-gun and the application are different. This, I think, is clear, as stated in the invention of the appellant, by saving or preventing from waste any part of the powder in the act of igniting, and in dispensing with the fulminate at the head of the charge. In this respect there is certainly more simplicity and economy, and also in obviating the evil of clogging after firing from thirty to fifty times, as alluded to. These are substantial advantages; and if most, at least, of these had not been overcome or avoided by the invention of Swyney—also referred to in the commissioner's report—there would have been less difficulty in this case. That device appears to be equally simple, being without the fulminate, as in the needle-gun, at the top of the charge, and with nearly if not the same saving of powder; but by the Swyney gun the charge is ignited in the centre, instead of being ignited at or near the top of the charge. Of course the tube used in the

one case is not more than half as long as that in the other. This difference, with the disadvantages of the one and the advantages over it of the other, are stated in the argument of the appellant hereinbefore alluded to. I am not satisfied with the force of the principle which is asserted as to the supposed evil which would be occasioned by the lateral pressure, where there would be a simultaneous ignition of the whole cartridge or charge, as, if there be soundness in the principle, the construction of the gun would always be made of such a consistency as to guard against any contingency of that kind. This, it is also said, could not occur where the ignition is at the top of the charge, and by the peculiar operation of which the power of the whole load or charge is exerted to produce greater velocity and efficiency of the ball. In this, however, the needle-gun, with the exception of its fulminate, and except as it may be affected by the supposed loss of powder, is analogous in its operation.

To illustrate and explain that part of the commissioner's report in which he supposes that a substantial identity is sustained between the appellant's plan and that of Swyney's, derived from the fact in relation to the difference in the volume of powder for one kind of shot and another, it is said, "that as the cylindro-conical shot, when solid, will require about double the charge of powder that a spherical shot of the same calibre does, it is evident that a tube of the required length to ignite the charge in front with the spherical will conduct the fire only to about the centre of the charge when the cylindro-conical shot is used in the same gun; and a tube which would only conduct the fire to the centre of the charge of the latter form of shot would carry it to the front of the charge for the former. Hence, if a gun be made after Swyney's plan for the cylindro-conical shot, it will answer all the requirements of the applicant's claim when the spherical shot is used in the same gun, and for the simple reason that the volume of the charge of powder in the latter case is only about half what it is in the former." As the truth of the proposition thus stated may be supposed to have had much influence with the commissioner in deciding on the claim of the appellant, I have given it every earnest consideration and examination which the greatest respect and deference for the opinion of such high authority is justly worthy, after which, although I will not allow myself to say there is no such theory, I must be allowed to say that I am authorized, from the most unquestionable source, to say that, practically, the converse of the proposition to that just recited is true. Take, as an instance from actual experiment, the United States musket, which, with a cylindro-conical ball, has only a charge of seventy grains; with a round ball, it has one hundred grains. This argument, therefore, must lose its weight.

The real case which appears to be made out is a new combination, and though formed of the substantial constituents of each of the inventions referred to, yet is substantially different from each. To ignite the charge so as to explode the whole of it is supposed to be done most effectually by igniting it at the fore part. This effect cannot certainly be known but by experiment; but it is not unreasonable to believe that such would be the case; and if so, Halsey's obtains twice the effect that Swyney's does; the former, as he says, only igniting at the fore part, the latter at the centre. This and the other advantages which he says his invention has over the references (conforming his specification, if necessary, to this character of claim) I think ought to be deemed sufficient in this stage of the proceeding to entitle him to a patent for such an invention, as the patent laws do not require that the invention should be in use or reduced to actual practice before the issuing of the patent "otherwise than by a model, drawings, and specification containing a written description of the invention, and of the manner of making, constructing, and using the same, in such full, clear, and exact terms as to enable any person skilled in the art to which it appertains to make, construct, and use the same." Heath v. Hildreth [Case No. 6,309].

It may be proper also to state the rule of patent law which I think applicable to this point of the case. It is to be found in Moody v. Fiske [Id. 9,745], and to this effect: "Where a patent is for a new combination of existing machinery or machines, and does not specify or claim any improvement or invention except the combination, unless that combination is substantially violated, the patentee is not entitled to any remedy, although parts of the machinery are used by another, because the patent by its terms stands upon the combination only. In such a case, proof that the machines, or any part of their structure, existed before, forms no objection to the patent, unless the combination has existed before, for the reason that the invention is limited to the combination."

Upon the best consideration which I have been able to give this case, I think the appellant is entitled to a patent for his improved invention, as a new combination of constituents mentioned in his specification.

Case No. 5,964.

HALSEY et al. v. FAIRBANKS et al.

[4 Mason, 206.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF IMPERFECTIONS IN—RELEASE FOR FIRM.

1. On the general validity of assignments, made by a failing debtor for the benefit of creditors.

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

2. An assignment for the benefit of all creditors is good against subsequent attachments, although all the creditors are not parties to the deed before the attachments.

[Cited in Stewart v. Spenser, Case No. 13,437].

[Cited in Ingram v. Kirkpatrick, 6 Ired. Eq. 463; Hall v. Denison, 17 Vt. 317.]

3. It is not a fraud upon any attaching creditor to provide for the payment of all the creditors, in preference to one, who means to attach by process the property conveyed.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Adams v. Blodgett, Id. 46.]

[Cited in Walters v. Whitlock, 9 Fla. 86; Mathews v. Stewart, 44 Mich. 216, 6 N. W. 635.]

4. A general assignment is good, notwithstanding it does not purport to convey all the debtor's property, and yet requires a general release; or has imperfect schedules annexed to it; or does not fully enumerate all the debts due, or describes the property generally; or gives preference to certain classes of creditors; or authorizes debts to be admitted by the assent of the debtor, the trustee, and any one creditor; or authorizes the trustee to require an oath from a creditor of the truth of his debt; or provides for a future mode of ascertaining privileged debts; or reserves any ultimate surplus after payment of all debts to the debtor; or allows six months for the creditors to come in under it; or requires a general release from all creditors who come in and assent to the assignment.

[Cited in Adams v. Blodgett, Case No. 46.]

[Cited in Rundlett v. Dole, 10 N. H. 462; McFarland v. Birdsall, 14 Ind. 129; Haven v. Richardson, 5 N. H. 124, 125, 127.]

5. If the terms of release are general, the operation will be restrained to a release of debts.

6. If the terms of a covenant by creditors to indemnify the debtor against claims under them are general, it will be construed a several covenant by each creditor, and not a joint one by all.

7. A general assignment is valid for future liabilities, as well as for debts due, if the parties so intend.

8. One partner may sign and seal such an assignment for the firm, and it will bind the partnership, as a release of the debt.

[Cited in McDonald v. Eggleston, 26 Vt. 157.]

9. Quaere, whether upon general principles, an assignment stipulating for a release of the debtor, ought not to be deemed fraudulent, as locking up the debtor's property from his creditors, unless they consent to relinquish a part of their debts?

[Cited in The Watchman, Case No. 17,251; Adams v. Blodgett, Id. 46; Stewart v. Spenser, Id. 13,437.]

[Cited in Atkinson v. Jordan, 5 Ohio, 300; Grover v. Wakeman, 11 Wend. 200, 217; Miller v. Conklin, 17 Ga. 430; Clayton v. Johnson, 36 Ark. 406; Greeley v. Dixon, 21 Fla. 413; Collier v. Davis, 47 Ark. 367, 1 S. W. 684; Schuler v. Miller, 45 Ohio St. 332, 13 N. E. 278; Garver v. Tisinger, 46 Ohio St. 61, 18 N. E. 493; Haven v. Richardson, 5 N. H. 124, 125, 127.]

10. The assent of creditors to an assignment, not stipulating for a release, may be presumed; aliter if release stipulated for.

[Cited in Stewart v. Spenser, Case No. 13,437.]

[Cited in Hurd v. Silsby, 10 N. H. 210; Oakley v. Hibbard, 1 Pin. 681; Merrills v. Swift, 18 Conn. 262; Spinney v. Portsmouth Hosiery Co., 25 N. H. 15, 16, 18; Sandmeyer v. Dakota F. & M. Ins. Co., 2 S. D. 352, 50 N. W. 354; Alliance Milling Co. v. Eaton (Tex. Sup.) 25 S. W. 615; Hall v. Denison, 17 Vt. 313, 318; Greene v. Sprague Manuf'g Co., 52 Conn. 394.]

This was an action of assumpsit [by John C. Halsey and others] on several promissory notes, signed by the principal defendant. In June, 1826, Fairbanks, being unable to meet the demands against him, made an assignment of all his property to Whitney, in trust, for certain of his creditors, who should become parties to the assignment, and upon the consideration that they should release all their respective claims and demands upon him. The trusts, expressed in the instrument of assignment, were, that Whitney should sell the property, and, after paying all expenses, &c. then "apply the residue of said trust-moneys to the payment and discharge of the several promissory notes, bills of exchange, bonds, and other debts and sums of money, set forth in said schedule, marked A, belonging and owing to persons and parties hereto, and to indemnifying and saving them harmless from all losses, costs, and charges, which they, their heirs, executors, or administrators, may sustain or be put to, by reason of their having signed or indorsed said notes or bills of exchange, or otherwise become responsible for the payment of the same or any part thereof. Then in trust to apply the residue of said trust-moneys, to the payment and discharge of the several promissory notes, bills of exchange, and other debts and sums of money, set forth in said schedule, marked B, belonging and owing to persons, parties hereto in proportion to their respective amounts, and to indemnifying and saving harmless them, the said persons, their heirs, executors, and administrators, from all losses, payments, costs, and charges, which they shall sustain or be put to, by reason of having signed or indorsed said notes or bills, or any of them, or otherwise become responsible for payment of the same, or any part thereof, in proportion to their respective amounts of such losses, payments, costs, and charges, as far as said trust-monies will go; then in trust to pay over the surplus of said trust-monies, if any, unto the said Gerry Fairbanks, his executors or administrators, or his or their order in writing." The following provisions and clauses were also contained in the assignment: "And whereas it is the wish of the said Gerry Fairbanks, that all his creditors may have an equal opportunity to become parties hereto, it is mutually agreed, that the term of six months shall be allowed for all persons, creditors of the said Gerry Fairbanks, to become parties to these presents, upon the express condition, however, that all persons, whose claims are not mentioned in said schedules at the date of these presents, shall make oath, before a suitable magistrate, of the truth and justice of said claims, if thereto required by said trustee." "And it is further agreed, that such alterations and additions may be made in and to said schedules by the mutual consent of one

of the parties to each part of these presents as shall be necessary for a more perfect and correct statement of the matters and things therein contained." It was further provided by the said assignment, that the trustee, if he saw fit, might employ said Fairbanks, the debtor, to sell the goods so assigned. And it appeared by the answers of the trustee, that he was so employed, and a compensation allowed him therefor out of the proceeds. It also appeared by the answer of the trustee, that certain words and numbers were omitted by mistake in one of the three parts of the indenture of assignment, and that certain additions were made to one of the schedules before mentioned, after the creditors had signed the instrument of assignment. And that such additions were not made in the presence of one of the parties to each part of the indenture, but that such additions were made in good faith, and in pursuance of the undertaking and agreement contained in the assignment, and that a paper containing all the particulars, stated in said schedule so amended, was exhibited, with the indenture, to all the creditors who executed the same, and was laid before them when they executed it; and was exhibited, at a meeting of said creditors, as a component part of said instrument. It further appeared from the answers of the trustees, that the account of stock, annexed to the indentures, was made out after the execution and delivery of the indentures, but was exhibited to the creditors, who applied, or were called upon, to examine the said indentures, and was laid before them at their meeting.

Webster & Morse, for plaintiffs, contended, that, upon the facts which appeared in this case, the assignment was fraudulent in law, and insufficient to protect the property of the defendant in the hands of the trustee, from the claims of the plaintiffs. The principal points taken by them in support of their positions are severally noticed and commented upon in the opinion of the court.

C. G. Loring, contra.

STORY, Circuit Justice. The whole question, as to the plaintiffs' right of recovery in this case, turns upon the validity of the general assignment, made by the defendant, Gerry Fairbanks, an insolvent debtor, to William Whitney, the trustee, as set forth in the answers of the latter, for the benefit of creditors. If that assignment be fraudulent in point of law, as to creditors, then the right of the plaintiffs against the trustee is complete; if otherwise, then the trustee must be discharged. I own that there are some questions involved in this case, upon which I have long formed a decisive opinion, and which, after years of deliberate consideration, I find myself, upon any legal principles which have occurred to my mind, unable to surrender. If the conclusions, to which I have arrived on this subject, differ from those which have been entertained by some eminent and learned minds, it cannot but create a just distrust of my own judgment. Still I am bound to follow the results of that judgment, and to administer the law as I understand it.

In one sense, the present discussion may be said to depend upon local law; in another, to depend upon general principles and presumptions belonging to the common law, in its widest application. So far as there may be any peculiarity in the jurisprudence and laws of Massachusetts, which limits the effect, or destroys the validity of general assignments, the question is local. So far as it involves principles and presumptions of constructive fraud upon creditors, the question must turn upon the same considerations substantially, as would govern it in New York, Pennsylvania, or England. It has been often argued, that general assignments for the benefit of creditors are void, because they operate as a fraud upon our attachment law. I can very well understand, why such an assignment of a debtor's property is deemed in England a fraud upon the bankrupt laws, because it is deemed per se an act of bankruptcy, and an attempt to distribute the debtor's property among his creditors in a mode discountenanced by the policy of those laws. But in respect to persons not falling within the reach of the bankrupt laws, such assignments, if bona fide made, and free of fraud, are so far from being prohibited, that they are, if I may so say, encouraged by the common law. Such an assignment, said Lord Ellenborough, in Pickstock v. Lyster, 3 Maule & S. 371, "is to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors." And Mr. Justice Le Blanc added, in the same case (which was a general assignment for the benefit of all creditors), to hold such a deed fraudulent would be contrary, not only to Holbird v. Anderson, 5 Term R. 235, but to all the cases, which have decided, that a party, independently of the bankrupt statutes, may convey away his property for the benefit of all his creditors. Mr. Justice Bailey gave his full assent to the doctrine, emphatically observing, "that this conveyance, so far from being fraudulent, was the most honest act the party could do." This doctrine was asserted in a case where the very object of the conveyance was to prevent a judgment creditor from obtaining satisfaction out of the property on execution. But the court decided, that it was not sufficient, that the creditor was defeated and delayed by such a conveyance of his remedy under the execution; but the act must be fraudulent. Nor was there anything new in this doctrine. It may be clearly gathered from prior cases, and particularly from Estwick v. Caillaud, 5

Term R. 420; Holbird v. Anderson, Id. 235; Meux v. Howell, 4 East, 1; and it has since been confirmed, even as against the crown, in King v. Watson, 3 Price, 6. See, also, Nunn v. Wilsmore, 8 Term R. 528. It would indeed be somewhat strange, if a debtor might bonâ fide prefer one creditor to another in the distribution of his property, and was not at liberty to prefer all his creditors to one; to do equal justice to all, instead of exclusive justice to a preferred creditor. In the jurisprudence of Massachusetts, there is nothing analogous to a bankrupt or insolvent law inter vivos; and the general principles, as to frauds and fraudulent conveyances at common law, or under the statute of Elizabeth, are not supposed to be essentially different.

Then as to the position, that general assignments are a fraud upon our attachment law. For myself I have never been able to understand, precisely, what was intended by this language. Our attachment law is nothing more than a common process, by which any single creditor may attach the property of his debtor at the institution of his suit, so as to secure a priority of right to take the same by a levy and satisfaction on the execution, which may issue upon the judgment in such suit, for his own use. The attachment is not made for the benefit of creditors generally, but solely for the benefit of the attaching creditor. The creditor can attach only such property as he may take in execution; and there is not, and with deference be it said, there cannot be any fraud committed upon such creditor by any conveyance, which would not be equally a fraud upon a judgment creditor, who had made no prior attachment. The case, therefore, stands upon the same general principles, as that of a judgment creditor in England, so far as the conveyance may be decreed a fraudulent act to delay or defeat creditors, or in fraud of their legal means and process to satisfy their debts. Now the difficulty of the argument lies here. The property cannot be attached or taken in execution, unless it, at the time, belongs to the debtor. If he has lawfully parted with it bonâ fide, and for a valuable consideration, it no longer remains subject to process against him. A creditor may be defeated or delayed in the satisfaction of his debts by a bonâ fide conveyance of a debtor's property, either on a sale, or by a preference to another creditor. Such a conveyance is not rendered void by such effect, whether it be intentional or not. But there must be other ingredients in the case. There must be a fraudulent intent to defeat or delay creditors. Every conveyance, by which an insolvent debtor conveys his whole property to a few preferred creditors, not being more than sufficient to pay their debts, and they being parties to the deed, necessarily tends to delay and defeat all other creditors; but however strong the intention is, thereby to defeat or delay the latter, still it has never been supposed, that the conveyance was void on that account. The law allows such preference to any one creditor; and I am unable to perceive why it does not equally allow a like preference of the whole creditors to one. It is assuming the whole question in controversy to say, that a general assignment is a fraud upon the attachment law, and therefore void. If fraud, it is doubtless void; and it would equally be so, as to a judgment or execution creditor, for the same reason. But whether a fraud or not, is the point to be proved. If by the principles of law, it is not dishonest to convey all a debtor's property for the benefit of all his creditors, if it be a moral and just discharge of duty, then it is no answer to say, that one creditor may be defeated of process to levy his whole debt; for it may be as forcibly replied, that, by the opposite course, all other creditors would lose theirs. The law allows the debtor to give a preference to one creditor (and, as I think, to all creditors also), by a bonâ fide conveyance. It allows any creditor also, by an attachment, to acquire a preference in invitum. But which shall prevail, depends entirely upon the priority of the acts, by which the preference is legally acquired. Neither is, of itself, a fraud upon the other. This is the English doctrine, and I am not prepared to admit, that it ought not to be held as true doctrine in Massachusetts as in Westminster hall, the common law being our birthright, and nothing in our positive code having changed, in this respect, its obligation or justice. It is in the fullest manner recognised and approved by the supreme court in Marbury v. Brooks, 7 Wheat. [20 U. S.] 556, 11 Wheat. [24 U. S.] 78. Taking the fair result of the Massachusetts decisions, they do not appear to me to overthrow, in an unqualified manner, the English doctrine. On the contrary, to a limited extent they support it; for every case, in which a general assignment in favor of creditors has been upheld, although every creditor was not a party, is an authority to show, that such an assignment is not fraudulent and void, ipso facto, as contravening the policy of our attachment law. If it were bad for such a cause, it could not be good for any purpose, for no consideration, however valuable, will uphold against a creditor a conveyance, which is a fraud upon the law. See Cadogan v. Kennett, Cowp. 432. The case of Hatch v. Smith, 5 Mass. 42, is directly in point, and has never been overturned.

Then again as to the position, that a general assignment for the benefit of creditors is void, unless the creditors are parties to, or assent to the conveyance. I say, are parties or assent, for I do not understand, that any local decisions have gone the length of requiring, that the creditors should be technically parties to the deed, or should assent to it at the moment of its execution. If they sign the instrument afterwards, or in any manner assent to and ratify its provisions, the conveyance is good against all persons but in-

tervening attaching creditors. One reason assigned for this position is, that otherwise there is no valuable consideration to uphold it. If this doctrine were to be tried by the established principles of the common law, it would encounter no small share of difficulty. To the creation of a trust by deed in favour of any persons, it is not necessary that the cestui que trust should either be a party or assent to it. He may indeed reject the beneficiary interest, and if he does so, it falls to the ground, and becomes, perhaps, a resulting trust for the grantor. But if the trust be for his benefit, the law presumes his assent to it, until the contrary is shown. And it is clear, that trusts may lawfully be created, where there can be no present assent, for they may be in favour of persons not in existence. It is sufficient, in general, that in such cases there is a competent grantor to convey, and a competent grantee to take the property. As to trusts, created for the benefit of creditors, and to which they are not, technically speaking, parties, if bonâ fide made, they are unquestionably valid by the law of England, and pass a legal estate to the trustee. The sole question that can arise, independent of the bankrupt laws, is, whether the conveyance is bonâ fide or fraudulent. It can be no question, whether it is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration, in the highest sense of the terms, and the obligation of the trustee to perform the trust according to the provisions of the deed, is a sufficient valuable consideration, so far as he is concerned. Wilt v. Franklin, 1 Bin. 502, 517. This view of the law was adopted by the supreme court in Marbury v. Brooks, 7 Wheat. [20 U. S.] 556, 11 Wheat. [24 U. S.] 78, in a suit upon a foreign attachment. Now in the case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated for on behalf of the debtor, but the property is to be distributed equally among all the creditors pro rata, it seems to me, that his assent must be presumed upon the general principles of law, for the trust cannot be for his injury, and must be for his benefit. It must always be for his benefit to receive as much of his debt as the debtor can pay. If then, in such a case, such an assent be necessary, it may be inferred, as a presumption of law, until the contrary is shown; and if an assent is expressly given within a reasonable time, it operates retroactively to confirm the conveyance ab initio. Thompson v. Leach, 2 Vent. 198, 1 Show. 296; 3 Lev. 284; Meux v. Howell, 4 East, 1, 9 (Dr. Lawrence, J.); Wilt v. Franklin, 1 Bin. 502; Estwick v. Caillaud, 5 Term R. 420; Pickstock v. Lyster, 3 Maule & S. 371; Nicoll v. Mumford, 4 Johns. Ch. 522, 529; Small v. Oudley, 2 P. Wms. 428; Marbury v. Brooks, 7 Wheat. [20 U. S.] 556, 11 Wheat. [24 U. S.] 78. I freely admit, that when there are conditions in the assignment, as for instance, that the creditors shall release their debts, there the same presumption of assent does not arise, because it involves a question of discretion, upon which different minds may draw different conclusions. If, therefore, an assent on the part of creditors be necessary to give full effect to such an assignment, it is not complete until such assent has been expressly given. But it by no means follows, that because all the creditors do not assent, therefore, if in all other respects the assignment is valid, it is void, as to those who do assent, or, at all events, who do assent before any intermediate attachment.

The case of Widgery v. Haskell, 5 Mass. 144, has been pressed upon the attention of the court, as containing a doctrine not entirely consonant with the English doctrine, and establishing, in some sort, a rule of local law. It is a great defect in the report of that case, that the assignment and trusts are not set forth at large, so that the reasoning of the court, as applied to the state of facts, may be fully comprehended. It is somewhat difficult, indeed, to ascertain upon what precise ground the court held that assignment void. If it turned upon the point suggested by Mr. Justice Putnam in Harris v. Sumner, 2 Pick. 129, that might, perhaps, furnish of itself a sufficient ground. But various other reasons are incidentally alluded to, some of which would be fatal to the assignment in any court, and others again, upon which one might well pause before he could affirm them in judgment. I cannot admit, that there was not, in that case, a valuable consideration for the conveyance, for the grantees were creditors to a very large amount; nor that, in a conveyance professedly assigning property in trust to pay the grantees as creditors, a release is necessary on their part to give it a legal effect. See Marbury v. Brooks, 7 Wheat. [20 U. S.] 556, 578, 11 Wheat. [24 U. S.] 78. It may be a very important inquiry to repel the presumption of fraud, in the case of a mere purchase, to show, that the consideration is adequate as well as valuable. But in the case of a trust, which intends to provide for the payment pro rata of all creditors, the adequacy of the consideration seems to admit of very little debate. There is, however, a ground suggested for the judgment of great weight, and that is, that the intent apparent upon the deed was not the true intent, but that the deed was, upon a confidence not expressed, for the benefit of the debtors, and reposed in the grantees. An allusion is here probably made to the omission in the original conveyance to provide for the distribution, among the general creditors, of the surplus not absorbed by the preferred creditors.

It is not, however, my intention to go into a commentary upon the case of Widgery v. Haskell, or to question, that it was rightly decided upon its own circumstances. I must indeed confess, that some of the reasoning, used by the learned chief justice on that oc-

casion, did not then convince my mind, and upon frequent revisions since, I remain still unconvinced of its accuracy. And Marbury v. Brooks is a strong confirmation of my doubts. So far, however, as it may be presumed to stand upon local law, my duty is to follow it, and it will be performed without hesitation. I understand, then, the case of Widgery v. Haskell to have decided, that in Massachusetts an assignment to a trustee, executed by a debtor bonâ fide for the benefit of creditors, is not valid, unless the creditors are parties to, or assent to the deed. It is otherwise a naked trust, which, however good by the common law, is from the defect of equitable jurisdiction, and the nature of our local policy, utterly void. I do not understand, that the case decides that it is essential that the creditors shall be technically parties to the deed, or that their assent to it in pais would not, on sufficient proof, be valid; or that such assent may not be presumed in cases, where the common law will presume it in favor of cestui que trust or creditors; or that it is necessary that all the creditors within the scope of the assignment should be parties, or assent. If the assignment be assented to by any creditors, and be in other respects free of fraud, to the extent of the debts due to those creditors, it is valid, and subsequent attaching creditors can only avail themselves of the surplus. This is the doctrine in Hastings v. Baldwin, 17 Mass. 552, and it appears to me founded in the strongest legal sense and public convenience.

Having thus far expressed my opinion on the general principles discussed in the case, and my understanding of the qualifications annexed to the Massachusetts doctrine on this subject, it remains to examine the exceptions, which have been taken to the present assignment. Previous to the present attachment it had been executed by creditors, whose demands and claims are sufficient to absorb the fund, if it be not deemed fraudulent in point of law. Fraud, in point of fact, is not even pretended.

The first exception is, that the assignment does not purport to convey all the debtor's property, and yet it requires a general release from the creditors. Such a provision, under such circumstances, it is said, is unreasonable, and shows an intent to defeat the creditors of their just rights. It is true, that the assignment does not, on its face, purport to convey all the debtor's estate; he may, for aught that appears, have household furniture or other estate. But if he has, then the presumption of fraud is less cogent; for a debtor, conveying part only of his estate to certain privileged creditors, does not thereby necessarily impair the rights of other dissenting creditors. The argument has generally come from the other side, as repelling any inference of fraud. Such was the reasoning in Estwick v. Caillaud, 4 Term R. 420, and Wilkes v. Ferris, 5 Johns. 335. It is, however, suggested at the bar, that in point of fact the debtor has no other property; and if material, it is asked, that the answer of the trustee may be amended so as to show it. In the present case, it does not appear to the court to be material.

2. Another exception is the imperfection of the description of the property of the debtor, referred to as in schedules (C) and (D) in the assignment, and also to the imperfection of the description of the demand of the preferred creditors in schedule (A), and of the non-preferred creditors in schedule (B); and, as connected with this exception, the power given to vary these schedules. First, as to the description of the debtor's property, the schedule (C) is as follows: "Choses in action &c. assigned. All the books of account belonging to the said Gerry Fairbanks relating to his trade and business, and all and singular the sums of money due and owing to him by notes or on account, as therein appearing, or otherwise, a particular schedule of which is to be written below as soon as the same can be made out, viz."—schedule (D)—"all and singular the goods, wares, and merchandise, stock in trade, chattels, and effects to the said G. F. belonging, being in the store or warehouse numbered twenty-seven in Washington street in said Boston, consisting of hats, furs, trimmings, Leghorn bonnets, plumes, Spanish wool, and shelac and other articles, estimated to be worth about twelve thousand dollars. All of which are mentioned in the stock (book) herewith delivered to the said Whitney, and of which a particular schedule is to be written below as soon as possible." So far as the objection here stated rests on general principles, it is certainly not maintainable. A schedule and special enumeration in detail of the property conveyed, is not necessary, in ordinary cases, to make a legal transfer thereof. It is sufficient, if there be reasonable certainty in the description of the things intended to be conveyed; and it appears to me, that here is that certainty. It is true, that in one part of the indenture, intended for the creditors, the words "twenty-seven," "Washington," and "twelve thousand" were omitted at the time of the execution thereof by mistake. But this uncertainty is cured by reference to the other parts of the indenture, which must all be taken as one conveyance. The omission of specific schedules may in some cases be a badge of fraud, but it is not deemed so in all cases; and especially would it not be entitled to this construction, where the parties expressly provided for a future enumeration, and, in good faith, as soon as could conveniently be done, accomplished it. The want of a schedule has, in many cases, been held not decisive of fraud; and the case of Stevens v. Bell, 6 Mass. 339, is directly in point against this objection. See Wilt v. Franklin, 1 Bin. 502, Whart. Dig. "Deed," I, pl. 72. Then, as to the description of the debts and claims of the preferred creditors in schedule (A), it appears to me that it is certain to a reasonable intent, and there can be no danger of mis-

taking the nature or extent of these claims, or the persons to whom they belong. Schedule (B) purports to be an enumeration of the non-preferred creditors by notes, bills of exchange, and account. The enumeration was not pretended to be complete; but as far as it went, it was possessed of reasonable certainty; and the imperfections of it were, by the very terms of the assignment, on which I shall immediately comment, authorized to be supplied. For myself, I can perceive no legal ground, upon which any schedule of the non-preferred creditors was necessary to be inserted at all. It might be convenient for the purpose of guiding the judgment of the creditors, but as all are entitled to come in, any omission, if not fraudulent, would certainly not prejudice the assignment or the omitted creditors. The same point was adjudged in Wilt v. Franklin, 1 Bin. 502, and I follow with undoubting confidence that decision. In point of fact, the schedule has since been, as far as practicable, completed, whether exactly in the manner prescribed by the assignment, I do not inquire, because nothing material in this case turns upon that point. Then, as to the clauses authorizing additions to, and amendments of, these schedules. They are in these terms: "And whereas it is the wish of the said G. F. that all his creditors may have an equal opportunity to become parties hereto, it is mutually agreed, that the term of six months shall be allowed for all persons creditors of the said G. F. to become parties to these presents, upon the express condition, however, that all persons, whose claims are not mentioned in said schedule at the date of these presents, shall make oath before a suitable magistrate of the truth and justice of said claims, if thereto required by said trustee. And it is further agreed, that such alterations and additions may be made in and to said schedules, by the mutual consent of one of the parties to each part of these presents, as shall be necessary for a more perfect and correct statement of the matters and things therein contained." These clauses are objected to, as unreasonable, and therefore fraudulent: first, because they require an oath to be made by the omitted creditors at the option of the trustee only, and not of the creditors generally, and that consequently fraudulent claims may be admitted, against the interests of the other creditors. But the trustee must be presumed to act honestly, and does, in fact, covenant with all the parties for a faithful performance of his duties. A clause reposing confidence in him in discharge of his duties can surely not be deemed fraudulent from that fact alone. If the selected trustee were notoriously insolvent, or of bad character (which is not pretended here), such a clause might be deemed an auxiliary ground for presumptive fraud. But a power of this nature simply, because it may be abused, is not to be deemed unreasonable, or fraudulent. If under it a person were fraudulently admitted as a creditor, who was not so to the full amount, such an act would be utterly void, and the trustee responsible for his misconduct. But even in such a case the assignment would not be avoided, as to bonâ fide creditors, by such an act. It would remain good as to all the real assenting creditors. In point of fact, no person has been placed on the schedule, who is questioned as a bonâ fide creditor. Then, again, it is objected to the second clause, that it provides an unlimited power of alterations and additions by the consent of the debtor, the trustee, and any one of the other creditors. This power, it is said, is so susceptible of abuse, that it is unreasonable and unjust, and therefore fraudulent in point of law. It puts the mass of creditors completely at the mercy of any one creditor acting with the other parties. The object of this power is obviously to carry into effect, and not to subvert, the general intent of the assignment. It would be difficult, if not impracticable, to procure an assent of all the creditors to every addition of a new person to the schedules. For instance, creditors under twenty dollars are ranked as preferred creditors, and the mass of creditors are admitted to exceed eighty. It would seem unreasonable to require, that before any such small creditor could be admitted, that he should be compelled to get the assent of all other creditors, who were parties to the assignment. It is natural to suppose, that neither the debtor nor the trustee, nor any other creditor would have any interest to swell, by fraud, the list of these small creditors; and, so far as the schedule of preferred creditors could be altered, it is necessarily confined to this class of small creditors. It seems to me rather a guard upon the admission of debts, that some other creditor should concur, as well as the debtor and trustee. The whole argument, indeed, rests on the ground, that such a power may be abused, and therefore it is fraudulent ab initio. If abused, I think the fraud would make the act void; for no fraudulent act can be allowed in law or equity to prejudice the rights of bonâ fide creditors. Nor is the power, in any just sense, an unlimited power; for it is only to make such alterations and additions, "as shall be necessary for a more perfect and correct statement of the matters and things therein contained." Neither party can therefore make any alterations, which should be a fraud upon the others. My judgment accordingly is, that these clauses do not vacate the assignment in point of law. There is a suggestion thrown out under this head, that no oath is required of the preferred or other creditors, whose names are mentioned in the original schedules. But this is no badge of fraud. There is no pretence that the persons so named are not bonâ fide creditors, and an oath, as to subsequent persons, might be proper to prevent unjust claims by such persons. It was a useful precaution, not in fraud, but in favour of the real creditors.

3. Another exception is, that there is a reservation of the ultimate surplus to the

debtor; and this, it is contended, is fraudulent. But what is the nature of this surplus, as it stands on the face of the assignment? It is not of any specific sum to the debtor, whether his debts are wholly paid or not; but of such surplus only as shall remain, after indemnifying and paying fully all the creditors, who shall come in under the assignment. There is no ground for saying, that, if all his debts were paid, the debtor may not honestly reserve the surplus to himself. If there was no such express reservation, it would constitute a resulting trust by mere operation of law. If all the creditors should not choose to come in, and accept the terms of the assignment, there must necessarily arise a resulting trust, as to the surplus, in favor of the debtor; and the charge is therefore merely an expression of that, which the law would imply. Now what is there fraudulent in all this? The creditors are at liberty to come in, if they please; if they do not, the debtor stipulates, that the assignment shall not carry the whole interest, but so much only, as is necessary to discharge the debts of the assenting creditors; and the residue remains as a fund for the payment of other creditors, if they choose to attach. It is not held by a secret trust for the benefit of the debtor, but avowed to be a surplus belonging to him. The non-assenting creditors are not defeated or delayed of their legal remedy for this surplus. They may attach it by a trustee process, and appropriate it to themselves, as the debtor's property. I know no difference, in point of law, between such a case and a conveyance of property to particular creditors, as security for their debts, with a liberty to sell the property, and to pay the surplus to the debtor. The latter has never been deemed fraudulent, as to other creditors. The like objection would have lain against any assignment before any creditors had signed it, for until they had signed, there would be a resulting trust to the debtor; and yet such an objection has never, hitherto, been held valid in Massachusetts; and elsewhere it would obviously not be supported upon principles of the common law. The cases cited at the bar are clearly distinguishable. The principle decided in them is not controverted; but it is inapplicable to the circumstances of this case. In Burd v. Fitzsimmons, 4 Dall. [4 U. S.] 76, there was a trust resulting to the debtor himself, for the proportion of all such creditors as should not agree to accept thereof within nine months. This was deemed by a majority of the court a badge of fraud, under the peculiar circumstances of that case. But several other grounds were assigned for the decision by the judges, and it may be recollected, that the case turned upon an aggregate of reasons, confirmatory of fraud. In Widgery v. Haskell, 5 Mass. 144, there was a concealed trust, independent of the trusts expressed in the deed (see Jackson v. Brush, 20 Johns. 5); and the court was apparently influenced in its decision by several concurrent grounds. Ingraham v. Geyer, 13 Mass. 146, seems to have turned upon the point, that the creditors had not assented to the assignment. But if they did not, it may be truly said, that the court did not even allude to the reservation of the surplus as a ground of judgment. In Marston v. Coburn, 17 Mass. 454, the attachment was before the assignment was executed by the creditors, so as to become a complete conveyance. In Harris v. Sumner, 2 Pick. 129, the decision rested on the reservation of a gross sum in favour of the debtor at all events, whether all his debts were paid or not, which the court thought a fraud upon the creditors. In Hyslop v. Clarke, 14 Johns. 458, there was a clause, which declared the trust for creditors void, if they refused to assent to the assignment, and reserved an indefinite right to the debtor to declare, in future, to what creditors it should be paid, and this was deemed a fraud. Austin v. Bell, 20 Johns. 442, turned upon a like principle, and it contained a reservation in favour of the debtor, like that in Burd v. Fitzsimmons. In Seaving v. Brinkerhoof, 5 Johns. Ch. 329, there was an equally obnoxious clause. No cases have been cited containing broader principles against reservations, than the foregoing, and none, to my knowledge, exist. They fail to establish the plaintiffs' argument; and although there is no case directly in point the other way, yet it can scarcely be presumed, that, if such a resulting trust could, in all cases, avoid the deed, the general rule would not have been laid down in some of the numerous contested cases of assignments. I cannot say, that such a reservation constitutes per se a badge of fraud; or that it ought to be deemed an attempt to lock up the property from creditors, if, in all other respects, the conveyance be free of taint. See Wilkes v. Ferris, 5 Johns. 335; Murray v. Riggs, 15 Johns. 571.

Another exception is to the effect of the clause for the creditors to come in within six months. It is asked, if the debtor has a right to lock up his property from his creditors during such a period, or any other, which he may choose. In all cases of this nature, a reasonable time must be allowed for creditors to come in under any assignment. What is a reasonable time is matter dependent upon the particular circumstances of each case. A time may be so short or so long, as justly to raise a presumption of fraud. It is not suggested, that six months was too long a time with reference to the present debtor's affairs; and the argument, therefore, goes to the length of overturning all assignments containing any stipulation for time for creditors, not parties, to come in. The doctrine to this extent is certainly not maintainable.

Another exception taken is to the stipulation for a release, as the condition upon which alone the creditors can take any thing

under the assignment. Such a stipulation is objected to as fundamentally fraudulent, in general principles, as an attempt to coerce creditors to unjust terms, as a means of locking up the whole property from the creditors, unless they choose to submit to compound for their debts on the debtor's own terms. The particular stipulation in the present deed is also objected to, as peculiarly noxious. To understand the nature of the latter objection, it is necessary to advert, to the terms of the assignment. It purports to be between the debtor, the trustee, and the creditors, indorsers, and sureties of the debtor. It recites the insolvency of the debtor, and the agreement to assign his property, and in consideration thereof the creditors, &c. shall release unto the debtor their claims and demands. In the close of the instrument occurs the clause in question. "The several persons, parties of the second and third part hereof (trustee and creditors), do hereby accept the said granted premises in full payment and satisfaction and discharge of all claims and demands, actions and causes of action, which they now have, or hereafter may have, by reason of holding, or having indorsed said notes or bills, or otherwise become responsible for said debts, or being otherwise creditors or sureties, as set forth in said schedules, marked A & B, and that they will not, and no person claiming under them shall sue, molest, or trouble the said G. F. or his representatives, for or on account of the same, and that they will save harmless and indemnified the said G. F., his heirs, executors, and administrators, against all claims and demands which they, or any person claiming under them, now have, or hereafter may have, for or on account of said bonds, notes, bills, and debts, or any other matter or thing, from the beginning of the world to the day of the date hereof." First, it is said, that here there is a joint covenant of indemnity, and not a several covenant by each creditor for himself; and that it is unreasonable to require them to be sureties for each other. It appears to me, that this is not the true construction of the clause. The whole must be taken together and with reference to the manifest intention of the parties. The parties severally release, and the covenant of indemnity, following in the same connexion and part of the same sentence, must be deemed several also. The words are, the "several persons" do accept, &c. and that "they will not, and no person claiming under them shall sue," &c. There is plainly a mistake in leaving out the proper and usual words of covenant before the latter clause, and such a construction must be given as is consistent with the fair, presumed intent. There are here no words of joint covenant; "they" must have for its antecedent "several persons," and if so, nothing is clearer than that the covenant is several. If there was not so strong an expression, I should have thought, that upon common principles the covenant ought to be construed distributively and not jointly. Com. Dig. "Covenant," D 2; 1 Saund. 154, note; Ernst v. Bartle, 1 Johns. Cas. 319.

Secondly, it is objected, that the release covers not only all debts and demands for which payment and indemnity is provided, but "any other matter or thing from the beginning of the world." This, it is said, is unreasonable in itself. The words are, indeed, as broad as the objection states them. But I have very great doubts, whether, looking at the antecedent parts of the sentence, a court of law would not restrain the meaning to those claims which are positively released and covenanted not to be sued for, and especially as the assignment, in one of its recitals, comprises the consideration to such a release. Words of this nature are often found in common releases. But they have been generally restrained to the subject matter on which the parties acted. I have no doubt that a court of equity would so restrain them in this case. It does not appear to me, that they ought to be construed, as intentionally demanding a release of any claims which were not to be compensated for. But if they do, as none other are shown to exist, it would be hard to infer a fraudulent intent from what was undoubtedly the phrase of the scrivener.

A far more difficult question is that presented by the consideration, whether a debtor can rightfully stipulate for a release from his creditors, as the condition of yielding up his property to them. I am aware, that it may be said, that the property may be reached by a trustee process, so that it cannot be absolutely locked up from his creditors. But the question never can be, whether a remedy exists for the creditors, but whether the debtor has not endeavored fraudulently to delay or defeat them. This objection has struck me to be of great force, and I have paused upon it with no small hesitation of opinion. Where a debtor assigns all his property for the benefit of all his creditors, without stipulating for any favour to himself, he cannot be said to lock up his property from his creditors. The most that can be said is, that he locks it up from one, by giving it unconditionally to all. But where he stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and if the assignment be valid, to some extent a defeating of their rights. It is not sufficient to say, that it is a proposition to creditors; so would be a condition by the debtor to receive a gross sum. The object and nature of the proposition are to be considered, in order to decide, whether it be fraudulent or not. Has it not a tendency to obstruct the common rights of the creditors? Is not its design to prevent creditors from receiving compensation out of the debtor's property, without yielding up

some portion of their debts, and conferring on him a substantial benefit, which he has no legal claim to demand? In Seaving v. Brinkerhoof, 5 Johns. Ch. 329, where there was an assignment of real estate (not purporting to be all the estate of the debtor) for the use of all the creditors, upon the condition of their executing a release, that very learned judge, Mr. Chancellor Kent, held, that the assignment was, on that account, fraudulent and void, and that the condition was oppressive, and without any colour of justice, as the assignment was not of all the property of the debtor, but only of a part. The reasoning of the court in Hyslop v. Clarke, 14 Johns. 459, though the case itself was distinguishable from the present, is, as far as it goes, strong against such a stipulation, where the assignment is of all the property. That case and its reasoning met the entire approbation of Chief Justice Spenser, in his able opinion in Austin v. Bell, 20 Johns. 442; and on that occasion the latter, in behalf of the court, declared, "that a deed, which does not fairly devote the property of a person overwhelmed with debt to the payment of creditors, but reserves a portion to himself, unless the creditor assent to such terms as he shall prescribe, is in law fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions." Had the court considered the principle fully adopted and recognised in Seaving v. Brinkerhoof, 5 Johns. Ch. 329, and Burd v. Smith, 4 Dall. [4 U. S.] 76. Tried by this principle, the stipulation in the present case would make the assignment utterly void, for the surplus, after payment of the assenting creditors, is to go to the debtor. The question is not (I repeat it), and cannot be, whether there may not be some remedy for the creditors to intercept the surplus, but whether the intent, apparent upon the deed itself, be not to coerce them to a settlement by embarrassing or delaying their remedy. Such an intent is of itself illegal. In examining the Massachusetts Reports, the point does not appear to have met with any direct decision. In Widgery v. Haskell, 5 Mass. 144; Ingraham v. Geyer, 13 Mass. 146; and Harris v. Sumner, 2 Pick. 129,—there are intimations, which might well lead one to doubt, if the court were prepared to admit the validity of such a stipulation. On the other hand, in Hatch v. Smith, 5 Mass. 42, there was a stipulation for a release, and no exception was taken to it, though the cause was contested by very eminent counsel. The case turned indeed, in the judgment of the court, upon a point somewhat more close, for the creditors, to an amount beyond the property conveyed, agreed to the deed, before it was executed by the debtor, and the assignment was upheld. Then, again, in Hastings v. Baldwin, 17 Mass. 552, where the assignment was held not to be fraudulent, we are now told by the counsel, that there was such a stipulation, although it is omitted in the report, no question having been raised on that point. Yet doubtless, if the court had thought such a stipulation per se fraudulent, that was as fit a case as could arise for the application of the principle. The decisions in Massachusetts, therefore, leave the question in equilibrio. But when we take into consideration the great length of time, during which stipulations of this nature have prevailed in this state, without objection, there is much reason to believe, that the profession have deemed the law settled in favour of the debtor on this point. Then, on the other hand, in Lippincott v. Barker, 2 Bin. 174, where the direct point arose, it was settled, that a stipulation for a release was not fraudulent. The reasoning of the court is limited, indeed, to the circumstances of that particular case, but it would be difficult not to perceive, that it naturally reaches further. I find also, that my brother, Mr. Justice Washington, in Pierpont v. Lord,[2] in 1820, is reported to have held, that an assignment in trust, for the benefit of such creditors as should release their debts, is founded upon a sufficient consideration in law. Whart. Dig. "Deed," I, pl. 72. The case is not in point, but it was probably decided on the general principle. There is, however, a case in England directly in point. It is King v. Watson, 3 Price, 6, where the very exception was taken by counsel, and the assignment was held good by the court of exchequer against the claim of the crown itself.

The weight of authority is then in favour of the stipulation, for the decisions in New York did not turn upon the naked point of a release, but upon that, as incorporated into a peculiar trust. I am free to say, that, if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of mind would be against the validity of them. As it is, I yield, without reluctance, to what seems the tone of authority in favour of them. If the result had been different, this assignment would have been void in toto, for it could not, where the fraud was apparent on the face of the deed, be good in favour of any of the creditors who had signed it. They must, under such circumstances, be deemed conusant of, and participators in the unlawful object. The doctrine in Hyslop v. Clarke, 14 Johns. 458, and Harris v. Sumner, 2 Pick. 129, on this point, is sound and wholesome. I should apply to other parties the rule there applied to the trustee.

Another exception is, that as the assignment has not been signed by all the creditors, it is void, for the parties did not intend it should have a partial operation. If indeed there had been any provision in the deed, or any settled collateral agreement, that it should be void, unless all the creditors assented, the objection would be fatal. But the assignment admits of no such interpretation; and there is no evidence aliunde to support it. The design was to allow all the creditors to come in within six months; but if they did not, then those who became par-

[2] [See Pearpoint v. Graham, Case No. 10,877.]

ties were to receive their debts, and the surplus only was to go to the debtor.

These, I believe, are all the exceptions which have been urged against the validity of the assignment; and they are overruled. It remains only to notice two points of a subordinate character. The first is, that the trustee can only retain for debts actually due to the creditors at the time of the attachment, and not for legal liabilities, though provided for by the assignment. It is sufficient to say, that this position cannot be maintained. The assignment is just as valid a security for liabilities to indorsers, &c. as for debts. Stevens v. Bell, 6 Mass. 338, is in point, if indeed so clear a principle requires support. The next is, that several of the creditors, who have signed and sealed the assignment, being partners, have executed it with a single seal, in the name of the firm and partnership, and not in the individual names of the partners, which is inoperative in law; and so far as their claims go, they must be deducted from the amount to be retained by the trustee. It is generally true, that one partner cannot bind another by deed without his consent. But one partner is competent, in his own name, or in the name of the firm, to release a debt; and for the same reason he may enter into a composition, and execute such an assignment as the present, and it will be a release of the debt. A signature and sealing in the name of the firm, with a single seal, is good, and binds all the partners, who are present, or assent to the execution. If none but the executing partner assent, it is still valid to release the debt, and bind, in this respect, the rights of the firm. The authorities fully establish these principles, and they are decisive against this objection. Wats. Partn. c. 4, p. 225; Pierson v. Hooker, 3 Johns. 68; Ludlow v. Simond, 2 Caines, Cas. 1; Mackay v. Bloodgood, 9 Johns. 285; Bulkley v. Dayton, 14 Johns. 387; Bruen v. Marquand, 17 Johns. 58; Salmon v. Davis, 4 Bin. 375; Ball v. Dunsterville, 4 Term R. 313. Upon the whole, the assignment is sustained as good in point of law, and the trustee is, upon the disclosure, entitled to his discharge.

Case No. 5,965.

HALSEY v. GARLICK et al.

[12 O. G. 1026.]

Circuit Court, N. D. New York. Aug. 22, 1877.

PATENTS—INFRINGEMENT—DECREE.

Reissue letters patent No. 6,660, granted Edgar Huson, September 28, 1875, for improvement in wagon-gearing, examined and sustained.

[This was a bill in equity by Eliza G. Halsey against Alfred S. Garlick, Frederick Coleman, and Noah R. Osgood for the alleged infringement of reissued letters patent No. 6,660, granted to Edgar Huson, September 28, 1875. The original patent, No. 16,648, was granted to Huson, February 17, 1857.]

WHEELER, District Judge. This cause has been submitted on bill, answer, replication, proofs, and briefs of counsel. The only point insisted on in behalf of the defendants is, that the patent is void, because the patentee was not the original inventor of the improvement in wagon-gearing for which he obtained the patent, and because it was in actual use at the time he claimed to have invented it. Upon consideration of the evidence it is not found that he was not the original inventor, nor that it was in actual use at that time. It is therefore considered that the patent of the oratrix is valid, and that the defendants have infringed it. Wherefore it is ordered that a decree be entered for the oratrix to restrain the defendants from further infringement, and for an account of the profits received by the defendants, and of the damages sustained by the oratrix by reason of the infringement, and appointing the Hon. Charles Mason special master, to take the account, and, on the coming in of his report, for the payment of the sum reported by the defendants to the oratrix, with costs.

Decretal Order.—Aug. 23, 1877.

This cause having heretofore been submitted on bill, answer, replication, proofs, and briefs, by counsel for the respective parties, on the pleadings and proofs, and the court having considered the same, and being of the opinion that Edgar Huson was the first and original inventor of Huson's improved platform-wagon gear, as described and claimed in the patent set forth in the complainant's bill of complaint, adjudges and decrees that the defendants have infringed the said patent in making and vending the said improved platform-wagon gear, as charged in the bill of complaint, and that the said complainant is entitled to have a perpetual injunction to restrain said defendants, their agents, servants, and all claiming or holding under or through them, from making, vending, or using, or in any manner disposing of, wagons embracing the invention or improvements described in said letters patent—namely, "Huson's Improved Platform-Wagon Gearing." And it is further adjudged and decreed that the cause be referred to the Hon. Charles Mason, Esq., the clerk of this court, as special master to ascertain and report the number of wagons made, also the number sold by the defendants embracing within their construction the platform in the patent described, since the 28th day of September, A. D. 1875, and the damages complainant has sustained, or use and profits the defendants have derived, by reason of such infringement since the time last aforesaid, and, upon the coming in and confirmation of the said report, that said complainant have a decree and execution for the amount found due to her, the said complainant, and also for the costs in this suit to be taxed.

Case No. 5,966.

HALSEY v. HURD et al.

[6 McLean, 14.] [1]

Circuit Court, D. Michigan. June Term, 1853.

WRITS—DEFECTIVE SERVICE—EFFECT OF PLEA IN ABATEMENT.

A plea in abatement is not a waiver of process. The plea may be abandoned, and a motion to quash the writ for a defective service, may be substituted. Where there has been no personal service, the requisites of the statute which are in place of it, must be strictly complied with.

[Cited in Van Antwerp v. Hulburd, Case No. 16,826; Rubel v. Beaver Falls Cutlery Co., 22 Fed. 284; U. S. v. American Bell Tel. Co., 29 Fed. 28.]

At law.

Howard & Wendall, for plaintiff.

Mr. Frazer, for defendant.

OPINION OF THE COURT. A motion is made to set aside the process in this case, on the ground that it has not been properly served. The endorsement on the writ is "Copy left at defendant's place of business." The law requires, personal service or a copy left "at defendant's usual place of abode." A plea to this effect being filed, it is abandoned, and the motion is substituted.

It is objected, that defendant by filing the plea appeared in the case, and that he cannot, under such circumstances, abandon the plea. But the court held, that a plea in abatement by the party is not an appearance which constitutes a waiver of process, and also that the service was defective. Where a personal service of process is not made, the requisites of the statutes substituted for it, must be strictly complied with. The copy should have been left at the residence of the defendant, and not at his place of business.

Case No. 5,967.

HALSEY et al. v. HURD et al.

[6 McLean, 102.] [1]

Circuit Court, D. Michigan. June Term, 1854.

WRITTEN CONTRACT — PAROL EVIDENCE TO SUPPLY DEFICIENCIES—DELAY OF COMMON CARRIER—MEASURE OF DAMAGES.

1. Where a contract was made for the purchase of a quantity of wheat at Detroit, to be delivered in the spring, on the opening of navigation, parol proof is admissible to show at what time payment was to be made.

2. This does not vary the written agreement nor contradict it, as by the agreement no time of payment was specified. Where it was agreed that the money should be transmitted through the express, the delays to which that conveyance was subjected, by the badness of the roads, is within the agreement.

3. On a failure to deliver an article, at the time specified, the purchaser may claim, as damages, the difference between the contract price of the article purchased, at the time the delivery was to be made, and the current price of the article at the time and place of the delivery.

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

[This was an action by the firm of R. & H. Halsey to recover from J. L. Hurd & Co. damages for failure to deliver wheat.]

Howard & Mandell, for plaintiffs.

Mr. Frazer, for defendants.

OPINION OF THE COURT. The partnership of the plaintiffs, and also that of the defendants, is admitted. The action is brought on a contract to deliver wheat. It is dated the 30th of January, 1852, at Detroit, and is as follows:

"Mr. R. & H. Halsey, Bo't of J. L. Hurd & Co., the following lots of pure white Michigan wheat, first quality, sound and merchantable, to be delivered free on board vessel on opening of navigation.

Five thousand bushels at 72 cents..	$3,600 00
Five thousand bushels at 73 cents..	3,675 00
	$7,275 00

"Received on account of the above $100, signed, J. L. Hurd & Co."

Samuel Lewis, a witness, was present at an interview between the plaintiffs and Stewart, one of the defendants. The bill for the 10,000 bushels of wheat was in the hand writing of Stewart. Halsey told Stewart that he had come prepared to pay for the wheat; Stewart said that he should not, and did not intend to deliver it; Halsey said he had the money in the hands of Lewis & Graves, of Detroit; Stewart said he had not the wheat. Navigation was then open. Before the navigation was open, Halsey said to Stewart that the money was in the hands of the above firm. It was received by them the 13th of February, and they retained it until the middle of July.

The defendants' counsel asked the witness what time the money was to be paid. This was objected to, as changing the legal effect of the contract. That by the legal effect of the contract, the wheat was to be paid for when it was delivered; and that parol evidence is inadmissible to change the terms of the contract, or in any respect to vary the legal effect of it. But the court said that the evidence offered did not alter, in any respect, the written terms of the contract; that the time of payment was not specified, and in such case the construction would be, that the payment was to be made when the article was delivered. But this was an inference of law, which the agreement of the parties might vary, by fixing a different time for payment. That on such contracts it was customary to advance the money, in order that the seller might purchase the article on better terms. And this not being a part of the written contract, may be approved by parol. It does not, in the sense of the books, contradict or vary the written agreement. If the time of payment be stated in the written agreement, and the vendor give further time for payment, and it be made within the extended time, it constitutes a good defense.

In Susquehanna Bridge Co. v. Evans [Case No. 13,635], the judge says, "the reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies with respect to the endorser of a note of hand." In Hill v. Ely, 5 Serg. & R. 362, it is held, parol evidence is admissible in a suit by the endorsee against the endorser of a note endorsed in blank, to show that at the time of the endorsement the endorsee received it under an agreement, that he should not have recourse upon it against the endorser. In Battles v. Fobes, 21 Pick. 239, parol evidence was held admissible to prove the time at which a specialty was actually executed, contrary to the date. In Bradley v. Washington Steam Packet, 13 Pet. [38 U. S.] 99, the court held, "that in giving effect to a written contract by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made; whenever without the aid of such evidence, such application could not be made in the particular case." In Davenport v. Mason, 15 Mass. 85, it is said, "parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other contract." In United States v. Leffler, 11 Pet. [36 U. S.] 86; it was held that a surety, in a joint and several bond may show that he signed it on condition that others, besides those whose names are to it, would execute it, and that their signatures were not procured.

Lewis, a witness, said, at the time the contract was made, it was agreed that the money should be paid as soon as it could be forwarded by express, and the defendant said that a few days would make no difference. Mr. Fargo, agent of the express at the above time, states, that the travel of the express was then by land, and it was from seven to nine days, and sometimes longer, in travelling from Buffalo by Cleveland to Detroit. The money was received by Lewis on the 13th of February. Some four or five days before the money was received, Stewart called on Lewis for the money, who informed him it was expected daily; and on calling again two or three days afterwards, saying he had some notes to pay in bank, witness offered to loan the money to him, which he declined. After this the witness met Stewart in the street, and proposed to advance him the money on railroad certificates, that the wheat was in the warehouse; but Stewart refused, saying, he had bought wheat in the interior; but as Halsey had failed to advance the money, he would not comply with the contract. From the time the contract was made, to the receipt of the money by Lewis, thirteen or fourteen days elapsed, which exceeded by four or five days the time within which the money was expected to be transmitted from Ithaca. The navigation of the lake opened from the 10th to the 15th of May. Several witnesses proved the price of wheat, at Detroit, at the time the navigation opened. There was some discrepancy in the statement of one or two witnesses called by the defendant, and the witnesses of the plaintiff.

THE COURT instructed the jury that from the parol evidence, the defendants agreed to the mode of payment stipulated, through the express, the defendants observing a few days would make no difference. After the contract, Halsey was to return to Ithaca, in New York, his place of residence, and from which the money was to be transmitted to Mr. Lewis, his agent at Detroit. It was supposed that this could be accomplished in some seven or eight days. But it was thirteen or fourteen days before the money was actually received. In the month of February it was shown, that the road the express travelled, in many places was almost impassable, and that it was liable to be delayed by high waters and various casualties. If it appear, gentlemen, from the evidence, that there was no delay on the part of Halsey, but that he forwarded the money by the express, as he agreed to do; and the delay was principally, if not entirely, owing to the badness of the road travelled by the express, he is not chargeable with any laches, which would discharge the defendants from the obligations of their contract. In consenting to receive the money through the express, it is reasonable to say that they incurred the chance of a short delay, which amounted to no more than a few days, and which they said would make no difference. That the defendants were desirous of avoiding their contract is manifest, from the fact that at the time navigation opened, wheat was somewhat higher than the prices stipulated in the contract. The money was ready for the defendants, three months before the navigation opened, which would seem to be a reasonable time within which to make their purchases. If you are satisfied, gentlemen, that the plaintiffs have substantially complied with their agreement, they are entitled to recover the damages they have sustained, by reason of the failure of the defendants. These damages arise from the fact, that at the opening of navigation, when the wheat was to be delivered, it bore a higher price, at Detroit, than the price stipulated to be paid in the contract. This difference, together with the hundred dollars advanced by the plaintiff, at the time of the contract, with the interest thereon, will form your verdict, if you find for the plaintiff.

The jury found for the plaintiff $520.

HALSTEAD (UNITED STATES v.). See Case No. 15,287.

Case No. 5,968.

HALSTED v. LYON.

[2 McLean, 226.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

NEGOTIABLE INSTRUMENTS — PAYABLE TO BEARER —HOLDER MAY SUE IN HIS OWN NAME—PLEADING.

1. On a note, payable to James A. Hicks or bearer, suit may be brought in the name of the bearer.

2. The transfer of such a note is not within the 11th section of the act of 1789 [1 Stat. 78], which prohibits the assignee from suing, in the courts of the United States, unless the assignor could have sued in said courts.

3. Possession of a note, payable to bearer is, prima facie, evidence of right. And further proof is not required, unless under suspicious circumstances. Such circumstances must be shown by defendant.

4. The holder of a note, payable to bearer, may sue in his own name, with the consent of others, who may be interested in the note.

5. A plea is bad which states facts that amount only to the general issue.

6. It is bad, if it set up two distinct matters of defence, either of which is sufficient to defeat the plaintiff's action.

7. So, a plea is bad which sets up matters in defence, and neither denies nor admits, and avoids the plaintiff's allegation. It should give color to the plaintiff's right.

[This was an action at law by William M. Halsted against Edward Lyon.]

Barstow & Lockwood, for plaintiff.

Romeyn & Atlee, for defendant.

OPINION OF THE COURT. This action is brought on a promissory note, in which the defendant promised to pay James A. Hicks, or bearer, eleven hundred and sixteen dollars and six cents, for value received, with interest, one year after the 23d May, 1839. And the declaration avers, that the said James A. Hicks then and there delivered, and transferred the said note to the plaintiff, for value received, who became, and is still, the lawful bearer thereof. The defendant pleaded—First, the general issue; second, that Hicks, the payee, when the note was given, and still is, a citizen of Michigan, and that the note was by him assigned to William M. Halsted, Richard T. Haines, Matthias C. Halsted, Richard J. Thorn and James M. Halsted, who still are the owners and holders thereof, which he is ready to verify, &c.; third, that Hicks was, and is, a resident of the state of Michigan, and that the defendant is a citizen of Michigan; that Hicks assigned the mortgage to William M. Halsted and the others, as above stated, and delivered it, together with the note, to the assignees, &c. To the second and third pleas the plaintiff demurs, and assigns, as cause of demurrer to the second plea, that it does not confess and avoid, or traverse and deny, any material fact in the declaration, which it was necessary to allege. And that the third plea does not put in issue any material fact alledged, or necessary to be alledged, in the declaration; that it is equivalent to the general issue, and is argumentative and evasive. The defendant joined in demurrer.

The bearer of a bill or note originally payable to bearer, has, in general, only to produce the instrument; though, under suspicious circumstances, the bearer of a note, transferrable by delivery, may be required to prove that he, or some person under whom he makes his title, took it bona fide, and gave a valuable consideration for it. Doug. 632; Grant v. Vaughan, 3 Burrows, 1516; Chit. Bills (Ed. 1839) 626. In the case of Bank of Kentucky v. Winter, 2 Pet. [27 U. S.] 327, the court say, they have uniformly held that a note payable to bearer, is payable to any body, and not affected by the disabilities of the nominal payee. And, in the case of Bullard v. Bell [Case No. 2,121], it was held, that the circuit court had jurisdiction of an action brought on a bank note, payable to W. Pitt, or bearer, by the holder, a citizen of one state against the citizen of another, without showing that W. Pitt is a fictitious person, or a citizen of a state different from the defendant —the prohibition contained in the 11th section of the act of September 24th, 1789, not applying to such a case. The rule is, that the bearer of a note or bill payable to bearer, need not prove a consideration, unless he possess it under suspicious circumstances. If a question of mala fide arises, that is a fact to be raised by the defendant, and submitted to the jury. Mauran v. Lamb, 7 Cow. 174; Conroy v. Warren, 3 Johns. Cas. 259; Payne v. Eden, 3 Caines, 213. There is nothing in the law which forbids the holder of a negotiable note, after it has been indorsed, from suing it in the name of another, with his consent, provided it is unattended with any circumstances of fraud and oppression. Nor is it unlawful for another person to institute such suit in his own name, with the privilege and consent of the party beneficially interested. 2 Am. Com. Law, 324.

We will now apply these principles to the points raised, in this case, by the pleadings. The objection to the second plea, is, that it does not confess and avoid, or traverse and deny, any material fact in the declaration, which it was necessary to alledge. In this plea, it is averred that Hicks, the payee of the note, at the time it was given, also, when it was assigned to William M. Halsted and others, was, and still is, a citizen of Michigan, and that the assignees are the holders thereof. In what way the note was assigned, whether by indorsement or delivery, the plea does not state; nor is this material. The action is brought by the plaintiff, as bearer. There is no allegation in the plea which creates a suspicion that the plaintiff is not a bona fide holder. For, if the fact be admitted that the other assignees have an interest in the note, the action, by their consent, may be sustain-

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

ed in the name of the plaintiff. He has possession of the note, and his right to maintain the action will be presumed, as bearer, or, with the consent of the other parties in interest, until the contrary appear. In an action brought on a note payable to bearer, the declaration need not allege of whom he obtained it, but that he came into the possession of it bona fide. He is not obliged to prove the consideration paid, except under suspicious circumstances; and these are to be shown by the defendant. The note, under consideration, was payable to Hicks or bearer. Now, if the note had been indorsed by the payee to the plaintiff, and he had brought his action on the assignment, he would have been bound to prove it. Waynam v. Bend, 1 Camp. 175; Rex v. Stevens, 5 East, 244; Chit. Bills (Ed. 1839) 626. Though the note had been assigned by indorsement, the action might have been brought, as bearer, without alledging the assignment. The drawer promises to the bearer, as well as to the payee, and no indorsement by the latter can affect the obligation incurred by the drawer. There is a privity between him and the bona fide holder. The promise is to him, and, on a general count for money had and received, the note is evidence in an action against the drawer by the bearer.

In the case of Sere v. Pital, 6 Cranch [10 U. S.] 332, the court held, that a general assignee of an insolvent can not sue in the federal courts, if his assignor could not have sued in those courts. That was a case where an alien, who was the assignee of an insolvent citizen of New Orleans, brought suit, in the district court of the United States, against a citizen of the same place. The court, in that case, did not seem to think it was clear of doubt; but it was altogether different from the case under consideration. The assignee of the insolvent represented the right of his assignor. He could set up no other right. It was through the assignment only, that he could maintain his action. He acted in a fiduciary capacity. But the plaintiff, in this case, brings the action in his own name, and in his own right. He relies upon the promise made to him as bearer of the note, and not on the promise made to Hicks. The plaintiff, then, asserts no right under an indorsement, but a right in himself; a right made complete by a mere delivery of the note, in the course of business, the same as a bank note which passes by delivery. In principle, there is no difference as to the right of the bearer, between a bank note and any other promissory note, or bill payable to bearer.

From these considerations it appears that the facts, stated in the second plea, do not go to destroy the plaintiff's action. The delivery of the note by Hicks, or its transfer, is not within the act which restricts the right of the assignee, as to bringing suit in the courts of the United States, to the right of the assignor. Hicks, being a citizen of Michigan, could not have brought this suit against the defendant, on account of his being a citizen of the same state; but this does not affect the plaintiff, who is a citizen of New York, and who sues as bearer. Nor is there any thing in the plea which controverts the right of the plaintiff to maintain this suit, in his own name, if the other persons named have an interest in it.

The third plea differs from the second, only, in alledging that a mortgage was given to secure the payment of the note, which was assigned, by Hicks, to William M. Halsted, and the other persons named, and that the note, with the mortgage, was delivered to them. The objection to this plea, is, that it does not put in issue any material fact alledged, or necessary to be alledged, in the declaration; and that it is equivalent to the general issue, and is argumentative and evasive. This plea does not alledge an assignment of the note, but that it was delivered to the persons named, with the mortgage, which was assigned. Now, these facts are less strong against the right of the plaintiff to maintain this suit, than those set forth in the second plea. That plea contains an averment, that the note was assigned by Hicks; the third plea, that it was delivered. Now, according to the third plea, it passed to the above persons by delivery; but this does not show that the plaintiff is not now the bona fide bearer of the note. There are, in fact, no allegations in the third plea which are not already answered in the considerations applicable to the second. There is another objection to these pleas, which would be fatal, even if the matters alledged, properly pleaded, would have abated the plaintiff's suit.

In each of the pleas two distinct grounds are set up against the plaintiff's right to maintain his suit: One, that the assignor, being a citizen of Michigan, where the suit was brought, could, under the act of congress, assign no interest to the plaintiff which would give him a right to sue in the circuit court; and, the other, that the plaintiff is not the holder of the note. Now, if the assignment were within the act, this objection would be fatal to the plaintiff's suit; and so would the other objection be fatal, if it were shown that the plaintiff was not the bona fide holder of the note. Neither of these pleas deny the allegations of the declaration, nor do they admit and avoid them. The facts are pleaded in abatement, or, according to the form of the pleas, in bar of the plaintiff's action, without giving color to his right. And this is a fatal defect. It is plain, that a plea which shows new matter in avoidance or discharge of the plaintiff's allegations, is double and argumentative, if it do not admit the apparent truth of these allegations as matter of fact. There can be no occasion to adduce grounds for defeating the operation of disputed facts. The plea in avoidance must, therefore, give color to the plaintiff. Chit. Pl. (Ed. 1827) 556.

Where the defence consists of matter of fact merely, amounting to a denial of such allegations in the declaration as the plaintiff would, on the general issue, be bound to prove in support of his case, a special plea is bad, as unnecessary, and amounting to the general issue—First, on the ground of its prolixity; and, secondly, if viewed as a plea in confession and avoidance, it does not give color, or a plausible ground of action, to the plaintiff. 1 Chit. Pl. (Ed. 1827) 556. The defendant can not, in answer to a single claim, rely on several distinct answers; nor can he do so in one plea. Thus, in a plea of outlawry, the defendant can not state several outlawries, because one would be sufficient to defeat the action. Carth. 9; 1 Chit. Pl. (Ed. 1827) 260. It is insisted, that the demurrers to these pleas are not special. They might have been drawn with more formality, but they are sufficiently so to bring up the points above discussed. The principal defect alledged, is, that they do not state, with the requisite precision, the grounds of the demurrer. But facts are stated, from which the law infers legal consequences, and this is sufficient. Whether these pleas, therefore, be considered as stating facts which amount only to the general issue, as setting up two distinct grounds of defence, or, as pleas in confession and avoidance, they are defective. The demurrers to these pleas are sustained.

Case No. 5,969.

HALSTED v. MILLER.

[Cited in Miller v. Jones, Case No. 9,575. Nowhere reported; opinion not now accessible.]

HALSTED (MILLER v.). See Case No. 9,572.

HALSTED (STOVER v.). See Case No. 13,509.

Case No. 5,970.

HALVERSON v. NISEN et al.

[3 Sawy. 562.] [1]

District Court, D. California. March 16, 1876.

INJURIES BY NEGLIGENCE OF A FELLOW SERVANT.

1. The owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate, where no personal negligence on the part of the owner appears.

[Cited in Couillard v. The Victoria, 4 Fed. 160; Peterson v. The Chandos, Id. 649; The Edith Godden, 23 Fed. 46; The Egyptian Monarch, 36 Fed. 776; McFarland v. The J. C. Tuthill, 37 Fed. 716; The A. Heaton, 43 Fed. 597; The Frank and Willie, 45 Fed. 495.]

[Cited in Benson v. Goodwin, 147 Mass. 239, 17 N. E. 518.]

[In admiralty. Suit by Stiner Halverson against E. P. Nisen and others.]

J. McHenry, J. P. Dameron, and A. H. Townshend, for libellant.

Milton Andros, for respondents.

HOFFMAN, District Judge. This action is brought to recover compensation for injuries sustained by the libellant, a seaman on the schooner Twilight, by reason of the giving way of a rope to which a triangle on which the libellant was working, was attached. The libellant fell to the deck and sustained grave injuries. The respondents are the owners of the schooner. The rope which gave way was the jib down-haul, and the accident was caused by the chafed condition of the seizing, by which the down-haul block should have been secured. The triangle was rigged by the mate, and it is to his negligence or unskillfulness that the accident is to be attributed. No evidence whatever has been offered to show actual negligence on the part of the respondents. It is not pretended that they failed to exercise due care in the selection of the mate, or that there was any carelessness or neglect in the original outfit and appointments of the vessel. It is contended that in the owner's contract with the seaman there is an implied warranty that the vessel shall be, and continue during the voyage, seaworthy in every respect, and that the owner is responsible for any damage that may happen to the seamen through any defect in the tackle, apparel, or furniture of the ship. I do not consider it necessary to examine at much length the soundness of this proposition, for the circumstances of this case do not admit of its application if its soundness were conceded. In a certain sense it is as much a part of the implied engagement of the owner with the mariner that the ship shall, at the commencement of the voyage, be furnished with all the customary requisites for navigation, or, as the term is, shall be seaworthy; as that the master shall supply the mariners with good and sufficient provisions. Dixon v. The Cyrus [Case No. 3,930]; Curt. Merch. Seam. 20.

If, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from that of any other master to a servant in his employment. It is the master's duty in all cases to use ordinary care and diligence to provide sound and safe materials for his servants. But he does not warrant them to be so nor insure the servant against the consequences of their defects. The foundation of his liability is his personal negligence. If the master knows, or would have known if he had used ordinary care, that the buildings or materials which he provides for the use of his servants are unsafe, he is certainly answerable for injuries caused thereby to his servants. See Shear. & R. Neg. § 92, and cases cited.

So, also, it is the duty of the master, so far as he can by the use of ordinary care.

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

to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate, though he is not bound to guarantee them against such risks. Id. § 93, and cases cited. In Couch v. Steel, 3 El. & Bl. 402, these general doctrines were applied to the case of a seaman suing for injuries caused by the unseaworthiness of the vessel. The court held the declaration insufficient because it failed to allege that the owner knew of the unseaworthiness, or to impute any personal blame to him. It may perhaps, be doubted whether the allegation that "the owner so negligently, improperly and insufficiently equipped and fitted said ship, that she was unseaworthy and unfit for the voyage," was not a sufficient averment of actual negligence or want of due care on his part.

In the case at bar there is, as before remarked, no evidence of any negligence whatever on the part of the owner. The vessel was not unseaworthy even at the moment of the accident. By natural wear and tear the fastenings of a block had become chafed and gave away. They should undoubtedly have been examined before using them under circumstances where their insufficiency might produce serious or fatal injuries. But the negligence was that of the mate who rigged the purchase—it was in no respect that of the owner. The case, therefore, turns upon the question whether the owner, as the common employer of both, is liable to one servant for the negligence of his fellow-servant.

In Wright v. New York Cent. R. Co., 25 N. Y. 564, Allen, J., delivering the opinion of the court observes: "Certain principles touching the liability of the master to the servant for injuries sustained by the latter in the course of his employment have, by decisions in this state and several of the sister states, as well as in England, become so well settled that they need only to be stated. They cannot be disturbed, neither can their authority be disregarded. 1. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. 2. The rule exempting the master is the same although the grades of the servants or employés are different; and the person injured is inferior in rank and subject to the directions and general control of him by whose act the injury is caused." For these propositions the learned judge cites a long list of authorities.

The learned authors of the work on Negligence already cited state the law as follows: "A master is not liable to his servant for the negligence of a fellow-servant, while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault, or in retaining him after notice of his incompetency. The master does not warrant the competency of any of his servants to the others. Whether rightly or wrongly decided as a matter of principle, it is at least certain that this is the settled law of England, Ireland and America. A fellow-servant, within the meaning of this rule, is generally held to be one serving the same master and under his control, whether equal, superior or inferior to the injured person in his grade or standing. * * * The fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference." Shear. & R. Neg. § 86.

The learned authors sustain these positions by copious citations of authority. It may be added that in a case nearly identical with the case at bar the question was decided by the circuit court for this district in accordance with the rules above stated, though not without the same misgivings as to its soundness in principle, at which the authors of the treatise on Negligence hint in the passage first above cited. Under the law as settled by the authorities I am compelled to decide that the libellant has no cause of action against these respondents.

Case No. 5,971.

In re HAMBERGER et al.

[8 Ben. 98.] [1]

District Court S. D. New York. May, 1875.

REGISTER'S FEES—GENERAL ORDER No. 30.

Under general order No. 30 a register is entitled to charge $5 a day for each day's service while actually employed under a special order of the court, in all ordinary cases; but the court has power to fix the compensation at a smaller rate, if the circumstances of a particular case should warrant it.

[See note at end of case.]

[In bankruptcy. In the matter of Max Hamberger and Berthold Frankel.]

In this case the register certified that he had rendered a bill to the assignee for four days' service under a special order of the court, at $5 a day; and that the assignee claimed that, under general order No. 30, he could not pay the register anything until the rate had been fixed by the court, either by general rule or by order in the particular case. The register held that he was entitled to five dollars "for each day's service while actually employed under a special order of the court," in all ordinary cases, reserving to the court the power to fix the rate of compensation at a less figure, where the circumstances in a particular case should warrant it.

BLATCHFORD, District Judge. I concur with the register in his views.

[NOTE. In Case No. 5,974, Blatchford, District Judge, held that, under general order No. 30, counsel fees for services rendered the bank-

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

rupt, prior to the appointment of the assignee, were not a proper charge against the estate. The same judge also held (Case No. 5,975) that the assigned estate was liable for reasonable rent for premises occupied by the assignee.]

Case No. 5,972.

HAMBLETON v. HOME INS. CO.

[6 Biss. 91.] [1]

Circuit Court, N. D. Illinois. May, 1874.

RENEWAL OF INSURANCE POLICY — AUTHORITY OF SOLICITOR—WAIVER, HOW SHOWN—WAIVER, WHAT CONSTITUTES.

1. The insurance solicitor has no authority simply from the nature of his business, to bind the company to a waiver of payment of the premium.

2. Where by the terms of the policy a renewal is not binding unless the renewal premium be paid, the assured, claiming a waiver, must show either an express agreement to that effect or one arising by necessary implication from the facts and circumstances.

3. Where the partner of the agent of the assured tells the solicitor that if he will carry the risk and send him the bill, he will pay it, and the solicitor answers, "All right," and afterwards presents the bill at the agent's office, of which he has notice, but makes no effort to pay it, the whole transaction being neither reported to the regular agents of the company nor entered upon their books, there is no consummated contract of renewal, and no waiver of the payment of the premium.

[Cited in Connecticut Fire Ins. Co. v. Hamilton, 8 C. C. A. 121, 59 Fed. 265.]

This was a bill in equity [by Chalkley J. Hambleton against the Home Insurance Company of New York] to enforce an alleged verbal contract of renewal of a policy of insurance issued by the company on the second day of October, 1869, to indemnify the plaintiff for loss on buildings owned by complainant in Chicago, and destroyed by fire on the 9th of October, 1871. The original policy provided that neither it nor any renewal thereof should take effect until the premium was paid by the assured. The original policy was given for one year, and was renewed from time to time, up to October 2nd, 1871.

W. T. Burgess, for complainant.

Paddock & Ide, for defendant.

1. The testimony of the complainant's witnesses as to a contract to renew, is lacking in the certainty and clearness required by courts of equity in cases for specific performance, and, besides, is contradicted by Parsons, the solicitor of defendant, and Parsons is sustained by the circumstances, and by inferences resulting from the routine of the Chicago office. Neville v. Insurance Co., 19 Ohio, 452; Trustees of First Baptist Church v. Brooklyn F. Ins. Co., 28 N. Y. 161.

2. Parsons had no authority to bind the company, either by contract or waiver of conditions of the policy. Nor did the company hold him out in their course of dealing as having such authority. Renewal is, in effect, a new contract. Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 524; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 167.

3. No policy is delivered; the contract is incomplete. No credit was given, and no waiver of the condition requiring prepayment of premium. The policy made this a condition of renewal. Flint v. Ohio Ins. Co., 8 Ohio, 501.

DRUMMOND, Circuit Judge. It is claimed on the part of the plaintiff that this policy was renewed for another year from October, 2nd, 1871. The facts seem to be that Mr. Dunning, of the firm of Dunning & Easton, was the plaintiff's agent for the property, the subject of the insurance.

Mr. Parsons, the renewal solicitor of the defendant, in September or October, 1871, called at the office of Dunning & Easton, but did not find Mr. Dunning in, and left without stating his business. The second time, he was asked by Easton what his business was, and he stated that it related to the insurance of the plaintiff. Mr. Easton told him that Dunning was absent in Michigan, and that if he would carry the risk and send him the bill, he would pay him the premium. Parsons said that this was "all right." This is the statement made by Mr. Easton.

The premium for the renewal was never in point of fact paid, for the reason, as Easton says, that the bill was never presented. Easton and another witness state that Parsons had a memorandum book with him, in which he appeared to make an entry at the time this conversation took place. There does not seem to be much doubt but that these witnesses understood that Parsons had agreed to renew the insurance.

There is a conflict in the evidence as to the time when this conversation took place. According to Mr. Easton, it was about the 2nd day of October, 1871. According to Mr. Parsons, it was the latter part of September of that year. Mr. Easton states that on the return of Mr. Dunning, he told him what had taken place between himself and Mr. Parsons, and Dunning said that he was glad of it, and that it was his purpose to attend to it. Mr. Easton also says that he heard that Parsons afterwards had returned with a bill when he was not in his office. There is some conflict in the evidence as to the number of times that Parsons called at the office of Dunning & Easton. Some of the witnesses say it was three times, others that it was only twice.

Mr. Parsons says that at the second time when he called, something was said about the policy being renewed; that there was nothing definite done; that he made a memorandum in the book which he had, to the effect that he was to call and see Dunning when he returned; that Easton did not seem to have the right to order the insurance, and that he would not be responsible for the pre-

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

mium if the plaintiff did not want the insurance.

Both Mr. Parsons and several of the officers of the company state that the practice was, whenever the solicitor of the renewals made his returns, to place on a file, called the "binding file," a note of the facts in such manner as to indicate that the contract was binding on the company. It is clearly shown that nothing of this kind was done by Parsons, and that there was no entry or memorandum of any kind made upon the books or papers of the company, and there is nothing except what took place with Parsons to affect the company as to the renewal of this policy. The memorandum book Parsons had in his hand at the time was destroyed by the fire.

When Parsons was spoken to after the destruction of the property, concerning the renewal of the policy, he did not seem to be perfectly certain upon the subject, though the impression on his mind was that the policy was not renewed. He made an effort to recollect all the policies that were renewed, as he says, but could not remember that this particular one was renewed. After the property was destroyed the plaintiff tendered the amount of the premium to the officers of the company, by whom it was refused.

There are two questions arising upon this state of facts. One is whether there is any satisfactory evidence to show that Parsons was authorized to waive the payment of the premium, and to bind the company by giving credit on the same.

Parsons seems to have been simply a sort of clerk or agent, employed to solicit policies and renewals, and without any authority to bind the company, except such as might arise from the nature of his employment. If even the question were to rest on the right of Parsons to bind the company by waiver of the premium, there is great reason for saying that there was no sufficient evidence shown to authorize him to bind the company.

But, secondly, I am of the opinion that, conceding his authority, there was no agreement by the company by which there could be said to be a waiver of the payment of the premium for the renewal due on the second of October, 1871.

If by the terms of a policy it is distinctly stated that it shall not be renewed except on the payment of the premium, it should then clearly appear before that condition can be said to be waived, that there was either an express agreement to that effect, or one arising by necessary implication from the facts and circumstances of the case.

It is a very common practice for insurance companies to waive the payment of the premium where its payment is a condition precedent to the existence of a policy, and to the continuance of it by renewal; and where it really appears that this has been done, either by facts expressly shown, or by necessary implication, the courts will enforce the obligations of the policy against the underwriter. But where this condition is annexed by express terms it is manifest that the only safe rule upon which reliance can be placed is to require the assured to furnish proof, clearly showing that the payment of the premium at the time was waived by the understanding or agreement between the parties; and it must appear that such was the understanding of both parties. It is not enough for the assured to understand the payment of the premium to be waived: the underwriter must also have so understood. In other words the minds of the parties must meet upon the subject matter of the waiver of the payment of the premium. Undoubtedly this may be done by circumstances. Express words need not be used, but the circumstances must clearly show the understanding of the parties.

Now it was in this case incumbent upon the plaintiff to make out this waiver. He must show that the company agreed to waive the payment of the premium on the second day of October, 1871. It is not shown that Mr. Parsons or the company, or any of its authorized agents did make that agreement either in words or by necessary implication, and where an agreement is sought to be made out by such testimony as is here introduced, it is manifest that great stress should be placed upon the conduct of the parties at the time, because that may be decisive of the case.

It is said that Parsons, in reply to what was stated by Easton, declared that it was all right. That was an equivocal expression. It might be that he understood that the plaintiff intended to renew his insurance. It does not necessarily imply that he understood the company were at that time bound to extend credit upon the payment of the premium from the second of October, and the entry made by him in his memorandum book confirms this.

Again, it is said by Mr. Easton that he notified Mr. Dunning of what had taken place between him and Mr. Parsons, and that he (Easton) was told that Parsons had called with a bill. Admitting the full effect of what is stated by Mr. Easton, was it the intention that Parsons was to call absolutely any number of times to obtain payment of this bill? Or, rather, was it not incumbent on Dunning or on Easton, if Parsons had called for the premium and it was not paid him, to make some inquiry on the subject, and not permit the premium to be in default on the day when it should have been paid? Or, ought they to be permitted to take the chances upon so material a point?

If the company is to be bound in the case, it must be by the loose conversations and actions of a renewal solicitor without its knowledge, and of which it had no notice, and when there was nothing upon its books to show that a contract was made by it.

It seems to me that under the circumstances of this case the omission of Parsons to give the officers of the company any notice,

the fact that no memorandum was placed on any of the books or papers of the company to indicate that there was a renewal, or that there was a credit given upon the premium, is confirmation strong that no one on the part of the company understood that an agreement had been made to waive the payment. The bill will therefore be dismissed.

NOTE. To support an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, such contract must be clearly proved. If the matter is left in doubt the suit must be dismissed. Neville v. Merchants' & M. Mut. Ins. Co., 19 Ohio, 452; 2 Pars. Cont. 351. The plaintiff, before he is entitled to receive payment or to sue for the loss, must present the notice and statements required by the company's policies. Ang. Ins. § 226; Columbian Ins. Co. v. Lawrence, 2 Pet. [27 U. S.] 53, 10 Pet. [35 U. S.] 513; Haff v. Marine Ins. Co., 4 Johns. 132. In a recent case in the Illinois supreme court,—Lycoming Fire Ins. Co. v. Rubin [79 Ill. 402],—it was held that an insurance solicitor could not bind the company to a waiver of the conditions of the policy, and that he was the agent of the insured and not of the company.

Case No. 5,973.

In re HAMBRIGHT.

[2 N. B. R. 498 (Quarto, 157);[1] 2 Am. Law T. Rep. Bankr. 61; 1 Chi. Leg. News, 201.]

District Court, W. D. South Carolina. April, 1869.

BANKRUPTCY—RIGHTS OF LIEN CREDITORS.

Where a creditor had a valid lien on real estate of the bankrupt, and after proving the debt in bankruptcy, applied to have said lien satisfied from the proceeds of the sale of said estate by the assignee, *held*, that he was so entitled upon deducting therefrom the cost of proving the lien, and their was no prior claim on such proceeds to pay the fees, costs, and general expenses in bankruptcy.

[Cited in Re Stevens, Case No. 13,392.]

[Cited in Adams v. Lee, 64 N. H. 422, 13 Atl. 787.]

By W. J. CLAWSON, Register:

I, the undersigned, having been designated by the court as the register in bankruptcy, before whom the proceedings in the above matter of the bankruptcy of Abner Hambright are to be had, do hereby certify that in the due course of such proceedings, the following question pertinent to the same arose and was stated and agreed to by J. Bolton Smith, Esq., attorney for A. F. Smith, executor of J. B. Manning, deceased, and T. W. Clawson, attorney for J. S. R. Thompson and T. S. Jeffreys, assignees of the estate of Abner Hambright, the above-named bankrupt:

The estate of the bankrupt, as embraced in his schedules, consisted of one tract of land containing one hundred and ten acres, an undivided interest in two other small tracts, and a small personalty. The whole of the personal estate was set off to the bankrupt by the assignees, and the only property sold by them was the land referred to above, for which they realized the sum of eighty dollars and eighteen cents. A. F. Smith, executor of J. B. Manning, deceased, a creditor of the bankrupt, holds a judgment against the bankrupt for seventy-five dollars, obtained in 1856, which created a lien on the bankrupt's estate. This debt he has proved as a secured debt against the bankrupt's estate, according to form 46, Rice's Manual. The property of the bankrupt was sold by the assignees, free from encumbrance, and the proceeds of sale are insufficient to pay the fees, costs, and expenses of bankruptcy, and to pay off the judgment of A. F. Smith, executor, referred to above. The said A. F. Smith, executor, by his attorney, J. Bolton Smith, Esq., has since the sale served a notice on the assignees, which is hereunto attached, that he claims the proceeds of the sale of the lands as applicable to the aforesaid judgment. J. Bolton Smith, attorney for A. F. Smith, executor, insists that the judgment is entitled to be paid out of the proceeds of sale, to the exclusion of the fees, costs, and expenses; whereas, it is submitted by T. W. Clawson, attorney for assignees, that the fees, costs, and expenses in bankruptcy should first be paid, and that the balance, if any, remaining, in their hands, should be applied to the judgment; and the said parties requested that the same should be certified to your honor for your opinion thereon. The register agrees with the attorney for the assignees, that the proceeds of the sale of the property should be first applied to the payment of the fees, costs, and expenses in bankruptcy, and that the balance, if any, remaining in their hands, be applied to the judgment.

Under section twenty-eight of the bankrupt act [of 1867 (14 Stat. 530)], it is provided that, "in the order of a dividend * * * the following claims shall be entitled to priority, &c." "First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy." In the forty-seventh section, after providing a schedule of fees for the different officers, the act says: "Such fees shall have priority of payment over all other claims, out of the estate of the bankrupt, * * * and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant issues shall pay the same." And in the next paragraph the act further says: "Before any dividend is declared, the assignees shall pay out of the estate to the messenger the following fees." From the clauses of the act above referred to, two propositions seem necessarily to follow: First. That the fees, costs, and expenses, have priority of payment over all other claims against the bankrupt's estate. Secondly. That the bankrupt is liable to pay no fees or expenses of his bankruptcy beyond his deposit fee, pro-

[1] [Reprinted from 2 N. B. R. 498 (Quarto, 157), by permission.]

vided he has an estate which comes to the hands of the assignee sufficient for the payment of the same.

In confirmation of the second proposition, you will find an opinion in the Bankr. Court Reporter (page 48), in these words: "The bankrupt may apply to the assignee to pay from assets in his hands any sums he may have advanced, or procured to be advanced to the marshal as his fees, and the assignee may charge the same among his disbursements, to be paid out of the assets." The justice and equity of this ruling is obvious, from the fact that under rule 29 of General Orders, it is provided, "that the fees of the register, marshal, and clerk, shall be paid, or secured, in all cases, before they shall be compelled to perform the duties required of them by the parties requiring such services." Thus it would appear, that if the deposit fee is not sufficient to pay all the costs, and any of the officers refuse to perform the duties required of them until their fees are paid or secured, and the bankrupt should pay or secure the fees, he is entitled to have the same refunded by his assignee, out of his estate. If a creditor, holding a lien against the bankrupt's estate, is entitled to the whole of the proceeds of the sale of the bankrupt's estate, bound by his lien, then he would be also entitled to have the personal estate of the bankrupt, which is liable to be set off to him, sold for the same purpose. But congress has undertaken, as I think they had the right to do, to exempt for the benefit of the bankrupt, "household and kitchen furniture" and "other articles and necessaries," to the value of five hundred dollars. If a creditor holding a lien, has the right to have the proceeds of the sale of real estate applied to the payment of his lien, to the exclusion of the fees and expenses of bankruptcy, then he would have an equal right to have the whole of the personal estate sold, for the same purpose, thereby entirely depriving the bankrupt from any of the property, exempted under the humane provisions of the bankrupt act, except the mere pittance allowed under the exemption law of the state.

In the case of McKittrick, from Abbeyville, S. McGowan, Esq., attorney for the petitioner, your honor held that the sheriff had no right to levy and sell the personal estate of the bankrupt, which might be set off to him under the bankrupt act, and enjoined him, as I think you had the right to do from selling any property which I would certify was exempt under the bankrupt act. And in that case, my impression is, the levy was made before the filing of the petition in bankruptcy. In this case no levy was made before the filing of the bankrupt petition. But I regard that as a matter of no consequence, for no creditor whose debt is provable in bankruptcy, has any right to intermeddle with the bankrupt's estate, after the filing of the petition, without the leave of the district court. Upon the filing of the petition, all proceedings against the bankrupt in state courts must stop statu quo, the district court having exclusive original jurisdiction over the bankrupt, his estate, and his creditors. Upon this point I refer your honor to the learned decision of Judge Erskine, of the Northern district of Georgia, in Re Winn [Case No. 17,876]. With that opinion I fully concur. I am therefore of the opinion that the assignee should first pay the costs and expenses of bankruptcy, and the balance to the creditor holding the lien in this case, and so respectfully recommend.

BRYAN, District Judge.—In this case the schedules of the bankrupt showed that he had an interest in certain parcels of real estate and in a small personalty. The personalty was set off to the bankrupt under the provisions of the fourteenth section of the act. The real estate was bound by the lien of a judgment entered in the state court for some seventy-five (75) dollars, which had also been duly proven in bankruptcy. This real estate, under an order of this court, had been sold by the assignee free from all encumbrances, and brought at the sale eighty (80) dollars. There are no other funds in the hands of the assignee. The creditor holding the judgment claims that the proceeds of the sale of the realty, bound by his lien, should be applied to the extinguishment of his lien, after paying the special costs incurred in proving it. The assignee contends that before the proceeds of sale can be applied to the lien, all the costs incurred in the whole proceedings in bankruptcy must be paid out of them. The point was submitted to Mr. Register Clawson, who decided it in favor of the assignee, and has certified his opinion, with the reasons for it, to this court.

The register relies upon the twenty-eighth and forty-seventh sections of the bankrupt act. The forty-seventh section, after providing a schedule of fees for the several officers of the court, says: "Such fees shall have priority of payment over all other claims out of the estate of the bankrupt. And if there are not sufficient assets for the payment of these fees, the person upon whose petition the warrant issues shall pay the same." What is meant by the expression "estate of the bankrupt"? Evidently such property and rights of property of the bankrupt as the bankrupt act vests in the assignee. The assignee can take nothing more than the bankrupt himself had in any case, except the case of a fraudulent conveyance by the bankrupt. The act does not divest liens acquired and consummated before the adjudication in bankruptcy. When the act, therefore, speaks of the estate of the bankrupt in the hands of the assignee, it means such estate with all the encumbrances existing upon it at the time of the bankruptcy. In other words, the net value of the property after the liens upon

it are satisfied. This will appear upon examining the twentieth section of the act.

The first clause of this section provides that in all cases of mutual account the account shall be stated, and one debt set off against the other, and the balance only allowed or paid. The second clause provides that when a creditor has a mortgage, or a pledge of real or personal property of the bankrupt, or a lien thereon for securing payment of a debt owing to him, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale. The third clause authorizes the creditor in such a case to release or convey to the assignee his claim upon such property, and then prove for the whole debt. The fourth clause provides that if the value of the property exceed the debt, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess, or he may sell the property subject to the claim of the creditor. No comment is necessary. It is clear that the estate of the bankrupt, in property bound by a lien, is in the excess of the value of the property after satisfaction of the lien, and that this is all the act conveys to the assignee. That this forty-seventh section, in providing for the payment of the fees out of the "estate of the bankrupt," in its terms forbids the idea of the payment of the fees out of that portion of the property bound by a lien, which is not in excess of the lien. Inasmuch as the lien creditor seeks and enjoys the aid of this court in enforcing and realizing his lien, he is bound to pay the costs incurred in obtaining this aid. But with regard to the costs of general administration in which he has no concern, and in which he can have no interest until his lien is either satisfied or realized, it would be inequitable to require him to bear the burthen of them.

Upon examining the twenty-fifth section of the act, on which the register also relies, it will be seen that it makes provisions for the payment of certain preferred debts when a dividend is declared. It will be observed that a dividend is paid only to general creditors, and that no creditor holding a lien shall share in it, except for the overplus which may remain after crediting the debt with the full value of the property bound by the lien, or by the surrender and release of his lien altogether. Section 20. It will also be observed that the twenty-eighth section gives preference not only to the fees, costs, and expenses of suit, but also to four other classes of creditors—such as debts to the United States, debts to the state, wages of operatives, and debts due to persons who, by the laws of the United States, are entitled to priority or preference. The debts due to the United States are to be paid next after the costs. And yet it has been decided by a series of judicial decisions that a debt due to the United States is not in the nature of a lien, nor has a debt due the government a preference over the claims of a lien creditor. U. S. v. Hooe, 3 Cranch [7 U. S.] 73; [Bank of Columbia v. Hagner] 1 Pet. [26 U. S.] 458; Philips v. The Thomas Scattergood [Case No. 11,106]; U. S. v. Sheriff of Charleston [Id. 16,276]. So that this section puts in the same category of preferred debts the costs, &c.; and debts due to the United States must be understood to mean such a preference as is not inconsistent with the vested rights of a lien. Indeed, it can hardly be maintained that a creditor holding a lien which is recognized by this court should be postponed to all these five classes of creditors, or will be compelled to meet these debts of the bankrupt out of property pledged to him.

The register seems to apprehend that if the lien creditor can insist upon his lien to the exclusion of the general costs, he can also insist upon it as against the personalty set off to the bankrupt. But there is no ground for such apprehension. The bankrupt act takes hold of and administers all the property and rights of property of the bankrupt. When it has assumed jurisdiction, it exercises power over all persons and property connected with the bankrupt. It invites and compels the discovery and surrender, not only of visible property bound by liens, but of all rights, interests, and equities. In return for this frank and full discovery, it secures the bankrupt certain parts of his estate, which are set off to him free of all claim. Of these he, in fact, becomes the purchaser, in consideration for the purchase being the surrender of all his estate, and the sanction of his title being in the supreme law of the land. Again, the act of congress directs the court of bankruptcy to set apart a certain portion of the property in the schedule of the bankrupt for his use, free from the claims of creditors. The lien of a creditor upon the property so set apart could not, therefore, be enforced in this court. Nor could he use the state court for such a purpose before the adjudication of bankruptcy. This court assumes jurisdiction over all the property under the control of the bankrupt, and in this court it must be administered. The creditor having come into this jurisdiction, has submitted himself to it, and he is bound by its orders. An effort to enforce the law through the state court would put him in contempt, and would be punishable accordingly. I am of opinion that the register has erred in his ruling, and that the assignee, after paying the costs of the proceedings necessary for proving the lien, should pay the remainder of the proceeds of the sale of the real estate to creditors holding the same.

Case No. 5,974.

In re HAMBURGER et al.

[8 Ben. 189.] [1]

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

COUNSEL FEES — ASSIGNEE'S DISBURSEMENTS — SERVICES RENDERED BEFORE THE ASSIGNEE WAS CHOSEN.

At the time an assignee in bankruptcy was elected, suits were pending against the bankrupts, in which suits counsel employed by the bankrupts had rendered services. Such counsel afterwards presented to the assignee, to be paid out of the estate, a bill for services, which the assignee paid, and he claimed to be allowed for the amount in his accounts as assignee. All the services were either rendered before the assignee was elected, or it did not appear that they were rendered under employment by the assignee: *Held*, that, under general order No. 30, no allowance could be made to the assignee for the fees of counsel for the services in question, although such services were more or less beneficial to the creditors and the assignee, and were services proper and necessary to be rendered, on the procurement of the bankrupts.

[See note at end of case.]

In this matter, a bill of fees for services and disbursements of counsel in various actions which were pending in the courts of the state against the bankrupts [Max Hamburger and Berthold Frankel] at the time of the election of the assignee, had been presented to the assignee and paid by him. The question of the allowance of the bill was referred to the register, who reported in favor of the allowance of the bill, and the report was presented to the court for approval.

Marks & Russell, in person.

W. F. Scott, for the assignee.

BLATCHFORD, District Judge. The terms of general order No. 30 must govern the question. It declares that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors or counsel, except when necessarily employed by the assignee, when the same may be allowed as a disbursement." The principle adopted by the register is, that the services for which he thinks an allowance should be made were more or less beneficial to the creditors and the assignee, and were services proper and necessary to be rendered, on the procurement of the bankrupts. This would be a very proper consideration were it not for the express language of general order No. 30, which was manifestly intended to exclude the exercise of all discretion by the court in cases of this kind. The assignee was not elected till January 18th, 1875, and the papers do not show that the assignee gave any instructions to the counsel who make this claim, in regard to any pending suit, so as to warrant the court in considering that the assignee employed such counsel, until the 8th of February, 1875. The register reports that the counsel "were directed by the counsel for the assignee to continue such of said suits as were pending at the time of the appointment of said assignee." The testimony to which he refers to support this view, is the evidence of Mr. Marks; but that evidence only states that the counsel were instructed to continue the defence in one action—that brought by Smith. This instruction, according to the papers, was given February 8th, 1875. All of the services for which the register has allowed, except those in the action by Smith, were either rendered before the assignee was elected, or it is not shown that they were rendered under employment by the assignee. The services in the action by Smith were all of them rendered prior to February 8th, 1875.

I do not see on what principle the $20.80 paid as a disbursement in a suit in the state court, in September, 1874, can be allowed. The $122.35, paid as disbursements in the bankruptcy proceedings, is allowed, with the costs of the reference.

[In Re Hamburger, Case No. 5,971, Blatchford, District Judge, defined the proper charges of a register under general order No. 30. The same judge also held (Case No. 5,975) that the assigned estate was liable for reasonable rent for premises occupied by the assignee.]

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

Case No. 5,975.

In re HAMBURGER et al.

[12 N. B. R. 277; 1 N. Y. Wkly. Dig. 53.] [1]

District Court, S. D. New York. 1875.

BANKRUPTCY—RENT.

If the officers of the court keep possession of the premises the landlord is entitled to a reasonable compensation for the time that they are so occupied.

[Cited in Re Ives, Case No. 7,116; Re Secor, 18 Fed. 320.]

By the Register:

This cause is pending before me, at the chambers of this court, by an order, dated the 27th day of March, 1875, "to inquire on proofs and report what is a proper amount, if any, to be paid out of the assets of the estate for the use and occupation of the said premises by any officer of the court, or by the assignee, since the petition in bankruptcy was filed." I do hereby certify and report that the petitioners and the assignee have appeared before me: That the facts as appears from the testimony before me taken on this trial, and the proceedings in the matter, are as follows: The above-named bankrupts [Max Hamburger and Berthold Frankel] on the 10th day of August, 1874, filed a petition for an adjudication in bankruptcy of themselves, and were duly adjudged bankrupts the same day, and thereupon surrendered to me their estate and effects, consisting in part of pictures, picture-frames,

[1] [Reprinted from 12 N. B. R. 277, by permission. 1 N. Y. Wkly. Dig. 53, contains only a partial report.]

mouldings, machinery, etc., situated on the third and fourth lofts of the premises, Nos. 18 and 20 Vesey street, in the city of New York, which remained in my possession until on or about the 18th day of February, 1875, when an assignee was appointed. That the assignee subsequently sold said property, and on the 15th day of March, 1875, delivered the keys of said premises to the petitioners, the landlords of said premises, from whom the said bankrupts held a lease of said premises at a yearly rental of one thousand eight hundred dollars, which said lease is hereunto annexed. That the said bankrupts sought to effect a compromise with their creditors, under the provisions of section 5103a of the Revised Statutes, which was accepted by their creditors at a meeting held for that purpose on the 2d day of October, 1874, and afterwards duly ratified by the required number and value of their creditors, and subsequently approved by this honorable court, but by reason of the failure of the bankrupts to procure the indorsement of their composition paper by the person relied upon and mentioned by them, at the said composition meeting, the terms of said composition were not carried out. That the order for the first meeting on composition is dated the 12th day of September, 1874, and the second report on composition was filed in the office of the clerk of this court on the 26th day of November, 1875. That pending said proceedings, the petitioners applied to the attorneys for the bankrupts a number of times for possession of said premises, by whom they were told the bankrupts would certainly effect a compromise with their creditors, and they would then pay the rent and remove the goods. That the petitioners also demanded possession of said premises from the undersigned, by whom they were told "that they would have to proceed in the state courts to dispossess him," that is, the register, and that he, the register, "did not know but that this court would enjoin the petitioners from putting the goods on the sidewalk." That no formal proceedings were taken by the petitioners to get possession of the said premises until after the failure of the bankrupts to carry out the terms of the said composition, when they applied to this court by petition dated the 11th day of December, 1874, praying "for an order directing me, the said register, to sell said property stored in said lofts, as aforesaid, according to the rules and practice of this court." That said petition was referred to the undersigned, by an order of this court, dated the 6th day of January, 1875, to take proofs and report to this court what ought to be done in the matter. That several witnesses were examined under said order, but before the testimony was completed, the bankrupts applied to the undersigned for a warrant for the first meeting of creditors for the purpose of electing an assignee, whereupon the petitioners suspended further proceedings under the said order, and the undersigned as register and the assignee of said bankrupts retained successively undisturbed possession of said premises until the 15th day of March, 1875, when the keys thereof were surrendered to the petitioners by the said assignee. That the testimony taken under the order of January 6th, 1875, is herewith returned as a part of these proceedings, it having been offered in evidence by the attorney for the assignee. That no agreement was entered into by the undersigned, or the assignee herein, with the petitioners, as to what rent should be paid for said premises while occupied by them in their respective capacities as register and assignee. A witness as an expert testifies that the said premises were and are worth the sum of one thousand six hundred dollars per annum, whether used for manufacturing purposes or merely for storage. That he never had occasion to collect rent from a tenant holding without an agreement.

The facts in the case are in no wise analogous to those in the cases cited by the counsel for the assignee in his brief, which is herewith submitted. In this case the landlords have from the time of the bankruptcy acted the part of just, honest, and honorable men, in every way, aiding the bankrupts to continue their business, and the creditors to obtain the percentage originally agreed upon. The refusal by the person named by the bankrupts, to indorse their composition notes, was not their fault; they waited patiently for the bankrupts to fulfill their agreement and to carry out the composition sanctioned by this court. That it could not be done was the bankrupts' misfortune, and not the fault of the landlords. The fault was in the over-estimate and exaggerated value put by the bankrupts upon their property and business. My experience has taught me that such is the fault common to all bankrupts. But for such a fault the landlords cannot, neither should they be punished by depriving them of a fair and just compensation for the use and occupation of their premises. Bankruptcy, like death, is the end of all things; contracts as well as all other things cease and end by an adjudication. In this case, the lease terminated with the bankruptcy, after which the landlord must apply to the court, as per practice, and must prove the value of the premises so occupied. This they have done, and the amount is not controverted nor disputed by the assignee. The court has had possession of the premises. To have removed the property and rented other premises would have been much more expensive, and entailed a much larger sum upon the estate than the amount claimed by the landlords. The retention of the premises has been for the best interest of the creditors. Equity and good conscience requires that the landlords should be fairly and justly dealt with. It is to be expected that assignees will be

cautious and resist all claims they deem doubtful; but the court should see that equal and exact justice was done as between all parties. This is clearly intended by the wording of the order of reference in this case. The testimony shows the value of the premises to be from one thousand six hundred to one thousand eight hundred dollars per annum, which is a reasonable sum to be paid therefor by the estate. It is apparent that the premises were worth that sum to the estate. The court, by operation of law through its officers, becoming the occupant and deriving title by operation of the bankrupt act [of 1867 (14 Stat. 517)], succeeds to all the rights and some of the liabilities of the bankrupts, especially those liabilities incurred in the preservation of the estate, as was done in this case. The landlords only claim the actual value of the use of the premises, nothing more.

I do not consider the decision in the case of McGrath [Case No. 8,808], as an adverse decision. The application for the order of reference to fix the amount due the landlords was the correct course to be pursued, and the finding of the court fixes the rate at which the landlords as well as the assignee must be bound, as the measure of compensation for the use and occupation of the premises. The landlords did not apply to the court for the possession of the property, nor to have a fixed and definite amount of rent agreed upon, but did consent to the occupation of the premises by the estate, and can therefore only be allowed for the use and occupation of the premises what they were worth, be it more or less than the sum named in the lease. The adjudication in bankruptcy canceled the lease, and if the landlords desired the immediate possession of the premises, or the payment of the rent as named in the lease, they should have applied to the court for the one or the other. Not having done so they can only have the value of the premises allowed them. In re Metz [Id. 9,509].

The testimony uncontradicted varies from one thousand six hundred to one thousand eight hundred dollars per annum. It has been the uniform practice, and I deem it the correct one, that the claimant pay the fees of the referee upon the making up of the report. In this case let the register's fees be a charge upon the estate in the hands of the assignee. I find, and do hereby so report, that the sum of nine hundred and fifty-five dollars and fifty-four cents is due the claimant for the rent of said premises, while the same were occupied by the officers of this court, to wit: from the 10th day of August, 1874, until the 15th day of March, 1875, being seven and one-sixth months at one hundred and thirty-three dollars and thirty-three and one-third cents per month, or one thousand six hundred dollars per annum, and respectfully recommend that an order be entered herein empowering and directing the assignee herein to pay the same out of the funds in his hands belonging to the estate.

BLATCHFORD, District Judge. Let an order be entered in accordance with the decision of the register.

[See Cases Nos. 5,971 and 5,974.]

Case No. 5,976.

In re HAMILTON.

[1 Ben. 455.] [1]

District Court, S. D. New York. Oct., 1867.

HABEAS CORPUS AD TESTIFICANDUM—MILITARY DESERTER—PERSONAL IDENTITY.

1. Where a person, confined in prison in Philadelphia, was brought to this state in charge of an officer, under a writ of habeas corpus ad testificandum, issued out of this court, and, after his arrival here, applied to a state court and obtained a writ of habeas corpus, under the operation of which he was discharged by the state court from the custody of the officer, who returned to Philadelphia without him, *held*, that, as he was brought from Philadelphia under the writ issued by this court, and was still actually present before this court, he was still under its control, and must be sent back to the place from which he was brought for the purpose of testifying, and that, as his proper guardian had left him, he must be returned there by the marshal of this district.

2. Where a person, arrested as a deserter from the military service, was brought up under a writ of habeas corpus issued by this court, and the military authorities made return that he was regularly enlisted into the military service of the United States, which return the petitioner traversed, and, on the traverse, evidence was taken as to the identity of the petitioner with the person enlisted, *held*, that, on the proofs, the petitioner was the person enlisted, and that, as he was regularly enlisted, he must be remanded.

This case came before the court on a writ of habeas corpus, issued at the request of the petitioner [William L. Hamilton], to procure his discharge from the military service of the United States. The return to the writ showed that he had been legally enlisted, and was held as a deserter. This return was traversed by the petitioner, and testimony was taken at considerable length before a United States commissioner, upon the issues raised by the traverse. Upon this testimony, and some oral testimony, given by the petitioner himself in court, the case was argued. In the course of the proceedings a collateral matter arose, which was first disposed of by the court. This matter arose out of the following facts: Before the issuing of this writ, Hamilton, being in Philadelphia, was arrested by the military authorities there as a deserter, and was by them sent to Governor's Island, New York, to be tried for desertion. On his application, however, before he left Philadelphia, a writ of habeas corpus in his favor had been issued out of one of the state courts. This writ was directed to one Captain Brown, who had had Hamilton in charge after his arrest.

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

Brown made a return to the writ of habeas corpus, but that return was by the state court adjudged insufficient, and that court committed Brown to Moyamensing Prison, in Philadelphia, for contempt of the writ. After the habeas corpus was issued out of this court, it was deemed important that Captain Brown's testimony should be taken in the matter, and for that purpose a writ of habeas corpus ad testificandum was applied for, and issued by this court, directed to the keeper of the prison in Philadelphia. This writ was returned to this court as personally served upon the keeper of the prison at Philadelphia, who failed to make any return to it, and thereupon the court issued a writ of attachment against him, but, before this writ was issued to the marshal, Mr. Mann, the district attorney of the state court in Philadelphia, appeared with the return of the keeper, and thereupon the default was waived, and the return submitted to this court. Mr. Mann stated to the United States district attorney in New York, that if the court should hold that the return was insufficient there was no need of sending on an officer, but on letting the keeper of the prison know what the decision was, Captain Brown would be forthcoming. The court having decided the keeper's return to be insufficient, the United States district attorney wrote to the keeper, telling him so, and directing him to have Brown before Commissioner Osborn, to whom it had been referred to take the evidence, on a day which he named. The keeper accordingly put Captain Brown in charge of an officer, who brought him to New York but did not report his arrival to the United States district attorney in person. His arrival was, however, reported to the military officer who had charge of the proceedings in Hamilton's case on behalf of the military authorities, and he, without the knowledge of the United States district attorney, applied to Judge Cardozo, of the court of common pleas for the city and county of New York, and obtained a writ of habeas corpus, directed to the officer who had Brown in charge, to bring Brown before that court. On the return of this writ, the officer produced Brown before the court of common pleas, but did not notify the United States district attorney of the proceedings, and did not have with him any copy of the committal papers, and declined to have the case adjourned for the purpose of procuring them. Brown was thereupon discharged from custody of the officer, who went back to Philadelphia without his prisoner. Brown then went before the commissioner and gave his evidence in Hamilton's case, and was present in court on the hearing. The authorities in Philadelphia having complained of the manner in which Brown had been discharged, the matter was brought to the attention of the United States district attorney in New York, who, on the hearing of Hamilton's case, stated the facts to the court, and asked that, inasmuch as Brown had been brought here under the writ of habeas corpus ad testificandum, this court would order him to be returned to Philadelphia, in accordance with it, notwithstanding the proceeding before Judge Cardozo.

BLATCHFORD, District Judge. Inasmuch as Captain Brown came here under the habeas corpus ad testificandum issued by this court, and is now before the court, he is not out of its power, and this court has jurisdiction of the matter. It was decided in the Kaine Case, that a party who was brought up by a writ of habeas corpus was under the control of the court which issued it, till the writ was disposed of. The original writ in this matter bore the name of the district attorney of the United States for this district upon its face. Yet the officer from Philadelphia, who brought Brown here in obedience to that writ, when served with the habeas corpus issued by Judge Cardozo, did not notify the district attorney of this fact. It appeared from the petition on which Judge Cardozo's writ was issued, that it was not alleged in it that Brown was held by any writ of this court at all, but only by a commitment of the court of quarter sessions of Philadelphia. And the return did not mend the matter, for it merely set out that Brown was held by an order of Mr. Perkins, the superintendent of the prison in Philadelphia. This court will assume that, if the officer had made a proper return, Judge Cardozo would have done his duty and at once dismissed the writ. But, whatever may have been his private information, he was bound by the papers before him, and on those no valid reason for detaining the prisoner appeared. However, neither his action nor the negligence of the officer can affect the rights of this court. Captain Brown has never been out of its jurisdiction, and the court has but one course to follow. It must send him back to the place from which he was brought for the purpose of testifying, and, as his proper guardian has abandoned him, the marshal must return him there, leaving him to such remedy as he may think proper for any injury he may have sustained from the state courts of Pennsylvania.

The question in Hamilton's Case having been argued on the evidence, the following decision was rendered:

BLATCHFORD, District Judge. The traverse to the return made by General Butterfield to this writ, denying that the petitioner was regularly enlisted into the service of the United States, and was regularly sworn on such enlistment, would appear to have been intended to raise the legal question of the regularity of the enlistment, and not the question of the identity of the petitioner. But the testimony has been addressed to the question of identity. The recruit was enlist-

ed in Philadelphia, on the 1st of April last, deserted on the 6th of April, and the petitioner was arrested on the 20th of August. On charges being preferred against him, he was sent to Governor's Island for trial, and is now brought up on this habeas corpus, the point being made that he is not the same individual who was enlisted. Though the traverse does not seem to raise this question, yet on the testimony, it is fair to the parties to dispose of the case on its merits. I have carefully examined the testimony, which was mainly taken before Commissioner Osborn. The only evidence produced by the petitioner is his own deposition. His language is very guarded on the question as to whether he did enlist. In the enlistment papers the recruit swore that he was twenty-one years of age. The petitioner swears that he is now nineteen, and has a mother living, his father being dead, and that he had been living with his mother in Philadelphia, until he was arrested there on the 20th of August. It is, therefore, to be noticed, that the petitioner admits that he lived in Philadelphia at the time of this enlistment. There is nothing in the case to show an alibi. The question of his enlistment was put to him, and he says that he does not recollect going to the office, and does not recollect signing the papers, and does not recollect taking the oath. The enlistment papers were shown to him, and he said that he could not read them, but he denied that either of the signatures was his. He was asked if he recognized Colonel Park, whose name is three times signed to the papers, and he said he did not. He was then asked if he was not enlisted before Colonel Park, and his answer was, "Not that I know of." On the other side, Colonel Park was sworn for the government, and, on looking at the petitioner, he said that he recognized him; first saw him at the surgeon's office; saw him there on April 1st; that he saw the papers and swore to them before the witness; and that Hamilton remained under his charge till April 6th, when he deserted. Then the medical paper was produced, and Colonel Park testified that he was present at the examination, and that, as far as he could judge, the recruit was perfectly sober. Colonel Park's testimony is very direct and clear, and he recognizes Hamilton as the party who swore to and signed the enlistment papers. Still, if the case stopped here, it might be claimed that it was but one oath against another; but in addition to that, there is the correspondence of the petitioner's personal appearance with the description in the enlistment papers. He is described in them as having brown eyes, dark hair, and florid complexion, and being five feet seven inches in height. He has brown eyes, dark hair, and florid complexion, and, on measurement, he appears to be five feet seven and one-quarter inches in height—a very slight discrepancy. Another circumstance is his handwriting. There is a peculiarity in it which can hardly be the result of accident. The recruit signed his name, on enlistment, in two places, and, after the word "William," there is a period. That same period is found, in the same position, in the signature of the petitioner to his petition for the writ, and in his signature to the traverse of the return. In the latter he has written out his middle name in full—William Lewis Hamilton—and has put a period after the word Lewis also, showing that that was a habit of his, which is quite peculiar, and is a strong circumstance to show that the signatures are made by the same person. Moreover, the general correspondence of the signatures is such that there is no room to doubt that they were made by the same person. In view of the positive evidence of Colonel Park, the correspondence of the signatures, and the doubtful character of the petitioner's testimony, I can have no reasonable doubt that the petitioner is the party who signed the enlistment papers. Moreover, in the medical paper, the surgeon states that the recruit has a crucifix stamped on his left arm, and the petitioner admits that he has a crucifix on his left arm, with a Virgin Mary on each side. As the petitioner was the person who signed the enlistment papers, in which he swore that he was twenty-one years of age, he was regularly enlisted, and must, therefore, be remanded.

HAMILTON, The (ATKINSON v.). See Case No. 611

HAMILTON v. BUTLER. See Case No. 5,988.

HAMILTON (CAMPBELL v.). See Case No. 2,359.

Case No. 5,977.

HAMILTON v. CARNES.

[4 Cranch, C. C. 531.] [1]

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

STATUTE OF LIMITATIONS — WHAT CONSTITUTES PROMISE TO PAY TO TAKE CASE OUT OF STATUTE.

An offer by the defendant to the plaintiff's agent, after the commencement of the suit, to pay the debt in a manner and upon terms which he was not authorized to accept, is not a sufficient promise to take the case out of the statute of limitations.

[See Ash v. Hayman, Case No. 572.]

Assumpsit on two promissory notes. Plea, limitations. General replication and issue.

Mr. Nathan Smith, a witness for the plaintiff, upon the trial testified, that in a conversation with the witness, who was the agent of the plaintiff the defendant [P. A. Carnes] said that if he would withdraw this suit he would give the witness an order on his partner at New Orleans for the amount; but the witness was not authorized to dismiss the suit upon those terms.

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

Mr. Morfit, for defendant, contended that this was not a sufficient promise to take the case out of the statute of limitations, and cited Reed v. Wilkinson [Case No. 11,611], and Bell v. Morrison, 1 Pet. [26 U. S.] 351.

Mr. Fendall, contra, cited Wetzel v. Bussard, 1 Wheat. [14 U. S.] 309.

THE COURT (THRUSTON, Circuit Judge, absent,) upon the authority of Bell v. Morrison [supra], and because the new promise was made after the commencement of this suit, were of opinion, and instructed the jury, that the defendant's promise so made, did not take the case out of the statute of limitations.

HAMILTON (CHINN v.). See Case No. 2,685.

Case No. 5,978.

HAMILTON et al. v. CUNNINGHAM.

[2 Brock. 350.] [1]

Circuit Court, E. D. Virginia. June 12, 1828.

BILLS OF EXCHANGE — LIABILITY OF FACTOR TO PRINCIPAL—PRINCIPAL AND AGENT — LIABILITY OF AGENT—MEASURE OF DAMAGES — PAYMENT PROVISIONAL AND ABSOLUTE.

1. Where bills are remitted by a merchant to his factor, to be converted into available funds, and the factor mingles the property of the merchant with that of others, by selling the bills on a credit, and taking a joint note, covering other sums than that stipulated to be paid for the bills, this is in accordance with the general usage, and if the parties to the note become insolvent before it is due, the factor will not be held responsible, in consequence of the mere act of taking such joint note, for the loss sustained by his employer.

[Cited in Roosevelt v. Doherty, 129 Mass. 303.]

2. A factor sells bills of his principal to C. on a credit, and takes in payment, a note of previous date, having three months to run, drawn by A. and endorsed by B., who were in good credit at the time; the note is not endorsed by C. *Held*, that the circumstances of the note being of previous date, and not endorsed by the purchaser of the bills, are not sufficient, per se, to outweigh the fact, that the drawer and endorser were in good credit at the time of the transaction.

3. Nor was it of any consequence that the name of C., the purchaser, was not communicated by the factor to his principal, the principal not having demanded of his factor the name of the purchaser.

4. An agent does not bear the same relation to his principal, that the holder of a bill of exchange does to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser, will not subject the agent to his principal, to the extent of the bill placed in his hands for collection.

5. The relation of principal and agent, is governed by general rules of law, founded on reason, and if the principal suffers, through the remissness or negligence of the agent, the actual loss sustained by the principal, in consequence of such misconduct, is the standard by which his damages must be measured. But the law merchant prescribes with exactness, the course to be pursued by the holder of a bill, and has substituted a peculiar standard by which damages are to be measured for any deviation from that course. Hence, the factor to whom commercial paper is transmitted for collection, but who does not make himself a party by putting his name upon the paper, is an ordinary agent, governed by the law which regulates the relation of principal and agent generally, and is not subject to the law merchant.

[See Allen v. King, Case No. 226.]

6. Where bills of exchange are transmitted by a debtor to his creditor to be sold, and the debtor directs the creditor to credit him with the proceeds; and the creditor sells the bills, partly for cash and partly for negotiable notes, and gives the debtor credit in his books for the amount, in two distinct items, first, for the notes, and secondly, for the balance in cash; this is a mere provisional payment, and if the notes be not paid, he may recur to his original claim, unless, by his subsequent conduct, he converts the provisional into an absolute payment.

7. But a payment which is merely provisional in its inception may, by legal intendment, be converted into an absolute payment, by the subsequent conduct of the creditor; and whether this has been done or not, must depend essentially upon the circumstances of the particular case. Thus, where the debtor in Virginia, sent to his factors, a commercial house in New York, (who were also his creditors), bills of exchange, with instructions to sell them and credit him with the proceeds; and the factors and creditors sold them, partly for cash, and partly for credit, for negotiable paper having some time to run, and credited the debtor on their books with the proceeds, but, when the paper was subsequently protested for non-payment, the factors did not, as commercial usage required them to do, communicate the fact to the debtor, though they had a regular correspondence with him, and several letters passed between them after the protest; though one of the partners was afterwards in Virginia, and received a considerable payment from the debtor in person; and where the creditors, after the protest, transmitted an account of the balance due them by their debtor, not including therein the amount of the protested notes, and themselves, without consultation with the debtor, instituted suits upon the protested notes against the endorser, and prosecuted it to judgment, but did not issue execution thereon; these circumstances, taken together, converted the provisional into an absolute payment; and on a suit by the creditors against the debtor to recover the balance due, the debtor was held to be entitled to a credit for the amount due upon the protested notes.

[Cited in Jennison v. Parker, 7 Mich. 364; Merchants' & Manufacturers' Bank v. Stafford Bank, 44 Conn. 567; American Express Co. v. Parsons, 44 Ill. 318; Carroll v. Sweet, 128 N. Y. 22, 27 N. E. 763.]

This was an action on the case, brought by the plaintiffs [Hamilton, Donaldson & Co.], merchants in the city of New York, against Alexander Cunningham, of Petersburg, Virginia, to recover a large sum of money alleged to have been advanced by the plaintiffs to the defendant. The following special verdict was rendered by the jury:—"They find that the defendant did assume upon himself, in manner and form, as the plaintiffs have alleged, and they assess the plaintiffs' damages, by reason of the defendant's nonperformance of his said assumption, to the sum of $4285 90, with interest thereon from the 1st day of December, 1826, till paid, if the court shall be of opinion, upon the facts set

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

forth in the case stated, that the plaintiffs have a right to recover the two sums therein mentioned, of $1158 28, and $1158 29, with interest on the same; but if the court shall be of a contrary opinion, then they assess the plaintiffs' damages to $1870 13, with interest from the 1st day of December, 1826, till paid." The following is the case stated for the opinion of the court, referred to in the verdict of the jury:

In the month of January, 1825, the plaintiffs were, and ever since have been, and still are, commission-merchants of the city of New York, in the state of New York, and the defendant was, and ever since has been, and yet is, a merchant of the town of Petersburg, in Virginia, dealing chiefly in cotton and other produce of the country; and during that month, the defendant employed the plaintiffs, as his agents in New York, to sell for him there, such cotton and other country produce, upon commission, belonging to the defendant, and to collect for him there, upon commission, such bills or notes, drawn upon, or payable in, New York, belonging to the defendant; and to sell or negotiate for him there, upon commission, such bills of exchange upon foreign countries, belonging to the defendant, as the defendant should, from time to time, send or remit from Petersburg, to the plaintiffs in New York, to be by them there so sold or collected for him. The correspondence between the plaintiffs and the defendant, touching this business, and the agency of the plaintiffs for the defendant, in and about the same, continued from January, 1825, till August, 1826, during which time, parcels of cotton and other produce were sent by the defendant from Petersburg, to the plaintiffs in New York, and divers notes and bills drawn upon or payable in New York, and divers bills of exchange on foreign countries, were remitted by the defendant to the plaintiffs, to be by them sold or collected for the defendant; and in the course of these transactions, the defendant was in the habit of drawing bills on the plaintiffs from time to time, and the plaintiffs were in the habit of accepting bills drawn on them by the defendant, as well on the credit of the notes, bills, and goods so placed or to be placed in their hands by the defendant, to be collected or disposed of by them for him, as for the defendant's accommodation. For all of this business, the plaintiffs charged the defendant, and he allowed them, a commission, but in no instance a del credere commission; and it was the understanding of the parties that no del credere commission should, in any instance, be charged by the plaintiffs, or allowed by the defendant, upon the business done by them for him. The plaintiffs, on the 28th of November, 1825, were in advance to the defendant, on account of the transactions aforesaid, above the sum of $5000; and on the said 28th of November, the defendant remitted to the plaintiffs, two sterling bills, to be by them sold on his account in New York, and the proceeds thereof to be placed to his credit; one drawn by John Walker on Evans & Trokes, of Liverpool, for £400 sterling, and the other, drawn by the defendant himself, on W. A. & G. Maxwell, of Liverpool, for £500 sterling. These bills were enclosed in a letter from the defendant to the plaintiffs in the following words and figures, to wit:

"Petersburg, November 28th, 1825. Messrs. Hamilton and Donaldson, Gentlemen—I herewith hand you an invoice and bills of lading for 30 bales per the Star: she sailed on the morning of the 25th. I hope you will be able to make a speedy sale of this parcel at your present quotations. You have also enclosed, John Walker's bill on Evans & Trokes, Liverpool, payable in London, for £400, and mine, on W. A. & G. Maxwell, Liverpool, payable in London, for £500. Proceeds to be placed to my credit. Cotton 14c. I am, gentlemen, yours, &c., Alexander Cunningham.

"N. B. Your letter of 23d, only came to hand this morning. Please forward the letter of advice to Messrs. Maxwells."

On the 1st of December, 1825, the defendant wrote another letter to the plaintiffs, in the following words and figures, to wit:

"Petersburg, December 1st, 1825. Messrs. Hamilton, Donaldson & Co., Gentlemen—I sent you, on the 28th, John Walker's bill, on Evans & Trokes, Liverpool, for £400, and mine, on W. A. & G. Maxwell, Liverpool, for £500, with invoice and B Lading for 30 bales cotton, per Star, and letter to Messrs. Maxwells. I am without any of your esteemed favours since. I have now to advise my draft on you for $2500. Please charge it to my account. Cotton has been brisker these two days past, and advanced ¼c. With respect, your most obedient servant, Alexander Cunningham."

The defendant's said letter to the plaintiffs, of the 28th November, 1825, and the said two sterling bills therein mentioned and enclosed, were received by the plaintiffs, on the 2d December following; and on the 7th of December, the plaintiffs sold the said two sterling bills, at New York for $4302 94, (net proceeds;) of which sum they received part, to wit: $1986 37, in cash; and for $1158 28, other part thereof, they took in payment a note of one Joseph Lyon, made payable to one Warren Rogers, and endorsed by the said Rogers in blank, dated the 7th September, 1825, and payable six months after date; and for $1158 29, the residue thereof, they took in payment another note of the same Joseph Lyon, payable to the same Warren Rogers, and endorsed by the said Rogers in blank, dated the 13th September 1825, and payable six months after date. But the first of the said notes of the said Lyon, endorsed by the said Rogers, was not for the said sum of $1158 28 only, but was for the sum of $1734 80; and the last of the said notes was not for the said sum of $1158 29 only, but was for the sum of

$1734 06: the way this happened was, that the plaintiffs had at the same time, sold other bills for one Thomson, and took these two notes of Lyon, endorsed by Rogers, in payment, as well of the two sums of $1158 28 and $1158 29, part of the proceeds of the defendant's said sterling bills, by them sold, as of the proceeds of the said Thomson's bills, by them sold at the same time, there being no connexion whatever between the defendant and the said Thomson, but the plaintiffs being in like manner agents for them both. The said Joseph Lyon, and the said Warren Rogers, were both in good credit at New York, at the time the plaintiffs took the two said notes of the former, endorsed by the latter, in manner aforesaid; and the said notes of the said Lyon, endorsed by the said Rogers, would have been regarded by prudent and well informed merchants of New York, as good security for the sums therein expressed. At the time the plaintiffs sold the defendant's said two sterling bills, it was usual in the course of business at New York, to sell such bills on a credit, and, indeed, impracticable in the then state of the money market there, to sell them for cash; and the time which the said two notes of the said Lyon, endorsed by the said Rogers, had to run when the plaintiffs took them in manner aforesaid, did not exceed the credit then usually given upon sales of sterling bills of exchange at New York; and the blending the proceeds of the sterling bills of the defendant, sold by the plaintiffs, with the proceeds of the bills of Thomson, sold by them at the same time, and the taking notes to secure the aggregate of the sums belonging to the defendant, and to the said Thomson, as before described, was, and is, according to the usage and course of such business at New York. The day after the plaintiffs had sold the defendant's two said sterling bills at New York, in manner aforesaid, to wit, on the 8th of December, 1825, they wrote him a letter advising him thereof, which was received by him at Petersburg, in due course of mail, and which is in the words and figures following, to wit:

"New York, December 8th, 1825. A. Cunningham, Esq.—We have none of your esteemed favours to reply to. Above we beg to hand you an account sales of your sterling bills, forwarded us on 28th ult.; net proceeds as above stated, $4302 64, viz.: at your credit 7th inst., $1386 37; due on a note of Joseph Lyon, endorsed by Warren Rogers, $1158 28, on the 10th March next; due on a note of the same, endorsed by the same, the 16th March next, 1158 29, which we hope will be satisfactory. The difficulty of disposing of bills here, induced us to take notes in payment, but in those taken, we have been particular, and think they are perfectly safe. The exchange was what private bills generally sold for yesterday. The same rate was obtained for Le Roy, Bayard & Co. only, and more of them than were sold were offered at that rate. Exchange will still get lower; the utter destruction of confidence, and the extreme scarcity of money, place many things in the very worst state; twenty-nine bales of your cotton by the Margaret Ann, have been sold at sixteen cents, agreed to sixty days; that in eight bales, at six months, adding two per cent. interest; twenty-one bales at ninety days, adding half per cent. The paper is good, it being sold to manufacturers. We wanted to close sales of all yours, but to day the article is heavy, a good deal having arrived; we shall do so, however, the first opportunity: it has just been landed. We beg your attention to further remittances, as we are much in want. We are, &c., Hamilton, Donaldson & Co."

The plaintiffs charged the defendant their usual commission of one per cent. (besides brokerage) on the sale of the defendant's two said sterling bills; and on the 7th of December, 1825, passed the whole proceeds to the defendant's credit, not absolutely, as to so much thereof as was due at a future day, but provisionally, in case they should be received when due; the entries on their books touching the same, were in these words and figures, to wit:

1825. December 7. By J. Lyon's note favour W. Rogers, received in part payment of sterling bills, £900, as per account sales rendered.....	$2334 40
Cash received for balance of said bills	2011 80

The defendant's two said sterling bills were not sold by the plaintiffs to the said Joseph Lyon and Warren Rogers, or to either of them, but were sold to some other person whose name has never been communicated by the plaintiffs to the defendant, or otherwise made known to him; and the plaintiffs' said letter to the defendant, of the 8th of December, 1825, contains all the information given by the plaintiffs to the defendant on the subject, except what may be found in the sequel of the correspondence between them, hereinafter set forth. The said two notes of Joseph Lyon, endorsed by Warren Rogers, were made and endorsed at the city of New York, in the state of New York, and were also payable there; and by the laws of the said state, were negotiable, in like manner, as inland bills of exchange; and the said two notes, before they came to maturity, were endorsed by the plaintiffs for the mere purpose of being placed in bank for collection, and were placed for collection in one of the banks of New York; were duly presented at maturity to Lyon, the maker, and payment duly demanded of him; and, payment being refused, were duly protested for non-payment; and due notice of the dishonour thereof was given to Warren Rogers, the endorser. The said notes and the protests thereof, are in the words and figures following, to wit:

"$1734 80. New York, September 7th, 1825. Six months after date, I promise to pay to the order of Mr. Warren Rogers, seventeen hundred and thirty-four dollars and eighty cents,

for value received. Joseph Lyon. (Endorsed.) Warren Rogers, Hamilton, Donaldson & Co. No. 2324. Due 10th March, 1826.

"United States of America, State of New York, to wit: On the 10th day of March, in the year of our Lord, 1826, at the request of Messrs. Hamilton, Donaldson & Co., I, Francis R. Tillon, notary public, duly admitted and sworn, dwelling in the city of New York, did present the original promissory note, (a true copy whereof is above written), to a gentleman in the office of Joseph Lyon, the maker thereof, and demanded of him payment thereof. He answered, that Mr. Lyon was not within, and that it could not be paid. Now, whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and indorser of the said promissory note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred, and to be hereafter incurred, for want of payment of the said promissory note. Thus done and protested in the city of New York, aforesaid, in the presence of John Doe and Richard Roe, witnesses. In testimonium veritatis. F. R. Tillon, Notary Public.

"1826. March 10th. I this day demanded payment of within as within. William Cadle.

"1826. March 11th. I this day gave a notice to a clerk in the office of Warren Rogers. William Cadle."

The second note for $1734 06, dated 13th September, 1825, payable six months after date, and falling due on the 16th March, 1826, drawn by Joseph Lyon, and endorsed by Warren Rogers, was protested in like manner with the above. The plaintiffs did not give any notice to the defendant, of the dishonour of the two said notes of Lyon, endorsed by Rogers, until the 30th of June, 1826, when they wrote him a letter of that date, giving him the first information he had received of the dishonour of the said two notes. This letter was received by the defendant in due course of mail, and is in the words and figures following, to wit:

"New York, June 30th, 1826. A. Cunningham, Esq. We wrote you on 21st inst., and are since without any of your favours. As there is upwards of $11,000, what we are still in advance of you, it becomes necessary we should have remittances to the amount thereof, or we can draw on you. Be pleased to let us know what you would prefer: it is only important we should have one way or another, and if an accommodation of $7000, or $8000, of that amount can be of service to you, we have no objections to accommodate you, under the understanding, that your drafts will be punctually met. The notes of Joseph Lyon, endorsed by Warren Rogers, for part of what your bill on W. A. & G. Maxwell for £500, and John Walker's on Evans & Trokes for £400, were sold in part, as you will see by account sales rendered you, and by our letter of 8th December, remain unpaid. Aware of your distress, arising from other losses, and being in weekly expectation that Mr. Rogers, who has ever been considered good, would arrange the payment of them, since they became due, were the causes of our not writing you earlier on the subject, but he waives the payment of them so long, that we deem it necessary to advise you of the state of things. The notes have been regularly protested, so as to bind Mr. Rogers, and we still think he is able to pay. Your advice on the subject, however, is desirable, although we have hitherto left nothing undone to bring about payment in that way we thought best. Another house, whose bill we sold, is implicated with you in this transaction. It is unnecessary to state to you our feelings on this communication; they are painful in the extreme, knowing as we do, how you have already suffered; but we do hope that you will suffer but little, if any, by this. Mr. Rogers has promised to do something soon, and we hope it will be satisfactory to all. He is certainly sufficiently able, and has always before this, stood high for punctuality, and as a man of wealth, and in his own affairs, he is perfectly unembarrassed. We are, &c., Hamilton, Donaldson & Co."

Before the said two notes were dishonoured, to wit: on the 13th of January, 1826, the plaintiffs wrote a letter to the defendant of that date, and endorsed him his account current, to the 1st of January, 1826, containing therein, the credits, as above stated, for the proceeds of sale of the defendant's said two sterling bills, and the debit for commission thereon, and showing a balance against the defendant of $3306 66. This letter, and the account current enclosed, were received by the defendant at Petersburg, in due course of mail, which letter is in the words and figures following, to wit:

"New York, January 13th, 1826. A. Cunningham, Esq. Annexed, we beg leave to hand you account sales of your thirty bales cotton, per the Margaret Ann. Net proceeds, $1464 42, at your credit, due 29th March next; also of your thirty bales, per the Star, net proceeds, $1430 60, at your credit, due the 25th of February next; likewise, your account current with us, up to the 1st inst., showing a balance in our favour of $3296 38, at that time, all of which we hope you will find correct. We closed the accounts of Messrs. A. & R. M. Cunningham in our books, the balance due on which, you will perceive you are charged with. The most part of the cotton sold, is at 13, some little at 13½, and some at 12½@12¾.

"P. S. We enclose for your acceptance, Mark Wilson, Esq's. draft on you, at 3 months, for $2000, which be pleased to return. Yours, &c., Hamilton, Donaldson & Co."

After the said notes had been dishonoured, to wit, on the 21st of April, 1826, James Hamilton, one of the plaintiffs, was in the town of Petersburg, and there received from the defendant in person, on account of the

dealings between the plaintiffs and the defendant, $3000 in bank notes, and a draft for $2000, and gave the defendant a receipt for the same, in the following words and figures, to wit:

"Received, Petersburg, 21st April, 1826, of Alexander Cunningham, Esq., three thousand dollars in the Bank of Virginia notes, and a draft of Beers, Bunnell & Booth, on Beers & Bunnell, of New York, dated 20th April, 1826, at 60 days date, for three thousand dollars, which are to be applied to his credit, with Hamilton, Donaldson & Co., on my arrival in New York. James Hamilton."

Afterwards, to wit, on the 5th of May, 1826, the plaintiffs wrote a letter from New York, to the defendant of that date, wherein they say, among other things:—"Your drafts on us in favour of Mr. M'Cauley, becomes due the 19th inst., all of which, with the balance due on former account, amounts to $8195 99." The "former account," in the passage alluded to, was the same account current rendered by the plaintiffs to the defendant, hereinbefore referred to; and the said balance of $8195 99, is made by assuming the balance of $3306 66, appearing due on that account current, as a correct balance, adding thereto the said drafts in favour of M'Cauley, amounting to $5050, and the sum of $2000, and crediting the defendant by an item of $2160 67, for money received in March, 1826. And nothing was included in the said sum of $8195 99, as charged to the defendant on account of the said two protested notes of Lyon, endorsed by Rogers. On the 22d of July, 1826, the plaintiffs wrote a letter to the defendant of that date, and therein enclosed an account current, brought down to the 1st of August following, in which the defendant is charged under dates of the 10th and 16th of March, 1826, with the aforesaid two sums of $1158 28, and $1158 29, on account of the two protested notes of Lyon, endorsed by Rogers, which letter and account current were received by the defendant in due course of mail. In November, 1826, the plaintiffs rendered the defendant another account current, carried down to the 1st of December following, showing that a balance would be due to the plaintiffs, at the last mentioned date, of $4756 11, in which balance are included the two sums aforesaid, of $1158 28 and $1158 29, charged in the account rendered in July, 1826, (before referred to) under dates of the 10th and 16th of March, 1826, on account of the said two protested notes of Lyon, endorsed by Rogers. In December, 1826, an application was made to the defendant, through an agent of the plaintiffs' at Petersburg, to settle the account, and to pay or secure the balance due the plaintiffs thereon; when the defendant, (besides objecting to some other items of charge against him in the said accounts, which are not now in controversy,) objected to the said two charges against him, under dates the 10th and 16th of March, 1826, of $1158 28, and $1158 29, on account of the said two protested notes of Lyon, endorsed by Rogers, which two items (principal and interest,) are the only points now here in controversy: the plaintiffs insisting that the defendant is bound to pay them those two sums, with interest from the dates at which they are charged; and the defendant insisting that he is not bound to pay the plaintiffs the said two sums, or either or any part thereof, principal or interest.

(Here follows, in the agreed case, the whole correspondence between the plaintiffs and the defendant, from the origin of the transaction, which is the subject of the present controversy, until the dealings between them wholly ceased. That correspondence is very voluminous, embracing a period of more than a year, and the editor has deemed it proper to omit it; the more especially, since the portion of it which particularly applies to the two notes of Lyon, endorsed by Rogers, which constitute the subject matter of this suit, has been already incorporated in the agreed case, as above set forth.)

The plaintiffs, as endorsers of the said Warren Rogers, instituted an action at law against the said Rogers, on the beforementioned two notes of Joseph Lyon, endorsed by the said Rogers, in the supreme court of judicature, of the people of the state of New York, which action was brought to the term next ensuing the date of the protest of the said two notes, and they thereon recovered judgment against the said Rogers, in the month of May, 1827. No process of execution has been sued out by the plaintiffs, on the judgment obtained against Rogers.

MARSHALL, Circuit Justice. Before I proceed to the point on which this cause appears to me to depend, it may be proper to notice some incidental questions which have been suggested in its progress, or in the argument on the case agreed.

It was contended by the defendant, at the trial before the jury, that the plaintiffs, by mingling the property of the defendant, with that of others, in a joint note, so as to deprive him of that perfect control over it, which his interest might require, or at least to embarrass the exercise of that control, had so misconducted themselves in their agency, as to become liable for the debt. I was inclined to this opinion, but placed it upon the usage at New York. The case states that usage, so as to justify the conduct of the agency, and this is no longer a question in the cause; but I think it proper to declare, that I satisfied myself, as soon as I looked into the subject, that my first impression was an erroneous one, and that the usage of New York, conforms to the general rule. 1 Liverm. Ag. 85. He quotes Mal. Lex Merc. 81, 82; Moll. de J. Mar. bk. 3, c. 8, § 4; [Ingraham v. Gibbs] 2 Dall. [2 U. S.] 136, note page 134; [Schenkhouse

v. Gibbs] 4 Dall. [4 U. S.] 136; Beawes, in his Lex Mercatoria (6th Dublin Ed. p. 36) in his chapter on the Law of Factors, &c., says: "One and the same factor may, and, generally, does act for several merchants, who must run the joint risk of his actions, though they are mere strangers to one another; as if five merchants shall remit to one factor, five distinct bales of goods, and the factor make a joint sale of them to one man, who is to pay one moiety down, and the other at six months' end; if the buyer breaks before the second payment, each man must bear a proportional share of the loss, and be contented to accept of their dividend of the money advanced." That the bills were sold upon credit, has not been urged against the agents as misconduct, because they gave notice thereof to their principal, who acquiesced in the sale. Independent of this fact, the sale upon credit was necessary and usual at the time, and was within the power to sell. But the defendant insists on the fact, that his agents received notes in payment for the bills, which notes had been given some time before, and were not endorsed by the purchasers of the bills. These circumstances are said to be such as cast suspicion on the notes, and ought to have restrained the agent from taking them. What influence these circumstances, connected with others, might have on a jury, it is not for me to say. They are presented to the court, in the case agreed by the parties, connected with no other circumstance than this: that the makers of the note were, at the time, considered as good. If A. and B. give their note to C. on account of any transaction with him, and before it becomes payable, C. wishes to negotiate it, I have never understood that, in a commercial city, this is an unusual circumstance which ought to discredit the note. If I am correct in this, I can perceive no distinction between taking the note having three months to run, and taking the note of C. the purchaser, with D. as his surety on the same credit. The whole depends on the relative credit of the parties. If A. and B. are as trustworthy at the time, as C. and D., I can perceive no solid reason for distinguishing between their notes. The same reasoning excuses the agent for not insisting on the endorsement of the purchaser. A man may be unwilling to put his name on any paper, and this might render doubtful notes still more doubtful; but ought not, I think, to discredit the notes of men whose mercantile standing was solid at the time. The circumstances, that the bills were sold for a note of previous date, on which the purchaser did not place his name, are not, I think, per se, sufficient to weigh down the fact, that the maker and endorser were, at the time, in good credit.

Some stress has been laid on the fact, that the name of the purchaser has not been communicated to the defendant. But the purchaser was not responsible, and the agent could have no motive for communicating it. Had it been demanded, suspicion might have been justified by withholding it; but no importance ought, I think, to be attached to the simple omission to communicate it, when no inquiries were made on the subject.

A point of more difficulty has been very much pressed in the argument. It is the omission of the agent to give notice of the non-payment of the notes. It is laid down generally by Paley and Chitty, that it is the duty of an agent in whose hands a bill is placed for collection, to give immediate notice of its dishonour. Both Paley and Chitty adopt the rule from Beawes' Lex Mercatoria, in his chapter on Bills of Exchange, &c., fig. 117 (6th Dublin Ed. 373). The passage in Beawes is in the following words: "It is incumbent on him to whom a bill is remitted in commission; 1, to endeavour to procure acceptance: 2, on refusal, to protest, (if not forbidden,) though not expressly ordered: 3, to advise the remitter of the receipt, acceptance, or protesting it, and, in case of the latter, to send the protest to him: 4, to advise any third person, that is or may be concerned in it, and all this by the post's return, without further delay." The counsel for the defendant insists, that a neglect of the duty thus prescribed, renders the agent liable for the amount of the bill, if the debt should be lost. The plaintiffs contend, that such neglect subjects him only to compensation for the injury actually sustained from that cause. It is plain, from the language of the sentence, that the author could not mean to say, that the failure of the agent in any part of the duty thus prescribed, would subject him, under all circumstances, to the payment of the whole bill, if it should be dishonoured by non-payment on the part of the drawee. It is declared to be equally the duty of the agent to advise the remitter, of the receipt, acceptance, or protest. These are placed in the text on the same footing. But it will not be pretended that the omission to give notice of the receipt of the bill, or of its acceptance, would render the agent liable for its amount, on the failure of the acceptor to pay.

The defendant's counsel, however, do not put the case so strongly as to insist, that the agent, by neglecting any particular part of his duty, becomes responsible for the whole debt, should the acceptor fail. They contend that he is in the same situation as the holder of a bill, or as if he had been a party to the note, and incurs the same responsibility, for any neglect of duty, as such person would have incurred. The plaintiffs controvert this proposition. The general rule, appears to me to be, that a person acting on commission, who by his misconduct has brought loss upon his principal, is responsible to the precise extent of the loss produced by that misconduct. The rule is very well expressed by Mr. Livermore, in his valuable treatise on Agency (volume 1, p. 398). He says: "The

loss which the principal has sustained by reason of the negligence of his agent. I should take to be the true measure of damages, in an action founded upon that negligence. This appears to follow from the very definition of damages, being a recompense given by the jury, for the injury or wrong done to the party." And Beawes, in his chapter on Factors, &c., says: "A factor is but a servant to the merchant, and receives from him, in lieu of wages, a commission," &c. "He ought to keep strictly to the tenor of his orders, as a deviation from them, even in the most minute particular, exposes him to make ample satisfaction for any loss that may accrue from his non-observance of them." Again he says: "A factor should always be punctual in the advises of his transactions in sales, purchases, affreightments, and, more especially, in draughts by exchange; for if he sells goods on trust, without giving advice thereof, and the buyer breaks, he is liable to trouble for his neglect; and if he draws without advising his having done so, he may justly expect to have his bill returned protested." The rule which governs human transactions generally, is, that compensation shall be apportioned to the injury; and that rule is, I think, applicable to principal and agent. Russel v. Palmer, 2 Wils. 325; Smedes' Ex'rs v. Elmendorf, 3 Johns. 185. To this general rule, there are some exceptions. The law merchant has made one, which stands on reasons peculiar to itself. This exception relates to commercial paper. For the benefit of trade, and to avoid endless contention respecting liabilities, on paper of that description, a set of positive rules, prescribing with precision, the exact course to be pursued by the holder, and measuring the damage in every case of deviation, has been substituted by merchants, instead of the general rule of law, that the person chargeable with negligence, shall be responsible for the damages actually produced by his misconduct. This exception, applies to all those whose names are on the paper, and to a person who has induced an endorser to take a bill by a written promise to accept, but has not, I think, been carried farther. I do not think it has been extended to an agent to whom commercial paper is transmitted for collection, but who does not make himself a party to that paper, by putting his name upon it. I find no case which establishes this principle.

Beawes, in his chapter on Bills of Exchange, &c., fig. 18, says: "When any person has bills sent him to procure an acceptance, with directions to return them or hold them at the order of the seconds, &c., and the person to whom they are sent, either forgets or neglects to demand acceptance, or if he suffers the party on whom they are drawn to delay their acceptance, and the drawer, in the interim, fail, he is certainly very blame-worthy, for his carelessness and disregard of complying with his obligation; though this will not subject him to payment of their value." Mr. Beawes adds: "But if he should be urged and pressed to procure acceptance and payment of a bill sent him, and should protract or defer the getting it done, and the acceptant, being ignorant of the drawer's circumstances, declares he would have accepted it, had it been timely presented; the person guilty of the neglect will be obliged to make good the loss that has happened to his correspondent, purely through his omission and carelessness." Both these cases show, very clearly, the distinction supposed by Mr. Beawes to exist, between an agent to whom a bill is remitted for collection, and an endorser. If the liability of an agent to his principal was the same with that of a holder to his endorser, there can be no doubt that the loss would be his in the first case put; and that it would be equally his, in the last case put, although the drawee should not declare "that he would have accepted it, had it been timely presented." The same author, in the same chapter, fig. 97, says:—"If a remitter in commission stands del credere for the remisses, he acts indiscreetly, if he has the bills made payable to himself or order, that he may endorse them." Among other reasons for this opinion, one is: 2, that, "the remitter by this means, makes himself liable, not only to answer all damages, &c., to his principal, but also to every possessor and endorser of the bill after him." "3. By endorsing the bill, he makes it his own, and obliges himself on the account of his principal, not only for the value by him received, but for all other charges and re-exchanges." "And though a remitter by commission does not stand del credere, he acts with equal imprudence in having the bills made payable to himself or order, and then endorses them, for thereby, he effectually engages himself to stand del credere, without reaping any advantage therefrom." These passages show, that Mr. Beawes takes a clear distinction, between the relation in which an agent for collection stands to his principal, and that in which the holder of a bill stands to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser, will not subject the agent to his principal to the extent of the bill placed in his hands for collection. His name is not on the bill, and the law merchant does not apply to him. Warrington v. Furbor, 8 East, 242. The case of Bridges v. Berry, 3 Taunt. 130, was a bill drawn by the defendant himself. The decision, that the neglect of the holder to give notice to the drawer of its dishonour, deprived the holder of his recourse against the drawer for a pre-existing debt, as a security for which this bill was given, belongs to a different and a much more difficult question, which I am about to examine.

The main question in the cause, and I will not affect to consider it a clear one, is this. Have the plaintiffs, by their conduct respecting these notes, made them absolute payment

towards the discharge of the debt due to them from the defendant? Have they made the notes their own? The parties stood towards each other in the double relation of principal and agent, and of debtor and creditor. This double relation does not sink either character, nor lessen the obligations imposed by either. That these notes were not applied in part payment of a pre-existing, ascertained, and fixed debt, but to the credit of the defendant in a running account, in which he was uniformly the debtor, is not, I think, a material circumstance. The transaction was not a sale of the bills of exchange, or of the notes, by the defendant to the plaintiffs; but an application of those bills, and of the notes for which they were sold, to his credit with them, in the ordinary way in which such paper is credited; that is, provisionally, to become absolute in their payment, or on such other event as may authorize the debtor to consider them as paid. It is admitted to be incumbent on the person receiving negotiable paper under these circumstances, to use due diligence to obtain its acceptance and payment; and that neglect in these respects, converts the provisional into an absolute payment. But due diligence, it is alleged, has been used in this case; and the charge against the agents and creditors is, that they did not give notice that the notes were dishonoured. Mr. Chitty (page 126) says: "The effect of taking a bill of exchange or promissory note, in satisfaction of a precedent debt, is, that the creditor cannot proceed in an action for such debt without showing that he has used due diligence to obtain acceptance or payment; and also showing, if the defendant was a party thereto, or delivered it to the plaintiff, that the defendant had due notice of the dishonour."

Elementary writers sometimes state general rules as if they were universal; and do not always make those discriminations which a comparison of the cases themselves shows ought to be made; nor trace results to the true principle which produces them. Chitty is, undoubtedly, a very respectable writer; but when he carries a rule farther than the cases have carried it, the proposition he states, rests upon his own authority entirely; and when the dictum stands alone, unaccompanied by the principle on which it is founded, there is the more reason for searching out the principle, and inquiring whether that will comprehend the case which the dictum will comprehend. If it will not, we may conclude that the writer has expressed himself carelessly, and may withhold our assent from his proposition, in the broad terms in which he states it. In this case, Mr. Chitty makes it indispensable, that the defendant should have due notice of the dishonour of a note given, provisionally, in payment of a debt. In general, the person who delivers such note, has his recourse against some other person, and that recourse may be lost, if immediate measures be not taken to enforce the claim. In any case, there is an actual loss, or the law supposes a loss of the debt, and throws the hazard on him whose negligence has produced it. Mr. Chitty lays down the rule as if it did not depend on the fact, that there were other persons whose responsibility might be affected by the want of notice. The authorities on which he relies for this broad proposition, are, an act of parliament passed in the fourth year of the reign of Queen Anne, and Bridges v. Berry, 3 Taunt. 130. The act of parliament is not supposed to affect this case. It may, however, be proper to advert to it. It enacts that "if any person accept any bill, for and in satisfaction of, any former debt, &c., the same shall be esteemed a complete payment of such debt, if the person do not take his due course to obtain payment thereof," &c. Mr. Chitty may have founded himself on his construction of this statute: so far as he has done so, his authority is inapplicable to this case.

Bridges v. Berry was an action brought against the acceptor of a bill of exchange, who, when the bill fell due, obtained time and gave the holder a bill drawn and endorsed by himself on one Ivory, payable two months after date. This bill was dishonoured, and the plaintiff omitted to give notice of its non-payment to the drawer. At the trial, it was admitted, that the plaintiff could not recover upon it, but he insisted that it constituted no bar to a recovery of the original debt. The court determined that it was a bar; and if no reason had been given for the opinion, I should admit that the case supported the principle for which it is cited. But the court does give a reason; it is that the defendant himself had a right to sue other persons, and that the plaintiff, by not giving him due notice of its dishonour, had put it out of his power to recover what was due thereupon. This is not an argument mixed up with other arguments, conducing to the judgment of the court, but is the very principle of that judgment. It is the distinction taken in that case, and one cited in argument. It is the very foundation of the judgment, a fact, without which, the judgment would not have been rendered. I will take the liberty to say, that this decision, if not inconsiderately made, has been very carelessly reported. The defendant was the drawer and endorser of the bill, which was dishonoured. His recourse upon it, therefore, could have been only against the acceptor. His right to recover against the acceptor, depended on having funds in his hands, and the ability to recover, could be lost only by the insolvency of the acceptor. Neither of these essential facts is stated in the report, but the opinion of the court is founded on them, and in applying the case, we must suppose their existence. Here, then, is an actual loss sustained by the debtor, to the amount of the bill, and his exoneration from the original debt, is made to depend on that loss. The case.

therefore, does not support the broad principle which Mr. Chitty has extracted from it. I cannot forbear noticing the distinction taken between the right to recover on the bill which had been dishonoured, and on the original debt. It was admitted that no suit could be sustained on the dishonoured bill. Why? Because the law merchant applied to it, and the doctrine of notice discharged the drawer and endorser. If this necessarily applied to the debt, on account of which the bill was given, then there could be as little question in a suit for that debt, as on the bill. The law merchant would settle one case as positively as the other; but while the claim on the bill was abandoned as desperate, that for the original debt was defeated, only by the consideration of actual loss sustained, in consequence of the negligence of the creditor who was the holder of the bill. This distinction is still more strongly marked in Bishop v. Rowe and Bishop v. Bayly, 3 Maule & S. 362. The suit against Rowe, was on a bill of exchange, drawn and endorsed by himself, and accepted by J. Bayly. It was also endorsed by the plaintiff, and was discounted at bank for Tucker. The bill was dishonoured, and due notice given. The money was in part paid, and, for the residue, amounting to £100, Tucker drew a bill on Lewis, payable to the plaintiff, which the plaintiff endorsed, and carried to the bank. This bill was also dishonoured, but no notice given to Tucker. It was insisted that, because the remedy on the substituted bill was lost, no action could be maintained on the original debt. A verdict was taken for the plaintiff, and a rule to show cause why a new trial should not be granted, was discharged. Lord Ellenborough laid some stress on the circumstance, that the name of Tucker, though the person for whom the original bill was discounted, and who was, consequently, the debtor in fact, was not on it. Tucker was, therefore, a person intervening, and his bill was accepted, not for, and in satisfaction of a former debt, under the statute of Anne, but for the chance of its being productive. The plaintiff might have returned it presently, or within a reasonable time; and when the bill is dishonoured, unless it had been received in satisfaction of a former debt, he was not bound to go farther. Lord Ellenborough expressed great doubt, but was finally of opinion, that the original creditor was not bound to prove that notice was given to the drawer of the substituted bill, especially where the name of that drawer was not on the bill which constituted the original debt, for which the suit was brought. Le Blanc, J., was of opinion that no action could have been maintained on the substituted bill, for want of notice; but that the substituted bill was no payment of the original bill, unless something had been done to discharge the party to that bill. If he could have shown that by the laches of the plaintiff in the course of this negotiation, he had lost £100, or that he had been prevented from suing on the £100 bill, he might have made out a defence. Bayley, Jr., was of opinion, that if the defendant had proved that Tucker drew on funds in the hands of the drawee, the defence might have been sustained, but not having shown this fact, he had not made out his defence. This was, undoubtedly, a case in which the inclination of the court might be excusably in favour of the plaintiff, for justice was plainly and strongly with him. The principle, in this case, as in Bridges v. Berry, is, that if a bill be received as provisional payment, the omission to give due notice of its dishonour, deprives the creditor of his action on that bill, but does not compel him to take it as absolute payment, or deprive him of his action on the original debt, farther than damage has been sustained, actually, or in legal supposition, by the debtor. In both cases, the possible damage, was the loss of the funds which the drawer might have in the hands of the drawee. The court of common pleas seems to have assumed the existence of such funds; the court of king's bench required proof of the fact. They both show how entirely the question, whether a provisional, becomes an absolute payment, depends on circumstances, and how carefully all those circumstances are to be considered. Both these cases turn singly on the omission to give notice, unaccompanied with any positive act, on the part of the creditor; circumstances may undoubtedly raise a legal presumption against the person who is creditor, or agent, or both, which may charge him with the loss, if he is merely an agent, or convert a provisional, into an absolute payment, if he is a creditor. Some strong cases of this description have been cited, which, though decisions at nisi prius, are not to be absolutely disregarded.

In Edgar v. Bumstead, 1 Camp. 411, the plaintiff, an insurance broker, had paid money assured for an insolvent underwriter, not knowing his insolvency at the time. Lord Ellenborough was of opinion that it could not be recovered back. This opinion was placed on the known course of dealing between the insurance broker, the merchant, and the underwriter. The agent, if not acting del credere, would certainly not have been liable for the insolvency of the underwriter, yet, the act of voluntary payment, though made by mistake, fixed the debt due from the underwriter on him, and made it his own.

In Jameson v. Swainstone, 2 Camp. 546,[2] the plaintiffs, who were insurance brokers, had effected a policy for the defendant on a vessel, which was afterwards stranded, and the plaintiffs advanced considerable sums of money to refit her for the voyage. An average loss was adjusted in May, 1806, upon which the plaintiffs transmitted an account to the defendant, debiting him with their advances, and giving him credit for the average loss

[2] Reported in a note to Bousfield v. Creswell, 2 Camp. 545.

due from the underwriters. The balance due on this account was immediately paid. In the month of August following, which was the usual time of settling between the brokers and the underwriters, the plaintiffs called upon the underwriters, some of whom refused to pay, on the ground of insolvency. Different applications were afterwards made, but without success. In August, 1808, the plaintiffs transmitted another account to the defendant, claiming the sum due from the insolvent underwriters; on their refusal to pay, a suit was instituted, and at the trial, Mansfield, C. J., said, he was of opinion, that after so great a lapse of time between rendering the two accounts, the brokers, as between themselves and their principal, must be presumed either to have received actual payment from the underwriters, or to have settled with them some other way. For the purpose of recovering from the defendant, they should have apprized him in August, 1806, of the state of the underwriters, who, he was naturally led to suppose, had settled with the brokers; and their silence had deprived him, for the space of two years, of all opportunities of enforcing the policies of insurance. The verdict was for the defendant. This is a case of simple agency. The delay will be admitted to have been such as to justify the opinion of the assured, that the money had been received by the brokers. But the language of the judge shows clearly, that immediate notice of the failure of the underwriters ought to have been given, and we are left to conjecture, for what length of time the laches of the agent might have been excused.

These cases, as well as those of Andrew v. Robinson, 3 Camp. 199, and Ovington v. Bell, Id. 237, show on what nice circumstances these questions turn.

In the case under consideration, a bill of exchange was remitted to the plaintiffs by the defendant, who was a debtor to the plaintiffs, in a letter of the 25th of November, 1825, directing them to sell it, and to place the proceeds to his credit, with them. This bill was sold on the 7th of December, partly for cash and partly for negotiable notes, payable in March, 1826, which were endorsed to the plaintiffs, and placed by them in bank for collection. Notice of the sale was given to the defendant the succeeding day, and an account transmitted to him on the 13th of January, 1826, in which he was credited for the proceeds of the bill. The money and the notes constituted two distinct items of credit. Thus far, the conduct of the agents was unexceptionable. The bill was transmitted to them to be converted into available funds, and if they sold it upon credit, the notes might have been payable to the defendant, in which case, they must have been transmitted to him to be endorsed, and returned for collection, or might be made immediately payable to themselves. The latter course was more convenient to the parties, but it subjected the agents, however correct in itself, to any disadvantage connected with it. In March, 1826, the notes were regularly protested for non-payment. According to commercial usage, the plaintiffs ought to have given the defendant immediate notice of their dishonour, and thus have put it in his power to direct such measures, as his view of circumstances might suggest. Bayley, Bills, 174. No doubt he would have been guided by the advice of the plaintiffs; but he had a right to the exercise of his judgment, and the plaintiffs ought to have enabled him to exercise it.[3] The correspondence between the parties was regular and frequent, yet no hint was given of the non-payment of these notes, until the 13th of June, 1826. From the silence of the plaintiffs respecting these notes, through the whole of this correspondence, the defendant had certainly a right to presume that they were paid, and had undoubtedly a claim upon the plaintiffs, commensurate with their actual damages. The rule by which these damages would be ascertained, is not now the question. The defendant insists, that the payment has become absolute, without entering upon this inquiry. If the case stopped at this point, I believe my opinion would be against him. But it does not stop at this point.

It is unnecessary to discuss the intricate questions which would arise in this stage of

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[3] Opinion of Parsons, C. J., in Colt v. Noble, 5 Mass. 167: "A person appointed a factor to cause a bill to be presented, is intrusted with no other powers, and it is his duty to notify his principal. The factor may not know to which of the prior parties to the bill the principal intends to resort, and if he does, he may not know their domicils, as he has no interest in the bill or privity with the parties." The contest in that case was between the holders and the endorser. After the plaintiffs had purchased the bill of the defendant, then master of an American ship at Madras, and bound to Portsmouth, in New Hampshire, where his domicil was, they seasonably sent it to their agents, merchants in London to obtain payment of the drawers there. The agents in due time caused the bill to be protested for non-acceptance and non-payment, and in a reasonable time, returned the bill with the protest to the plaintiffs in Madras. The agents sent no notice to the domicil of the defendant, which they might have done in three months from the protests, but due notice was given by the plaintiffs from Madras. The question was, whether the agents of the holders in Madras were bound to give notice, &c. to the defendant, the endorser, or only to return the bills with the protests to their principals, who were seasonably to give notice? In the course of his opinion, Parsons, C. J., said: "It is admitted by the defendant's counsel, that if a bill be remitted in payment, the correspondent may return it to the principal, when dishonoured, and is not bound to give notice to any of the prior parties to the bill. This is true; but the reason is, that he considers himself a mere factor, until the bill be honoured. Then, as holder, he receives the money to his own use, crediting the principal with the payment. There is, therefore, no differnce between the cases of a bill sent to a factor to procure acceptance, and of a bill remitted to a correspondent in payment, if the bill be dishonoured." Judgment for the plaintiffs.

the cause, the notes being negotiable paper; because, my opinion turns chiefly on the acts of commission on the part of the plaintiffs, taken in connexion with this act of omission, and with another which will be hereafter noticed. On the 21st of April, 1826, James Hamilton visited the defendant in Petersburg, and received from him a very considerable payment on account of the debt to them, without mentioning the non-payment of the notes. This fact is a strong circumstance to show, that the plaintiffs relied on the notes. It is said not to be shown, that Hamilton was the partner who transacted the business, or that he was acquainted with the fact. This might be an important inquiry in a criminal prosecution; but in a civil action, brought by the firm of Hamilton, Donaldson & Co., all the partners, as residents of New York, must, I think, be presumed, unless the contrary be shown, to be residents, to be active partners, and to be acquainted with the whole transaction. The silence of Mr. Hamilton is the silence of the firm.

A still more important fact remains to be considered. On the 5th of May, 1826, the plaintiffs wrote a letter to the defendant, concerning their increased responsibility for him, in which they recognise the account transmitted in January, and re-state the balance between them, upon the principle that the notes were paid. This is, I think, equivalent to an account in which unconditional credit should be given for the notes. They were then dishonoured. The plaintiffs gave no notice of their dishonour, but credit the defendant for them. Had the relation between the parties been merely that of principal and agent, and the plaintiffs, instead of crediting the defendant for the notes, had paid their amount, the case would have been much stronger than that of Edgar v. Bumstead, because the money would have been paid, not through mistake, but with full knowledge of the insolvency of the parties to the notes. Between the payment of the money by a mere agent, and the transmission of what is equivalent to an acknowledgment of the payment of the notes, by a person who is at the same time agent and debtor, the distinction, I think, cannot easily be drawn. I have said that there is still another act of omission which has considerable influence on this case. That is, the failure to enforce the judgment which has been obtained, or to show, otherwise, the insolvency of those who are liable for them. I readily admit, that in general, it is sufficient for him who has received negotiable paper as a provisional payment, to present it for acceptance, and to demand payment, and in the event of the bill's being dishonoured, he may return it, and recur to his original claim. Had these notes stood in the name of the defendant, this course would have been sufficient. But they are in the name of the plaintiffs, and have been put in suit in their name. If the notes had been sent to the defendant with the name of the plaintiffs on them, they would, according to the cases, have been responsible. Le Feuvre v. Lloyd, reported in 1 Marsh. 318, and 5 Taunt. 749, is expressly in point. They have, by putting the notes in suit, placed their names upon them, and have disabled themselves from striking them off. They have taken upon themselves to collect the money by suit, and ought to show their inability to do so, before they can come against the defendant. The defendant has been prevented from exercising any power over these notes by compromise, or otherwise, by the acts and omissions of the plaintiffs. The plaintiffs have undertaken to collect the money by suit. Under these circumstances, I think, they cannot recover the amount of the notes in this action. Judgment must be entered for the lesser sum found by the jury.

HAMILTON (DICK v.). See Case No. 3,890.

Case No. 5,979.

HAMILTON et al. v. DILLIN.

[13 Int. Rev. Rec. 164.]

Circuit Court, N. D. Tennessee. April Term, 1871.[1]

FACTORS—RIGHT OF ACTION—ACT JULY 13, 1861—ACT JULY 2, 1864—EXTORTION.

1. Factors who are compelled to pay an illegal exaction to an officer of the government for permission to ship produce in their charge are entitled to maintain a suit to recover the amount of such exaction in cases where the owners themselves might do so.

2. The regulations of the secretary of the treasury made in pursuance of the act of July 13, 1861 [12 Stat. 255], requiring, as a condition precedent to the shipment of cotton from the disloyal to the loyal states during the war, payment of four cents per pound upon the cotton to be so shipped, were legal and valid.

[See note at end of case.]

3. Had these regulations been invalid, the act of July 2, 1864 [13 Stat. 375], was sufficient to adopt and ratify them, and to legalize the action of the officers of the treasury department thereunder.

[See note at end of case.]

4. If illegal exactions are made by officers of the government involving payment of money, if the money is paid without objection it cannot afterward be recovered.

This was an action of assumpsit brought to recover $281,488 48, being the aggregate of payments of four cents per pound upon cotton made by plaintiffs [A. Hamilton & Co.] between August 13, 1863, and June 11, 1864, to defendant [J. R. Dillin], as surveyor of customs at Nashville, for permits to ship the cotton from Nashville to the loyal states. This requirement was made under regulations prescribed by the secretary of the treasury under authority conferred upon him by the act of July 13, 1861, with regard to intercourse licensed by the president between the loyal

[1] [Affirmed in 21 Wall. (88 U. S.) 73.]

and disloyal states. The cotton upon which these payments were made was shown to have been in charge of plaintiffs as owners or factors of the owners. It was not shown which. No protest was made to the exaction at the time of making any of the payments. The money had been duly paid into the treasury before the suit was commenced. It was conceded that during the period in question the requirement was generally known, and that defendant would not have permitted any shipment without compliance with it, and that the result of any attempt to evade it would have been the seizure and condemnation of the cotton involved.

For the plaintiffs it was contended that they were entitled to maintain the action as factors even if their factorship had terminated before the commencement of the suit; also, that the exaction imposed by the regulations complained of was authorized by the act of July 13, 1861; that if congress had intended to authorize such an exaction, it was not competent for them to do so, inasmuch as the same was in reality a tax, and the imposition thereof an act of legislative power which congress could not constitutionally delegate; that the act of July 2, 1864, did not intend to ratify the regulations in question, and that it would not have been competent for congress to have done so, for the same reason which precluded the original grant of the power; also, that the payment of the money under circumstances which would, as it was well known, have made any protest unavailing, was in essence a compulsive payment, since the plaintiffs were compelled to make the payment in order to obtain permission to ship their cotton.

Upon the other hand, is was contended that there could be no recovery by plaintiffs in any view of the law upon the other points, except in the character of owners of the cotton upon which the payments had been made, and that they had not shown that they were such owners, but only that they were owners or factors of the owners; that it had not been shown that, at the commencement of the suit, plaintiffs were even the factors of any of the owners, and that the mere fact of having been six years previously such factors for a day or a week could not empower them to maintain the suit after the business of the factorship had been closed, and perhaps all their principals had died. But that aside from this, plaintiffs could not recover because they had not objected to the requirement complained of at the time, nor indeed until long after the money had been paid into the treasury, and so the payments had been in the view of the law voluntary. And, further, that independently of the foregoing, the regulations complained of were perfectly valid. That the act of July 13, 1861, conferred upon the secretary of the treasury the power to make regulations for the conduct of the trade to be licensed between the loyal and disloyal states by the president. That the power to regulate included the power to make the charge complained of. That under the power to "regulate" commerce contained in the constitution, congress exercises the power to regulate navigation, which included the imposition of tonnage, light-money, etc., and the requirement of steamboats and vessels engaged in the coasting trade to take out annual licenses, involving payments of money; so that it appeared that the word "regulate" included the requirement of money. That the intention of congress was plain to confer the power upon the secretary, for aside from the breadth of the term "regulations" employed by them, the action of the secretary himself, implying his own construction of the power, was entitled to great consideration in view of his eminent character, and also in view of the fact that he was of course in familliar conference at the time of the passage of the act with the members of congress; also from the fact that the power was exercised immediately under the eyes of congress without provoking any expression of disapproval upon their part, and, what put this question beyond all controversy, from the fact that by the act of July 2, 1864, congress made mention of the moneys collected under the regulations complained of, and provided for their disposition. That the act of July 2, 1864, would have ratified the regulations and the action had under them even if these had not been originally legal; and cases were adduced showing that certain actions of municipal corporations ultra vires had been held to have been retroactively made valid by subsequent legislation.

As to the incompetency of the original grant, or the subsequent ratification, for the reason that neither would have involved the delegation of legislative power, it was urged that while the power of taxation was a legislative power and insusceptible of delegation, the requirement in question was not a tax. That it was made in the exercise of the war power in the enemy territory, and was such an act as without the act of July 13, 1861, the president might have done as commander-in-chief of the army and navy, and the regulations were approved by the president. It had been held that in time of war the president might erect a military government in conquered territory, with courts of justice, and power even to lay and collect duties. It had been settled that the late civil war involved while it lasted all the effects and consequences of a war between independent nations, though when it was over rebels might individually be called to account as traitors. During the war, then, Tennessee being enemy country and intercourse between its inhabitants and the rest of the states unlawful, the president might have licensed trade under proper restrictions between the people in localities firmly occupied in the enemy territory and those supporting the government. That a measure bearing upon the conduct of the war and in mitigation of its general effects

was as truly a war measure as one intensifying these effects. That the requirement of payment of proper fees and charges for a privilege which might be withheld altogether from enemies, was certainly not a restriction beyond the president's power. If a military government emanating from him might impose duties on imports, he might certainly require payment of such fees for the privilege to trade granted to enemies. That the act of July 13, 1861, was restrictive of the president's powers, who but for this might have licensed the trade in question absolutely, while the act required it when licensed to be carried on under the regulations imposed by the secretary. But it must be constantly kept in mind that the power in question would have existed without the act, and that therefore the plaintiffs must resort to the act to restrict the power; and when the act is considered, so far from restricting this power, it contains a declaratory grant of the power to the secretary of the treasury, who was selected to frame the regulations because they were to contribute to his department, but for which, doubtless, the secretary of war would have been chosen for this purpose.

H. H. Harrison and Edward Jordan, for plaintiffs.

R. McP. Smith, U. S. Atty., and J. R. Dillin, for defendant.

THE COURT (charging jury). This case is one of great importance, both from the amount in controversy and the character of some of the principles involved, which affect many persons residing in the Southern states. I regret that the briefness of the time intervening between the trial of the case and my enforced departure to Memphis to open the courts there at the appointed time for the Western district, has precluded a more elaborate consideration than I have been able to bestow upon the points discussed by the counsel upon both sides, and I would hardly be willing now to act in the premises if I were not satisfied that, whatever the result may be here, the unsuccessful party will renew the contest in the supreme court of the nation, a legally infallible tribunal, upon which, therefore, will be devolved the responsibility of disposing of the case.

The questions to be passed upon by the court have been argued by the counsel upon both sides with surpassing ability. They have been presented in every aspect, and illustrated by luminous and exhaustive reasoning and an ample array of authority. Counsel have left nothing undone which could have been done to establish their respective positions.

The first point in the order of the contest is whether plaintiffs are entitled to maintain this suit in the alternative character of owners or factors. It is objected that they can recover, if at all, only in the character of owners of the cotton upon which the requirement of four cents per pound was paid by them, and that, not being shown to have been such owners, but only factors of the owners, they are in no better position than if they had been factors in respect of all of the cotton in question. I do not regard this point as well taken. If as factors in charge of the cotton the plaintiffs were required to pay and did pay for permits to ship the same to the loyal states, and the exaction of the money so paid were illegal, I think that they became entitled to recover the aggregate of the money thus paid, unless there is some reason to the contrary which would preclude a recovery by the owners themselves.

I come now to the main point in controversy, one of vastly more consequence than that just disposed of. Were the regulations of the secretary of the treasury, approved by the president, which imposed the requirements in question, illegal and void? These regulations were made in pursuance of authority conferred by section 5, Act July 13, 1861, which provides that, under certain circumstances, the president might issue his proclamation declaring the inhabitants of certain states in insurrection against the United States, and that, thereupon, intercourse between them and the rest of the United States should be unlawful, except such as might be licensed by the president and carried on under regulations prescribed by the secretary of the treasury. By these regulations, which were approved by the president, permits were required for all shipments to be granted by officers appointed at various points by the secretary of the treasury. The surveyor of customs, the defendant in this cause, was the only officer at Nashville authorized to grant a permit for the shipment of cotton therefrom to the loyal states, and certain "fees" were required to be paid before the permit was to be granted. Section 42 of the regulations of September 11, 1863, provided that "the following fees were prescribed," and, among others, "for each permit to purchase cotton in any insurrectionary district and to transport the same to any loyal state per pound ten cents," etc.

It is contended that the power vested by the act of July 13, 1861, in the secretary of the treasury to make regulations respecting the trade to be licensed by the president, was not intended to include the power to impose these charges, and that congress had no constitutional power to authorize the secretary to impose them, because, it is said, the requirement was in essence a tax, and the power of taxation, being legislative in its character, is not susceptible of delegation to an executive officer. And it is denied that the act of July 2, 1864, intended to adopt and ratify the regulations in question and the action of the officers of the treasury department thereunder, while it is contended that such an effect cannot have been produced, even if this was the intention of the act, for the same reason which would have

invalidated the original grant of the power if attempted to be made. Certainly the act of July 13, 1861, did not attempt to confer upon the secretary of the treasury the power to lay a tax. And it is conceded that such a power could not have been constitutionally conferred upon him by congress, or retroactively legitimated if assumed to be exercised by him. The argument that the requirement in question was a tax was very ingenious, and at the time impressed me very strongly. But upon reflection I am unable to consider this as a tax. A tax is defined to be a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state. Taxes are uniform throughout the country. But the charge in question was only to be enforced in the states declared to be in insurrection. Let us consider their situation at the time. The president, by his proclamation issued in pursuance of the act of July 13, 1861, had declared the inhabitants of the state of Tennessee, among other states, to be in insurrection against the United States. It is perfectly well settled that they were, in the view of the law, public enemies of the United States while the war existed. The effects and consequences of our Civil War while it continued were precisely the same as if it had been a war between two independent nations. By virtue of the act of July 13, 1861, and, aside from this, as a consequence of the war, intercourse between the people of Tennessee and those of the loyal states was prohibited. The state was, as it were, outside of the government. It was enemy territory. Independently of the act of July 13, 1861, the president as the chief executive of the nation, the commander-in-chief of the army and navy, had power, under proper circumstances, in the exercise of a sound discretion, to mitigate the general effects of the war by permitting the inhabitants of localities of the enemy territory firmly occupied by the national forces to trade with the loyal states. He had the right to grant this privilege, for such it was, under restrictions. He might prescribe as a condition the payment of proper fees and charges. The regulations in question were approved by the president. The war did not, of course, create any new powers in the president not previously contained in the constitution. But powers which slumbered in peace awoke in time of war. A step in mitigation here and there of the effects of the war was as truly a war measure as one in the contrary direction. It cannot be said that the fees charged here were in excess of the power with regard to the trade in question. It is clear that they were not ratable charges upon the citizens of the United States in normal relation to the government, and so within the definition of a tax. They were fees charged for the privilege of trading in the products of the enemy country; and shipping these to that portion of the country in which the authority of the government was acknowledged and upheld. Their imposition was administrative in its character, being the exercise of the war power in the enemy country. And this would have been lawful without the act of July 13, 1861. But this act expressly authorizes the secretary to make regulations governing this trade. This provision certainly does not take away the power to impose the charges which existed without the provision. In the regulations made in pursuance of this act, these charges are denominated "fees." I cannot doubt that it was the intention of congress to confer the power in question. The power to make regulations is broad enough to include it. The authority of the secretary's own construction, in view of his eminent character, is great, and then he was, of course, at the time of the passage of the act, in familiar intercourse with members of congress who passed it, and the regulations were approved by the president who approved the act. And, besides this, the power was exercised immediately under the eyes of congress without any expression of disapproval upon their part, both by the secretary in office during the period in question, and by his successor, whose construction was similar to his predecessor's. And lastly, in the act of July 2, 1864, congress expressly mention these fees and provide for their disposition, thereby clearly intimating their knowledge in regard to the collection of the fees under the regulations and approving thereof. In section 11 of the last-mentioned act they provide that the expenses of the execution of the act shall be defrayed "from the proceeds of the fees imposed by said rules and regulations," etc. This act not only puts to rest any lingering doubt as to the intention of congress in conferring the power to make the regulations in question, but, had the action of the secretary in making them been in excess of the power conferred, it would have operated to adopt and ratify the regulations and the action thereunder, and to render them valid ab initio. Inasmuch as I have already stated that I regard the powers in question as possessed by the president without the act of July 13, 1861, and as not being legislative in their character, it follows that unless taken away by the act they existed when exercised. We have seen that the regulations were approved by the president. But so far from taking away the power, the act of July 13, 1861, expressly confers it upon the secretary of the treasury by empowering him to make regulations to govern the trade to be licensed by the president; and if not possessed by the president, the power was one which it was competent to grant, or to adopt and ratify if exercised without having been previously granted. The secretary acting as the agent of the government, but in excess of his powers, his action might be subsequently adopted and ratified by the government.

Upon the third point discussed I am compelled to the conclusion that the payment of the money in question by the plaintiffs in

compliance with the defendant's demand without any protest or exception, was a voluntary payment, and the money cannot now be recovered. Both parties evidently regarded the requirement as perfectly legal. The money was duly paid into the treasury by the defendant. Conceding that the exaction was unlawful, it was clearly a case of a mutual mistake of law. It was acquiesced in by plaintiffs, and they cannot, several years afterwards, be heard to complain. I confess that the strong array of authorities adduced by plaintiffs' counsel to show that the payment was compulsive appeared to me, at the time, almost overwhelming; but the case of Elliott v. Swartwout, 10 Pet. [35 U. S.] 137, cited by the district attorney, appears to me to be precisely in point. I cannot distinguish the payment here from that in that case.

The jury returned a verdict for defendant.

The case will be taken to the supreme court of the United States.

[NOTE. A writ of error was taken by the plaintiff upon exceptions to this charge. The judgment of the court below was affirmed in an opinion by Mr. Justice Bradley.—21 Wall. (88 U. S.) 73,—holding that: (1) Under the authority of the act of July 13, 1861, the president and the secretary of the treasury imposed the above condition upon the transportation of cotton. (2) The position of the plaintiffs was a voluntary one, and their application for permission to engage in the trade and their payment of bonus without compulsion take the case out of that class ordinarily constituting the rule as to voluntary payments. (3) The rule of construction of an act of congress depends in some sort upon the nature of the subject-matter. (4) The power of regulation in such a case is to be taken in its broadest sense, and * * * included the power to impose such conditions as the president and secretary should see fit. (5) The conditions imposed were not in the exercise of the taxing power, but of the war power; hence they were not void as conflicting with certain revenue laws; and that congress, by the act of March 12, 1863, § 4 (12 Stat. 820), clearly recognized the president's above demarcation of insurrectionary territory.]

Case No. 5,980.

HAMILTON et al. v. EATON.[1]

[1 Hughes, 249;[2] 2 Mart. (N. C.) 1; Mart. (2d Ed.) 83; N. C. Cas. 77.]

Circuit Court, D. North Carolina. June, 1792.

CONFISCATED DEBTS—TREATY OF 1783.

When, during the war of Independence (1775 to 1783), a debt due from a citizen of North Carolina to a British subject had been confiscated to the use of that state by law of its legislature and been paid to its commissioners by the debtor, *held*, that under that clause of the treaty of peace of 1783, by which it had been stipulated that citizens of either side should meet with no lawful impediment in the recovery of bona fide debts contracted before the date of the treaty, judgment must be rendered for the plaintiff in a suit brought for such debt.

This was an action of debt upon a penal bill bearing date the 11th day of August, 1776, for the penal sum of eight hundred pounds, proclamation money, to be discharged by the payment of four hundred pounds, like money, payable on the first day of August, 1778, with lawful interest from that date. The plaintiffs, Archibald and John Hamilton, trading under the firm of Archibald Hamilton & Co., were subjects of Great Britain, but were residents of North Carolina before and at the time of the Declaration of Independence, July 4th, 1776. The defendant, John Eaton, was a citizen of the United States, and of North Carolina, and was a citizen of North Carolina before the said Declaration of Independence. There were several pleas to this action. It is useless, as the case turned on that, to state any other than the first and principal one of those pleas, which was, that a law of the state had required that all persons, subjects of the state, living therein, who had traded to Great Britain or Ireland, should take an oath of allegiance or depart out of the state; that the plaintiffs had departed out of the state, leaving their debt due them; that another law of the state had appointed commissioners to sequestrate debts of citizens due to subjects of Great Britain to the use of the state, which commissioners had duly sequestrated this debt, which the defendant had paid to them for the use of the state; and that, therefore, by the laws of war and the law of nations, the defendant did not owe this debt. To this plea it was replied, that by the treaty of peace, which was entered into between Great Britain and the United States, which terminated the war of the Revolution in 1783, it had been stipulated by the two powers, that "creditors on either side should meet with no lawful impediment to the recovery of bona fide debts heretofore contracted." To this replication there was a demurrer, and there was a joinder in the demurrer.

Mr. Davie, for plaintiffs.

Mr. Baker, for defendant.

Before ELLSWORTH, Circuit Justice, and SITGREAVES, District Judge.

SITGREAVES, District Judge. This is an action of debt brought by the plaintiffs, to recover of the defendant on an obligation made in the year 1776. The defendant has pleaded four several pleas in bar, which are now for the decision of the court by demurrer. I shall consider of the case as it appears by the first plea, which places the defendant on the most advantageous ground, as a decision on that will probably govern all the cases arising out of the subsequent pleas. The case as it appears by the first plea is as follows: The plaintiffs were merchants, residents of North Carolina, before and at the time of the Declaration of Inde-

[1] This report of the case is much condensed from a very elaborate report of the pleadings, argument of counsel, and opinions of judge, in pages 1–77, pt. 2, Francois Xavier Martin's Notes of North Carolina Cases, 1797.

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

pendence. By an act of the legislature of North Carolina, passed in April, 1777, it was among other things enacted "that all persons being subjects of this state, and now living therein, or who shall hereafter come to live therein, who have traded immediately to Great Britain or Ireland, within ten years last past, in their own right, or acted as factors, storekeepers, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, shall take an oath of abjuration and allegiance, or depart out of the state." By the same act, such persons were permitted to sell their estates, to export the amount thereof in produce, and to appoint attorneys to sell and dispose of their estates for their use and benefit. The plaintiffs falling within the description of persons contemplated by this act, and refusing to take the oath, departed the state, the debt which is the subject of the present suit then existing. By subsequent acts of the legislature, all the estates, rights, properties, and debts of certain persons, among which the plaintiffs are specially named, are declared to be confiscated, and the debts due to such persons are directed to be paid to certain commissioners, to be appointed by the county courts for that purpose, by all persons within the state owing the same, under pain of imprisonment, which payment it is declared shall forever indemnify and acquit the persons paying the same, their heirs, etc., against any future claim for the money mentioned in the receipts or discharges of such commissioners. In obedience to those acts, the defendant paid the debt in question to the commissioners authorized to receive it, and relies on that payment as legal, and a full and sufficient discharge; the plaintiffs admitting the fact of payment as legal on the construction of the treaty of peace, the constitution of the United States declaring that treaty to be part of the law of the land. The counsel for the plaintiffs in support of this claim has, in the course of his argument, presented to the view a doubt whether the debt in the present question has been confiscated in a strictly legal sense, by any of the acts called confiscation acts, and has urged the doubt strenuously, and with much force of argument, contemplating them as a body of penal law, and of course subject to the legal rules of construction in such cases. The observations on that point would merit much attention, but I deem it not absolutely necessary to investigate that question in forming an opinion of the present case, and shall confine my observations solely to the law and the facts, as they arise out of the pleadings in the first plea of the defendant, which admits alone of this question, viz.: Are the plaintiffs barred of recovery?

It would appear quite unnecessary to inquire whether congress, under whose authority the treaty was negotiated, was vested by the state with a power competent to enter into such a contract, had not part of the argument of the defendant's counsel seemed to require it. No one will doubt if they had the power, the treaty consequently became obligatory on the people of the United States when made and duly ratified. Whatever agreement the states may have entered into at the Declaration of Independence, and to what purposes and extent that agreement may or may not have bound them, as a confederated body, it is clear that at a subsequent period, and previous to the negotiation of this treaty, they by their delegates in congress formed and entered into a solemn compact, by which they plight and engage the faith of their constituents to abide by the determination of the United States in congress assembled on all questions which by the confederation are submitted to them; and that the articles thereof shall be invariably observed by the states. Among many other portions of sovereignty which the states thought proper to deposit in that confederated head was the sole and exclusive right and power of determining on peace and war (except in certain cases specially enumerated), of sending and receiving ambassadors, entering into treaties and alliances. No words can be more comprehensible or express relative to the point in question; nor is there offered to my mind the least room of doubt. Admitting, for argument's sake, what has been contended, that the ministers who negotiated the treaty exceeded the powers granted them, certainly the ratification of that instrument by congress confirmed and legalized all that had been done by them; and if it could be supposed, as has been said, that congress in the ratification of it exceeded the powers vested in them by the state, the act of assembly of this state passed in 1787 must have extinguished every scintilla of doubt as to its validity and obligatory force on their citizens. That act is a perfect recognition of the whole treaty, declares it to be part of the law of the land, and directs the judges to decide accordingly. The last-mentioned act must surely be sufficient to satisfy the mind of the most scrupulous and skeptical. For myself, I do not hesitate to declare that it adds nothing to the validity and legality of the treaty; that its ratification by congress was alone sufficient, and that the act of assembly of the state was superfluous.

The counsel for the defendant has contended that by the operation of the acts of confiscation and the payment into the treasury, the plaintiffs were wholly divested of their right, and the same, if existing at all, was vested in the state. This forms a material part of his defence, and if it had been clearly evinced that the right of the plaintiffs was wholly extinguished by the operation of the confiscation acts, and could not possibly be revived or restored by any subsequent act of the state or the nation, it would follow of course that they could have no demand against the defendant. In sup-

port of this argument, it is said (4 Bac. Abr. 637) that all acts done under a statute while in force are good notwithstanding a subsequent repeal. I am ready to admit the principle in its fullest extent, in the exposition of a statute or municipal law of any particular state. It is consonant with reason, and is justified by the necessity of the case. It prevents much confusion and embarrassment, and insures a ready submission to the laws, by a confidence in the security impliedly promised to such obedience. If the treaty was now to be considered as an act of the state, and emanating from the same authority only that produced the acts of confiscation, this reasoning might be solid. But such an instrument as the treaty of 1783 cannot be subject to the ordinary rules of construction which govern the exposition of statutes of a particular state. They have for their object the regulation of the rights of a distinct community or society only, whose interests being similar, are equally affected by a uniform regulation of their rights; who are alike united by the allegiance due to and protection from the same government. That is not the case with a compact formed between two separate and distinct nations, relative to certain specified subjects which involve interests of their respective citizens or people, unavoidably clashing with each other. The one is an act of a state, but a component part of the nation providing for the benefit of its own citizens. The other a compact of the whole nation (of which that state is but a part) with another nation which must necessarily control all acts issuing from the inferior authority which might contravene it. This is evinced by that plain and strong expression in the constitution of the United States, which declares that all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

Taking it for granted, then, that the treaty is not to be governed, when in opposition to particular laws, by the rigid rules of the common law, nor to be restrained in its operation by any statute of any particular state, "but that it ought to be interpreted in such manner as that it may have its effect, and not be found vain and illusive," I will proceed to consider of the operation of the 4th article: "Art. 4th. It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." This article appears to me so clear, precise, and definite that one would be at some loss to select other words to render it more so. But it has been contended by the defendant's counsel that by a true construction of this article, it will appear much less general than the expressions would warrant; that it is a provision for real British subjects only, that is, persons resident in Great Britain at the commencement of the war; a term used in contradistinction to many other descriptions of people who in the course of the war took part with that nation; and that this construction is justified by the term "sterling money." In order to support this exposition a reference has been had to the 5th and 6th articles. The 4th article contains the only stipulation with respect to debts. In the whole instrument it is mutual and general in its expression, not limited or restrained by any particular words to any description of persons, as is evident in the 5th article. If that had been in the contemplation of the parties, they could not have overlooked the necessity for these distinctions, nor are we at liberty to presume it. In the next article the distinction is made with great accuracy with regard to those who may endeavor to procure a restitution of their lands and other property. With respect to the expression sterling money, it appears to me that was probably concluded on as a standard whereby to estimate the value of money due, it being no doubt apprehended that a depreciated paper medium circulated in many states of the Union, the nominal sum in which might not produce the intrinsic value of the debt due.

Another construction has been placed on this article, equally, in my opinion, unfounded with the foregoing. It has been said the article was only intended to take off from British subjects their disability as alien enemies to sue. Every one knows that disability can only exist during the continuance of a war; it would have been, therefore, unnecessary to provide for it in a treaty of peace, when it is obvious the peace itself, agreeably to the long-established principles of law, removed all such disability without any special stipulation. The word "recovery" admits of such an idea. The terms "sue" and "recover" have very different import in practice. The difference is daily exemplified in our courts, and the distinction appears evident in the body of that instrument. In the latter part of the 5th article it is stipulated that certain persons shall meet with no lawful impediment in the prosecution of their just rights. In the 4th article the words are, "no lawful impediment to the recovery of their debts." The distinction is obvious, and the terms aptly applied in each case. In the former, relative to lands and other property which had been confiscated, and a restoration of which entirely depended on the liberality of the legislatures, the term "recovery" would have been improper; in the latter, in which a payment to the creditor was positively stipulated, the expression is correct. Vattel says (page 369): "When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty presents; to go elsewhere in search of conjectures, in order to

extinguish or restrain it, is to endeavor to elude it." It is therefore my opinion that this article does control the operation of the acts of confiscation relative to debts; that the plaintiffs in this case are entitled to recover on the first demurrer, the plea in that case being the strongest ground of defence made by the defendant; that, therefore, judgment be given for the plaintiffs on each of the demurrers. The state, who has compelled the payment from the creditor by a threat of severe punishment, will certainly feel bound by every principle of moral obligation to reimburse, in the most ample manner, all those who have made such payments. In addition to the moral tie that it is bound by, a solemn promise so to do is clearly expressed by an act of the legislature. I have only to observe that I have considered this case as of the utmost importance; that I have given it all the attention and consideration in my power to bestow at this time and place; that if my opinion is founded in error, which is possibly the case, happily for the defendant there is a higher tribunal where the error may be corrected.

ELLSWORTH, Circuit Justice. It is admitted that the bond on which this suit is brought was executed by the defendant to the plaintiffs, and that the plaintiffs have not been paid. But the defendant pleads that since the execution of the bond a war has existed, in which the plaintiffs were enemies, and that during the war this debt was confiscated, and the money paid into the treasury of the state; and the plaintiffs reply that, by the treaty which terminated the war, it was stipulated that creditors "on either side should meet with no lawful impediment to the recovery of bona fide debts heretofore contracted."

Debts contracted to an alien are not extinguished by the intervention of a war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it, and also because a transfer of the treasure from the country to his nation would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities these reasons, and the suspension of the remedy, cease. As to the confiscation here alleged, it is doubtless true that enemy's debts, so far as consists in barring the creditor and compelling payment from the debtors for the use of the public, can be confiscated, and that on principles of equity, though perhaps not of policy, they may be, for their confiscation, as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted, not from the duty to which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and, indeed, a strong interest in supporting. Civil war, which terminates in a severance of empire, does, perhaps less than any other, justify the confiscation of debts, because of the special relation and confidence subsisting at the time they were contracted, and it may have been owing to this consideration, as well as others, that the American States, in the late Revolution, so generally forbore to confiscate the debts of British subjects. In Virginia they were only sequestered; in South Carolina all debts, to whomsoever due, were excepted from confiscation; as were in Georgia those of British merchants and others residing in Great Britain. And in the other states, except this, I do not recollect that British debts were touched. Certain it is that the recommendation of congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended among others, to the debts of the plaintiffs, providing, however, at the same time, as to all debts which should be paid into the treasury under that act, that the state would indemnify the debtors should they be obliged to pay again.

Allowing then, that the debt in question was in fact and of right confiscated, can the plaintiffs recover by the treaty of 1783? The 4th article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." There is no doubt but the debt in question was a "bona fide" debt, and theretofore contracted, i. e., prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditor should have been on different sides with reference to the parties to the treaty; and, as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the king of Great Britain; and it is pretty clear, from the pleadings and the laws of the state, that they were so. It is true, that on the 4th of July, 1776, when North Carolina became an independent state, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclination. But the state afterwards, in 1777, liberally gave to them with others similarly circumstanced, the option of taking an oath of allegiance, or of departing the state under a prohibition to return, with the indulgence of a time to sell their estates, and collect and remove their effects. They chose the latter, and ever after adhered to the king of Great Britain; and must therefore be regarded as on the British side. It is also pertinent to the inquiry whether the debt in question be within the before recited article, to notice an objection which has been stated by the defendant, viz.,

that at the date of the treaty, what is now sued for as a debt, was not a debt but a nonentity; payment having been made, and a discharge effected under the act of confiscation, and therefore that the stipulation concerning debts did not reach it. In the first place it is not true that in this case there was no debt at the date of the treaty. A debt is created by contract, and exists until the contract is performed. Legislative interference to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently enforced. Secondly, it was manifestly the design of the stipulation that where debts had been theretofore contracted there should be no bar to their recovery from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction would be to leave creditors to a harder fate than they have been left to by any modern treaty.

Upon a view then of all the circumstances of this case, it must be considered as one within the stipulation that there should be "no lawful impediment to a lawful recovery." And it is not to be doubted that impediments created by the act of confiscation are lawful impediments. They must therefore be disregarded if the treaty is a rule of decision. Whether it is so or not remains to be considered. Here it is contended by the defendant's counsel that the confiscation act has not been repealed by the state; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged. As to the opinion that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will and of high authority, but it is controlled by the public will subsequently declared. Hence the maxim that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty, when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will as much so as a statute can be. And it does, therefore, of necessity annul any prior statute so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made on the part of the United States, by a congress composed of deputies from each state, to whom were delegated by the articles of confederation, expressly, "the sole and exclusively right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act and law of every state. If, however, a subsequent sanction of this state was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this state, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789 was adopted here the present constitution of the United States, which declared that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land, and that the judges in every state should be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding. Surely, then, the treaty is now law in this state, and the confiscation act, so far as the treaty interferes with it. is annulled. Still it is urged, that annulling the confiscation act cannot annul the defendant's right of discharge, against which the act was in force. It is true, that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the state, the rights of individuals. And they are afterwards indemnified or not according to circumstances. What is most material to be here noted is that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments," all of which in this case, the treaty, as I apprehend, removes. Let judgment be for the plaintiffs.

HAMILTON (FELICHY v.). See Case No. 4,719.

Case No. 5,981.

HAMILTON v. FRANKLIN et al.

[4 Cranch, C. C. 729.] [1]

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

SALE—RECORDED BILL OF SALE—SUBSEQUENT PURCHASERS WITHOUT NOTICE.

An absolute bill of sale of personal property, where the possession does not accompany and follow the deed, is void, at common law, as to subsequent purchasers without notice, although acknowledged and recorded agreeably to the Maryland act of 1729, c. 8, §§ 5, 6.

Detinue for a slave. Both parties claimed under one Howard; the plaintiff [William Hamilton] by virtue of a bill of sale made in

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

Charles county, in Maryland, in 1829; the defendants [Franklin and Armfield] under a recent sale in Alexandria, D. C. The bill of sale to the plaintiff, which was absolute upon its face, was acknowledged and recorded according to the Maryland act of 1729, c. 8, §§ 5, 6, but the possession remained in the vendor until his sale to the defendants, who were bona fide purchasers, for valuable consideration, without notice of the plaintiff's claim.

Mr. Taylor, for defendants, contended that as the possession did not accompany and follow the deed, it was, in law, fraudulent as to the defendants. And of that opinion was the court (THRUSTON, Circuit Judge, contra).

CRANCH, Chief Judge, cited the case of Durham v. Ashton [Case No. 4,192], in this court, at November term, 1832, and stated that the ground of that opinion was that such a deed was void at common law, as decided by the supreme court of the United States in the case of Russell v. Hamilton, 1 Cranch [5 U. S.] 309; that the Maryland statute did not repeal the law in that respect, but was in affirmance of it; and that the acknowledging and recording of a deed void at common law, did not make it valid.

HAMILTON (GRANT v.). See Case No. 5,695.

Case No. 5,982.

HAMILTON v. IVES et al.

[6 Fish. Pat. Cas. 244;[1] 3 O. G. 30.]

Circuit Court, E. D. Michigan. Jan. 16, 1873.[2]

PATENTS—COMBINATION—DRAWINGS—ATTORNEY FEE.

1. The claim of Hamilton's patent, granted December 5, 1865, for "improvement in saw-mills," being, "giving to the saw, in its downward movement, a rocking or rolling motion, by means of the combination of the cross-head working in curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin, substantially as described," and the defendants using a like combination, but in which the upper guides are set with the lower ends two inches forward of a perpendicular line, let fall from the top ends—the charge of the judge "that the plaintiff is entitled to the protection of his patent, no matter whether the curved slides are set in one line or another, provided the combination is otherwise complete, that it is a mere matter of adjustment, which any competent mechanic skilled in the art would understand and adopt" is without error.

[See note at end of case.]

2. The fact that in the drawings of the patent the curved guides are shown set in a perpendicular position, is not of itself sufficient to limit the claim of the patentee to that position of the guides.

[See note at end of case.]

3. The drawings are, no doubt, a part of the description of the thing patented, but they must be considered in connection with the specification.

[Cited in Steam-Gauge & Lantern Co. v. Ham Manuf'g Co., 28 Fed. 619.]

4. When the invention patented consists of a combination of old elements to produce a new result, mere matters of adjustment of the individual elements are not limited or controlled by the drawings, unless (1) they are expressly so limited by the specification as well; or (2) such limitation and control are necessary to maintain the integrity of the specifications, taken as a whole, or of some essential part thereof; or (3) such limitation and control are essential to produce the result claimed.

[See note at end of case.]

5. The description in the specifications, of the operation and effect of each separate element or part of a patented combination, must be read and construed with reference to the entire combination and its results, and the effect which the operation that each element or part has upon that of each of the others.

[See note at end of case.]

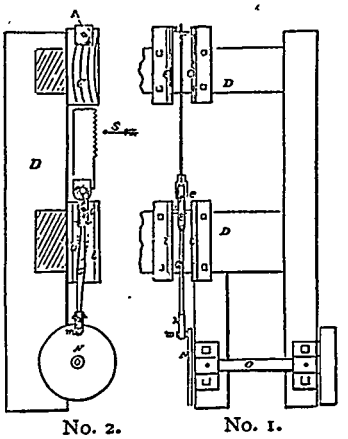
6. It is well established that in the effort to ascertain the intention and meaning of the specification and claims, they are to be viewed in a liberal spirit, that, if possible, the object of the inventor or patentee may be carried out. Mere rigid technicalities are to be set aside, unless there is clear legal necessity for sustaining them. The cases on this point cited.

[Quoted in Brush Electric Co. v. Electric Imp. Co., 52 Fed. 974.]

[See note at end of case.]

7. The motion being overruled, an attorney fee of ten dollars is allowed the plaintiff.

In equity—Motion for a new trial. Suit brought upon letters patent for "improvement in saw-mills," granted Palmer Hamilton, December 5, 1865, No. 51,310. In the engravings, Fig. 1 represents a front elevation and Fig. 2 a vertical section of a portion of a saw-mill, containing the patented improvements. D, D is the frame-work, to which the guides are fastened; C, C, the curbed upper guides; t, t, the straight lower guides. The patentee states in his specification that the object of his invention is to impart to the saw of a saw-mill a rocking motion while it is cutting, so that the movement of its toothed edge assimilates to that of



No. 2. No. 1.

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

[2] [Affirmed in 92 U. S. 426.]

the pit-saw operated by hand. His claim is: "Giving to the saw, in its downward movement, a rocking or rolling motion, by means of the combination of the cross-head working in curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin, substantially as described." The defendants [Caleb Ives and George B. Green] used a combination substantially the same, but in which the upper guides were set with the lower ends two inches forward of a perpendicular line let fall from the top ends. At the trial the defendants' counsel asked the court to charge the jury "that if the face of the slides are not placed so that the top and bottom of the slides are in the same perpendicular line, there is no infringement." The court refused to charge as requested, and charged the jury as follows: "That the plaintiff is entitled to the protection of his patent, no matter whether the curved slide be set in one line or another, provided the combination is otherwise complete. It is a mere matter of adjustment, which any competent mechanic, skilled in building saw-mills and adjusting the saw for the most effective service, would readily understand and adopt." The jury found for the plaintiff, and the defendants moved for a new trial on the ground (1) of newly discovered testimony, which was disposed of on the hearing adversely to the motion; and (2) on the ground of erroneous instruction to the jury, which is decided in the present opinion.

G. O. N. Lathrop, for plaintiff.
Chas. J. Hunt, for defendants.

LONGYEAR, District Judge. The action in this case was for an alleged infringement of a patent, No. 51,310, granted to the plaintiff December 5, 1865, for an improvement in saw-mills. The device patented consists of a new combination of old elements as a means of producing a certain result, and is set up in the claim in the following words: "Having thus described the best mode with which I am acquainted of embodying my improvements, what I claim as my invention, and desire to secure by letters patent, is giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw with the crank-pin, substantially as described." In the drawings the curved guides are represented as set with their concave facing in the same direction as the cutting edge of the saw, and consequently toward the approach of the log, which is represented in the drawings by an arrow marked "S," and they are referred to in the specifications as being so set. Nothing whatever is said in the specifications as to whether the curved guides are to be set with the lower end perpendicularly under the upper end, or in an inclined position, they being entirely silent upon the subject. In the drawings, however, they appear as if set in a perpendicular position, and on this account it was claimed at the trial that any other position of the guides was not covered by the patent, and that because in the combination, as used by the defendant, these guides were set with the lower end about two inches forward of a plumb line let fall from the upper end (as to which there was no dispute), there was no infringement. The defendants' counsel asked the court to charge the jury as follows: "That if the faces of the slides are not placed so that the top and bottom of the slides are in the same perpendicular line, there is no infringement." The court refused to charge as requested, and charged the jury as follows: "That the plaintiff is entitled to the protection of his patent, no matter whether the curved slides be set in one line or another, provided the combination is otherwise complete. It is a mere matter of adjustment, which any competent mechanic, skilled in building saw-mills and adjusting the saw for the most effective service, would readily understand and adopt."

This refusal to charge, and the charge as given, are claimed to be erroneous, and constitute the only grounds of the present motion, as I construe the three several subdivisions or grounds of motion, as spread upon the record. The grounds of motion, as stated upon the record, are as follows: "(1) In this, that the judge charged the jury that the patent of Hamilton did not require the slides to be set perpendicular. (2) In this, that the judge charged the jury that, under Hamilton's patent, the slide could be set in any position, at the choice of the mechanic who set them up. (3) In this, that the judge charged the jury that if the slides of Ives and Green fell back from a straight line drawn from one end of the slide to the other, that it was an infringement on the Hamilton patent."

The first and second, although not in the language of any charge as given, clearly have reference to the charge above quoted. But, on a careful examination of the whole charge, which was in writing, I am unable to find any portion of it which authorizes the statement contained in the third subdivision. No such charge was given. I do not intend to accuse counsel of intentional misstatement; but that there was a misapprehension on the part of the counsel there can be no doubt. The fault of the counsel is that he evidently made his statements as to what charges were given without resort to the written charge to ascertain their correctness.

The question of decision, then, is as to the correctness of the instructions above quoted. It is claimed that because the curved guides at the upper end of the saw are represented

in the drawings as set in a perpendicular position, no other position of the guides, even if the combination be the same in all other respects, is covered by the patent; and that therefore the use by defendants of a like combination, but in which the upper guides are set with the lower ends two inches forward of a perpendicular line let fall from the top ends, is no infringement of the plaintiff's patent.

It is to be observed: (1) That the curved guides are not themselves claimed as new, and of course they are not covered by plaintiff's patent. (2) That it is only the position and office of the curved guides in the combination that are patented. (3) That the only respect in which the position of the curved guides in the combination is made specific, or is at all essential, is their location in reference to the saw—that is, at its upper end, and with their concave sides toward its cutting edge, or, as it is expressed in the specifications, "to the advance of the log." (4) That the only office to be filled by the curved guides is to carry the top end of the saw backward of its general line of movement, or, as substantially expressed in the specifications, in the same direction as the advance of the log during the first half and forward or toward the log during the last half of its downward motion, while at the same time, by another part of the combination, the lower end of the saw is being carried in the opposite directions, thus doing their part in imparting to the saw the "rocking or rolling motion" mentioned in the claim as above quoted.

We see, then, that so far as the specifications are concerned, nothing is specified as to whether the curved guides are to be set perpendicularly, or inclined, and if inclined, at what angle, or how much. So far as the specifications are concerned, then, this matter was certainly left to be adjusted according to the judgment of the builder, for the most effective service. This being the case, and it being the intention of the patentee so to leave the matter, the curved guides could not be represented in the drawings in any other than a perpendicular position, because that is the only initial or starting-point, or line, from which any divergent or inclined position could be calculated. The drawings are intended to represent the positions of the individual parts in the combination, and not mere matters of detail. For instance, the saw is as much a part of the combination as the curved guides. In the drawings, the saw is represented as hung in a perpendicular position. The evidence of all the experts shows, and it is indisputed, that no saw-mill, no matter what combinations or devices used are in other respects, will do effective work without what is called "overhang" of the saw, or its equivalent. That is, the saw must be so hung that, when its downward stroke is completed, the upper end shall overhang the lower end with reference to a perpendicular line. Now, it might as well be said that a saw-mill, built after plaintiff's device, is not an infringement of his patent, because the saw has the necessary overhang, as to say it is not an infringement because the curved guides are not set perpendicularly. In fact, the testimony of the experts tended to show, that, setting the lower end of the curved guides forward, was but one method of giving the saw the necessary overhang. The matter as to how the curved guides shall be set, is left unlimited and undefined, like a score or more of other matters of detail, such as their length and degree of curvature, the length and thickness of saw-plate, the length and number of saw-teeth, length of stroke of the crank, length of pitman, length of leverage at the upper end of the pitman, between where it is pivoted to the lower cross-tree and where the saw is pivoted to it, etc. All these are clearly mere matters of adjustment, and may be varied in different cases, according to the intelligence, judgment, or even caprice of the builder, and still the combination be the same, and in each case equally covered by the plaintiff's patent. American Hide, etc., Mach. Co. v. American Tool & Mach. Co. [Case No. 302].

The drawings are no doubt a part of the description of the thing patented, but they must be considered in connection with the specicfications. Where the invention patented consists, as in this case, of a combination of old elements to produce a new result, mere matters of adjustment of the individual elements are not limited or controlled by the drawings, unless (1) they are expressly so limited by the specifications as well; or (2) such limitation and control are necessary to maintain the integrity of the specifications, taken as a whole, or of some essential part or parts thereof; or (3) such limitation and control are essential to produce the result claimed. As to the first, we have already seen that the perpendicular position of the curved guides, as represented in the drawing, are not expressly limited to that position by the specifications. As to the second, it is claimed, on the part of the defendant, that the perpendicular position of the curved guides, as represented in the drawings, is necessary to maintain the integrity of the following clause in the specifications, viz.: "As the upper guides are concave to the advance of the log, the effect upon the upper end of the saw is, that, while it is descending, it also moves in the direction of the arrow S ('the arrow S indicates the advance of the log'), and it continues this movement as it descends until about half of the stroke is accomplished; then, during the remainder of the stroke, it moves in a direction the reverse of that indicated by the arrow S." It is claimed, that inasmuch as the advance of the log is in a horizontal line, the curved guides can not be concave to it, in a strictly mathematical sense, unless the curves be so set that a straight line drawn from one end of the curves to the other, representing the chord of

an arc of a circle, be perpendicular to such horizontal lines. In order to have this true, even in a strictly technical sense, it is necessary that the curve of the guides should be in the exact form of an arc of a circle. But it is not so described in the specifications, neither is it necessarily so in order to maintain the integrity of any portion of the specifications, nor is it essential in order to produce the result claimed. All that is specified, and all that is essential, is that the upper guides shall be curved. The degree of curvature, and the shape or form of the curve, whether an arc of a circle or otherwise, are non-essentials, but are mere matters of adjustment, like the length and proportions of the connecting or pitman rod, etc. The foundation of the argument in that regard is therefore lacking, and the argument falls to the ground. But however this may be, the clause quoted does not purport to be, and it is not any part of the description of the combination, or of any portion of it. These had been already described. It is simply a description of the office or operation of this particular element, viz., of the curved guides.

It is claimed, however, that in order to maintain the integrity of the description of the office, or operation of the curved guides, as stated in the specification above quoted, it is essential that the guides be set perpendicularly. In order to maintain this claim, it is assumed that in order to have the upper end of the saw move in the direction indicated (in the same direction as the advance of the log), during the first half of its downward stroke it must fall back of a plumb-line let fall from its starting-point, and that it can not be made to do this if the lower ends of the curved guides are set forward of such plumb-line. The fallacy of this assumption appears from the following propositions: (1) The description is not that the upper end of the saw is made to move the one way or the other with reference to a plumb-line. (2) While it is true that, taken by itself, and without making any allowance for the operation and effect of the movement of the lower end of the saw in the opposite direction, the movement of the upper end, in order to be in the same direction as the advance of the log, must be a falling back from a plumb-line, as claimed, yet, when taken in connection with and as affected by that other movement, it is not necessarily so, even with the curved guides set perpendicularly. In this connection it must be borne in mind that the movements of the saw, here spoken of, all have direct reference to its operative effect upon the log, and, of course, when the "saw" is spoken of, it must have reference to its operative or toothed edge, and the "upper" and "lower" ends of the saw must be understood to mean those ends of that edge or side, which, in practice, as is well known, always terminates several inches below and above the fastenings or hangings at the respective ends of the saw-plate.

It will be remembered that, while descending, the two ends of the saw are moved back and forward in opposite directions at the same time—the upper end back by operation of the curved guides during the first half, and forward during the last half, and the lower end by operation of the lever connecting-rod or pitman, forward during the first half and back during the last half of its downward stroke. Each of these movements, of course, affects the saw throughout its entire length, but with a gradually diminishing effect.

The description in the specifications of the operation and effect of each separate element or part of a patented combination must be read and construed with reference to the entire combination and its results and the effect which the operation that each element or part has upon that of each of the others. Cahoon v. Ring [Case No. 2,292]. So construing the description of the operation and effect of the curved guides, now under consideration, it is evident that, while of course the cross-tree operating in the guides and to which the upper end of the saw-plate is pivoted, must fall back of a plumb line in the first half of the descent of the saw, the upper end of the saw itself—that is, the upper tooth or teeth of the saw—may be carried so far forward by the forward motion of the lower end as not to fall back of such line, but may, on the contrary, actually move in the opposite direction, dividing, of course, upon the degree of curvature of the guides and the extent to which the lower end is thrown forward. This was, in fact, shown to be the case by experiments at the trial with a model constructed after the plaintiff's patent, the correctness of which was not disputed. But, as paradoxical as it may seem at first view, this does not prove, as claimed, that the statement in the specifications that the upper end of the saw, in the first half of its downward stroke, moves in the direction of the advance of the log, is untrue. It simply proves that while it must necessarily so move, yet, on account of another simultaneous movement, it is not thereby caused necessarily to, and does not in fact, fall back of a plumb line, even with the curved guides set perpendicularly, as represented in the drawings. This theory of there being a backward motion as the result of an individual cause, and an absolute forward motion as the result of compound causes, is well illustrated by the familiar example of a man starting on the bow of a moving ship and walking back along the deck to its stern. Now, suppose the ship to be moving forward at the rate of five miles per hour, and the man to move toward the stern at the rate of three miles per hour, the man will have actually gone forward of a plumb line let drop to the ground from where he started, and yet, with reference to the ship, he actually moved the other way.

The backward movement of the upper end of the saw is caused, as we have seen, by the cross-tree, to which the upper end of the saw-

plate is pivoted, following the curve of the guides. A completed downward movement of the cross-tree is, I think, correctly represented by a straight line drawn from the starting-point of the pivot to the point of the termination of the movement. Now, I think it evident that if the curved guides are so set, no matter what their position may be in other respects, that this pivot, or operating cause, falls back of such straight line during the first half of its downward movement, the call of the specification in that respect is answered. The fact is, however, that this statement in the specifications as to the operation and effect of the curved guides upon the upper end of the saw, is not descriptive of any part of the combination itself. It is a statement merely of the patentee's theory in that regard; and even if he was mistaken in that particular, it would not invalidate his patent, because it is immaterial; provided, of course, that the entire combination actually produces the result claimed for it, as to which there is no dispute. Foss v. Herbert [Id. 4,957]. "It is well settled by the courts," says Judge Leavitt, "that in the effort to ascertain the intention and meaning of the specifications and claims, they are to be viewed in a liberal spirit, that, if possible, the object of the inventor or patentee may be carried out. Mere rigid technicalities are to be set aside, unless there is a clear legal necessity for sustaining them." Goodyear v. Berry [Id. 5,556]. I entirely concur in the proposition. See, also, Imlay v. Railroad Co. [Id. 7,012]; Goodyear v. Railroad Co. [Id. 5,563]; Page v. Ferry [Id. 10,662]; Judson v. Cope [Id. 7,565]; Burden v. Corning [Id. 2,143]; Beard v. Egerton, 8 Man., G. & S. 165; Ames v. Howard [Case No. 326]; Blanchard v. Sprague [Id. 1,518]; Ryan v. Goodwin [Id. 12,186]; McCormick v. Seymour [Id. 8,726], affirmed, except as to rule of damages, 16 How. [57 U. S.] 486.

It appears, therefore, that the claim on behalf of the defendants, that the curved guides at the upper end of the saw must be set perpendicularly in order to maintain the integrity of the specification above quoted, has no foundation. It remains to consider the third and last condition, viz.: whether it is essential to limit the curved guides at the upper end of the saw to a perpendicular position, as represented in the drawings, in order to produce the result claimed for the entire combination. The result, as stated in the claim, is "giving to the saw in its downward movement a rocking or rolling motion."

These curved guides at the upper end of the saw, it must be borne in mind, perform only a part of the work of imparting to the saw the motion claimed to be imparted by the entire combination. How it performs that work, we have already seen. Now, it is evident that any practical inclination of the guides from a perpendicular position—that is, any inclination that will allow the saw to respond to the entire revolution of the crank, and to do effective work, which was shown in practical use to be from one to two inches only—would not destroy the effect of the curve of the guides upon the motion of the saw. It would no doubt somewhat modify, and slightly diminish, that effect, but it must be borne in mind that the motion claimed as the result of the combination, is in no manner limited to any particular degree or extent. It is in kind only, and so long as the kind of motion claimed is produced by the combination described, the combination is protected by the patent.

It follows, therefore, that there was no error in the instruction complained of, and the motion for a new trial must be denied, with costs to the plaintiff, including an attorney fee of ten dollars.

[NOTE. From this ruling the defendants went to the supreme court upon writ of error, where, in an opinion by Mr. Justice Bradley, the judgment of the circuit court was affirmed. 92 U. S. 426. It was held that the substitution of guides made crooked by a broken line, instead of a curved line, was a transparent imitation. Nor was the attaching of the lower end of the saw to the pitman below the crosshead instead of above it a change in principle. The combination was held to be a close copy of the plaintiff's invention. "The essence of the improvement has nothing to do with the precise position of the guides. It is a combination of mechanical means to produce a rocking motion of the saw; and this combination is just as applicable to guides that have a slight inclination as to guides that are perpendicular. The description in the patent is sufficiently specific."

[For other cases involving this patent, see Hamilton v. Rollins, Case No. 5,988; Hamilton v. Kingsbury, Cases Nos. 5,984, 5,985, 4 Fed. 428.]

Case No. 5,983.

HAMILTON v. JONES et al.

[Brunner, Col. Cas. 24;[1] 2 Hayw. (N. C.) 291.]

Circuit Court, D. North Carolina. Dec., 1803.

SCIRE FACIAS AGAINST HEIR — RIGHTS OF INNOCENT VENDEE.

A scire facias issued against an heir to have execution of the lands of the deceased, but before the scire facias issued the heir sold the lands, and it was held that the purchaser from the heir might, in the name of the heir, be permitted to plead to the scire facias that the executor had assets.

This was a scire facias against the heirs and devisees of John Jones, deceased, to have execution against the lands descended or delivered to him, of a judgment obtained against the executors upon a plea of fully administered, found for the executors. After the test of the scire facias, but before the issuing of it was known to Peter Arrington, he purchased a share of the lands from one of the defendants, who being served with the scire facias would not plead thereto. Arrington alleged there were personal assets much more than sufficient to pay the debt.

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

MARSHALL, Circuit Justice. The seller impliedly gave power to the vendee to plead such pleas in his name as were necessary for the defense of the land; and should a plea be now put in by Arrington in the name of the vendor, I would not consent to strike it out.

Whereupon Arrington put in the plea of personal assets in the hands of the executor, enough to satisfy the judgment. And he put in the name of the vendor in open court.

HAMILTON (KERR v.). See Case No. 7,731.

Case No. 5,984.

HAMILTON v. KINGSBURY et al.

[15 Blatchf. 64; 3 Ban. & A. 346; 14 O. G. 448.] [1]

Circuit Court, N. D. New York. July 12, 1878.

PATENT—LICENSE TO USE AND SELL — EFFECT — ASSIGNABILITY.

By a license under letters patent H. granted to L. and to his "legal representatives" "the full and exclusive right to use and to sell to be used" the invention, as applied to a specified construction, "as secured by the said letters patent, for, to and in the state of New York, I excepting and reserving the right to manufacture the said invention for myself and legal representatives:" *Held*, that, by the license, L. acquired the right to manufacture the invention for such sale or use, and that the license was assignable by L.

[Cited in Adams v. Howard, 22 Fed. 657.]

[Suit by Susan Hamilton against Gilbert J. Kingsbury and George T. Davis for an alleged infringement. Heard upon bill and plea.]

William H. Bright, for plaintiff.

Henry R. Selden, for defendants.

BLATCHFORD, Circuit Judge. This suit is founded on letters patent of the United States [No. 51,310] granted to Palmer Hamilton December 5th, 1865, for "improvements in saw-mills," of which the plaintiff claims to be the owner. The defendants interpose a plea to the bill. The matters set up in the plea are as follows: Palmer Hamilton, on the 1st of August, 1866, assigned to Milton A. Hamilton all the right, title and interest of Palmer Hamilton in the invention covered by the patent "as it is or may be applied to mulay or single upright mill-saws," for the whole of the United States. Milton A. Hamilton, on the 27th of August, 1866, assigned to Clinton A. Lombard and John Thompson, "and to their legal representatives," for the consideration of $3,000, "the full and exclusive right to use and to sell to be used the said saw-hangings" (the invention being previously in the assignment stated to be known as "Hamilton's oscillating and reciprocating saw-hangings,") "as they are or may be applied to mulay or single upright mill-saws, as secured by the said letters patent, for and in the state of New York, I excepting and reserving the right to manufacture the said invention for myself and legal representatives." Lombard and Thompson, on the 29th of April, 1868, for the consideration of $10,000, assigned to Robert P. Russell, Montgomery Reese and the firm of Strong & Woodbury, in equal shares of one-third each, all the right, title and interest of Lombard and Thompson in the invention patented, for, to and in the state of New York. Reese, on the 15th of July, 1868, in consideration of $1,200, assigned to Russell and the firm of Strong & Woodbury, in equal shares of one-half to each, all the right, title and interest of Reese in the invention patented, for, to and in the state of New York. Strong & Woodbury, on the 10th of December, 1869, in consideration of $1,000, assigned to the defendants all the right, title and interest of Strong & Woodbury in the invention patented, for the state of New York, except the counties of Cayuga and Franklin. The defendants did not make or sell any machine containing the patented invention, prior to the assignment from Strong & Woodbury to them, except that, within a year prior to that time, they made for Strong & Woodbury, and at their request, a small number of said machines, and, since said assignment, they have not made, used or sold any machine containing said invention, except that they have made and sold mulay and single upright mill-saws containing said invention, within the state of New York other than in the counties of Cayuga and Franklin in that state. The bill sets up an assignment by Palmer Hamilton to Milton A. Hamilton, on the 1st of August, 1866, of the entire patent, and an assignment by Milton A. Hamilton to Palmer Hamilton, on the 12th of March, 1867, of the entire patent, and an assignment by Palmer Hamilton to the plaintiff, on the 18th of April, 1873, of the entire patent. The plea alleges that the assignment set up in the bill from Milton A. Hamilton to Palmer Hamilton was not recorded in the patent office until after the time when the defendants made the purchase from Strong & Woodbury, and received from them the said assignment; that the defendants had no notice of such assignment from Milton A. Hamilton to Palmer Hamilton until after this suit was brought; and that they made the purchase from Strong & Woodbury and received from them said assignment, and paid them therefor in good faith the consideration of $1,000 therein expressed, without any knowledge or notice that any such assignment as that from Milton A. Hamilton, above mentioned, then or ever existed, and in the full belief that the said assignment from Strong & Woodbury gave to them a perfect title to such interest in the patent as it purported to convey. The bill alleges that the defendants, in violation of the rights conferred by the patent, and in infringement thereof, have made and sold, without the license of Palmer Hamilton, or Milton A. Hamilton, or the plaintiff, large

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 346; and here republished by permission.]

numbers of machines containing the patented invention, and have cut large amounts of lumber with such machines, and have realized large profits from such infringement. It also alleges that the plaintiff is the owner, by assignment, of all the rights of action for infringement of the patent which accrued to either Palmer Hamilton or Milton A. Hamilton. The plea alleges that the assignment from Milton A. Hamilton to Lombard and Thompson was recorded in the patent office on the 22d of October, 1866, that the assignment from Lombard and Thompson was recorded in the patent office on the 7th of August, 1868, and that the assignment from Reese was recorded in the patent office on the 7th of August, 1868.

It is contended for the defendants, on the hearing on the bill and plea, that the assignment from Milton A. Hamilton to Lombard and Thompson gave to the latter the exclusive right to use and sell to be used the saw-hangings, as applied to mulay or single upright mill-saws, within the state of New York, and the right to manufacture the same for such use or sale, in common with a right to manufacture the same, reserved to said Milton A. Hamilton. For the plaintiff, it is contended, that, by the assignment to Lombard and Thompson, the privilege granted to them is limited to the right to use and sell, and that Milton A. Hamilton expressly reserved to himself the right to manufacture.

The language of the assignment to Lombard and Thompson is inartificial and awkward, but the meaning of it is, I think, clear. The grantor, having the right to the patent for the whole of the United States, for its application to mulay or single unright mill-saws, that is, the exclusive right, for the whole of the United States, to make, use and sell saw-hangings according to the patent, as applied to mulay or single upright mill-saws, conveys to Lombard and Thompson, for $3,000, the exclusive right to use and sell saw-hangings according to the patent, as applied to mulay or single upright mill-saws, for and in the state of New York, and excepts and reserves to himself the right to manufacture the patented invention. He conveys the exclusive right to use and sell in the state of New York. He does not convey the exclusive right to make in that state, because he reserves the privilege of making himself in that state. He retains the exclusive right to use and sell in other states, and the privilege of making in the state of New York for use and sale in other states is desirable to him. He does not except and reserve the exclusive right to make in the state of New York, but merely a right to make. On all proper rules of construction, the exception and reservation must be held to be an exception and reservation of something which, but for such exception and reservation, would pass, by the granting part, to the grantee. A right to use and sell, and, especially, an exclusive right to use and sell, for which $3,000 is paid, would be practically valueless if no machines to use or sell could be obtained except by some further agreement with the grantor, who retained the exclusive right to make. The construction contended for by the plaintiff requires that the exception and reservation should be read as if it excepted and reserved the "exclusive" right to manufacture. It does not. In view of the fact that there can be no use or sale of a machine unless it can be made, it is a violent wresting of language to construe the exception as one of an exclusive right to make, as compared with a construction which makes the grant one of an exclusive right to make, use and sell, reserving to the grantor a right to make. The effect of such a grant, coupled with the reservation, is to grant an exclusive right to use and sell, and a right to make, and to reserve a right to make in common with the right of the grantee to make, the grantor not retaining any right to use or sell in the state of New York, and the grantee not acquiring any right to use or sell, out of the state of New York, any machines made by him in that state. If the granting clause be held to cover nothing but the right to use and sell, the reservation clause is of no force. The instrument, on such view, would have the same effect without the reservation clause as with it. It is plain that the grantor regarded the granting clause as bearing the interpretation that it would carry the right to make, and that, because of the use of the word "exclusive," it might be held to be an exclusive right to make, as well as an exclusive right to use and sell; and that, desiring to reserve a right to make, and to grant a right to make, the language used was used, the effect being to leave the right to make in the state of New York exclusive in the grantee and the grantor in common, and the right to use and sell exclusive in the grantee. This interpretation is the only one which gives effect to all the words found in the instrument. Woodworth v. Curtis [Case No. 18,013].

The assignment is to Lombard and Thompson, "and to their legal representatives," to be held and enjoyed by them for their own use and behoof, "and for the use and behoof of their legal representatives." It is contended, for the plaintiff, that the instrument conveyed a mere personal license to Lombard and Thompson, and that it did not authorize them to assign their right. I think otherwise. The words "legal representatives" must be held to mean "assigns," as well as "executors and administrators." It certainly means something. If it means "executors and administrators" and not "assigns," the instrument ceases to be a personal license. But it is fair to suppose that both grantor and grantees understood that, for $3,000, the grant was to be assignable, and that the parties understood, by "legal representatives," those who would legally represent the

grantees by a legal and valid voluntary transfer from them, equally with those who would represent them by a legal and valid involuntary transfer. Especially is this so when we find that the grantor, in the reservation clause, excepts and reserves the right to manufacture, "for myself and legal representatives." He not only could not have intended to cut himself off from the right to assign the reserved right to make, but he must have contemplated that, in there using the words "legal representatives," he included assignees.

The plea does not admit the doing, by the defendants, of anything which it can, on the bill and the plea, be held it was unlawful for them to do, and the plea must be allowed, with costs to the defendants, with liberty to the plaintiff to move, on notice, within thirty days after service of a copy of the order to be entered hereon, for leave to amend his bill, under rule 35 in equity, and, in default thereof, the bill must be dismissed, with costs.

[NOTE. The plaintiff subsequently amended his bill by setting forth two unrecorded instruments. There was a plea to the amended bill and a replication to the plea, and proofs were taken thereon. The cause was then submitted to the court on briefs without oral argument, and the plea was duly overruled. Case No. 5,985. A petition for a rehearing was afterwards denied. 4 Fed. 428.

[See note to Case No. 5,982 for other cases involving this patent.]

Case No. 5,985.

HAMILTON v. KINGSBURY et al.

[17 Blatchf. 264; 4 Ban. & A. 615; 17 O. G. 147.] [1]

Circuit Court, N. D. New York. Nov. 7, 1879.

PATENT—RECORDED INSTRUMENTS—RIGHTS OF BONA FIDE PURCHASER—UNRECORDED INSTRUMENTS.

1. Three instruments relating to rights under letters patent, and none of them purporting to grant anything more than a license, were executed between the same parties contemporaneously and as parts of the same transaction. One of them was recorded in the patent office and the other two were not. A person having purchased the right covered by the recorded instrument, bona fide, and without notice of the unrecorded instruments: *Held*, that the recorded instrument was one not required by section 11 of the act of July 4, 1836 (5 Stat. 121), to be recorded.

[Cited in Brush Electric Co. v. California Electric Light Co., 3 C. C. A. 368, 52 Fed. 959; Jones v. Berger, 58 Fed. 1007.]

2. The unrecorded instruments were not required by that statute to be recorded.

3. The instruments were all of them valid as against such purchaser, without being recorded.

4. Such purchaser acquired no greater rights than were conveyed by all three of the instruments, construed together.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 615; and here republished by permission.]

[This was a bill in equity by Susan Hamilton against Gilbert J. Kingsbury and George T. Davis to restrain the infringement of certain letters patent for an improvement in saw mills. The cause was first before the court upon bill and plea, and the plea was allowed (Case No. 5,984); whereupon the plaintiff amended his bill by setting forth two unrecorded instruments. There was a plea to the amended bill, and a replication to the plea, and proofs were taken thereon. The cause is now submitted to the court on briefs without oral argument.]

A. C. Coxe, for plaintiff.

W. F. Cogswell and George B. Seldon, for defendants.

BLATCHFORD, Circuit Judge. This suit is brought on letters patent [No. 51,310], granted to Palmer Hamilton, December 5th, 1865, for "improvements in saw mills." The bill alleges infringement by the defendants by making, constructing, using and vending to others to be used, machines containing the patented invention. Palmer Hamilton, by an instrument in writing executed August 1st, 1866, conveyed to Milton A. Hamilton and to his legal representatives all the right, title and interest which he, the said Palmer Hamilton, had in the patented invention "as it was, or might be, applied to muley or single upright mill saws." This instrument was recorded in the patent office August 27th, 1866.

By an instrument in writing executed August 27th, 1866, and recorded in the patent office October 15th, 1866, and which recited the said conveyance from Palmer Hamilton to Milton A. Hamilton as being one of all the right, title and interest of Palmer Hamilton in and to the invention as it is or may be applied to muley or single upright mill saws, Milton A. Hamilton conveyed to Clinton A. Lombard and John Thompson, as copartners, under the name and style of Lombard & Thompson, "and to their legal representatives, the full and exclusive right to use and to sell to be used the said saw hangings" (the invention patented being stated in said conveyance to be known as "Hamilton's oscillating and reciprocating saw hangings"), "as they are or may be applied to muley or single upright mill saws, as secured by the said letters patent, for, to and in the state of New York, I excepting and reserving the right to manufacture the said invention for myself and legal representatives." On the same 27th of August, 1866, and at the same time, a written agreement was executed between Milton A. Hamilton of the first part and Lombard and Thompson, as copartners under the name of Lombard & Thompson, of the second part, which contained the following language: "The party of the first part, in consideration of the conditions hereinafter named, to be kept and performed by the party of the second part, hereby agrees to furnish as many sets of

'Hamilton's patent oscillating and reciprocating saw hangings' as they may use or sell to be used in the state of New York, as they are or may be applied to single or upright muley mill saws, as secured by letters patent from the United States, the said party of the second part having the right to use and sell the said patent saw hangings according to a deed of assignment bearing even date herewith, upon which this article is based, and to deliver the said machinery; * * * the said party of the second part agrees to pay to the party of the first part sums of money for the said machinery according to the following prices and rates; * * * and the said party of the second part further agrees that they will not manufacture the said machinery or its parts so long as they are supplied by the said party of the first part, as above specified, or by his legal representatives; and, further, it is understood and agreed that the said second party is not to sell the said machinery to be used in any other than the said state of New York." This instrument was never recorded in the patent office. On the same 27th of August, 1866, and at the same time, Milton A. Hamilton executed and delivered to Lombard & Thompson an instrument in writing, which recited that they had purchased and paid him for certain rights in "Hamilton's patent oscillating and reciprocating saw hangings." and referred to the said patent, and then proceeded thus: "And whereas I, Milton A. Hamilton, have also given them, the said Lombard & Thompson, a certain contract, bearing even date herewith, for the supply of the said saw hangings, I reserving for myself and legal representatives the right to manufacture the said hangings, now this indenture witnesseth, that, in case I, or my legal representatives, are unable, from any circumstance or emergency, to furnish the said Lombard & Thompson saw hangings according to the above-mentioned contract, I, for myself and legal representatives, agree that the said Lombard & Thompson shall have the right to manufacture the said hangings for use in the state of New York. The purport of this article is to secure to them the said machinery against failure on my part to fulfil the conditions of the said contract, which, being fulfilled, this is to be null and void; otherwise, to be in effect." This instrument was never recorded in the patent office.

Lombard & Thompson, by an instrument in writing, executed April 29th, 1868, and recorded in the patent office August 7th, 1868, conveyed to Robert P. Russell, Montgomery Reese and the firm of Strong & Woodbury, in equal shares of one-third each, "all the right, title and interest which we have in the said invention, as secured to us by said letters patent, for, to and in the state of New York." Reese, by an instrument in writing executed July 18th, 1868, and recorded in the patent office August 7th, 1868, conveyed to Russell and the firm of Strong & Woodbury, in equal shares of one-half each, "all the right, title and interest which I have in the said invention, as secured to me by said letters patent, for, to and in the state of New York." Strong and Woodbury, by an instrument in writing executed December 10th, 1869, conveyed to the defendants in this suit "all our right, title and interest therein, as secured by the letters patent and assignment before-mentioned, which consists of the right, title and interest of the said Robert P. Russell, Henry A. Strong and Edmund F. Woodbury to the right for the whole state of New York, except one-half interest held by Robert P. Russell, and the counties of Cayuga and Franklin, previously assigned to John Busby and Sidney A. Paddock, respectively."

The bill alleges, that Milton A. Hamilton, by an instrument dated March 20th, 1867, and duly recorded in the patent office, conveyed to Palmer Hamilton all his right, title and interest in and to the said patent and invention; and that the recorded conveyance from Milton A. Hamilton to Lombard and Thompson was not intended by the parties thereto to convey to Lombard and Thompson any right to manufacture said invention, and that the practical construction placed upon said instrument by the acts of said parties at the time of the execution thereof and subsequently was that the sole right to manufacture said invention remained in said Hamilton. It also sets forth the two unrecorded instruments of August 27th, 1866, and avers that ever since the three instruments were executed the said Milton A. Hamilton and his assignee have been at all times and now are ready and willing to furnish such saw hangings to said Lombard and Thompson and to their assigns, and did so furnish such saw hangings to said Lombard and Thompson, and that the defendants have not applied to the said Milton A. Hamilton or to his assigns to be furnished with such saw hangings, but have assumed to manufacture the same themselves; that Palmer Hamilton, by an instrument dated April 18th, 1873, and recorded in the patent office, assigned to the plaintiff all the right, title and interest of him, the said Palmer Hamilton, in and to said invention, and also all rights of action for infringements of said patent which had accrued to him, the said Palmer Hamilton; and that she is the sole owner of said invention.

The defendants have filed a plea to the whole bill. It sets up the conveyance of August 1st, 1866, from Palmer Hamilton to Milton A. Hamilton, the recorded conveyance of August 27th, 1866, from Milton A. Hamilton to Lombard and Thompson, the conveyance of April 29th, 1868, from Lombard and Thompson to Russell, Reese and Strong & Woodbury, the conveyance of July 15th, 1868, from Reese to Russell and Strong & Woodbury, and the conveyance of December 19th,

1866, from Strong and Woodbury to the defendants. It then avers, that the defendants "never made, contributed or used, or vended to others to be used, any machine or machines, containing the invention of said Palmer Hamilton, described in the letters patent in said bill of complaint mentioned, or any part of any such invention, prior to the time of the execution of the said assignment from Strong & Woodbury to them, as above-mentioned, excepting that, within a year prior to the time of said assignment, they manufactured for said Strong & Woodbury, and at their request, a small number of said machines, the exact number they cannot state, and that, since the time of the execution of the said assignment, these defendants have neither made, constructed or used, or vended to others to be used, any machine or machines containing the said invention, or any part thereof, excepting that they have made, constructed and vended to others to be used muley and single upright mill saws, containing said invention, or some part thereof, within the state of New York, and not elsewhere, and not in the counties of Cayuga and Franklin in the said state, as they lawfully might, in pursuance of the authority given them by virtue of the several assignments above-mentioned." The plea further alleges, that the instrument of March 20th, 1867, from Milton A. Hamilton to Palmer Hamilton, was not recorded in the patent office until after the time when the defendants made the purchase from Strong & Woodbury, and received from them the assignment above-mentioned; that the defendants never had any notice of such assignment from Milton A. Hamilton to Palmer Hamilton, until after the commencement of this suit; that the defendants made the purchase from Strong & Woodbury, and received from them the assignment above-mentioned, and paid them therefor, in good faith, the consideration of one thousand dollars therein expressed, without any knowledge or notice that any such assignment as that from Milton A. Hamilton, above-mentioned, then or ever existed, and in the full belief that the said assignment from Strong & Woodbury gave to the defendants a perfect title to such interest in said patent as it purported to convey. The plea further alleges, that the defendants have no knowledge or information as to what was intended by the parties to the assignment from Milton A. Hamilton to Lombard & Thompson, save such as is derived from the language of said assignment, and no knowledge or information of the practical construction put upon said assignment by the acts of the parties, at or subsequent to the time of the execution thereof, save such as is derived from the bill, and no knowledge or information, save such as is derived from the bill, that Milton A. Hamilton ever entered into two or any contracts, as mentioned in the bill, or any other contract of any kind, except the assignment to Lombard & Thompson, and that they never heard of said two contracts, or had any notice thereof, until they learned of the mention thereof in the bill.

The plaintiff put in a replication to the plea, and proofs have been taken and the case has been heard thereon. The bill above-mentioned is an amended bill. The suit was before the court on the original bill and a plea thereto, at the June term, 1878. Hamilton v. Kingsbury [Case No. 5,984].

The pleadings then brought before the court all the instruments now before it, except the two unrecorded instruments of August 27th, 1866. The question then presented for consideration was solely as to the construction of the recorded conveyance of August 27th, 1866, from Milton A. Hamilton to Lombard & Thompson. The court held, that, under and by that conveyance, Lombard & Thompson acquired the right to make, as well as the right to use and to sell to be used, "the said saw hangings, as they are or may be applied to muley or single upright mill saws, as secured by the said letters patent, for, to and in the state of New York," such right to use and to sell to be used being exclusive, but the grantor reserving to himself a right to make in common with the grantees. The plea was allowed.

On the present pleadings and the proofs thereunder it is contended for the plaintiff that, under the three instruments of August 27th, 1866, taken together, Lombard & Thompson acquired no right to make the invention, except in a certain contingency, which has never happened; that the three instruments are contemporaneous and are all portions of the same transaction, and must all be read together to determine the intent of the parties to the transaction; that those three instruments are consistent with no intention other than the one set up in the bill; that, if the recorded conveyance of August 27th, 1866, gives to Lombard & Thompson the right to manufacture, the other two instruments have no meaning; and that the instruments are (1) a license, which, in terms, gives the licensees no power to manufacture; (2) an agreement, by which the licensor agrees to furnish the hangings to the licensees at fixed prices, and the licensees agree that they will not manufacture so long as the licensor keeps his agreement; (3) a permission from the licensor to the licensees to manufacture, in case the licensor fails to perform his agreement.

It seems plain that the three instruments, taken together, must have the interpretation claimed for them by the plaintiff. But, the defendants contend that they are bona fide purchasers, without notice of any instrument but the recorded conveyance of August 27th, 1866, and that they are protected from any unrecorded agreement between Milton A. Hamilton and Lombard & Thompson, in the absence of any actual notice thereof.

The recording act in force when the defendants took their conveyance from Strong & Woodbury, on the 10th of December, 1869, was section 11 of the act of July 4, 1836 (5 Stat. 121), which provided, "that every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States, shall be recorded in the patent office within three months from the execution thereof." It is well settled, that mere licenses, or contracts conferring the limited and not the exclusive right to exercise some of the privileges secured by the patent, are not the subjects of regulation by this statute, and that it relates solely to grants or conveyances of the exclusive right, or legal estate, vested in the patentee, which leave no interest in the patentee for the particular territory and the particular right to which they relate. Curt. Pat. (3d Ed.) § 179. Within this rule, the recorded conveyance of August 27th, 1866, from Milton A. Hamilton to Lombard & Thompson, is not an assignment of the whole interest in the patent, or of any undivided part thereof, nor is it a grant or conveyance of the exclusive right under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States. It is only a license. It reserves to the grantor "the right to manufacture the said invention." Whatever right to manufacture the grantees acquired by the face of it, such right was not exclusive in them. Therefore, such instrument was not one required to be recorded. Nor were the other two instruments of August 27th, 1866, instruments which it was necessary to record. The recording of the instrument of August 27th, 1866, which was recorded, was not notice to the defendants that they could safely rely on the record, as showing the whole transaction between the parties to the instrument in respect to its subject-matter. The three instruments were all of them valid, without recording, as against the defendants, although bona fide purchasers without actual notice. Although the recorded instrument of August 27th, 1866, may, on its face, convey the right to make to the grantees, seeing it on the record is of no more avail to the defendants than if they had seen it out of the record. The existence of the three instruments, taken together, as limiting the right of Lombard & Thompson, affects the defendants with the consequences of such limitation, for they can have no greater right than Lombard & Thompson had.

The plea is overruled, with costs to the plaintiff to be taxed, with leave to the defendants to answer, on payment of such costs, within 30 days after service of a copy of the order to be entered on this decision.

[A petition for rehearing was denied. 4 Fed. 428. For other cases involving this patent, see note to Hamilton v. Ives, Case No. 5,982.]

HAMILTON v. LUDLOW. See Case No. 8,052.

HAMILTON (MUTTER v.). See Case No. 9,974.

Case No. 5,986.

HAMILTON v. MUTUAL LIFE INS. CO.

[9 Blatchf. 234; 5 Am. Law T. Rep. U. S. Cts. 30; 1 Ins. Law J. 573; 6 Am. Law Rev. 578; 3 Bigelow, Ins. Cas. 787.] [1]

Circuit Court, S. D. New York. Dec. 22, 1871.

LIFE INSURANCE—NON-PAYMENT OF PREMIUMS BY REASON OF WAR — EFFECT OF WAR ON EXECUTORY CONTRACT BETWEEN CITIZENS OF THE NATIONS AT WAR.

1. In March, 1858, a mutual life insurance company of New York issued to G. a written policy on his life. G. was, at the time, a citizen of, and a resident in, Alabama, and continued to be such until his death in June, 1866. The policy was for life, subject to the payment of an annual premium on or before a specified day, and contained a provision, that, in case G. should not punctually pay such premium, the policy should cease and determine, and all previous payments made thereon should be forfeited to the company. In due season, in March, 1859, 1860 and 1861, G. paid to M., an agent of the company at Mobile, Alabama, the accruing premiums, and they were received by the company at New York. Afterwards, and in March, 1861, the company withdrew all their agencies from Alabama, and had no agent in that state until 1869. G., after 1861, paid no further premiums on the policy. He was always ready to pay, but did not pay because of the revocation of the agencies, and because the insurrection against the government of the United States prevented lawful intercourse between Mobile and New York. The restrictions against intercourse continued until May, 1865. Afterwards, and before March, 1866, G. applied to the company at New York, to receive the premiums in arrear, with interest. It refused to do so or to recognize the policy as subsisting. The plaintiff, as executor of G., renewed the application, but it was refused, on the ground that the policy was forfeited. He then filed this bill, praying for a decree declaring the policy to be subsisting and not forfeited, and directing the payment of the amount insured by it, less the unpaid premiums and interest thereon. *Held*, that the plaintiff was entitled to such decree.

[Cited in Bird v. Pennsylvania Mut. Ins. Co., Case No. 1,430.]

[Cited in Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610.]

2. An executory contract of continuing performance, made before the breaking out of a war, with an alien enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is ipso facto dissolved by the declaration of war, which operates, for that purpose, with a force equivalent to that of an act of congress.

3. Where a contract is of such a character that its continued existence is not dependent

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[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 6 Am. Law Rev. 578, contains only a partial report.]

upon any further intercourse between the parties, the only effect of the war is to suspend its operation, and, on the return of peace, the rights of the parties under it may be enforced.

[Cited in Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 623; Sands v. New York Life Ins. Co., Id. 636.]

4. The policy of life insurance, in this case, was suspended, but not dissolved, during the continuance of the war between the United States and the insurrectionary states, of which latter Alabama was one, and New York was not one, in so far as G. could not pay the accruing annual premiums without commercial intercourse between Alabama and New York.

5. The contract was not one of continuing performance, in the sense of the rule before stated, so as to be dissolved by the war.

6. The policy was not unlawful, as continuing to insure the life of G., although he was an alien enemy, it appearing that he was a neutral, passive, non-combatant enemy, who remained such in fact.

[Cited in Sands v. New York Life Ins. Co., 50 N. Y. 638.]

7. On the facts of this case, it was a part of the contract of the company, that G. should have the right to pay the annual premiums to an agent of the company in Alabama, and the company was bound to provide in Alabama, during the continuance of the risk on the policy, an agent to receive such premiums, appointed and qualified in compliance with the statute law of Alabama on the subject, and G. was not bound to pay such premiums elsewhere than to such agent. As the absence of such agent was all that prevented the payment of the premiums by G., the company cannot set up, as a defence, the non-payment of the premiums at the stipulated times.

8. The agency of M., having been created before the war, would not have been revoked by the war, at least so far as the right to receive payment of annual premiums was concerned.

9. Payment of the premiums by G. to the agent, would not have violated any law of war, or any duty of G.'s.

10. The refusal of the company, when applied to by G., to recognize the policy or receive the premiums, made it unnecessary for him to pay the premium due in March, 1866.

[Cited in Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. Law, 457; Worthington v. Charter Oak Life Ins. Co., 41 Conn. 388; Dillard v. Manhattan Life Ins. Co., 44 Ga. 119; Martine v. International Life Ins. Society of London, 53 N. Y. 343.]

11. It is of the essence of every contract, that, if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance.

12. The inability of the company to receive the premiums, because of the unlawfulness of commercial intercourse, was equivalent to a tender of the premiums and a refusal to receive them, or to a waiver of their punctual payment.

13. There is a sound distinction between cases in which the impediment to the performance of a precedent condition, on which, by contract, money is to be paid, exists solely on the part of him who is to be the actor in performance, and cases in which the impediment exists either solely on the part of him who is to be the recipient of performance, or is an impediment affecting both parties jointly, and equally in extent.

14. Although the company was a mutual company, the policy was not dissolved by the war, as a contract of partnership between enemies.

[This was a bill in equity, brought by Peter Hamilton, as sole acting executor of the will of Duke W. Goodman, deceased, against the Mutual Life Insurance Company of New York.]

Charles F. Sanford, for plaintiff.
Henry E. Davies, for defendants.

BLATCHFORD, District Judge. The plaintiff is a citizen of Alabama. His testator was, during all the period covered by the transactions in this case, a citizen of Alabama, residing and domiciled therein, and the defendants are a corporation created by the state of New York.

The defendants, by their proper officers, made a written contract with Duke W. Goodman, the plaintiff's testator, dated March 24th, 1858. The contract was what is commonly known as a policy of life insurance. It was signed by the officers of the corporation, and made in its name, and was not signed by Goodman, but was delivered to and accepted by him. The material provisions of the policy are these: "This policy of insurance witnesseth, that the Mutual Life Insurance Company of New York, in consideration of the representation made to them in the application for this policy, and of the sum of one hundred and seventy-seven dollars and fifty cents to them in hand paid by Duke W. Goodman, and of the annual premium of one hundred and seventy-seven dollars and fifty cents, to be paid on or before the second day of March in every year during the continuance of this policy, do assure the life of the said Duke W. Goodman, of Mobile, in the county of Mobile, state of Alabama, in the amount of five thousand dollars, for the term of his natural life." There is then a stipulation on the part of the company to pay the sum insured to the assured, his executors, administrators or assigns, in sixty days after due notice and proof of interest (if assigned or held as security) and of the death of the assured. There is then a declaration that the policy is accepted by the assured on certain express conditions, that, in case the assured shall, without the consent of the company, previously obtained and endorsed on the policy, pass beyond certain specified limits, or visit certain specified parts of the United States, or be or reside in certain specified places, or do certain specified things, or die from certain specified causes, the policy shall be null, void and of no effect. Then follows this provision: "It is also understood and agreed, by the within assured, to be the true intent and meaning hereof, that, * * * in case the said Duke W. Goodman shall not pay the said annual premium on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine;

and it is further agreed by the within assured, that, in every case where this policy shall cease, or become or be null or void, all previous payments made thereon shall be forfeited to the said company." At the foot of the policy, on its face, were these words, in print: "Agents of the company are authorized to receive premiums when due, but not to make, alter or discharge contracts or waive forfeitures." On the back of the policy were these words, in print: "Receipts heretofore by the company of premiums after the day on which they fell due, were by the assured and the company considered acts of grace or courtesy, and as forming no precedent in regard to future payments of premiums on the policy; and all future receipts of the company of premiums after due, are viewed and understood by the parties in interest, as acts of courtesy of the company, and in no case to be considered a precedent, or a waiver of the forfeiture of the policy, according to the conditions expressed therein, if any future payment of premiums be omitted on the day it falls due."

The defendants had, on the 2d of March, 1849, issued to the wife of the said Duke W. Goodman, a policy for $5,000 on the life of her husband, subject to the annual premium of $177.50, on an application made February 28th, 1849, when Mr. Goodman was 37 years of age. The defendants are organized on the mutual plan, and made, under their charter, a dividend on the 1st of February, 1853, whereby there was added to the policy in favor of Mrs. Goodman, the sum of $415.37 at that date, as a principal sum in which Mr. Goodman's life was insured, subject to all the terms of the policy, in addition to, and in like manner as, the $5,000, but without any addition of premium to be paid. On the 1st of February, 1858, a like dividend was made, whereby the further sum of $567.68 was added to the same policy, as a like principal sum. These dividends were sums of money representing excesses of premium paid by Mrs. Goodman beyond what was found to be necessary to be retained by the company in respect of its risk on the policy, and were applied by the company, on behalf of Mrs. Goodman, to the purchase for her, of paid up insurances with the company, on the same life, in the principal sums so added to the policy. But, although no increased premium beyond the $177.50 was payable in respect to these additions, or in respect of the policy by reason of these additions, such premium of $177.50 was annually payable in respect of the whole policy, embracing the $5,000 and the additions, the additions being placed upon the same footing with the $5,000, in respect to all the stipulations of the policy, in like manner as if they had been part of a sum in which the life insured was insured at the inception of the policy, at the annual premium of $177.50. These added sums were at the risk of the policy, with the $5,000, and recoverable from and payable by the company, at the death of Mr. Goodman, only if the $5,000 was recoverable and payable. Under this state of facts, the policy in favor of Mrs. Goodman was surrendered to the defendants, and they accepted its surrender, and, in place of it, issued the policy of the 24th of March, 1858. It bore the same number as the policy of March 2d, 1849, and appears to have been regarded as a continuation of it, with only the change as to the recipient of the sum insured at the death of Duke W. Goodman, for the defendants transferred to it, and endorsed upon it, as sums insured by it, the said several sums of $415.37 and $567.68, which had been so added to the policy of 1849.

On the 2d of March, in each of the years 1859, 1860, and 1861, Mr. Goodman paid to Thomas W. McCoy, the agent of the defendants at Mobile, the sum of $177.50, as the annual premium mentioned in the policy. For the payments of 1859 and 1860, he was furnished, on each occasion, with a receipt signed, on behalf of the company, by its secretary, dated at the office of the company in New York, and countersigned by McCoy, as agent. The receipt of 1859 specifies the sum paid as renewing the policy "from the 2d day of March, 1859, to the 2d day of March, 1860." The receipt of 1860 specifies the sum paid as renewing the policy "from the 2d day of March, 1860, to the 2d day of March, 1861." On the margin of each one of the receipts of 1859 and 1860, were these words, in print: "N. B. The agreement is mutual (see application and policy), that, unless the premium is paid on or before the day it becomes due, the policy is forfeited and void." For the payment of 1861, Mr. Goodman received a receipt signed by McCoy, as agent of the company, and dated Mobile, March 2d, 1861, specifying the sum paid as the renewal premium on the policy "from date unto 2d day of March, 1862." The payment of March 2d, 1861, was remitted by McCoy to the defendants at New York, and was received by them there by March 26th, 1861. Afterwards, and on that day, the defendants, by their president, addressed a letter from New York, to McCoy, at Mobile in which they said: "On full examination of the Alabama law of 24th February, 1860, we come to the conclusion that we cannot comply with its provisions, and therefore feel obliged to withdraw all our agencies from the state. We write to each policy holder to remit premiums directly to us in future. Will you be kind enough to address them for us, as we cannot tell where the parties now live. Our assured are not covered against actual warfare of any description, whether it be by collision with the Northern states or any other power. This does not apply to non-combatants." McCoy was the principal agent of the company in Alabama. They had other agents in that state. After sending such letter of March 26th, 1861, the company had no agent in Alabama until some time in the year 1869. Mr. Goodman died

at Mobile, June 6th, 1866. He had not made any payment of the annual premium on the policy after the payment made March 2d, 1861.

Under these circumstances, the bill in this case is filed, setting forth, that, on the 2d of March, 1862, and on every 2d of March thereafter during his lifetime, Mr. Goodman "was ready and willing to pay the several annual premiums, as the same respectively became payable," "but that he did not, on or after the 2d of March, 1862, pay said annual premiums or any or either of them, because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead, and because the then existing insurrection and rebellion against the government of the United States had interrupted and prevented all lawful intercourse, by mail or otherwise, between the city of Mobile, where the said Duke W. Goodman resided and then was, and the city of New York, where the said company resided and had its office and place of business;" that, on the 16th of August, 1861, under the authority of the act of congress of July 13th, 1861 [12 Stat. 255], the president of the United States, by proclamation, declared that the inhabitants of the state of Alabama were in a state of insurrection against the United States; that all commercial intercourse between the state of Alabama and the inhabitants thereof, and the citizens of other states, was, and would remain, unlawful, until such insurrection should have ceased or been suppressed, and that all goods, chattels, wares and merchandise coming from the said state of Alabama into other parts of the United States, without the special license and permission of the president, would be forfeited to the United States; that such restrictions and prohibitions and liabilities to forfeiture continued until May 22d, 1865, and that, until the proclamation of the president, issued on the 2d of April, 1866, the inhabitants of the state of Alabama could have had no standing in this court; that, immediately after the removal of the prohibition of intercourse, Mr. Goodman applied to the company at New York, to receive from him whatever of such annual premiums might be found in arrear, together with interest thereon, and offered to do whatever he was bound to do for the preservation or restitution of his rights under the policy, but the defendants refused to entertain such proposal and denied that Goodman had any rights in the premises; that, after such refusal, Goodman died; that the plaintiff, immediately after his appointment as executor, caused application to be made to the company, at New York, to receive from him whatever of the annual premiums might have been in arrear at the time of the death of Goodman, together with interest thereon, and offered to pay the same, or to abate the same from the amount of the policy, and to do whatever else he was required to do, and gave notice, and offered to make due proof, of the death of Goodman, but the company refused to receive said premiums, or to accept such proof, or to pay said policy, or the additions thereto, or any part thereof; that the company pretends that the policy was forfeited by the non-payment of premium; that any other compliance than as aforesaid with the terms and conditions of the policy, was, without any act or default of Goodman, suspended and prohibited, and rendered impossible; and that it is contrary to equity and good conscience that a forfeiture of his valuable rights should be worked thereby. The prayer of the bill is, that the rights of Goodman, and of the plaintiff, as his executor, under the policy, may be decreed to be valid and subsisting, and not to have been lost by forfeiture or otherwise, the plaintiff being ready and willing, and offering, to pay to the company, all such sums of money, together with interest thereon, as may appear to the court to be justly and equitably due for premiums on the policy; that the company may be enjoined from asserting any forfeiture of the policy or of the rights of the assured, or of the plaintiff, under the same; and that the defendants may be decreed to pay to the plaintiff the amount thereby assured, with such additions thereto as have accrued and been made or credited to Goodman under the same.

The answer avers, that, if Goodman had been ready and willing to pay the annual premiums falling due March 2d, 1862, and thereafter, it would have been unlawful for him to have made such payments, and equally unlawful for the defendants, after the 16th of August, 1861, to have received such payments and continued the policy in force; that no payment has been made on the policy, to the defendants, since the 2d of March, 1861; that none was offered or tendered to be made until after June, 1865; that the policy expired and ceased to exist, by its terms, on the 3d of March, 1862; that, at the time the policy was issued to Goodman, Thomas W. McCoy was the agent of the defendants at Mobile, in and for the state of Alabama; that the appointment of McCoy as such agent, in and for said state, was revoked by the defendants in March, 1861; that Goodman had notice thereof; that since that time the defendants have not had any agent in and for the state of Alabama; that the citizens of the state of Alabama, and that state, on the 12th of April, 1861, rebelled against and instituted a civil war against, the government of the United States, and organized a government in hostility thereto; that thereupon all the citizens and inhabitants of that state, and the said Goodman, a citizen and resident thereof, became and were from thenceforth alien enemies, and so continued to be up to and until the cessation of said hostilities, in May, 1865; that the restric-

tions and prohibitions and liabilities to forfeiture declared by the proclamation of August 16th, 1861, continued until the 22d of May, 1865; that, after the 16th of August, 1861, and before the 22d of May, 1865, it was unlawful for the defendants to insure the life of Goodman, or to receive from him, or credit him with, any premium on the policy; and that such state of insurrection and war, of itself, terminated the policy, and all the rights and interests of Goodman or his assigns therein, and also terminated his membership of said company, and all his rights and privileges as a member thereof, and all right thereafter to participate in the investments, earnings and profits thereof.

The third section of the act incorporating the defendants provides, that "all persons who shall hereinafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation, as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation, and no longer." The thirteenth section of the same act provides, that "any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment, due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company." On the 22d of February, 1848, a resolution was adopted by the board of trustees of the company, providing, "that any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium or periodical payment due from him to the company, shall not share in the profits of the company, and all previous payments made by him or her shall enure to the benefit of the company."

The principle of law on which the defendants contend that the war terminated the existence of the policy, is the familiar one, that an executory contract of continuing performance, made before the breaking out of a war, with an alien enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is, ipso facto, dissolved by the declaration of war, which operates, for that purpose, with a force equivalent to that of an act of congress. The William Bagaley, 5 Wall. [72 U. S.] 377, 407; Hanger v. Abbott, 6 Wall. [73 U. S.] 532, 536; Esposito v. Bowden, 4 El. & Bl. 963, and 7 El. & Bl. 763; Reid v. Hoskins, 4 El. & Bl. 979. Assuming that Goodman could not pay the annual premiums on the policy without commercial intercourse with the defendants at New York, he being a resident citizen of Alabama, the argument is that the policy was executory; that the vital principle of the contract is the payment of the annual premium by Goodman, and the consequent liability of the company to pay the amount insured, in case of the death of Goodman during the period covered by the payment of premium; that the continued existence of the policy depended on the punctual payment of the premium, every year, by Goodman; that, by the express terms of the policy, the non-payment of the premium relieved the defendants from liability; that, in this respect, the contract was executory, and its continued existence absolutely demanded continued intercourse and dealings between the parties; and that the contract is, therefore, brought within the very definition of the authorities, as an executory contract, of continuing performance.

Where a contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, the only effect of the war is to suspend its operation, and, on the return of peace, the rights of the parties under it may be enforced. In the case of Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614, in March, 1871, the court of appeals of Virginia, by a majority of three judges against two, held, that a policy of life insurance, in a like situation with the one at bar, in the particulars involved in the question now under consideration, was suspended, but not dissolved, during the continuance of the late Civil War. The view taken by the majority of the court was, that the contract was altogether executory on the part of the company, in the sense that they had done nothing yet towards the performance of it on their part; that it had, however, been largely executed on the part of the assured, creating a right which could be defeated only by a default on his part; that this right was a right to the insurance, not merely for one year, but for the life of the assured; that a new contract every year was not necessary to give the right, but only the annual payment of the premium was necessary to prevent the divesting of the right; that the principle, that war dissolves the contract, had not been applied in a single instance to a contract made before the war, and executed by one of the parties, in part, before the war, and where the execution of the contract on his part was to be completed before he was entitled to any performance by the other party, or where the dissolution of a contract made before the war would work a forfeiture; that such an application of the rule would be arbitrary, unreasonable and immoral; that, when the contract is made before the war, but not executed by either party, and the carrying it into execution will involve a violation of the duty of the parties respectively to their countries, in the new relations which the war has created, in that case, its execution not having been entered upon, and it being uncertain how long the war may last, and prevent the execution of the contract, it may be dissolved, and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit, to be absolved from the obliga-

tion of a contract, which, in the changed relations of their countries, cannot be carried into execution; that, on the other hand, if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without loss or forfeiture to one of the parties, and it cannot be carried into execution consistently with the duty of the parties to their countries respectively, while the war lasts, in such case, it should not be dissolved, but only suspended; and that, if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

In respect to a policy of life insurance in like situation, the court of appeals of Kentucky, in the case of New York Life Ins. Co. v. Clopton, 7 Bush. 179, in August, 1870, adopted the view, that the policy of the law does not avoid, because of the intervention of war, a pre-existing valid contract, which a single act, such as the payment of a debt, can perform; that, in such cases, a suspension of remedy during the war is the only effect of the war; that both principle and policy dissolve a contract made before the war for continuing performance, such as partnership, or affreightment; that the policy of interdicting the payment of a debt, is, that it may aid the enemy in the prosecution of hostilities; that, consequently, suspension of performance until the restoration of peace, effectuates the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle of the temporary interdict; that, in that class of cases, it is the contract, and not the performance, that is continuing, and a suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting or just; that, in such cases as partnership and affreightment, the performance is continuous and unremitting, until the end of the contract shall have been consummated; that, therefore, as supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object, of the contract, a dissolution of the contract is the natural and legal effect of the war; that the reason for dissolution in these two classes of cases is inapplicable to contracts which may be performed by a single act, or by periodical acts, between which there is nothing to perform, and, consequently, no continuity of performance; that, between a single act and such periodical acts, there is no apparent difference, in reason or principle; that, therefore, the law, which only suspends the remedy in the one case, cannot consistently dissolve the contract in the other; that, according to this definition, the ordinary contract of insurance does not seem to belong to the class of contracts of continuing performance, so as to be dissoluble because of an intervening war; that, in the case then before the court, the insurance was an executed entirety for the prescribed term, and the only performance which could devolve on the insurer was to pay the stipulated amount, in the event of loss insured against, fulfilment of which was not a continuing act, but a single act of a continuing contract; that the consideration, though payable in annual instalments, was, also, an entirety, and full performance was not of the kind technically styled continuing; and that, consequently, the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment.

I have dwelt somewhat at length on the views taken by the Virginia and Kentucky courts, in the cases referred to, because they are the only cases on the question of the effect of the late war in respect to the dissolution or non-dissolution of a contract of life insurance, where it is assumed that the payment of the annual premiums required intercourse with the enemy, which have met my notice. I have no hesitation in saying, that I concur fully in the conclusions of those courts on the question, and in the views, above set forth, on which those conclusions are founded. Even if the policy be regarded, for the purposes of this question, as containing a contract on the part of the assured to pay the annual premiums, though a contract not enforceable by a suit to be brought by the insurer, but enforceable only through the pressure of the stipulation for forfeiture in case of the non-payment of such premiums at the specified times, and even though, to pay such premiums, requires intercourse with the enemy, yet the case is one where a suspension of performance on the part of the assured will effectuate, as respects the belligerent governments, the whole aim of the law, without dissolving the contract. As regards the obligation of the insurer, the contract was not one at all of continuing performance, although it was a continuing contract. All that the insurer had to do under it was to pay the sum insured, in case a loss insured against should occur, and the annual premiums had been duly paid, and the proper proofs of such loss were furnished.

There would seem to be no principle on which it could be held, that, in this case, the war dissolved and abrogated this policy, which would not require the court to hold equally, that the policy would have been abrogated by the war, if Goodman had died after the 16th of August, 1861, and before the 2d of March, 1862. In such case, Goodman having been alive on the 16th of August, 1861, the court would be asked to hold that the rights of the parties were to be determined according to their status at the time the proclamation of that date was issued, and that, although Goodman had punctually paid all previously accruing premiums, and had died without making default, yet, the contract being one contracting for continuing performance by him in paying premiums annually, it was abrogated by the war on the

16th of August, 1861, so that the insurer was released from liability on it. A decision to that effect would shock every sense of justice. Yet it can make no difference that Goodman did not happen to die before the 2d of March, 1862. If the principle is to be applied to this policy at all, it must be applied as of the 16th of August, 1861. If it is not applied as of that date, it cannot be applied as of any other date. Its applicability cannot be made to depend on the question whether, in fact, Goodman survived, after the 16th of August, 1861, until after it became necessary for him to do an act of performance under the contract.

There is another suggestion which seems to me of great force. In all the cases, so far as I have observed, where the doctrine of abrogation has been applied to a contract of continuing performance, requiring, for such performance, intercourse with the enemy, the question arose on ground taken by the defendant in the suit, when sued for the breach of, or to enforce, some stipulation of the contract, which could be enforced against him by suit, that he was absolved from such stipulation by the dissolution of the contract through the operation of a war. The present case is not such a one. The defendants cannot, in respect of their obligation under the policy, set up, as a defence against the payment of the sum insured, the dissolution of such obligation by the war, any more than the maker of a promissory note, given before the war, could set up, after the end of the war, that his obligation to pay the note was abrogated by the war. In respect of the stipulation in regard to the payment of annual premiums, this is not a suit to enforce such stipulation or any liability under it, and the party who was, by the contract, to make such payments, does not set up, as a defence against an obligation to make them, a dissolution of the contract by the war.

It is further insisted, on the part of the defendants, that, if it is unlawful to insure the property of an alien enemy, it is, a fortiori, unlawful to insure the life of an alien enemy; that such an insurance could not lawfully be made during the existence of a war; that the acceptance of a renewal premium is virtually a new insurance, the obligation of the insurer lasting only for the period for which the premium is paid; that it matters not whether the alien enemy bears arms in the contest, or is merely a member of the hostile community; that the insurance of the life of an alien enemy gives aid and comfort to the enemy; and that, if it were to be held that the life of the plaintiff's testator, and the lives of many others similarly situated, continued to be insured after the breaking out of the war, under policies made before it broke out, then, if the persons insured had died during the war, the amounts or values of the policies would have been property capable of being used by the enemy of the United States in aid of the war against it, because certain to be realized and made available after the termination of the war.

It is not to be conceded, that, under the policy in this case, the acceptance of a renewal premium would have been a new insurance. But, an examination of the cases and text books on the subject of the dissolution by war of contracts of insurance made before the war, shows, that the principle on which the rule rests does not extend to avoiding policies insuring property which is exempted by the laws of war from liability to be seized by the government of the insurer's country. While the rule would avoid a policy insuring the life of one who should become an actual and active enemy of such government, it thus acquiring the right to destroy his life, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy, who remained such in fact, and over whose life there is no belligerent power, on the part of the government of the insurer. Though, by his domicil, he is a technical enemy, so that his property may be lawfully captured as enemy property, yet, as such nominal hostility does not subject his life, like his property, to peril, no belligerent right is affected by continuing the validity of the insurance. "Consequently, in such a case," as is said in New York Life Ins. Co. v. Clopton, before cited, "neither authority nor principle would avoid the policy, any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation." Nor is it perceived how the amount or value of a policy on the life of an alien enemy who dies during the war, can be availed of, to aid the war, by the government of the country of the assured, in any way or to any extent in or to which the amount or value of a promissory note made before the war, and falling due during the war, cannot be availed of, to aid the war, by the government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war.

The bill alleges that Goodman was not concerned, directly or indirectly, in bringing on the insurrection and rebellion mentioned in the bill; and that he did not bear arms against the United States during the continuance of such insurrection and rebellion, nor in any way, directly or indirectly, aid or abet the enemies of the United States. The evidence is, that Goodman did not favor secession as a measure of redress for alleged wrongs; that he did not bear arms against the United States; that he was enrolled among the citizens of Mobile for home defence, but was not called into service; that he paid the taxes and assessments which were levied upon him and his property by the power which ruled the state of Alabama; that he contributed to the relief of sick and

wounded soldiers, and of the families of absent soldiers; that he held no office, during the war, under any government; that he was over the age for field service in the army, or was otherwise exempted from such service, and was not conscripted, and furnished no substitute for the army; and that he pursued the occupations of civil life during the war. On these facts, it cannot be held that any rule of law requires that the policy on the life of Goodman should be regarded as having been dissolved and abrogated by the war.

I have assumed, in the discussion hitherto, that Goodman could not, after the 16th of August, 1861, have paid to the defendants the annual premiums which accrued before the 22d of May, 1865, without direct intercourse with them. The fact is so. The bill alleges that Goodman failed to pay such premiums on or after the 2d of March, 1862, "because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead." The answer alleges, that the appointment of McCoy, as the agent of the defendants at Mobile, in and for the state of Alabama, was revoked by the defendants on or about the 26th of March, 1861, and Goodman had notice thereof, and since that time the defendants have not had any agent in and for the state of Alabama. The statements of the bill and the evidence show that these allegations of the answer are true, and that the defendants had no agent in Alabama from March, 1861, up to January, 1869. In the absence, therefore, of any agent of the defendants in Alabama, it was impossible for Goodman to pay his annual premiums without direct intercourse with the defendants at New York.

The defence is also set up, that the policy, by its terms, ceased to exist by reason of the non-payment of the annual premium that was due and payable on the 2d of March, 1862, and that thereby, also, all previous payments made by Goodman became forfeited to the defendants. It is replied, on the part of the plaintiff, to this defence, that the defendants, by the act of withdrawing all their agencies from the state of Alabama in March, 1861, prevented the payment by Goodman of his annual premiums, and thereby waived such payments, all of which became due after the 16th of August, 1861, the act of the defendants having prevented the payments in Alabama, and the effect of the war being to make such payments at New York, by Goodman, unlawful.

If it was a part of the contract entered into by the defendants, or of their obligations to Goodman under it, that Goodman should have the right to pay his annual premiums to an agent of the defendants in Alabama, and if the defendants were bound to provide in Alabama, during the continuance of the risk on the policy, an agent to receive such premiums then Goodman was not bound to seek any other recipient of such payments than such agent, and was not bound, for want of any such agent, to pay the premiums directly to the defendants at New York. In the application made in February, 1849, for the policy issued to Mrs. Goodman in March, 1849, Goodman is described as residing in Mobile, Alabama, and as being a wharfinger there. In his application of March, 1858, for the policy of 1858, and in that policy, he is described as of Mobile, in the state of Alabama. All the premiums that he paid, were with the knowledge of the defendants, paid at Mobile, to McCoy, their agent there, and were received by the defendants through and from McCoy. Goodman resided in Mobile from 1835 up to his death, and died at Mobile. In the absence of any notice to the contrary, the defendants must be held to have continued to understand that he continued to reside in Mobile. His application for the policy of 1858 was made through McCoy, at Mobile, the policy was delivered to him through the hands of McCoy, at Mobile, and bears McCoy's signature, as agent at Mobile, the three payments of premiums in 1859, 1860 and 1861, were made through McCoy, at Mobile, and the receipts therefor bear the signature of McCoy as the defendants' agent. The policy contains on its face the words: "Agents of the company are authorized to receive premiums when due, but not to make, alter, or discharge contracts, or waive forfeitures." It is contended by the defendants that there was no obligation on them to keep an agent at Mobile or in Alabama. Considering the character of the contract, the circumstances under which it was entered into, the fact that Goodman was, with the knowledge of the defendants, a resident citizen of Alabama at all times, the fact that the contract must be regarded as having been entered into, and continued in operation by the defendants, at least as long as they themselves recognized its continuance, that is, until March 2d, 1862, with reference to, and in subordination, on their part, to such statute law of the state of Alabama as should be enacted on the subject of their keeping agents in that state, and the fact that the agency of McCoy, having been continued during the life of the policy up to March, 1861, was then withdrawn, it must, I think, be held, that the defendants were bound to keep in Alabama an agent to whom Goodman could pay his annual premiums, or could, at least, offer or tender payment, such agent to be appointed in conformity with such statute law, and that, if the absence of such agent was all that prevented the payment of such premiums by Goodman, the defendants are estopped from setting up the non-payment of such premiums at the times stipulated therefor as a defence to this suit.

The Alabama statute on the subject of foreign insurance companies, enacted February 24th, 1860, is in evidence in this case.

Its provisions are applied (section 1190) to life insurance companies not incorporated by the laws of the state of Alabama, whether such companies are or are not organized on the mutual plan. It provides (section 1180) that no agent of any such company shall take any risk or transact any business of insurance in Alabama, without first procuring a certificate of authority from the comptroller of the state; that, before obtaining such certificate, such agent must furnish to the comptroller a sworn statement showing the name and locality of the company, the amount of its capital stock, the amount of capital stock paid in, and the act incorporating it, and an instrument authorizing such agent to acknowledge service of process for and in behalf of the company, and consenting that service on such agent shall be taken to be service on the company; that no company incorporated by any other state, or any agent of it, shall transact any business of insurance, unless the company is possessed of at least $100,000 of actual capital invested in stock of at least par value, or in bond and mortgage on real estate worth double the amount for which the same is mortgaged; and that, on a compliance with these provisions, the comptroller shall issue a certificate thereof, with the authority to transact the business of insurance, to the agent applying for the same. It also provides (section 1182) that the agent, before taking any risks or transacting any business of insurance in the state, shall file in the office of the judge of probate of the county in which he may desire to establish an agency for the company, copies of the statement and instrument aforesaid. It also provides (section 1183) for the renewal annually of these proceedings. It also provides (section 1185) that every agent must annually deposit with the assessor of the county in which the agency is established, a sworn statement of the gross premiums received for insurance by the company at the agency during the preceding year. It also provides (section 1186) that such agent, before taking any risk or transacting any business of insurance, must pay certain local fees annually so long as the agency is continued. It also imposes (section 1188) a penalty of fine and imprisonment for the violation of the provisions of the law. It also provides (section 1191) that the provisions of the law shall apply when the risk is taken or any insurance business is transacted in Alabama by the agent of any company, whether the policies are signed by the officers of the company in or out of Alabama.

There can be no doubt that the passage of such a statute as this, was within the competence of Alabama. That state had a right to impose such terms and conditions as it chose, in granting its assent to the recognition of the defendants in Alabama, and of their rights under policies to be issued in Alabama to citizens and residents of Alabama, and to exact, in its discretion, such security as it thought proper, for the performance of the contracts of the defendants under such policies. It also had a like right to regulate the business of agencies of the defendants in Alabama, with reference to future payments to become due on existing policies issued in Alabama to citizens and residents of Alabama. Paul v. Virginia, 8 Wall. [75 U. S.] 168, 181. The policy in question was in fact issued in Alabama by the defendants, to a citizen and resident of Alabama, although it professes to have been delivered as well as signed by the president and secretary of the company. The receipt, by McCoy, of the premium paid at Mobile March 2d, 1861, such premium having been received by McCoy as agent, under the authority to that effect on the face of the policy, made the contract of insurance, as respected the period to elapse before March 2d, 1862 (even if, as contended by the defendants, such payment of premium created a new contract of insurance for a year), an Alabama contract, to be governed by the statute law of Alabama. Such receipt of such premium by McCoy was ratified by the defendants. I think the proper construction of the policy, as such policy stood when the payment to be made March 2d, 1862, became due, is, that, inasmuch as Goodman was then living, and the obligation of the defendants under the policy was outstanding, the defendants were bound to furnish Goodman with an opportunity, on the 2d of March 1862, and on every recurrence of the day of annual payment, to pay the premium to an agent of theirs in Alabama. As such payment to the agent would have been the transaction of insurance business in Alabama, the statute of that state required that the agency should conform to the statute. The defendants were bound to be ready to receive performance of the contract by Goodman through an agent in Alabama, such agent to be appointed in accordance with the Alabama statute. McCoy's agency in this case existed after that statute was passed. Such agency was withdrawn in March, 1861. Having been created before the war, it would not have been revoked by the war, at least so far as the right to receive payments of annual premiums was concerned. Payment of the premiums by Goodman to the agent would not have violated any law of war, or any duty of Goodman's. Ward v. Smith, 7 Wall. [74 U. S.] 447, 453; Conn v. Penn [Case No. 3,104]; U. S. v. Grossmayer, 9 Wall. [76 U. S.] 72, 75.

The evidence shows pecuniary ability and willingness on the part of Goodman to pay the premiums at Mobile, and that the reason why he did not pay them there was the absence of any agent there of the defendants. I see no legal objection to the evidence on this subject, either as competent, or as sufficient to prove the facts. If the defendants were entitled to the punctual payment of the premiums, as a condition precedent to their continuing liability from year to year, their prevention of such payment, by the with-

drawal of McCoy's agency, and of all other agencies in Alabama, excused Goodman from making the payments punctually, and debars the defendants from setting up such want of punctuality as a defence in this suit. Williams v. Bank of U. S., 2 Pet. [27 U. S.] 94, 102; Van Buren v. Digges, 11 How. [52 U. S.] 461, 479.

There is no force in the objection, that the defendants could not, during the war, have received from their agent in Alabama any moneys paid to him there as premiums, or that such moneys would have been confiscated in the hands of such agent, if paid to him. If the agent had been provided, Goodman could have tendered the premium, and the agent could have refused to receive it, because he could not remit it, and because it would be confiscated. The rights of Goodman would thus have been preserved, according to the tenor of the contract. The loss, if any, which would have ensued to the defendants, was a loss incident to the war, and with which Goodman had no concern, and the apprehension or certainty of which could not affect his rights. The unlawfulness of any receipt by the defendants at New York, from Goodman, or any other person in Alabama, during the war, of any moneys paid as premiums, cannot affect any rights of Goodman in respect of having the opportunity of paying such premiums in Alabama, or be set up by the defendants as a ground of forfeiture of the policy in respect of such rights.

Under these views, the contract was only suspended during the war. After the end of the war, the right of Goodman to pay the premiums which he had been prevented from paying by the action of the defendants, continued, in all respects, as if the 2d of March, 1862, had not passed. Within a reasonable time after the close of the war, that is, in January or February, 1866, and before the coming around of any 2d of March after the close of the war, an application on behalf of Goodman was made to the defendants at New York, requesting them to recognize the policy, on terms to be arranged. The reply of the defendants was, that they did not recognize the policy as valid, because it had been forfeited by the non-payment of premiums, and they refused to receive payment of the premiums in arrear. What thus transpired made it unnecessary for Goodman to tender the premium due March 2d, 1866. In December, 1867, after Goodman's death, an agent of the plaintiff presented to the defendants his claim on the policy, and tendered to them proofs of Goodman's death, and offered to pay any premiums that were in arrear. The reply of the defendants was, that the policy was forfeited, and they would recognize no liability upon it, and would not receive any premiums, or pay any loss upon it, but that they would, as a gratuity, pay what was the surrender value of the policy on the 2d of March, 1862.

The withdrawal of the agency of McCoy, and of the other agencies in Alabama, made it unnecessary for Goodman to seek out McCoy or some other person who had been an agent of the defendants in Alabama, and tender the premiums, as due, to him, even though, as would appear from the evidence, McCoy remained in Alabama, accessible, during a part, at least, of the war. Especially is this so, in view of the fact that Goodman had notice of the revocation of McCoy's agency.

On all these considerations, I am of opinion that the defendants must be regarded as having prevented Goodman from paying his premiums, as due, in Alabama, where he had a right by the contract to pay them, and, therefore, as having waived such punctual payment; that the policy was not and is not forfeited by reason of the non-payment of premiums; that it is a valid and subsisting policy against the defendants; and that the plaintiff was, when he brought this suit, in a position to ask the relief prayed for by the bill.

These views recognize fully all the terms of the policy, and do not interpolate in the contract of the parties any provision, by way of excuse for the non-payment, on the stipulated day, of any premium, which is not within the terms of the contract. It is of the essence of every contract, that, if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance. In this case, the prevention by the defendants of performance by Goodman was equivalent to actual performance by Goodman, or to a waiver by the defendants of such performance.

But, it is urged by the defendants, that Goodman could have paid his premiums at New York; that, if he elected to remain in Alabama, where he could not or would not make payment of the premiums, it was his own fault; and that the existence of the war and the prohibition of commercial intercourse between the state of Alabama and the city of New York furnishes no legal excuse for the non-compliance by Goodman with his agreement to pay the premiums on the designated days. Yet, the defendants insist, in the answer, that it was unlawful for them, between August 16th, 1861, and May 22d, 1865, to receive from Goodman any premium on the policy; and, on the argument, their counsel insisted, that, if Goodman had, after the 16th of August, 1861, offered to pay the premiums, as they fell due, it would have been unlawful for the defendants to receive such premiums. It was further insisted, that, notwithstanding this, the policy terminated because of such non-payment, for the reason that the intervention of the war, as an excuse for non-payment, was not provided for by the policy. But these arguments are without avail to support the defendants' case. Their inability to receive the premiums, when due, in 1862, 1863, 1864 and 1865, amounted to the same thing as if such pre-

miums had been actually tendered, and the defendants had refused to receive them. Such inability to receive was a dispensing by the defendants with the punctual payment of the premiums, and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk. Such inability was a default on the part of the defendants, preventing Goodman, a citizen and resident of Alabama, from paying the premiums to the defendants at New York, and, therefore, dispensing with the payment of them, as performance by Goodman. The case is not one where the excuse set up is merely inability or impossibility of performance on the part of him who is to perform. It is one where inability on the part of the party to whom performance was due, to receive such performance—an inability notorious and known to the party owing performance—existed, and is set up by the party to whom performance was due, as a ground for forfeiting the rights of the other party under the contract, because he did not pay what it was impossible and unlawful for his obligee to receive. The cases in the books, which were cited on the part of the defendants, as enforcing strictly the rule that a precedent condition on which, by contract, money is to be paid, must be absolutely complied with, were cases in which the impediment to performance existed solely on the part of him who was to be the actor in performance, and were not cases in which the impediment existed either solely on the part of him who was to be the recipient of performance, or was an impediment affecting both parties jointly, and equally in extent. The distinction is a sound one; and it would be gross injustice to apply to this case a rule the reason of which has no application to it. The defendants, in effect, say to Goodman: "It was unlawful for us to receive from you your premiums for 1862, 1863, 1864, and 1865, as they became due; it would have been idle for you to have tendered them to us; yet, as the contract was that you should pay them at specified times, and you did not pay or tender them at those times, the contract is forfeited, our liability to pay you the $5,983.05 is at an end, and, besides that, the $2,307.50 paid to us as premiums on the policies of 1849 and 1858 is forfeited to us." I do not believe a defence of that kind to a policy of life insurance situated like the present one, was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind. Indeed, it has often been held, that the intervention of the law will excuse non-performance of a contract, where the operation of the intervention was solely on the party who was to perform, and not at all on the party who was to receive performance. Wolfe v. Howes, 20 N. Y. 197, 201; Jones v. Judd, 4 Comst. [N. Y.] 411, 413; People v. Tubbs, 37 N. Y. 586, 588.

The views I have endeavored to maintain are concisely stated by the court in Manhattan Life Ins. Co. v. Warwick, before cited. In speaking of the obligation of the insurer, under the policy, to pay the sum insured, the court say: "The company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium, or by hindering or preventing the other party from paying it, or by any disability on its part to receive it, and which prevented the payment, which was not provided for in the contract." In the present case, the defendants are setting up their own disability to receive payment, as a ground of forfeiture. In New York Life Ins. Co. v. Clopton, before cited, the court say: "To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of another instalment of premium, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay, when there was legal ability to receive the premiums."

There was, therefore, no forfeiture in this case. Goodman continued to be insured in the defendants' company until his death, and was a member of the company at the time of his death. He was entitled, under the policy, at the time of his death, to all the rights, in respect of the sums insured by the policy, and of all proper increase of such sums insured, as the result of dividends made to members, up to the time of his death, which he could have been entitled to, if the defendants had received and accepted all the annual premiums specified in the policy. The resolution of February 22d, 1848, cannot be interpreted as applying, or having been intended to apply, to a case like the present one. Goodman did not "omit" to pay any premium, in the proper sense of that word. His failure to pay was wholly inactive and involuntary, and was no default on his part, but was, as between him and the defendants, the default of the defendants.

Nor is there any force in the view, that, Goodman being a partner with the other persons insured in the defendants' company, the partnership was dissolved by the war. The relation between him and such other persons, assuming that they were domiciled in New York during the war, because the company is a New York corporation, was not such a relation of partnership as requires the application to it of the rule that a war dissolves a contract of commercial partnership between enemies. The views before stated in regard to the effect of the war on the policy, as a contract between enemies, apply to it equally in its aspect as a policy issued by a company doing business on the mutual plan. The relations of Goodman to the partnership

and to his partners, and his duty to it and them, as a member, were created and are to be measured wholly by the terms of the policy, and no different rule can be applied to the policy, because it was issued by a mutual company, than would have been applied to it if it had been issued by a company of which the insured did not, by the insurance, become a member.

I have carefully considered all the views urged by the defendants, and am entirely satisfied that the plaintiff is entitled to a decree, with costs. There must be a reference to a master to take and state an account of the amount due on the policy, with interest, such amount to be computed on the basis before stated, and the defendants to be allowed credit for the unpaid annual premiums.

[On appeal to the supreme court of the United States, this decree was affirmed by a divided court, April 6, 1874 (case unreported), no reason being assigned, save the division of opinion.]

Case No. 5,987.

HAMILTON v. NATIONAL LOAN BANK.

[3 Dill. 230;[1] 18 N. B. R. 97.]

Circuit Court, W. D. Missouri. 1875.

BANKRUPT ACT — LEGAL AND EQUITABLE RIGHTS OF THIRD PERSONS IN THE PROPERTY OF THE BANKRUPT—SALE OF CHATTELS NOT SET APART.

1. The assignee in bankruptcy takes the property of the bankrupt subject to all legal and equitable rights thereto existing in favor of third persons, at the time of the bankruptcy.

2. This principle applied to a case where the bankrupt sold six out of twenty specific bonds of like character and value, in the hands of a bailee, and received pay therefor before the bankruptcy; and it was held that the rights of the purchaser of the six bonds were superior to those of the assignee in bankruptcy of the vendor.

[Appeal from the district court of the United States for the Western district of Missouri.

[This was a proceeding by H. B. Hamilton, assignee in bankruptcy of the Lexington & St. Louis Railroad Company, against the National Loan Bank of St. Louis and M. W. Withers.]

The county of Lafayette, in Missouri, in April, 1871, subscribed $20,000 to the stock of the Lexington & St. Louis Railroad Company, and to pay for the same executed twenty negotiable bonds of the same date, May 1st, 1871, payable at the same time, with the same rate of interest, for one thousand dollars each, and numbered from 71 to 90, inclusive. By agreement between the county and the railroad company these bonds were placed in the hands of M. W. Withers, in escrow "to be delivered by him to the railroad company upon the completion of its road, ironed, equipped, and in running order, and operated into the city of Lexington, in said Lafayette county, from Sedalia." There was no other condition attached to the delivery of the bonds, and the bonds themselves were fully executed and ready for delivery on the completion of the road to place named. When the bonds were put in the hands of Withers, as the agent or trustee for both parties, he executed to the railroad company a bond conditioned to deliver to said company or its order said twenty bonds of the county on the completion of the railroad to the city of Lexington. The twenty bonds were exactly alike, and only distinguishable from each other by difference in the numbers. Soon afterwards, viz.: On the 29th day of May, 1871, the president of the company sold six of the said twenty bonds to the National Loan Bank of St. Louis for the full value thereof, and received payment therefor, and as evidence of such sale delivered to the bank the above mentioned bond of Withers to the railroad company. In April, 1872, the bank notified Withers that it had purchased of the railroad company six of the bonds in his hands. In April or May, 1872, the railroad was completed to Lexington and the company had fully complied with the condition which entitled it as against the county to the twenty bonds. Withers has ever since been in the possession of the twenty bonds and now holds the same. On the 30th day of May, 1872, one John Reid, claiming to own the same, demanded of Withers "the fourteen bonds issued to the Lexington & St. Louis Railroad Company by the county of Lafayette, dated May 1st, 1871, numbered from seventy-one to eighty-five." The contract of sale by the railroad company to the National Loan Bank of St. Louis of the six bonds above mentioned in the hands of Withers did not designate by number, letter or otherwise, which of the twenty bonds the said bank was to get. Withers had only the twenty bonds in his hands. After the completion of its road to Lexington, the railroad company was put into bankruptcy; and this suit is a contest between the assignee in bankruptcy of the railroad company and the National Loan Bank of St. Louis, as to the right of the respective parties to the six bonds in the hands of Withers purchased by the bank of the company in the manner above described. The case arose in this manner. One Blair sued the railroad company before its bankruptcy in one of the state courts, and garnished Withers. Under the statutes of Missouri (1 Wagner's St. p. 192, § 52; Id. p. 665, § 9; Id. p. 664, §§ 1, 4), the National Loan Bank intervened by means of a proceeding termed an "interplea," and claimed the six bonds in the hands of Withers under its said purchase, which was prior in date to Blair's garnishment. Afterwards the railroad company was put into bankruptcy in the United States district court for the Western district of Missouri, and by the consent of Blair and the assignee in bankruptcy of the railroad company and the National Loan Bank, the case of Blair and the "interplea" of the bank were transferred to said federal

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

district court for trial and final disposition. Blair's attachment was dissolved by the federal district court, which left the contest as to the six bonds between the bank and the assignee in bankruptcy, remaining. The parties waived a jury and tried the question to the court, and after hearing the evidence the court, upon the issues joined, found for the bank, and entered the following judgment, viz: "That M. W. Withers (who had answered in the proceeding), commissioner of Lafayette county, who has in his possession twenty of the bonds of that county, deliver six of the same to the interpleader, the National Bank of St. Louis, and that the assignee in bankruptcy pay the costs." To reverse this judgment or order the assignee brings the case to this court.

Lay & Belch and H. B. Hamilton, for assignee in bankruptcy.

H. C. Wallace, Ewing & Smith, and J. L. Smith, for National Loan Bank.

DILLON, Circuit Judge. It is very doubtful whether this case is properly before the court upon the appeal of the assignee, or whether any errors of law appear of record properly saved by bill of exceptions or special findings of fact. But as counsel have made no questions of this kind, and have argued the case in this court upon the merits, and as upon the merits it must be affirmed, I will dispose of it upon the assumption that it is rightfully here and that the material facts are those appearing in the statement of the case.

This is a contest between the bank and the assignee in bankruptcy of the railroad company. Before the bankruptcy of the company the bank had purchased of it six of the twenty bonds of the county of Lafayette, then in the hands of Withers. The bank paid the company in full therefor, and the bona fides of the transaction is not impeached. But the company could not then deliver the bonds to the bank because they were in the hands of Mr. Withers, and because it had not then completed its road to Lexington. Afterwards the bank gave notice to Mr. Withers of its purchase of the six bonds, and in April or May, 1872, the company completed its road to Lexington, thus becoming fully entitled to the bonds, as between it and the county. All this occurred before the bankruptcy of the company. The twenty bonds are still in the hands of Mr. Withers, who claims no interest in them, and is ready to abide the orders of the court.

The assignee in bankruptcy relies upon this point, viz: That the purchase of the six bonds by the bank is void because the particular six of the twenty which it purchased were not determined by any description thereof, or by separating them from the residue, and therefore, it is argued, the title or property in the six bonds did not pass to the bank, but remained in the company.

As the bonds were all exactly alike in date, amount, time of payment, etc., there are not wanting respectable authorities that the title or property in six of the twenty would pass without any actual separation of them from the others. Kimberly v. Patchin, 19 N. Y. 330; Russell v. Carrington, 42 N. Y. 118; Young v. Miles, 20 Wis. 615, 23 Wis. 643; Chapman v. Shepard, 39 Conn. 413; Pleasants v. Pendleton, 6 Rand. (Va.) 473; Waldron v. Chase, 37 Me. 414; Warren v. Milliken, 57 Me. 97; Cushing v. Breed, 14 Allen, 380.

The authorities, however, are not harmonious on the point, and will be found very fully collected in the American edition of Benjamin on Sales (sections 78, 81, 308, 318, 355).

It is not necessary to the determination of the present case to decide whether the legal title to the six bonds passed, or could pass, to the bank before the particular six were identified, set apart, or appropriated under the contract.

At the very least the contract between the company and the bank would be valid as an executory agreement on the part of the company, for a consideration actually received, to sell and transfer six of the twenty bonds, in the hands of Withers, to the bank; and this agreement having been made in good faith and the bonds having been paid for by the bank, gave to the bank a right or equity as against the company or its assignee in bankruptcy, to six of the twenty bonds. This right or equity would attach directly to the bonds in the hands of Withers, and could be enforced against the company if bankruptcy had not supervened, and it is not defeated by the subsequent bankruptcy of the company, to whose rights, and to whose rights only, in this respect, does the assignee in bankruptcy succeed. If the railroad company afterwards sold the remaining fourteen bonds to Reid, and designated the fourteen, leaving six, and only six, in the hands of Withers for the bank, this would amount to an appropriation of the six or a separation of them, and the title of the bank would be unquestionably complete.

In short, if the legal title to the six bonds passed to the bank, the assignee in bankruptcy of the vendor has no right to them. But if the absolute property in the six bonds did not pass to the bank the transaction gave to the bank a consummated and specific right or equity to six of the twenty bonds which are yet in the hands of the bailee, and this right or equity is recognized and preserved to the bank by the bankrupt act. Actual delivery of the bonds at the time of the sale is not necessary, for, says Willes, J., in Meyerstein v. Barber, L. R. 2 C. P. 38, 51; "Since the judgment of Lord Wensleydale (then Justice Parke), in Dixon v. Yates, 5 Barn. & Adol. 313, it has never been doubted

that by the law of England the sale of a specific chattel passes the property to the vendee, without delivery." Benj. Sales, § 308; How v. Taylor, 52 Mo. 592; Massmann v. Holscher, 49 Mo. 89. And in equity, "A contract for the sale of chattels, to be afterwards acquired, transfers the beneficial interest in the chattels as soon as they are acquired to the vendee." Benj. Sales, § 81, and cases cited. Frazer v. Hilliard, 2 Strob. 309; Story, Eq. Jur. (10th Ed.) §§ 421b, 421c, 1040.

In the case under consideration the railroad company had already paid the county for the bonds by its stock, and was entitled to the bonds in the hands of the custodian thereof as soon as its road was completed to a given point; clearly it could transfer the beneficial interest in bonds thus held, and it did so by the sale to the bank, if indeed it did not pass the title to them, which became perfect and absolute when the road was finished and operated to Lexington. But whether the bank has the legal title or only the beneficial or equitable title, in either event its rights are superior to those of the company or its assignee in bankruptcy. Affirmed.

Case No. 5,988.

HAMILTON v. ROLLINS. SAME v. TODD et al. SAME v. BUTLER et al. SAME v. SHERWOOD.

[5 Dill. 495; 3 Ban. & A. 157; 4 Law & Eq. Rep. 561; 1 N. W. (O. S.) 205; 10 Chi. Leg. News, 4.] [1]

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

PATENT FOR INVENTION — ASSIGNMENT OF RIGHT TO RECOVER FOR PREVIOUS INFRINGEMENTS.

1. Letters patent No. 51,310, to Palmer Hamilton, for "improvement in saw-mills," is valid, and was not anticipated by the Straub patent, No. 7943.

2. A patentee may assign his right to recover for infringements occurring before the assignment.

These suits, heard together, were brought [by Susan Hamilton against John Rollins, and against Shubael D. Todd and others, Levi Butler and others, and George Sherwood], to restrain the infringement of letters patent No. 51,310, granted to Palmer Hamilton, December 5th, 1865, for an improvement in saw-mills, and for an account of profits. The object of the invention was to give to a reciprocating saw a rocking or rolling motion, and it consisted in hanging the saw to cross-heads working in curved guides at the upper end, and straight guides at the lower end, the saw being pivoted to the pitman below the lower cross-head, which gave to the saw the requisite motion. The claim was for "giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head working in straight guides, and pivoted to the pitman below the saw, with the crank pin, substantially as described." The complainant claimed under a deed of assignment from the patentee, dated 18th of April, 1873, whereby, after reciting the grant of the letters patent, he "assigned, sold and set over to said Susan Hamilton all the rights, title and interest which I have in said invention, as secured to me by said letters patent, and my whole right and interest in all infringements of said patent, and actions in law for damages for such infringement; the same to be held and enjoyed by the said Susan Hamilton for her own use and behoof, and for the use and behoof of her legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me had not this assignment been made."

W. E. Hale and Geo. H. Lothrop, for complainant.

Lochren, McNair, & Gilfillan and Lamprey & James, for defendants.

NELSON, District Judge. These suits are brought by the complainant, an assignee of the patentee, to recover damages for infringements of the patent No. 51,310, granted to Palmer Hamilton, December 5th, 1865, for "improvement in saw-mills."

The defences set up in all the cases are: (1) Want of novelty.

This patent was sustained in the case of Ives v. Hamilton, 92 U. S. 426. It is there described as "an improvement in saw-mills, and consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting rod or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, * * * giving to the saw, in its downward movement, a rocking or rolling motion, by means of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head working in straight guides, and pivoted to the pitman below the saw with the crank-pin."

The defendants rely upon the Straub patent, No. 7943, issued in 1851, to sustain this defence. In the case above cited, this patent was not spread on the record, and the supreme court did not consider it. I have

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Dill. 495, and the statement is from 3 Ban. & A. 157. 4 Law & Eq. Rep. 561, contains only a condensed report.]

examined the drawing of the invention and claim of the patentee, and find it is not the combination used in the Hamilton patent. Straub obtains a similar result (a vibratory motion of the saw), but the means devised for producing the motion, and not the result, is the claim made by Hamilton, and for which he was granted a patent. In Straub's patent, the saw is fixed at the upper end between two blocks, and at an angle to the perpendicular of forty-five degrees, or thereabouts, are placed grooved guides in which the blocks with saw attached slide. These guides are fastened to and supported by the saw frame, which consists of two upright standards with a cross-bar at the top running from each to the guides. The opposite end of the saw is fastened directly to a short rod connected to the extremity of a fly-wheel, so that, passing upwards and downwards by the rotary motion of the wheel, the saw retreats from and advances towards the log, describing in its movement nearly a circle. Between the guides, and running in the same direction, is fitted to the upper end of the saw a rod with spiral spring coiled around it, which strains the saw in descending by opposing its descent, and by its tension draws up the sliding blocks and upper end of the saw, and thus prevents it from bending during its upward and downward movement.

Hamilton obtains a vibratory motion to the saw by the cross-head to which the saw at the upper end is attached sliding in curved guides with the concave part towards the log, and the opposite end of the saw oscillating slightly by being attached to the pitman rod above the cross-head.

The design of the inventors of both combinations is to secure a motion similar to that given a whip-saw by men in a saw-pit, but the means employed by each are different. The curved guides above and the straight guides and lever pitman below, all of which comprise the Hamilton mechanical combination, are not found in the Straub patent.

Second defence. No right of action to recover for infringements occurring before the assignment. This defence is not intended to apply to all the cases, but, so far as it does, cannot be sustained.

Ordinarily, a cause of action in tort is not assignable. This rule, however, has reference to strictly personal torts, but rights of action for damages, and claims growing out of and adhering to property, will pass by assignment. The deed of assignment introduced is sufficient to convey the rights vested in the original patentee, and all his interest in infringements, to the complainant. She can, therefore, maintain these suits, and a decree will be entered accordingly for a perpetual injunction and an account, with costs. Decree accordingly.

[For other cases involving this patent, see note to Hamilton v. Ives, Case No. 5,982.]

Case No. 5,989.

HAMILTON v. RUSSELL.

[1 Cranch, C. C. 97.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.[2]

WITNESS—COMPETENCY AND CREDIBILITY.

Possession of the goods by a witness, does not create such an interest in the witness as to render his testimony inadmissible in favor of the party under whom he holds the possession.

Trespass for ordering an execution to be served on the plaintiff's goods, at the suit of the defendant [James Russell], against James and Robert Hamilton. The goods had been taken in the possession of Robert, and the defendant alleged that the deed of conveyance under which the plaintiff [Thomas Hamilton] claims, was fraudulent as to the creditors. The plaintiff offered Robert Hamilton as a witness. The defendant objected that he was interested, because, if the plaintiff recovered, Robert would still remain in the possession and use of the goods by permission of his brother, (the plaintiff,) as he had done heretofore.

But THE COURT were unanimously of opinion that the possession, or the probability that his brother would suffer him to remain in possession, was not such an interest as affected his competency, but went only to his credibility. (See the other points of this case in the report of it in the supreme court of the United States, 1 Cranch [5 U. S.] 309, where the judgment of this court was affirmed.)

[The question of the competency of the witness does not seem to have been raised in the supreme court.]

HAMILTON (SANDERS v.). See Case No. 12,294.

HAMILTON v. SHERWOOD. See Case No. 5,988.

Case No. 5,990.

HAMILTON v. SIMMS.

[Brunner, Col. Cas. 25; [3] 2 Hayw. N. C. 291.]

Circuit Court, D. North Carolina. Dec., 1803.

HEIR—LIABILITY FOR DEBTS OF ANCESTOR.

If the heir, in an action against him on the bond of his ancestor, plead nothing by descent or devise, and it be found against him, judgment shall be de bonis propriis.

At law.

PER CURIAM. This is a debt upon bond against the heir of the obligor; and if the plea of nothing by descent or devise be falsified by verdict, the judgment will be de

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

[2] [Affirmed in 1 Cranch (5 U. S.) 309.]

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

bonis propriis of the heir or devisee. And it will not help the defendant if the jury should find the value of the land on such issue, for still the court would give the judgment against the defendant in jure proprio for the whole debt. Thereupon this plea was by consent withdrawn, and the lands devolved to the defendant in remainder set forth in a new plea.

Case No. 5,991.

HAMILTON v. SIMONS et al.

[5 Biss. 77.] [1]

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

AVOIDING INJUNCTION—ADVICE OF COUNSEL.

1. Where an injunction has been issued restraining a defendant from using patented parts of a machine, he is not at liberty to leave off certain parts selected by himself as infringements, and continue the use of the remainder of the machine; the proper course is for him to take the judgment of the court in the matter.

[Cited in Bate Refrigerating Co. v. Gillett, 30 Fed. 685.]

2. Advice of counsel is not a sufficient justification, and counsel should not take such a responsibility.

[This was a bill in equity by John Hamilton against Simons and Sample, upon which an injunction was issued restraining the defendants from selling a certain machine covered by patents Nos. 17,916 and 20,324. An attachment for contempt was issued against defendants, who now move for an order discharging them from the attachment, alleging that the machines sold since the injunction were without the parts covered by the said patents.]

R. H. Forrester, for plaintiff.

Hitchcock, Dupee & Evarts, for defendants.

DRUMMOND, District Judge. I do not consider it necessary, in this case, to go into the history or details of the question argued on the motion.

An application was made to the court for an attachment against the defendants on the ground that they had violated the injunction issued by the court, and the defendants, admitting that they had sold the apparatus which was claimed by the plaintiff, contend that since the issuing of the injunction they had left off all the material parts covered by the Carpenter patent.

Whatever may be true in relation to the patent of May 25, 1858 [No. 20,324], still there is a question connected with the patent of August 4, 1857 [No. 17,916], upon which it was claimed the patent of 1858 was an improvement, and which is not affected by these changes which have been made in the apparatus of the defendants since the issuing of the injunction. It is a very material question, and of such a character that the court cannot say but that the defendants may have violated the injunction, because if we concede that they have left off what was claimed in the patent of 1858, since the issuing of the injunction, there is another question behind. I will only concede it for the purpose of argument. It is clear to me that the defendants had no right under the circumstances of the case to take the responsibility of disobeying the injunction simply because they left off certain improvements covered by the patent of 1858. The true course for them was either to come into court and ask for a dissolution of the injunction, or to ask for security from the plaintiff if it is a doubtful case. It is a very serious responsibility, where an injunction is issued against a party, restraining him from using any parts of a machine covered by a patent, to leave off certain parts and then take for granted that he is not infringing the patent, and is not violating the injunction. This was done by the defendants under the advice of counsel, but it was advice which I think counsel had no right to give. It is the duty of the counsel to ask for the judgment of the court in such a case, and not take the responsibility of telling his client that he can go on and disregard the injunction.

It seems to be a clear case, where the defendants had no right, in the absence of any action on the part of the court, to go on and dispose of this machine in the way they have done. Unless it is insisted by the counsel for the plaintiff, I shall not feel inclined to punish these men unless they continue violating the injunction, but the order of the court will be that the motion interposed by the defendants to discharge them from the attachment will be overruled. I shall not discharge them. I shall simply decline, under the circumstances, to punish them at present.

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

HAMILTON (STARR v.). See Case No. 13,314.

HAMILTON (STEDMAN v.). See Case No. 13,343.

HAMILTON (STEVENSON v.). See Case No. 13,415.

HAMILTON (STEWART v.). See Case No. 13,429.

HAMILTON (THISTLE v.). See Case No. 13,884.

HAMILTON v. TODD. See Case No. 5,988.

HAMILTON (UNITED STATES v.). See Cases Nos. 15,288–15,291.

HAMILTON COUNTY (COOK v.). See Cases Nos. 3,157 and 3,158.

HAMILTON COUNTY (JACOBS v.). See Case No. 7,161.

HAMILTON MANUF'G CO. (BADISCHE ANILIN & SODA FABRIK v.). See Case No. 721.

HAMILTON, The M. M. See Case No. 9,685.

Case No. 5,992.

The HAMILTON MORTON.

[Brown, Adm. 40.][1]

District Court, D. Michigan. March, 1858.

SUPPLIES BOUGHT FOR A VESSEL LYING AT A DISTANT PORT.

Where coal was bought for a tug, then lying at a distant port, by one who purported to be the master and owner, *held* that the seller was bound to ascertain the extent of the purchaser's authority, and the necessity for the purchase of the coal.

This was a libel for fuel furnished Oct. 27, 1857. It appeared, upon the trial, that one Isaacs, who held himself out as master and owner, ordered of libellants, at Cleveland, on Oct. 23d, 230 tons of coal, and, at Isaacs' request, the same was shipped by them, upon the schooner Velocity, consigned to the tug Hamilton Morton, at Algonac, Michigan, Isaacs representing that he purchased it for the use of the tug. It was shown to be customary for masters of steam vessels to purchase large quantities of coal at Cleveland, and have it shipped to various ports upon the lakes, for their use. The coal was sold upon the credit of the tug, and not upon that of Isaacs, who was known to be irresponsible. It appeared, however, that Isaacs, though the owner, was not, in fact, the master; that, on Oct. 24, the day after the coal was ordered, and before it had all been shipped on the Velocity, the tug was seized by the marshal, at Detroit, for debt, and remained in his custody until she was finally condemned and sold. The coal was never actually delivered to the tug, nor unladen by the Velocity at Algonac, but was carried by her from Algonac to Detroit, where it was sold by Isaacs. It also appeared that the purchases for the use of the tug were usually made by one Robinson, her master, and that Isaacs paid little attention to her beyond collecting her bills.

Wm. Gray, for libellants.
W. A. Moore, for claimants.

WILKINS, District Judge. The coal never was furnished the Morton. It was delivered by the libellants to the schooner Velocity, which was chartered by Isaacs, claiming to be the master and owner of the Morton, which, at the time, was actually in custody of the marshal of this district, and had been for four days previous thereto. Should the court decree in favor of the libellants, it must be entirely upon the very unsatisfactory testimony of Isaacs, which in its material facts, is contradicted by Robinson, who testifies that he was master of the tug until the close of navigation, made all her contracts, and, at the time Isaacs was negotiating with libellants, had purchased all the coal she needed while she was lying at Algonac. Independent, then, of the question raised as to the lien under the Ohio law, the proof would not warrant a decree against the vessel. The fact that, at the time the coal was ordered, the tug was lying at a distant port, should have put the libellants upon inquiry, and they were bound to ascertain the extent of Isaacs' authority, and to see that the coal was actually needed by the tug. Libel dismissed.

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

Case No. 5,993.

Ex parte HAMLIN.

In re BRODT.

[2 Lowell, 571;[1] 16 N. B. R. 320; 5 Cent. Law J. 281.]

District Court, D. Massachusetts. May, 1877.

BANKRUPTCY—SETTING ASIDE COMPOSITION — NOTICE TO CREDITORS—ACTS UNDER COMPOSITION VALID—DUTIES OF CREDITORS.

1. When an application is made to set aside a composition once recorded, and to proceed in bankruptcy, notice should be given to all the creditors as well as to the debtor.

[Cited in Re Shaw, 9 Fed. 498; Re Dunn, 53 Fed. 343.]

[Cited in Farwell v. Raddin, 129 Mass. 8.]

2. When a composition, partly carried out is set aside, all acts which have been regularly done in pursuance of the resolutions are valid, and the assignment to an assignee in bankruptcy should contain a proviso to that effect.

[Cited in Re Wilson, Case No. 17,781.]

3. Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares.

4. It seems, that a creditor, who knows that a composition is being carried out, and that the creditors are being paid, and makes no effort to obtain his own share, will be estopped to object to these payments.

In February, 1876, a petition in bankruptcy was filed against H. D. Brodt, as surviving partner of the firm of R. W. Dresser & Co.; and he at once offered a composition, which was finally accepted, and ordered to be recorded in April, 1876. It provided for payment of twenty per cent, by instalments, secured by notes, the last payment to be at the end of six months from the date of recording the resolutions. In February, 1877, one Hamlin filed a petition in the cause, alleging himself to be a creditor of Brodt, and that he and some others had not been paid the composition, by reason of disputes concerning the amount of their respective debts, and that Brodt was apparently no longer able to pay the composition; but that the petitioner had reason to believe there were assets which might be reached by an assignee, and praying that the composition might be set aside, and for an adjudication of bankruptcy. After notice to the debtor the petition was granted and a warrant was issued. At the first meeting of creditors a question arose, and was certified to the court, of the right of a creditor who had received his twenty per

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

cent, and had released the debtor, to prove his debt. Certain creditors then filed a motion to vacate the adjudication, or to modify it in such a way that the assignee should not disturb the payments which they had received under the composition. The evidence tended to show that Brodt had given notes for the instalments of his composition to all the creditors whose debts were undisputed, or with whom he could adjust the amount due, leaving Hamlin, and perhaps two others, out of the account. There was no charge of fraud. Brodt's position was a difficult one, because his partner had attended exclusively to the financial affairs of the firm, and had died suddenly, leaving the business in much confusion. After the composition was recorded, the petitioner Hamlin entered into a partnership with Brodt, and had lent him money, and they had disposed of the old stock of R. W. Dresser & Co., and of such new goods as they bought; but the business was not profitable, and the new firm was dissolved. Brodt, in the mean time, paid all the composition notes as they came due, with the knowledge of Hamlin.

A. E. Pillsbury, for petitioner Hamlin.

B. F. Brooks, J. W. May, E. Avery, and H. J. Boardman, for creditors.

LOWELL, District Judge. The statute of 1874, c. 390, § 17 (18 Stat. 184) provides, that if at any time it shall appear to the court, on notice, satisfactory evidence, and hearing, that a composition cannot proceed without injustice or undue delay to the creditors or the debtor, the court may refuse to accept it, or may set it aside, and that the debtor shall then be proceeded with as a bankrupt. Upon examination, I think the point is well taken that "notice" means notice to the creditors as well as the debtor. If the debtor should make the application, as he clearly may, there would be no doubt; but the court cannot know that a creditor is not acting in concert with the debtor, to obtain a reversal of the composition. The notice is undoubtedly intended to be given to the parties interested; and in almost all cases the creditors must be such parties. I was misled by the analogy of petitions for adjudication, and by the fact that the action in cases of this kind heretofore has been upon motions which showed on their face that all the creditors stood on an equal footing. But it is plain that a creditor hostile to the composition, if he could procure the acquiescence of the debtor, might do great mischief in this way. Without committing myself to the position that such notice is absolutely essential in all cases, I hold that it was in this case.

Several creditors having now been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow. I therefore proceed to the other points taken by the creditors, that the remedy of setting aside the composition and going forward in bankruptcy is not appropriate to the case; that the petitioner, having stood by when the composition was entered into, and when the notes were paid, is estopped; that, at any rate, the decree of adjudication should be so modified that it cannot interfere with what has been done under the composition.

If the danger which the creditors fear, that the title of an assignee appointed at this time will relate back to February, 1876, so that the acts of the bankrupt since that day would all be voidable, were well founded, there would be very strong ground for holding this petitioner and all others having actual or constructive notice of the composition estopped to interfere with it. There was a time when it was thought that annulling proceedings in bankruptcy would render voidable every thing done by an assignee; but this fear was quieted by the able judgment in Smallcombe v. Olivier, 13 Mees. & W. 77; and there was a similar case in this country,—Penniman v. Freeman, 3 Gray, 245. It is the law now that to annul or supersede proceedings of this character, means to stay their further prosecution.

So with compositions: the statute authorizes them, the court orders them; and payments made in conformity to a recorded resolution are not preferences. If the creditors are willing to trust a debtor to pay his composition, and exact no mortgage or transfer from him, they authorize him to raise the means for paying it, by dealing with his property. Ex parte Burrell, 1 Ch. Div. 537; Re Reiman [Case No. 11,673]; Re Van Auken [Id. 16,828]. And it cannot be held that the creditors are bound to see each other paid.

There is a hardship, undoubtedly, for those creditors whom the debtor omits from his list, or neglects to pay. In most cases, all difficulties would be met by the appointment of an assignee or trustee, to see that the composition is paid, and that all creditors are treated alike. I have not known the objection taken by a creditor in any case, that too much power was left with the debtor. I have not been willing to interpose mero motu, because, looking at the statute and its history, I am not satisfied that it intends to insist that there shall always be such security, or any security, if creditors choose to dispense with it. Nevertheless, under our statute, which throws a decision upon the court, I think it might be a sound exercise of discretion in almost all cases to require security, if any creditor asked for it.

I am of opinion that the remedy of bankruptcy is intended to reach any case in which it is likely to work a beneficial result for one or more creditors, or for the debtor. The two or three creditors whose dividends have not been paid have other remedies. They may apply to this court in a summary way to require the debtor to pay them, or they may bring actions at law; but I think they may

likewise go on in bankruptcy, if there is no objection raised. In this case, the debtor consents, and the general creditors have no objection, provided the decree shall be so modified as to express those points concerning the assignee's title, which I have already said would be necessarily implied. To this they are entitled, because a decree should be clear, and leave nothing to implication.

The ordinary form of assignment would make the assignee's title relate back to Feb. 6, 1876; and that is the day to which his title will relate; but in the assignment, after the mention of that date, there must be added: "Without prejudice to lawful acts done or titles acquired under and by virtue of the resolutions for composition heretofore recorded in this cause." Let a certificate be sent to the register that the creditors who have taken the composition have no right to vote for an assignee, and that the assignment should be in a qualified form, substantially as above indicated.

Case No. 5,994.

In re HAMLIN et al.

[S Biss. 122; 16 N. B. R. 522; 10 Chi. Leg. News, 131.] [1]

District Court, N. D. Illinois. Dec. 17, 1877.

FRAUDULENT COMPOSITION — WHO MAY AVOID — VEXATIOUS PROCEEDINGS — RIGHT TO DISMISS — PREFERENCE TO CREDITOR — WHEN MUST BE SET ASIDE — STATUTE OF LIMITATIONS.

1. Where the debts against a partnership have been compromised and the firm dissolved, one of the partners has no right afterwards to put the firm into bankruptcy upon allegations of his own fraud in effecting the composition.

2. A composition with creditors fair upon its face, but in fact fraudulent as to part of them, can be set aside only by the creditors who are wronged. The debtor cannot be heard to assert his own fraud as a reason for setting aside such settlement.

3. Where it appears that a petition in bankruptcy has been filed by one member of a firm solely for the purpose of vexing and harassing the other partner, the court has power to dismiss the proceedings.

[Cited in Allen v. Thompson, 10 Fed. 124.]

4. A preference to a creditor cannot be set aside unless an adjudication in bankruptcy is had within the time limited by the bankrupt act [of 1867 (14 Stat. 517)].

5. The rule of the Illinois statute of limitations that the limitation does not begin to run till the fraud is discovered has no application to such case.

Petition by Hamlin for adjudication of the firm of Hamlin, Hale & Co., composed of petitioner and R. W. Hale, filed April 13, 1877. Answer of Hale to rule to show cause, filed June 21, 1877, contains general denial, and a special motion, upon affidavits filed, to dismiss proceeding as to said firm because it is instituted not in good faith for the benefit of creditors, or to obtain a discharge, but for private and malicious purposes of petitioner.

Affidavit of Hale states that his said firm has not existed since 1871, and all of its debts were paid about five years before this petition was filed, under a composition deed at fifty cents on the dollar, executed by all the creditors November 1, 1871, which composition was effected by Hamlin personally, and was obtained and carried out in good faith, unless Hamlin himself committed some fraud respecting it hitherto kept secret from all concerned. That the debts of Hamlin, Hale & Co., scheduled by petitioner, are solely the fifty per cent. thrown off in the aforesaid composition, which settlement Hamlin now seeks to nullify in order to make out his old firm to be insolvent. That Hamlin, before filing this petition, threatened H. B. Claflin & Co., of New York, that if they did not loan him fifteen thousand dollars he would break up said composition, and cause them to be sued for a pretended illegal preference obtained by them under it from Hamlin, Hale & Co. That Hamlin then went to said creditors, and by misrepresentations that he merely desired to remedy, for the benefit of his firm, a technical defect in said composition, obtained the signatures of most of them to an assignment to his, Hamlin's, father, of any claim they might have against Hamlin, Hale & Co. That Hamlin thereupon filed this petition, setting forth as creditors of his said firm the said former creditors (without mentioning the composition or the assignments to his father), and setting forth as assets certain unsettled claims against insurance companies and claims for goods sold, and a claim against H. B. Claflin & Co. for an undetermined amount. That all the firm assets had in fact been assigned by Hamlin to Hale, and a full settlement made between said partners, and Hale had sold all said assets some two years ago. That there was no valid claim against H. B. Claflin & Co., and the last-mentioned firm had in fact lost by Hamlin, Hale & Co. a larger percentage than any other creditor. Respondent, Hale, also filed the affidavit of W. S. Dunn, a member of the firm of H. B. Claflin & Co., corroborating Hale's statements, and the affidavits of twenty-two creditors corroborating his statement as to the misrepresentations by which Hamlin obtained the assignments to his father.

In reply to Hale, the petitioner filed his affidavit, setting forth that he, Hamlin, did effect the composition, but at the direction of H. B. Claflin & Co. he misrepresented the assets and liabilities of his firm, and its liabilities to Claflin & Co., with the object of saving a large amount and paying it as a preference to said last-named firm, and that said amount was paid in fraud of the rights of the other creditors under the composition, and that Hale was privy thereto. That

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Statement and briefs from 16 N. B. R. 522.]

it was true he had obtained an assignment to his father of said claims by such creditors as would execute it, and his father had, a month after the petition was filed, assigned said claims to a trustee to pay the individual debts of petitioner. Petitioner denied having applied to H. B. Claflin & Co. for money, or having made any threats, but he did not deny the allegations as to the means by which he obtained the assignments to his father. It further appeared that, upon the dissolution of the firm sought to be adjudicated herein, a new firm of the same name, but with two new members, had been formed, and continued until November, 1873, when all the partners except Hamlin retired, and Hamlin organized the firm of Hamlin, Davey & Co., which continued several months longer, and that during all this time no objection had ever been made by Hamlin or any one else to the validity of said composition until the filing of this petition. It further appeared, by affidavits and papers filed, that since this petition was filed nearly all the alleged creditors had signed a paper ratifying and confirming said composition, notwithstanding the charges of Hamlin.

A. S. Bradley and H. H. Thomas, for respondent Hale.

This court, sitting in bankruptcy, has full equitable powers over a case—the same as have been exercised in the English courts—derived by construction from the acts of congress. Rev. St. §§ 563, 711, 4972; Morris' Estate [Case No. 9,825]; Ex parte Christy, 3 How. [44 U. S.] 292. The proceedings in the bankruptcy case proper are in equity, although, by special provision of section 566, a particular issue tried by jury is substantially a common law proceeding. Bump, Bankr. § 4972; In re Schuyler [Case No. 12,494]; In re Wallace [Id. 17,094]. If it appears that a proceeding in bankruptcy was instituted for purposes, or mainly for purposes, foreign to the legitimate object of the bankrupt law, the court will supersede it. Amsinck v. Bean, 22 Wall. [89 U. S.] 395; Robs. Bankr. p. 610, and cases cited; Ex parte Bourne, 2 Glyn & J. 137; Ex parte Harcourt, 2 Rose, 203; Ex parte Phipps, 3 Mont., D. & D. 505; In re Davies, 3 Ch. Div. 461. The interference by several state courts, enjoining the prosecution of proceedings in bankruptcy for inequitable purposes, shows that the necessity of enforcing the above doctrine exists in this country. In the English cases cited above, the moving parties appeared in a less inequitable position than Hamlin, for they were merely seeking ends which might have been legitimately prosecuted by other means, while this petitioner admits that the whole foundation of his proceeding is his own fraud, and that he has obtained control of the fund sought to be recovered, and he does not deny the charge that he also obtained this control by fraud.

Leonard Swett, Robert Hervey, and L. H. Bisbee, for petitioner, argued that the proceeding was one of strict right, in which creditors had an interest, and that this court has not the discretionary power exercised in England.

Wirt Dexter, for respondent.

1. The original composition deed, being under seal, and not impeached by creditors, Hale is entitled to the benefit of it, and it cannot be collaterally attacked by Hamlin by reason of his own fraud in effecting it. The composition has already been twice ratified by the creditors, who alone could impeach it.

2. Hamlin got control of the assets as a trustee for his firm, and it would be a fraud on his firm, or the firm creditors, to cause the assets to be assigned for the benefit of his individual creditors.

3. Even if the individual creditors obtained title to a claim against Claflin & Co., the statute of limitations would bar any recovery by them, because they would be affected by Hamlin's knowledge of any fraud in the composition.

4. This is a proceeding under the bankruptcy statute, and the statute itself invalidates only those preferences which were obtained within four months of the filing of the petition.

BLODGETT, District Judge. In this case F. N. Hamlin on the 13th of April, 1877, filed his petition on behalf of Hamlin, Hale & Co., asking that the said firm be adjudicated bankrupts. The petition was in the usual form, setting out that the firm of Hamlin, Hale & Co. was insolvent, that it consisted of F. N. Hamlin and Robert W. Hale, and that they asked the benefit of the bankrupt act, that they were willing to surrender all their property, and asked that on doing so they might be discharged from their debts. On the 14th of May, on a petition filed in behalf of Hamlin by one of his attorneys, a rule was entered that Hale, the partner who had not joined in the petition, should show cause in five days after service, why he and the firm of Hamlin, Hale & Co. should not be adjudged bankrupts.

This rule was returned served, and in the due course of procedure Hale made his answer, denying that the firm of Hamlin, Hale & Co. was insolvent, and denying that he, Hale, was insolvent, and asking that the issue made by his denial might be tried by a jury. At the same time that Hale filed his denial, he also, by leave of court, entered a motion to discharge the rule and dismiss the petition as against himself.

Several reasons were assigned in support of this motion; but I only deem it necessary to consider one, viz.: that the said petition, so far as it asks for an adjudication of the firm of Hamlin, Hale & Co., is a fraudulent attempt on the part of Hamlin, to use the process and jurisdiction of this court for the

purpose of annoying and vexing the respondent Hale, and to gratify Hamlin's feelings of revenge and spite against Hale.

The undisputed facts involved in this controversy, as shown by the pleadings and affidavits on file, appear to be these:

For sometime prior to the great fire of 1871, F. N. Hamlin and Robert W. Hale, had been doing business as wholesale and retail dry goods merchants in this city, under the firm name of Hamlin, Hale & Co. Their losses by the fire were very considerable, and in the month of November, 1871, they represented themselves to their creditors as insolvent and unable to pay their debts in full. From representations made to their creditors in regard to the extent of their losses by the fire, and their liabilities and assets, their creditors agreed to accept a composition of fifty cents on the dollar on the par value of their debts, and all signed a composition deed to that effect, and the promissory notes of the firm for the commuted amount of their debts to their several creditors were duly executed and delivered, payable in six and twelve months from the first day of November, 1871. This settlement with their creditors was wholly negotiated by Hamlin, and the representations to the creditors by which it was obtained, were all made by him. In January, 1872, the old firm of Hamlin, Hale & Co. was dissolved, and a new firm organized, under the same name, to continue the business, by bringing in two new partners, which new firm continued until November, 1873, when it was dissolved, the two new partners and Hale retiring from the business, and Hamlin organizing a new firm, under the firm name of Hamlin, Davey & Co. All the composition notes and other indebtedness of the old firm of Hamlin, Hale & Co. had been paid long before the dissolution of Hamlin, Hale & Co. in November, 1873, and no creditors of the firm have since sought to set aside or avoid the composition settlement of November, 1871.

Hamlin schedules as the only assets of the firm of Hamlin, Hale & Co.—First, "a claim against H. B. Claflin & Co., amount undetermined;" second—"claims against certain insurance companies that are in liquidation arising from losses by fire of October, 1871, for goods burned in the store of Hamlin, Hale & Co., amount unknown;" third—"certain book accounts due the firm of Hamlin, Hale & Co., the items of which I am unable to state (the books being in the possession of Robert W. Hale)."

The statement of Hamlin in regard to the claim scheduled against H. B. Claflin & Co. is, in substance, this: that when the old firm of Hamlin, Hale & Co. failed in the fall of 1871, and sought a compromise with their creditors, they owed the firm of H. B. Claflin & Co., about $870,000 and all other persons about $600,000; that Hamlin having the charge of the financial affairs of his firm, and being the sole partner engaged in negotiating said compromise, as he says, by Claflin's direction, represented the assets of the firm of Hamlin, Hale & Co., at about $350,000 less than they actually were, and represented the firm liabilities to H. B. Claflin & Co., at $350,000 less than they were. The object of this was to enable the firm of Hamlin, Hale & Co., to save $350,000, so as to be able to pay it to H. B. Claflin & Co., and accordingly, wrongfully, but at the direction of Claflin, said false representations were made, and about the amount of $350,000 was saved from the assets of the firm and paid to the firm of H. B. Claflin & Co., in fraud of the rights of the other creditors. This is Mr. Hamlin's statement taken verbatim from his rejoinder, as it is called, to Hale's denial.

It also appears that in the spring of 1874 Hamlin assigned to Hale all his interest in the notes and accounts of the old firm of Hamlin, Hale & Co., and that said assignment remains in full force.

It further appears that shortly before the filing of this petition in bankruptcy, and within the past year, Hamlin has, without consideration, obtained from nearly all the creditors of Hamlin, Hale & Co. named in the schedule filed with this petition, an assignment of the claims of said creditors for the fifty per cent. thrown off at the time of said composition, to Hamlin's father, who now holds the same under some pretended trust for the benefit of Hamlin's creditors.

It also appears that since this petition was filed, a large proportion of said creditors have signed papers, stating, in substance, that after learning of the statement of Hamlin as to the alleged fraudulent character of the composition of 1871, they are still willing and wish to ratify and confirm the same by signing the said paper, while many other creditors have filed affidavits stating that Hamlin obtained said assignments under the pretext that they were to be made for the benefit of the firm of Hamlin, Hale & Co., and for the purpose of legalizing their composition and curing any technical defects in it.

A careful perusal of the papers filed in the case leaves no doubt in my mind that the real controversy in this case is over the alleged claim of the old firm of Hamlin, Hale & Co. against H. B. Claflin & Co., growing out of the settlement; and that there were no debts of the firm of Hamlin, Hale & Co. at the time this petition was filed, unless the old creditors who settled with the firm in the fall of 1871, at fifty cents on the dollar should set aside that settlement on the ground of the fraud alleged to have been practiced upon them by Hamlin, as he alleges, at the instance and for the benefit of Claflin.

We have, then, this statement of the case: Hamlin alleges that a fraudulent settlement was made in November, 1871, between the

firm of Hamlin, Hale & Co. and their creditors at fifty cents on the dollar. This settlement was fair on its face, and is only voidable by the creditors at their election. No creditors have so far challenged this settlement, and no steps have been taken of any character to set it aside.

Upon the facts appearing in the case, can the firm of Hamlin, Hale & Co. be said to owe debts? Legally, these debts are all settled and discharged by the deed of composition and the payment of the composition notes, and it is, at least, extremely doubtful whether the act of Hamlin can revive these debts as against his firm, and he demand that the firm be adjudged bankrupt by reason of his awakened conscience as to the fraud perpetrated by him, no matter at whose instance. The question is, can Hamlin be heard in a court of justice to assert his own turpitude as a reason why this court should take jurisdiction of this matter, and treat the firm of Hamlin, Hale & Co. as still owing debts? Aside from this, we have the fact that so large a proportion of the creditors, after being fully informed of Hamlin's statements that they had been defrauded, have ratified and confirmed the composition, and no creditor is now in this court asking that an adjudication against this firm be had; but, on the contrary, the only person who is pressing this case for adjudication is the petitioner, Hamlin, who has obtained the transfer, to his father for his own benefit, of so large a proportion of the debts, which he proposes to revive against his firm by proclamation of his own fraud. But if the objection above urged to the further progress of this proceeding is not sufficient, it seems to me that the position assumed that this proceeding is carried on by Mr. Hamlin solely for the purpose of harassing his late partner, is abundantly shown by the proofs.

Hamlin had, before he filed this petition, obtained the assignment, without consideration, of a large part of these claims to his father, and they are now held, as he says, for the benefit of his, Hamlin's creditors. This assignment, so procured by Hamlin, must enure to the benefit of the firm, so that we have the spectacle of Mr. Hamlin holding most of the claims against his firm, which he has obtained to be assigned without consideration, seeking to have his firm adjudged bankrupt on claims which he now holds under circumstances which would prevent even the father, as trustee, from proving a claim in bankruptcy against the firm, because he could, under the admitted facts in this case, hardly swear, in making his proofs, that the "said claims were not procured for the purpose of influencing proceedings in bankruptcy." Every lawyer knows that no claim can be proven in bankruptcy unless this proof is made; and it seems to me very evident that, on all the facts in this case, the court must assume that these claims were obtained with the intent to prosecute and influence proceedings in bankruptcy, such as the election of an assignee in the interest of Hamlin.

The proof is conclusive that a bitter feud exists between Hamlin and Hale, and this fact, taken in connection with Hamlin's action, and direct agency in obtaining the transfer of these compromised claims to his father, and his further statement in his rejoinder to Hale's denial, that he has filed this petition in order that all the facts in regard to the alleged Claflin preference might be brought out, shows to my mind that this petition is not filed in good faith by Hamlin, for the benefit of the creditors of the firm of Hamlin, Hale & Co., and with the intent to surrender the property of the firm, for the benefit of such creditors; but, on the contrary, is solely for the purpose of vexing and harassing Hale and perhaps Claflin & Co., through the process and proceedings of this court, and making gain for Hamlin.

That a court, when it is satisfied its process is being abused and used for sinister, oppressive and vexatious purposes, has power to dismiss the proceeding is fully sustained by the following authorities: Amsinck v. Bean, 22 Wall. [89 U. S.] 404. So in Morris' Estate [Case No. 9,825], Hopkinson, J., says: "The judge to whom the power is given to issue the commission has also the power to recall it, if, instead of answering the purposes for which it was issued, it is used as an instrument of fraud and oppression."

In Ecfort v. Greely [Id. 4,260], Judge Krekel says that when bad faith appears to be actuating petitioners, "the court will not be slow in ordering them not to come here without clean hands."

The same rule was applied in this court in Re Scammon [Id. 12,429], where this court dismissed the petitioner summarily, on motion, on the ground that the petition had not been filed in good faith. The district courts, sitting as courts of bankruptcy, are clothed with all the powers of courts of equity to accomplish the purposes essential to the just operation of the system. Ex parte Christy, 3 How. [44 U. S.] 312. So, too, the English chancellors have never hesitated to dismiss cases when satisfied they were brought with the intent to abuse the process of the court or with the purpose of oppressing and vexing the respondents. Robs. Bankr. 610; Ex parte Bourne, 2 Glyn & J. 137; Ex parte Harcourt, 2 Rose, 203; Ex parte Gallimore, Id. 424; Ex parte Phipps, 3 Mont., D. & D. 505; Ex parte Ashworth, 18 L. R. Eq. 705; In re Davies, 3 Ch. Div. 461.

It seems to me, then, that upon the admitted facts in this case, the rule against Hale should be discharged. It cannot be said that this firm owes legal debts at this time; for, admitting the frauds upon the creditors alleged by Mr. Hamlin, still no one but the wronged creditors themselves could take advantage of those frauds.

It strikes me, a fair way to test this proposition would be to ask if Mr. Hamlin, by

going to one of these creditors and voluntarily paying him the fifty per cent. on the old debt which was thrown off in the composition of 1871, could maintain a suit at law, or in any other form of action, against Hale for contribution. If he could not do that, he certainly cannot revive the old debt as against the firm, and force the firm into bankruptcy. I therefore think this court justified in finding that this proceeding is not prosecuted in good faith; that it is an attempt to abuse the process of this court, which should not be sanctioned or tolerated.

It might also be asked, what is to be gained, so far as the alleged Claflin preference is concerned, by putting this firm into bankruptcy? It was, at most, as far as other creditors are concerned, a preference which could only be set aside in bankruptcy when an adjudication takes place within four or six months from the time the preference is taken. This preference, if taken at all, was taken five and a half years before the petition in this case was filed. It is not denied but that Hamlin, Hale & Co. owed Claflin & Co. all the money paid them; but it is claimed they were paid more than the other creditors. This would make the settlement voidable at common law, as between the debtors and creditors, but it does not give the creditors so defrauded a right of action against Claflin & Co., so that the only right of action which could be maintained in behalf of creditors would be, under the bankruptcy law, if an adjudication had been had against the firm of Hamlin, Hale & Co., within six months after the preference was taken.

Upon the argument of the case it was urged that the limitation did not apply nor begin to run till the preference was discovered, but from a number of cases I have examined, I am of opinion that this rule of the Illinois statute of limitations does not apply to proceedings under the bankrupt law, and that creditors are obliged to be vigilant in ascertaining whether other creditors have been given a preference or not, and if they do not ascertain that fact within the limited time fixed by the bankrupt law, the preference will stand.

The rule is therefore discharged.

HAMLIN (COBB v.). See Case No. 2,922.

Case No. 5,995.

HAMLIN v. PETTIBONE et al.

[6 Biss. 167;[1] 10 N. B. R. 172; 10 Alb. Law J. 141; 20 Int. Rev. Rec. 73; 1 Cent. Law J. 404; 31 Leg. Int. 293.]

Circuit Court, E. D. Wisconsin. July, 1874.

ERROR IN CHARGE—BANKRUPT ACT AMENDMENT OF JUNE 22, 1874—REPEALS BY IMPLICATION, OR BY GENERAL CLAUSE—TIME—VESTED RIGHTS.

1. Where error in a charge relates to a matter which might have been corrected on the spot, if the attention of the court had been called to it, the party failing so to do cannot take advantage of the error on motion for new trial.

2. The amendment of June 22, 1874 [18 Stat. 178] to the bankrupt act does not affect cases commenced before December 1, 1873, nor does the repealing clause affect suits by assignees then pending. The amendments are not inconsistent with the original act, except as to cases commenced since December 1, 1873.

[Cited in Re Perkins, Case No. 10,983; Bradbury v. Galloway, Id. 1,764; Singer v. Sloan, Id. 12,899; Grey v. Thomas, Id. 5,806.]

3. Repeals by implication or by general clause are never favored, and are never extended beyond their necessary operation.

4. In cases where no other time is mentioned the amendment only applies to cases arising after its passage. Congress did not intend to validate contracts void under the original act, or to affect contracts theretofore made, or the substantial rights of parties acquired under the original law.

[Cited in Brooke v. McCraken, Case No. 1,932; Van Dyke v. Tinker, Id. 16,849; Re Montgomery, Id. 9,732; Barnewall v. Jones, Id. 1,027; Tinker v. Van Dyke, Id. 14,058.]

5. The substitution of "knowing," for "having good reason to believe" is merely a verbal one, inapplicable to most cases. Notice of facts sufficient to put a person upon inquiry amounts in law to knowledge of the facts which inquiry would have developed.

[Cited in Re Hauck, Case No. 6,219.]

[In bankruptcy. Suit by R. S. Hamlin, assignee, against W. C. Pettibone and others.] Motion for new trial after judgment for plaintiff.

Jackson & Felker, for plaintiff.

Luther S. Dixon, for defendants.

HOPKINS, District Judge. This action was commenced before the passage of the amendments to the bankrupt law, of June 22, 1874, and the proceedings in bankruptcy were instituted long before the 1st day of December, A. D. 1873; and the sale sought to be set aside and avoided by the assignee in this case, as fraudulent, was made long before that time.

The case was tried and submitted to the jury without objection or exception, upon the theory that the recent amendatory act did not apply; at least no pretense of that kind was made on the trial. The jury returned a verdict for the plaintiff for the value of the property claimed; thereby finding that the sale by the bankrupt of the property in question to the defendants, who were his creditors, was fraudulent under the law.

In the charge to the jury no reference to the amended act was made; but they were instructed that the sale would be void, if they found from the evidence the several facts and propositions mentioned in the original act; to which charge no exceptions were taken.

On the second day after the verdict, the defendant's counsel filed a motion for a new trial, alleging that the court had charged erroneously upon the fourth proposition men-

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

tioned in section 35 [of the Act of 1867 (14 Stat. 534)], that the amended act had changed that section, so that it was now necessary, in order to avoid a sale, that the jury should be instructed that they must find that the party knew that the sale was made in fraud of the provisions of the act, instead of that he must have had "reason to believe so." It was claimed, that as the last section of the amended act repealed all provisions of the old law inconsistent with its provisions, the old law was on that point absolutely repealed, and, it being in its nature penal, it could not be considered as existing for any purpose, and hence no sale could now be avoided unless it fell within the provisions of the amended law, irrespective of the time it was made. If this question had been raised at the trial, or there had been a request to so charge the jury, and I had so charged, the result would not, I think, have been different; for the evidence of the guilty knowledge of the defendants was overwhelming, so that, as far as the result of the case is concerned, it would have been wholly immaterial; and as this was a proposition that might have been changed, if the attention of the court had been called to it at the proper time, and as, in my opinion, it could not have affected the result, it presents a question of a purely technical character. I do not, therefore, feel that it would be right to set aside this verdict for that reason, or to allow that exception to the charge after verdict. When a charge is wrong in principle, and the error is of such a nature as not to have been avoided, if the attention of the court had been called to it at the time, by a proper exception or request, I allow an exception to be filed after verdict; but when it relates to a matter that might have been corrected on the spot without overthrowing the whole theory of the case, I think it due to the court and to the adverse party that the attention of the court should be called to it at the proper time. The rights of the successful party are involved, and the court should not sacrifice them.

This is a sufficient ground for denying the motion, but, as the question is one of great importance and of general interest, I think I may as well state a further reason for the denial, which covers the ground upon which the motion was based.

This was a case of involuntary bankruptcy, and the right of the assignee to recover back property transferred by the bankrupt in payment of his debts, from the creditor so receiving it, is not conferred by the 35th section of the act alone, but such right was given by section 39 also. So it becomes necessary to ascertain the effect of the amendments upon that section as well as upon section 35. Section 12 of the amended act changes section 39 by inserting the word "knew" instead of the words "reasonable cause to believe," in the original section, being thus like the third amendment to section 35. But section 39 as amended, provides that its provisions shall apply to cases commenced since December 1, 1873, so that, as to cases like this, commenced before that time, the original act was not changed. The class of cases to which it should apply being designated, it left all others to proceed as if it had not been passed. It, in that respect, was restrictive of its operation, and section 21, the repealing section, does not change or affect the original section as to cases commenced before that time, for that only repeals such acts and parts of acts as are inconsistent with the provisions of the amended act, and as the amended act, or this section of it, by its terms, only applies to cases commenced since December 1, 1873, it is not inconsistent with the original act except as to cases commenced since that time. Cases commenced before that time were excepted from its operation, and are not therefore affected by it, or repealed by the repealing section. As the right to maintain this suit, upon the grounds and provisions contained in the original section 39, remains unchanged and is clear, this motion for a new trial should be denied. The charge of the court being in conformity with that section, there was no error of which defendants can complain. In this view, it might be unnecessary to consider the effect of the amendments to section 35. But as I am satisfied that the construction contended for by defendant's counsel cannot be sustained, I will briefly state my reasons therefor.

Repeals by implication, or by a general clause like the one inserted in the repealing section of this act, which amounts to the same thing, are not favored, and are never extended beyond their necessary operation. Repealing clauses of this kind are limited in terms to such provisions as are inconsistent with the amendatory act, and are never construed to include or alter provisions not embraced in the amendments. The amended act is not inconsistent with any other parts of the original act than such as are affected by its provisions. The repealing clause is coextensive with the amendments and only applies where they do and when they do. Spaulding v. Alford, 1 Pick. 33. So that the effect of such a repealing clause is very different from what an absolute repeal of section 35 would have been. Davies v. Fairbairn, 3 How. [44 U. S.] 636. Now if it should be held that the amendments to section 35 were intended to apply to cases occurring after the passage of the amended act, the repealing clause would only apply to such cases, for only as to those would there be any repugnancy. The original act, as to cases occurring before its passage, would remain unaffected by the repealing clause. Congress fixed the time for certain portions of the act to take effect before the passage (section 12), and for certain others (section 10), after; so, I think, the fair intendment is, that in cases where no other

time was mentioned, they meant that the amendment should only apply to cases arising after its passage. This, under the circumstances, should be so considered as to such portions of it as changes the substantial rights of parties. I do not believe congress intended to change the act, so as to make good, contracts that were void under the original act, or to change those provisions of the statute so as to affect contracts theretofore made. It would require a very clear expression by the legislature to give it such effect, or as being intended to vary the relations of litigant parties. Palmer v. Conly, 4 Denio, 374; Paddon v. Bartlett, 3 Adol. & E. 884; College of Physicians v. Harrison, 9 Barn. & C. 524. If they had so intended I think they would have expressed it in unequivocal language, as they did in the amendment of section 39.

There are many provisions of the act of a practical character that may properly be applied in further proceedings in all cases, such as those relating simply to the administration of the law, and as do not affect existing rights or the validity of contracts. Such provisions are of a remedial character, and may be presumed to have been intended to be applied to all cases. But such parts as relate to the substantial rights of parties, acquired under the original law, like the amendments to section 35, I think it must be held that congress did not intend to apply to cases occurring before the adoption of the amendments.

The question was suggested as to what extent this amendment had changed the original act in the respect heretofore noticed, and I must confess it is not without its difficulties. But it seems to me that in almost every case where the jury would be warranted in finding that the party "had good reason to believe," under the old statute, they would be justified in finding that he "knew," under the amended law, so that practically the amendment is merely a verbal one in that respect. It is a rule of universal application, in all cases of fraud on the part of the debtor, or seller of property, that notice of facts sufficient to put a party upon inquiry, amounts in judgment of law to notice, and is sufficient to charge the purchaser with knowledge of the matters and things it is reasonable to suppose such inquiry or investigation would have developed. Inquiry on the part of the purchaser having such notice, becomes a duty, and diligence an act of justice. A scienter may be shown by circumstances, and whatever fairly puts a party upon inquiry, when the means of knowledge are supposed to be at hand; if he omits to inquire, he does so at his peril, and he is chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. 4 Kent, Comm. 179; May v. Chapman, 16 Mees. & W. 355; Goodman v. Simonds, 20 How. [61 U. S.] 343; The Lulu, 10 Wall. [77 U. S.] 192; Hill v. Simpson, 7 Ves. 152; Smith v. Low, 1 Atk. 489; Booth v. Barnum, 9 Conn. 287; Pitney v. Leonard, 1 Paige, 461; Carr v. Hilton [Case No. 2,437]; Hawley v. Cramer, 4 Cowen, 717; Scammon v. Cole [Case No. 12,432]. In some of these cases "notice" is used instead of "knowledge," but, as is said in Goodman v. Simonds, supra, it is usually in the same sense, and that is one of its appropriate significations. So, if, within the meaning of the provisions of the original section, a party had reasonable cause to believe, that, under the foregoing rule, would be sufficient to put him upon inquiry, and if reasonable inquiry would show that the sale was, in fact, a fraud upon the act, he would be chargeable with knowledge of that fact. Unless this well-settled rule is ignored there is no escape from this conclusion. The motion for a new trial is denied.

NOTE. The clause in section 5021 amending section 39 of the bankrupt law, by inserting the word "knew" instead of the words "had reasonable cause to believe," is not to be applied to proceedings in bankruptcy commenced before the 1st of December, 1873. Tinker v. Van Dyke [Case No. 14,058].

Case No. 5,996.

HAMMEKIN v. CLAYTON.

[2 Woods, 336;[1] 2 Cent. Law J. 188.]

Circuit Court, W. D. Texas. Jan. Term, 1874.

REAL PROPERTY — RIGHT OF ALIENS TO HOLD AT CIVIL AND COMMON LAW—SECRET TRUST.

1. Where by the laws of a state aliens are prohibited from acquiring and holding real property, a deed made by A. to B. upon a secret trust for C. who is a foreigner, A. having no knowledge of the trust, is not void; the trust only is void.

2. By the law, of Mexico, which was in force in Texas from the 17th of March, 1836 to the 20th of January, 1840, aliens were prohibited from holding lands except by titles issuing directly from the government.

[Cited in Kircher v. Murray, 54 Fed. 621.]

3. By the common law, an alien might hold real estate against every one and even against the government until office found.

4. The same rule prevailed in the civil law of Mexico and Texas. Therefore, when an alien to the republic of Texas took a deed not emanating from the government to lands within the territory of the republic, his title was good against all persons until after some proceeding analogous to office found by which his title was declared void.

This was an action of trespass to try titles. It had been tried by DUVAL, District Judge, and a jury, and came up on motion of plaintiff for a new trial, which was heard by WOODS, Circuit Judge, and DUVAL, District Judge.

Geo. F. Moore and Charles S. West, for plaintiff.

Wm. M. Walton, for defendant.

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

WOODS, Circuit Judge. The case was an action of trespass to try titles, and the facts were substantially as follows: The plaintiff claimed title under an eleven league grant made by the state of Coahuila and Texas to Emanuel Crescentia Rejon, dated November 8, 1833. On the 11th of April, 1836, by a deed of that date executed in the City of Mexico, Rejon conveyed the land in question to one Mrs. Laguerenne. On the 27th of September, 1836, Mrs. Laguerenne executed at the City of Mexico an instrument of that date by which she declared that she held the lands in trust for the plaintiff Hammekin, and conveyed the same to him. On the 28th of July, 1840, Mrs. Laguerenne united with her husband in a deed of that date, whereby they again conveyed the land to the plaintiff Hammekin. The plaintiff was a native of the state of New York, and immigrated to the republic of Mexico in 1831, and became domiciled in the City of Mexico where he remained until 1836. In April, of that year, he purchased the land in question and paid for it 3,000 silver dollars. The deed, therefore, was made to Mrs. Laguerenne who was a native of Mexico and had never resided out of that country. The deed was made to her in trust for the plaintiff, and the reason why it was not made directly to the plaintiff was that the law of the republic of Mexico as the parties supposed, prohibited a foreigner from holding real estate situate in the republic. On March 2, 1836, the independence of the republic of Texas was declared, and on the 17th of the same month, the constitution of the Texan republic was adopted. These facts were at the time of the execution of the deed to Mrs. Laguerenne unknown to her and to Hammekin. In April, 1836, after the conveyance to Mrs. Laguerenne, the plaintiff took from her a power of attorney to sell the land, and started for Texas. He was shipwrecked and did not reach his destination until June, 1836, at which date he became a citizen of the republic of Texas, and continued to reside in Texas as a citizen until 1845. In 1838, he paid the land dues on the lands. In 1845, he left Texas and again became a citizen of the United States, and so continued until the commencement of this suit, being at the latter date a citizen of New York. In 1838, Mr. and Mrs. Laguerenne removed to and resided in New Orleans, and while there, executed the deed to plaintiff, dated July 28, 1840. In 1840 or 1841, they returned to the City of Mexico, where Mr. Laguerenne died, and where Mrs. Laguerenne, who is still living, resides. The defendant was in possession of the land in controversy at the commencement of the suit, but showed no title whatever. The constitution of the republic of Texas (section 10, General Provisions; 1 Pasch. Dig. p. 37) declares: "No alien shall hold land in Texas except by titles emanating directly from the government of this republic."

Upon this state of facts, the court instructed the jury that the deed from Rejon to Mrs. Laguerenne of April 11, 1836, was absolutely void, and conveyed no title to the grantee. In pursuance of this instruction, the jury returned a verdict for defendant. The motion for new trial is based on the alleged error of the court in giving such instruction to the jury. The defendant insists that the instruction was correct, and that the deed was void upon two grounds: 1. Because it was made with the purpose to evade the laws of the state of which Mrs. Laguerenne was a citizen, and where the plaintiff was domiciled; and 2. Because, at the date of the deed, the republic of Texas, within which the land was situated, had declared its independence and adopted a constitution, and both the constitution and laws of Texas forbid that an alien should hold land except by titles emanating directly from the government of the republic. We will notice these two points in their order.

It is claimed by the plaintiff that the law of Mexico at the date of the deed in question did not absolutely prohibit all foreigners from acquiring and holding real estate in Mexico, and to sustain this view, he cites the 6th, 9th and 10th sections of the decree of March 12, 1828, found on page 349 of Schmidt's Civil Law of Spain and Mexico. In the view we take of the case, it is unnecessary to decide this question. Conceding that the law of Mexico was as claimed by defendant, we think it does not follow that the deed to Mrs. Laguerenne was void. There is no evidence in the case that Rejon, the grantor, knew that the deed was in trust for Hammekin. We think that the deed operated to convey the title out of Rejon, and that the most that could be claimed was that the trust was void. Hubbard v. Goodwin, 3 Leigh, 492.

The main question in the case is the second, namely: Was the deed in question by the constitution and laws of the republic of Texas absolutely void, so as to convey no title to Hammekin? Between the 17th of March, 1836, and the 20th of January, 1840, the laws of Mexico, unless where modified by the constitution and statutes of the republic of Texas, were in force in Texas. Barrett v. Kelly, 31 Tex. 481; Hanrick v. Barton, 16 Wall. [83 U. S.] 166. It becomes important, therefore, to determine whether by the Mexican law the deed of Rejon was void and conveyed no title. Upon this point the decided weight of authority is, in our opinion, with the negative of this proposition. The rule of the common law is well settled that an alien may hold real estate against every one, and even against the government, until office found. 1 Com. Dig. tit. "Alien C." 2; Craig v. Leslie, 3 Wheat. [16 U. S.] 589; Bradstreet v. Supervisors of Oneida Co., 13 Wend. 546. That this is the rule of the civil law of Mexico is shown by the following authorities: 2 Escreche Partidos Hispano Mexicanos, 696; 2 Sala Mexicano, 240; Ramires v. Kent, 2

Cal. 558; People v. Folsom, 5 Cal. 378; Merle v. Mathews, 26 Cal. 478.

In the last cited case the court says: "At common law, a conveyance of land to an alien was a cause of forfeiture to the crown of such lands, not only on account of the alien's incapacity to hold them, but likewise on account of his presumption in attempting by an act of his own to acquire real property (2 Bl. Comm. 274), but notwithstanding, until office found, the title remained in him. So far as we are advised, the consequences that might follow this species of infraction of the law were substantially the same under the Mexican law as at common law, and until the denouncement, the alien grantee of land could hold and possess it as his own property." So in Racouillat v. Sansevain, 32 Cal. 386, the court declares that "the question as to the right of a nonresident alien to hold property at common law, and as we understand it under the civil law, was a matter between the alien and the government, and could not be called in question in a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased is by an inquest of office, and until office found, an alien may hold real estate. Under the civil law, there was some analogous proceeding." In Osterman v. Baldwin, 6 Wall. [73 U. S.] 121, the facts run almost on all fours with the case at bar. In 1839, prior to the admission of Texas into the Union, Baldwin, a citizen of New York and an alien to Texas, bought and paid for some lots in the city of Galveston. It was objected to Baldwin's title, that when his purchase was made, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. The supreme court held that "the defendants could not object on that ground; that until office found, Baldwin was competent to hold land against third persons; no one has any right to complain in a collateral proceeding if the sovereign does not enforce his prerogative."

But it is insisted, that the supreme court of Texas has settled the law otherwise, and that this court should follow the courts of Texas which have established the contrary doctrine as a rule of property in the state. We are cited to the cases of Holliman v. Peebles, 1 Tex. 673; Yates v. Iams, 10 Tex. 168; Clay v. Clay, 26 Tex. 24; Lacoste v. Odam, 26 Tex. 458,—and other cases, to show that the ruling of the supreme court of the state has been, that a deed of lands to an alien, under the laws of the republic of Mexico, was absolutely void, and conveyed no title. We should feel bound to follow these decisions of the supreme court of Texas, had they not been unsettled by later adjudications. The case of Barrett v. Kelly, 31 Tex. 476, is subsequent in date to all the cases cited to show the invalidity of the deed of Rejon, and is entirely inconsistent with those cases; and, though not in words, yet in effect it overrules them. The facts in that case were, that Wharton, a citizen of Mexico, on the 13th of April, 1833, executed a conveyance for lands in Texas to J. and W. D. Barrett, who were aliens, and the point was distinctly made in the case, that the alienage of the Barretts gave Kelly, who claimed under a junior grant, the better title. But the court sustained the Barrett title and took the same view of the Mexican law as was taken by the supreme court of California in the cases above cited. The learned judge, who delivered the opinion, says: "From 1833 to 1840, the defendants (the Barretts) were liable to have their land divested from them by due process of law, according to the laws of Mexico. There is no allegation that any court or political authority ever adjudicated upon the alienage of defendants, while they were such, and there can be as little question, that without some process of this kind the rights of the parties to the land were never divested." Pages 481, 482.

These remarks of the court and its action in the case are entirely inconsistent with the doctrine in Clay v. Clay, supra, that the deed to the Barretts was absolutely void, and conveyed no title. In the case of Settegast v. Schrimpf, 35 Tex. 341, the supreme court of the state appear to cite with approbation the case of Osterman v. Baldwin, supra. We are of opinion, therefore, that the later and better view of the supreme court of this state is, that under the Mexican law a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by the government for that purpose. Our conclusion is, therefore, that a new trial should be granted on account of the error of the court in instructing the jury that the deed from Rejon to Mrs. Laguerenne was void and conveyed no title.

[DUVAL, District Judge. In instructing the jury, upon the trial of this case, that the deed from Rejon to Mrs. Laguerenne was a nullity, and passed no title under the then existing laws of Mexico, I supposed that I was following what then seemed to me to be the settled construction given to those laws by the supreme court of this state. At the same time I stated that this construction was not in accordance with my own views upon the subject. Since the argument of this motion for a new trial, I have re-examined not only the authorities read on the trial, but others submitted since. After a more thorough consideration of the questions involved, my conclusion is that I was mistaken in supposing that the law had been definitely settled, as it then appeared to me to have been, by the supreme court of this state, in the cases of Holliman v. Peebles [1 Tex. 673]; Yates v. Iams [10 Tex. 168]; Clay v. Clay [26 Tex. 24]; and Lacoste v. Odom [Id. 458.] If these cases are not absolutely overruled (so far as the present question is concerned) by the later cases of Barrett v. Kelly [31 Tex. 476] and Settegast v. Schrimpf [35 Tex. 323], support-

ed, as they seem to be, by the case of Osterman v. Baldwin, 6 Wall. [73 U. S.] 121, they at least leave the question undetermined and doubtful, and it can not be said to have been clearly settled by the supreme court of this state. Such seeming to me to be the case, and this court not being bound to follow any doubtful rule of construction, my opinion is that a new trial should be granted, and in this, I concur with the circuit court judge.][2]

Case No. 5,997.

HAMMER v. KAUFMAN et al.

[2 Bond, 1.][1]

Circuit Court, S. D. Ohio. Feb. Term, 1866.

PLEADING—ANTICIPATION IN PLEADING NOT NECESSARY.

1. A plaintiff or defendant is not bound, in his declaration or plea, to anticipate, notice, and remove every possible exception, answer, or objection which may exist, and with which his adversary may intend to oppose him. He sufficiently substantiates the charge or answer for the purpose of pleading, if his pleading establishes a prima facie charge or answer.

2. It is not necessary to state matter which should come from the other side. Matter in defeasance of an action need not be stated, and whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a proviso, or a condition subsequent, it must, in its nature, be matter of defense, and ought to be shown in pleading by the opposite party.

[This was an action at law by Adolph Hammer against John Kaufman and others, upon a bond accompanying an agreement in which the defendants agreed to pay the plaintiff $30,000 for a disclosure of his improvement in the process and apparatus for brewing beer. The case was first before the court upon defendants' motion for an order on the plaintiff for oyer of the bond and agreement. See Case No. 5,993].

Kebler & Whitman, for plaintiff.
Stallo & Kittredge, for defendants.

OPINION OF THE COURT. This action is in debt for a penalty of $30,000, named in a bond executed by the defendant Kaufman for himself, and in behalf of the other defendants, dated December 9, 1864. The condition of the bond, as set out in the declaration, is substantially that the defendants shall, in all respects, perform the stipulations of a written agreement executed by the parties on the above-named day, and on the failure of the defendants so to do, they shall forfeit and pay to the plaintiff on March 1, 1865, the said sum of $30,000 as liquidated damages. The declaration then sets out some of the covenants in said agreement, reciting in substance that the plaintiff had discovered valuable improvements both in the process and apparatus for the brewing of beer, which the defendants were desirous of using in their brewery at Cincinnati, in making lager beer; and averring that the plaintiff, in consideration of the sum of $30,000, to be paid to him by the defendants on March 1, 1865, agreed to communicate to the defendant, Kaufman, the knowledge of his improvements in brewing, and to the best of his ability to instruct them in the art of brewing, so that they could make lager beer of a good quality in the hottest weather, if his mode was properly applied. The declaration further avers, that it was one of the stipulations of said agreement, that said Kaufman was to call at the plaintiff's office, in the city of New York, to receive instructions in the use of said improvement. It is then averred that the plaintiff fulfilled his part of the agreement by communicating to Kaufman the necessary information as to the use of his improvements, and that he received the same. Profert is made of the bond, and of the agreement; and the breach averred, is the nonpayment of the $30,000, on the said 1st of March, or at any other time. Upon the application of the defendants, oyer of the bond and the collateral agreement was ordered by the court; and the defendants now come into court, and after setting forth, in haec verba, these instruments, demur to the declaration specially, stating as the causes of demurrer: (1) A variance between the agreement, as set forth in the declaration and as it is exhibited upon oyer, in that the declaration avers that the defendants bound themselves unconditionally to pay the plaintiff $30,000, on or before March 1, 1865, contrary to the true and legal intent of said agreement; (2) that the declaration does not aver any sufficient breach of the writing obligatory set forth in the declaration.

The demurrer undoubtedly presents the question, whether upon the bond and the agreement, as set forth upon oyer, the plaintiff exhibits a prima facie right to recover the sum claimed in his declaration, or whether he shall be held to set up his defense by plea. Practically it would seem of very little importance, so far as the interests of the defendants are concerned, whether the decision on the demurrer is for or against them. If the demurrer is overruled, they will have the right to set forth any defense they may have, by plea, with the privilege of a full trial by a jury, on the issues presented. The agreement between these parties is unique in its character, and very inartificially drawn. It may not be an unreasonable supposition, from its peculiar structure and terms, that as lager beer was the principal subject-matter, that agreeable beverage had a controlling influence in its execution. Referring to the agreement, the only act to be done by the plaintiff was the communication to the defendant, Kaufman, of the knowledge of the plaintiff's improvement in the art of making lager beer, and permission to use the utensils

[2] [From 2 Cent. Law J. 188.]

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

or apparatus of the plaintiff in its manufacture. The declaration avers performance by the plaintiff of this part of the agreement; and by its terms, that was the consideration for the undertaking by the defendants to pay the plaintiff the sum named as the penalty of the bond. As already noticed, the only breach assigned is the non-payment of this sum. These averments clearly show a prima facie right of action in the plaintiff. But it is insisted by the counsel for the defendants, that the declaration wholly omits an essential part of the agreement, namely, the stipulation that if the defendants, on the trial of the plaintiff's method of brewing, did not find it to be better than the method or process previously used by them, they were at liberty, on or before March 1, 1865, to discontinue the use of it; and in that event were not to be liable to pay anything for the knowledge or information imparted to them by the plaintiff. This provision undoubtedly secured a very important right to the defendants; a right to abandon the use of the plaintiff's improvement on or before the 1st of March, if in their judgment it was not useful or valuable. It is insisted that the declaration in order to the setting forth of a legal cause of action as for a breach of defendants' stipulations, should have averred affirmatively, that they did continue the use after the 1st of March, and thereby became liable to pay the $30,000 named as the penalty for a violation of their agreement.

There can be no question that the agreement fully and distinctly recognizes the right of the defendants to discontinue the use of plaintiff's improvement, if, in their judgment after trial, it was of no value. And it is equally clear, that in that event they were absolved from all obligation to pay. But was the plaintiff bound to aver in his declaration, that they did continue to use the improvement after the date mentioned. It would seem that after having stated that he had complied with his agreement in communicating the information as to the character and application of his improvement, which constituted the consideration for which the defendants bound themselves to pay him $30,000, and having averred the non-payment of this sum as the breach of the agreement, he states a case which prima facie entitles him to recover. And that the fact of non-user, on and after the 1st of March, must be set up by way of plea, if the fact is that they ceased to use after that date. The non-user was a fact, in the nature of a condition subsequent, which the plaintiff was not bound to state. The authorities, I think, fully sustain this position. Gould, Pl. p. 177, § 17; Id. p. 179, § 21. In 2 Chit. Pl. (10th Ed.) 252, it is laid down as a rule that it is enough for each party to make out his own case or defense. He sufficiently substantiates the charge or answer for the purpose of pleading, if his pleading establish a prima facie charge or answer. He is not bound to anticipate, and therefore is not compelled to notice and remove, in his declaration or plea, every possible exception, answer, or objection which may exist, and with which the adversary may intend to oppose him.

But there is another well-settled principle of special pleading that has a direct bearing on this question. It is not necessary to state matter which should come more properly from the other side. Steph. Pl. 350. The author says the meaning of this is, that it is not necessary to anticipate the answer of the adversary. And in 2 Chit. Pl. 223, it is laid down, that matter in defeasance of the action need not be stated, and whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a proviso, or a condition subsequent, it must, in its nature, be matter of defense, and ought to be shown in pleading by the opposite party. Now the application of this rule to the question before the court is obvious. The ground of demurrer to the declaration is, that the plaintiff does not allege the non-user of his improvement by the defendants on or after the 1st of March, and that such non-user, under the agreement, was to release the defendants from their obligation to pay. But clearly this non-user, if such was the fact, was within the knowledge of defendants more properly than of the plaintiff, and must be set forth as matter of defense by plea. The object of all pleading is to advise the adversary party of what is relied on to sustain or defeat the suit. Now it clearly was not necessary for this plaintiff to notify the defendants of the abandonment of the use of the plaintiff's improvement, on the 1st of March, by an averment to that effect in the declaration; for the plain reason that whether the defendants did or did not cease the use on or before that day was within their knowledge. Perhaps a fair construction of the clause of the agreement under consideration would be, that the non-payment of the sum agreed on as fixed damages on the day named, was to be treated as notice of the non-user by defendants; but in the absence of express notice of that fact, the plaintiff was not bound to regard this negative evidence as conclusive. He might have reason for the conclusion that the failure to pay was from some other cause than the abandonment of the use of the plaintiff's improvements.

Without going more fully into the consideration of the questions raised on the demurrer, my opinion is clear that it must be overruled. If the views stated are correct, there is no variance between the declaration and the agreement, as the plaintiff was not bound to set forth the condition on which the penalty of the bond was to be payable; nor in making out a prima facie cause of action, was he bound to aver any other breach than the non-payment of the sum named as the penalty. In stating these views, I have great satisfaction in knowing that if erroneous, my

conclusions can work no injustice to the defendants. If they have a good defense to this action on the merits, the way is plain for making it available to them. And I may venture to intimate, that the final disposition of the case on pleas exhibiting fully the grounds of their defense, ought to be more satisfactory to the defendants than a decision based on the legal points raised by this demurrer. The demurrer is overruled, and the defendants have leave to plead.

Case No. 5,998.

HAMMER v. KLEIN et al.

[1 Bond, 590.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1865.

PROFERT OF DOCUMENTS—EFFECT—RIGHT TO OYER—SPECIAL PLEADING.

1. If, in his declaration, a plaintiff makes profert of the bond declared on, and also a collateral agreement necessary to establish his right to recover on the bond, the defendant may crave oyer of the bond and the collateral agreement.

2. As the legal effect of the profert of the papers, they are presumed to be in court, and the opposing party has a right to know their contents, and oyer will be granted on his application.

3. The right to oyer in a proper case, is a part of the common law system of special pleading, which, in a modified form, has obtained in this court from its first organization.

[At law. Action by Adolph Hammer against Klein & Bro.]

Kebler & Whitman, for plaintiff.

Stallo & Kittredge, for defendants.

OPINION OF THE COURT. This case is before the court on a motion by the counsel of the defendants for an order on the plaintiff for oyer of the bond and agreement set forth in the declaration. For the purposes of this motion, it is not necessary to state in detail the particulars of the plaintiff's claim as set out in the declaration. The plaintiff's cause of action is based on a bond executed by one of the defendants in the penalty of $30,000, in connection with a collateral agreement signed by the parties, by which the plaintiff bound himself to do certain acts therein specified, before the defendants should incur the penalty named in the bond. These acts, the declaration avers, have been performed by the plaintiff, whereby the defendants have become liable to pay the penalty of the bond. The declaration makes profert, both of the bond and the collateral agreement.

The counsel for the plaintiff insists that in this state of the case the defendants are not entitled to oyer as prayed for, either by the rules of pleading in this court, or by the common law. There can be no question, that under the common law system of pleading, oyer of any instrument of writing, of which profert is made in the declaration, may be demanded, and will be granted, of course. As to instruments of writing collateral to the bond, it is clear, if profert is made of them, oyer may be craved, although the profert may have been made without any necessity for it. Profert being made, the writing is presumed to be in court, and oyer may be required. 1 Chit. Pl. (Ad. Ed.) 363; Steph. Pl. 447. In this case, it seems, profert of the agreement was properly made, as it was essential to give the plaintiff a right of action on the bond. It is, in fact, the sole basis of his claim to recovery on the bond, and oyer may be claimed, both of the bond and the collateral agreement.

It seems to be supposed by plaintiff's counsel that the right of a party in a case in this court, to demand oyer, is abrogated by the operation of the seventh rule of this court, adopting certain provisions of the Ohio Code as rules of this court. But this rule clearly applies only to such papers or instruments of writing, which are to be used incidentally as evidence, and not to such as are in the possession of the plaintiff, and which constitute the basis of the action. Neither the rule referred to, nor any other rule of this court, has abolished the common law system of special pleading. Though the system has been greatly modified, it still exists, and has existed and been recognized from the first organization of the federal courts in this district. And the right to demand oyer in proper cases, being a part of this system of pleading, the court has no hesitation in making the order prayed for in this case. Oyer is accordingly ordered.

[As to the nature of the bond and agreement sued upon in this case, see Case No. 5,997.]

HAMMER (PUTNAM v.). See Case No. 11,479.

Case No. 5,999.

In re HAMMOND et al.

[1 Lowell, 381; [1] 3 N. B. R. 273 (Quarto, 71).]

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

BANKRUPT ACT — MERCHANT'S DUTY TO KEEP BOOKS—FRAUDULENT REMOVAL OF GOODS.

1. A merchant who has failed to keep proper books of account is not entitled to a discharge in bankruptcy, although the fault is wholly with his book-keeper. The law puts upon the merchant the duty of seeing that the books are properly kept, under pain of losing his certificate.

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

[Cited in Re Howard, 59 Vt. 595, 10 Atl. 716.]

2. An omission to write up a merchant's books for a reasonable time while the books are wanted for use in court, the accounts being kept

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

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

on slips of paper ready to be inserted in their proper places, is not a failure to keep the books.

3. Otherwise, of an omission without excuse, or for an unreasonable time, or a failure to procure new books if the old books are lost. Entries on separate loose slips of paper would not, as a permanent system, be keeping books.

4. A consignment of goods for sale is not a pledge or conveyance of them within section 29 of the bankrupt law [of 1867 (14 Stat. 531)], but where the allegation in specifications of objection to the discharge was of a consignment to one out of the district, in contemplation of bankruptcy and with intent to keep the property from the assignee; *held* (the defendant having waived all questions of mere form), a sufficient charge of a removal of the goods from the district with intent to defraud creditors.

[Cited in Re Frey, 9 Fed. 379; Re Graves, 24 Fed. 551.]

5. If a bankrupt, having knowledge of the existence of his books, and of their place of deposit, refuses to give them to his assignee, and denies their existence, this is a concealment of the books within section 29.

[Quoted in Re Heller, 9 Fed. 375.]

[In bankruptcy. In the matter of Hammond and Coolidge.]

H. W. Paine and R. M. Morse, Jr., for creditors.

E. Avery, for bankrupts.

LOWELL, District Judge. The question whether the bankrupts kept proper books of account is one of fact. The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary for exhibiting to a person of competent skill the true state of his dealings and affairs. The charge here is that during a certain specified period, about six weeks before the business stopped, the defendants kept neither a cash-book nor a shipping-book. You are relieved from embarrassment in the inquiry whether these books were necessary, because it has been testified on both sides, and is not denied in argument, that these books were kept during some years, and were necessary; though of this you will judge, as of all other facts. No doubt the law means not only that books of the right kind should be kept, but that they should be kept properly; that is, with such reasonable fulness and accuracy as to enable the assignee to acquire the information which books are intended to disclose. But the specification here merely is that no books at all were kept of the sort mentioned during the period alleged, which would not be a sufficient allegation that such books, though kept, were imperfect, because it would not sufficiently point out to the defendants the accusation which they were expected to meet.

You will remember the evidence. It tends to show that for a considerable time, ending with the actual stopping of the business, the books named were not in the hands of the book-keeper, and no entries were made in them. It is said that certain entries were made on pieces of paper, and both sides have asked for rulings concerning such memoranda. As applied to this case, the only ruling I can give is this: That an accidental and temporary omission to make entries in proper books would not be within the law, as, for instance, if the books were taken from Natick to Boston to be used in an important trial, and while they were detained, the clerk made full and accurate memoranda of all the transactions of the firm in such a way that he would be able to write up the books immediately on their being returned to him, it could not be said that the books were not kept. This is merely by way of illustration, and is said to have actually occurred in the month of December. Afterwards, it is said, the books were lost. If so, and if there were no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupts to supply their place with others. The question turns on the time that you find the books to have been gone, the intent and good faith of the parties, and whether they did all that prudent business men, intending to keep their accounts accurately, would naturally do. A temporary, accidental omission, in good faith, and for a reasonable time, to make the entries, would not be a failure to keep the books. But a cessation to keep them, on purpose, or for an unreasonable time, would be.

I cannot rule, as requested by the bankrupts' counsel, that if they employed a clerk whom they considered competent, and left the whole charge of the books to him, they are to be discharged. The law does not require traders to keep a book-keeper, but to keep books; and they are responsible to see that it is done. It is not a question of intent at all, or of due diligence, excepting to the extent before explained [that an accident may be overlooked while a fraud would not be.] [2] Nor can I rule that entries on numerous slips of paper, each entry on a separate slip, is a keeping of books, under the law. As I have before ruled, it might do for a short time in the absence of the books; but as a system or policy of a permanent character, no. It is not important whether the book is bound or not; and accounts might be kept on sheets carefully preserved together. You will decide what was done in this case, and whether it amounted to a keeping of the books during the time or about the time specified, under the rules above laid down.

The concealment of the books from the assignee does involve the question of intent. If the books were accidentally lost before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the defendants, and were not given up on demand, but their existence denied, the charge is sustained. [It is not necessary that they should have been

[2] [From 3 N. B. R. 273 (Quarto, 71).]

put in any unusual or out of the way place.][3]

The charge that certain goods were, at certain times, consigned to Mr. Henry, of Louisville, Kentucky, in contemplation on the part of the defendants, of bankruptcy, and with intent, &c., is relied on as a transfer of property, and as a removal of property from the district. In my judgment the clause concerning any pledge, payment, conveyance, &c., does not include a consignment, which would not ordinarily change the title, but be merely the employment of an agent. It is not shown that Henry had made any advances on the goods, or had any pledge of them. It does seem sufficient, in substance (the defendants having waived objections of form), as a charge of a removal from the district, and if it was done with a view at the time by the defendants of becoming bankrupt and having their property distributed under the law, and with intent to keep the property from their assignee, that is, in substance, a sufficient charge that it was to defraud their creditors. As all this is alleged, though the contemplation of bankruptcy was not a necessary allegation, it must be proved. You will say therefore, whether, when these acts were done, if you find that they were done, it was in the view and with the intent charged.

[The jury found the bankrupts guilty.][3]

Case No. 6,000.

HAMMOND v. ALLEN.

[2 Sumn. 387.][1]

Circuit Court, D. Rhode Island. June Term, 1836.[2]

CANCELLATION OF AGREEMENT—MUTUAL MISTAKE—CONTRACT VOID BY REASON OF MISTAKE

1. The plaintiff, having a large claim against the government of Portugal, appointed the defendant his attorney, "with power irrevocable," to demand and recover the same, and on 27th January, 1832, entered into an agreement with the defendant to allow him a large sum as commissions on his agreeing to use his utmost efforts for the recovery thereof. At the time this agreement was made, though wholly unknown to both parties, the government of Portugal, by a treaty stipulation dated 19th Jan., 1832, had allowed and liquidated the plaintiff's claim, so that nothing further remained to be done in the premises. *Held*, that this was a case of mutual mistake going to the substance of the contract and making it void, or voidable in equity; and a decree was accordingly made that the agreement above-mentioned be delivered up and cancelled, and that a perpetual injunction issue to prohibit the defendant from asserting any title at law or equity under the same.

[Cited in Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (85 U. S.) 251.]

[Cited in Wassell v. Reardon, 11 Ark. 705; Hughes v. Mercantile Mut. Ins. Co., 55 N. Y. 265; Ashmead v. McArthur, 67 Pa. St. 328.]

[See note at end of case.]

2. In the case above-mentioned nothing but a clear and unequivocal ratification of the agreement, after full deliberation and a complete review of all the material circumstances, would be held satisfactory by a court of equity.

[Cited in Berkmeyer v. Kellerman, 32 Ohio St. 257; Pratt v. Philbrook, 41 Me. 133.]

3. A mistake of facts going to the essence of a contract avoids it.

[Cited in Yates v. Little, Case No. 18,128.]

[Quoted in Dodd v. Gloucester Mut. Fish. Ins. Co., 127 Mass. 152.]

[See note at end of case.]

4. Semble, that, if the power of attorney above-mentioned was intended to be a security, in the nature of a lien, to the defendant for his commissions, it would be a power coupled with an interest, though not so in the ordinary sense of those terms.

5. Semble, that a recovery may be had upon a policy of insurance on a ship or cargo for a certain voyage, where the loss has already occurred at the time of executing the policy, and is unknown to both parties, even though the policy does not contain the common words "lost or not lost."

[Cited in Folsom v. Mercantile Mut. Ins. Co., Case No. 4,902.]

Bill in equity to set aside an agreement founded in a mutual mistake of important facts. The bill prayed, among other things, that a certain power of attorney, and a certain agreement between the complainant and defendant mentioned in the bill, might be decreed to be delivered up to the complainant to be cancelled. The material facts in the pleadings are as follows:

The power of attorney referred to was an irrevocable power from [John] Hammond to [Crawford] Allen, to receive from the government of Portugal, or of the United States, and of and from all and every person and persons whomsoever, a certain claim or demand which said Hammond had for and on account of the capture and condemnation of the American brig Ann, of Boston, and her cargo, on a voyage from New Orleans to Goree (intending to stop and trade at Fayal, Maderia, and Teneriffe), by the Portuguese squadron cruising off the island of Terceia, and condemned by the tribunal sitting at Lisbon, under the authority of the Portuguese government, on the 22d of December, 1831. The agreement was made on the 27th day of January, 1832, between Hammond and Allen, by which Hammond agreed to pay Allen ten per cent. on all sums recovered until the amount should equal 8,000 dollars, and on all sums, over that amount, thirty-three per cent.; and Allen agreed to use his utmost efforts to bring the claim to a favorable issue, and to receive the aforesaid commission in full compensation for his services and expenses, already incurred, or thereafter to be incurred, in prosecuting the claims.

The bill, amongst other things, alleged that on the 19th of January, 1832, in consequence of measures taken by the representatives of the government of the United States, at Lisbon, the Portuguese government recognized and admitted the complainant's claim to the

[3] [From 3 N. B. R. 273 (Quarto, 71).]

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

[2] [Affirmed in 11 Pet. (36 U. S.) 63.]

amount of 33,700 dollars, of which he alleges he was ignorant until the month of March, 1832. That the power of attorney was executed in consequence of certain representations made by Allen, that he could render important services in prosecuting the claim against the Portuguese government, without which services the claim would be lost; and that Allen proposed to Hammond to appoint him his agent; that he was then ignorant his claim had been recognized, and also that the agreement was executed while he remained ignorant of the fact. The bill also charged, that the claim had not been liquidated or paid, in consequence of any interference or exertions of the defendant, or through any agency or influence on his part. That both said instruments were executed without due consideration, and when the complainant was ignorant of the situation of his claim on the Portuguese government. That the contract of January 27th, 1832, "was entered into and executed without any adequate consideration or services to be by the said Crawford Allen paid or performed," under mistaken views and ignorance of the then situation of the complainant's claim; and was hard, unconscionable, and unequal, and ought, on that account, to be set aside, even if said claim had not been liquidated by the Portuguese government, at the time said contract was made and executed. The answer gives the history of the acquaintance between the complainant and defendant; shows the measures to enforce this claim, which the defendant had taken as the agent of the complainant, prior to the execution of the power of attorney; that those measures were approved by the complainant; that the power was read to him; that three copies were executed; and that the complainant saw all the letters which the defendant had received. It alleges that the defendant relinquished all claims for commissions and services, amounting to 268 dollars, then due him; and that the consideration to the complainant for executing said instruments, was the defendant's relinquishment of the immediate payment of the money then in his own hands, of what was then justly due to him for commissions and for services already rendered in regard to the reclamation of said vessel from the Portuguese government, and the agreement on the part of said defendant, to use his "utmost efforts to bring the aforesaid claim to a favorable issue," and to sustain all the expenses in prosecuting said claim. The defendant expressly denies that it was any part of the understanding or agreement between him and the complainant, that the defendant was not to receive said stipulated sums in case there should be little or no trouble in obtaining said money. On the contrary (he states) the understanding and agreement was that the defendant was to receive said sums and no more, even though his trouble and expenses should much exceed said sums, and to receive said sums also if his trouble and expenses should be but very small; and both parties fully understood that the value of the bargain to the defendant depended on these contingencies —and the defendant avers that he had no knowledge at the time of the situation of the claim, except that derived from the letters annexed to his answer, that all the information he had was made known to the complainant and was common to them both; that it was made known to the complainant in conversations and by exhibiting said letters; and he denies that the agreement, when executed, was to depend for its validity on any subsequent information, from any source whatever. "On the contrary, it was fully understood that contingencies like the one which unexpectedly happened, or others of an opposite character, might render the agreement very advantageous, or very disadvantageous to the defendant."

R. W. Greene and Mr. Webster, for plaintiff.

Dorr & Whipple, for defendant.

STORY, Circuit Justice. This cause has been elaborately argued; but, after all, the merits lie in a very narrow compass. The brig Ann and cargo, owned by the plaintiff (who was also master,) was captured by a Portuguese frigate for a supposed violation of the law of nations in April, 1830; and was finally condemned at Lisbon in April, 1831. The plaintiff after the capture went to Lisbon seeking for a restitution of the brig and cargo, and made representations to the American chargé d'affaires there, and procured his interposition with the Portuguese government in his favor. The defendant, Allen, residing at Providence, had been employed by the plaintiff in certain commercial agencies, and had procured insurance on the vessel and cargo for the voyage, on which she was captured; and, as soon as he received information of the capture, he made strong applications to the American government in favor of the plaintiff; and acted for him respecting the adjustment of the insurance. His conduct, after it was made known to the plaintiff was fully approved by him. After the return of the plaintiff, to the United States, and on the 22d of December, 1831, the plaintiff executed a letter of attorney to the defendant, whereby he appointed him his attorney, "with power irrevocable," to demand and recover from the government of Portugal, or of the United States, &c. his claim and demand on account of the capture, with other usual and incidental authorities. Subsequent to this time, and on the 27th of January, 1832, after some conversations between the parties, the defendant having certain moneys in his hands belonging to the plaintiff, and having a claim thereon for antecedent services of various sorts, amounting (as he estimated them,) to the sum of $268, and the plaintiff being desirous to realize the whole of the funds, an agreement

was entered into between them, which constitutes the subject of the present controversy. The agreement, after reciting, that the plaintiff had appointed the defendant his agent for recovering his claims on the Portuguese government, proceeds as follows: "I do hereby agree to pay to the said Allen ten per cent. on all sums, which he may recover, until the amount received shall equal the sum of eight thousand dollars; and upon all sums over the amount of eight thousand dollars so recovered I agree to pay him thirty-three per cent., which commission he is to retain out of any sums recovered." Then follows on the part of Allen the following agreement: "I hereby engage to use my utmost efforts to bring the aforesaid claims to a favorable issue; and that I do agree to receive the aforesaid commission in full compensation for my services and expenses already incurred or hereafter to be incurred in prosecuting the claims." Now, at the time when this agreement was made, though wholly unknown to both parties, the Portuguese government had, by a treaty stipulation dated the nineteenth day of the same month, allowed and liquidated the plaintiff's claim; so that nothing farther remained to be done in the premises. The information of the arrangement was received at Washington in April, 1832. Subsequently one instalment was received and remitted to England, where certain proceedings were had at law and in equity between the plaintiff and defendant, which terminated in an agreement to remit their respective claims to the domestic forum for a final adjudication.

The object of the bill, under these circumstances, is to set aside the agreement as unconscientious, and without consideration, and to place the parties in the position, which they respectively occupied in relation to each other, antecedently to that transaction. The parties certainly stood in a delicate relation to each other at the time of this agreement, that of principal and agent; and I need not say, with what scrupulous fidelity, closeness and vigilance, a court of equity watches over every transaction between them, in common cases, but especially when there is skill, influence, and property on one side, and distress, ignorance, and unmeasured confidence on the other. But considerations of this sort do not require to be more than glanced at on the present occasion, since there is no allegation of fraud, or intentional imposition, or undue advantage set up in the bill. Some suggestion has been, indeed, made in the bill, and it has been followed out in the argument, that the making of the letter of attorney in its terms irrevocable was not understood or assented to by the plaintiff. The bill asserts the ignorance of the plaintiff; the answer, responding to the bill, as expressly insists upon the plaintiff's knowledge of it. The evidence also is clearly on this point favorable to the defendant. Certainly, as this is on all sides admitted to be a case, where there was no intention of the plaintiff to convey an absolute or a mortgage interest in the property claimed to the defendant, the declaration, that the power was to be irrevocable, must be admitted to be somewhat unusual. But it may have been intended to be a security (in the nature of a lien) to the defendant for his commissions for his services; and then, in a sense, though not in the sense ordinarily given to the terms, it might be construed to be a power coupled with an interest. See Hunt v. Rousmaniere [Case No. 6,898] 8 Wheat. [21 U. S.] 174; Gaussen v. Morton, 10 Barn. & C. 731. But though irrevocable in its terms, it would certainly have been competent for the plaintiff at any time to have revoked the power, by paying all the just commissions for the services of the defendant connected therewith. At present, however, it is no otherwise important in the case, than as it shows the foresight of an intelligent agent, taking an abundant (though not an improper) care of his own interest, and an implicit confidence and devoted trust on the other side.

The real question in the case is whether this is such a case of mutual mistake going to the substance of the contract, as makes it void, or voidable in a court of equity. Now, the very basis of the contract certainly was, that important and valuable services were to be rendered and expenses incurred by the defendant in the future prosecution of the claim. Neither party could have contemplated, that the claim was already settled, or that nothing further was to be done to earn so enormous a compensation. The defendant himself surrenders the point. He admits, that his antecedent services on this and in all other concerns of the plaintiff could not entitle him to more than $26S; and that if the actual facts had been known to the plaintiff the present agreement would not have been entered into. The basis then, and the whole basis, of the agreement was a mutual mistake of a fact, constituting the whole consideration of the agreement. Each party supposed, that the claim was unliquidated, and therefore a high compensation ought to be allowed for future services, which would be rendered at the risk and expense of the agent. His compensation for those services was contingent, and dependent upon the successful issue of the claim; and therefore was liberally, not to say profusely, provided for. The whole argument for the defendant rests on the ground, that the possibility of the claim having been already adjusted must have been taken into the account by the parties at the time of the agreement, because it ought to have been taken into the account, and the circumstances naturally led to it. I think, that there is not the slightest evidence to establish the fact, that it was actually taken into the account. On the contrary, the whole transaction manifests, on the part of the plaintiff, an utter despondency as to the future success of the claim; and the stipulation on the part of the defendant is for

future efforts, and future services and future expenses in prosecuting the claim. The casus foederis, if I may so say, the case contemplated by the parties did not exist.

There is no principle of law more generally admitted than that a mistake of a fact, going to the essence of a contract, avoids it. "Non videntur, qui errant, consentire," is the maxim of the civil law; and it is a maxim of universal justice. The only question, which can arise, is in ascertaining and distinguishing, what is an error or mistake in circumstances, which do not influence the contract, and what is an error or mistake in circumstances, which induce the contract. See 1 Fonbl. Eq. bk. 1, c. 2, § 7, and notes t, v. Pothier has expounded this doctrine with great clearness and precision, and it rests on principles, about which it is difficult to frame a doubt. At least, if a doubt can be stated, it has hitherto been wholly unregarded in equity jurisprudence. Poth. Obl. p. 1, c. 1, note 18. Thus (to put a case stated by Potheir,) if one, with the intention of buying from you a pair of silver candlesticks, were to buy of you a pair of plated candlesticks, you and he both being in mutual error, supposing them to be silver; such a contract would be utterly void. Id. So if A should buy an estate of B, which each supposed to belong to B, and the title of B should turn out to be utterly void, a court of equity would, upon the ground of mutual innocent mistake, constituting the basis of the contract, rescind it. It is wholly unnecessary to introduce farther illustrations of so clear a principle, as firmly fixed in English and American jurisprudence, as it is in the Roman code; and springing from the same general source, the law of natural justice. Now, I confess myself wholly unable to see, how the present case can be extracted from the reach of the principle. It is a case of mutual error, upon a matter of fact, constituting the very basis of the contract, and the whole consideration for it. The ingenious arguments, which have been urged, and the authorities, which have been cited on the present occasion, do not appear to me to establish any solid ground for excepting the present case from the general doctrine. The authorities steer wide of the case. The reasoning, if admissible to its full extent, shakes the very foundation of the general doctrine.

All the cases cited proceed upon a clear distinction. They are cases, where the parties at the time contracted upon equal terms; or where all the facts were, at the time, as the parties supposed them to be, but they were varied by subsequent events; or the parties contracted for the very matter of a contingency, that being of the essence of the contract. I agree that mere inadequacy of price is not per se a ground to set aside a contract fairly entered into by the parties, and having no ingredient of fraud or of a mistake of facts. Mr. Fonblanque (1 Fonbl. Eq. bk. 1, c. 2, § 9, notes d, e) has well stated the general result of the cases; with which there is no reason to be dissatisfied. And if the consideration involves a contingency, which may happen before the agreement is completely carried into effect, but has not happened, when it is entered into, that furnishes no ground to rescind it; for the parties take the contingency upon themselves in futuro. But in all these cases, if there is a mutual mistake of material facts; if there is no longer any existing subject-matter of the contract; or if the contingency, though unknown to the parties, is actually determined before the parties have entered into the contract; under all these and the like circumstances, the contract fails in its very basis, and in conscience and equity is held inoperative.

The case has been put of a policy of insurance upon a ship or cargo; and it is asked, whether a recovery may not be had, even if the ship or cargo is lost at the time of executing the policy? Under our policies it is very certain, that a recovery may be had; for our policies all contain the words "lost or not lost;" the effect of which is, that the underwriter takes upon himself the very risk of a loss at the time, receiving a premium for the whole voyage. Perhaps (for I do not know, that the point has ever directly arisen in our law) the same result would arise upon the true construction of the general words of the policy, without such a clause, as the underwriter receives a premium for the whole voyage, and undertakes the risks of the whole voyage from its commencement to its end; and, therefore, by necessary implication, if the ship is safe at the commencement, he guarantees her safety from that period. Roccus seems to deduce this conclusion from the nature of the contract of insurance, without any clause on the subject. It may be so. 1 Roccus, Assec. note 51. But then it is upon the clear understanding, that it is a part of the risks of the contract taken by the underwriter, for which he receives a proportional premium. Pothier and Emerigon admit this to be the foundation of the special rule applied to this class of cases, and, at the same time, acknowledge the general rule in common contracts to be otherwise. See Poth. Traitè des Assur. notes 11, 46; 2 Emerig. Ins. c. 15, § 2, p. 154; 1 Marsh. Ins. bk. 1, c. 8, § 2, pp. 332, 333. The same principle applies to the case of the safe arrival of the ship, unknown to both parties. In such a case, at least when the policy contains the clause of "lost or not lost," (to which case Mr. Park confines his affirmance of the doctrine, Park, Ins., 6th Ed. 1809, c. 19, p. 503) the underwriters take all risks upon themselves for the whole voyage; and it is understood, that being so liable, and taking upon themselves all contingencies on account of losses, the assured concedes to them all the benefits of a safe arrival, as an implied result of the contract. But if an insurance were made upon a ship

from a particular day, and she had perished before that day, though unknown to both parties, no one would suppose, that the underwriter was bound for the loss. 2 Emerig. Ins. c. 15, § 2, p. 156; Roccus, Assec. note 57. The reason is clear; the insurance was made under a mutual mistake of a fact, constituting the essence of the contract at the time of its inception. So, if an insurance should be made on goods on board a particular ship, and the premium should be paid; if the assured, acting under a mistake, had no goods on board, the premium would be recoverable back; for the policy never attached, and the insurance was made under a mutual mistake of a fact, constituting the basis of the contract. In short, the principle is (as it is stated by Mr. Park), that if the ship or property insured was never brought within the terms of the written contract, so that the insurer never run any risk, the contract is void, and the premium must be returned. Park, Ins. (6th Ed. 1809) c. 19, p. 503.

The case which trenches most closely upon the distinction here stated, but which in fact turned upon the very distinction, is Earl of March v. Pigot, 5 Burrows, 2802. I do not say, whether that case was, or was not rightly decided; for upon that point grave doubts may be entertained. But the decision there made was upon the ground, that though the actual death of the father of either of the parties was not then in contemplation of either of them, it was, as an unknown event, wholly immaterial, in the view of both, to the essence of their contract. "If (said Lord Mansfield), it (the fact of such death) had been thought of, it would not have made any difference in the act; and there is no reason to presume, that they would have excepted it." That cannot be presumed in the present case; for the very basis of the contract is an existing contingency, and future services and expenses. In Mortimer v. Capper, 1 Brown, Ch. 156, the bargain proceeded upon no mistake of existing facts; and it was sought to be set aside upon events subsequently occurring. The case of the mine, in Fox v. Mackreth, 2 Brown, Ch. 420, was not a case of a mutual mistake of a fact, vital, in the opinion of both parties, to the essence of the contract. The sale of the land necessarily included a sale of all below its surface; and, consequently, the vendor must necessarily have contemplated, that it included mines as well as common soil. But suppose both parties had contracted under a mutual mistake, that there was no mine, as the basis of their contract, would the conclusion have been the same? Certainly not; any more than if they had contracted under a mutual mistake, that there was a mine, and there was none. In the case of City of London v. Richmond, 2 Vern. 421, the only question was, whether a court of equity should refuse to decree a specific performance of a bargain simply, because it was a losing bargain, the rent reserved being £700, the real value not more than £300. No fraud or mistake of fact was pretended. In Ramsbottom v. Parker, 6 Madd. 6, the question was, whether a contract by one partner, on retiring from the partnership, to pay a particular sum of money, and be discharged from all debts thereof, should be set aside, because it turned out by subsequent events, that his share of the debts would have been more than ten times as large a sum. The court said, that there could be no such relief, where the advantage or disadvantage of the contract was to be the result of future contingencies, and was not within the view of the parties at the time. But, suppose all the partners at the time had, by mistake, understood, that the whole debts were but £5,000; and that this was the basis of their contract; and it turned out, that instead of being £5,000, they were £30,000; it is clear, that the contract must have been set aside, as founded in mutual mistake. See, on a similar point, 1 Domat, bk. 1, tit. 1, § 4, art. 21.

These are the most important cases on this subject, which have been cited by the counsel for the defendant. They all fall short of the point, on which the present case hinges; and are distinguishable from it in most material circumstances. In my judgment, they leave the case of the plaintiff untouched, upon its original ground of a mutual mistake of facts, constituting the very basis of the contract. But it is said, that there has been a full ratification of the contract by the plaintiff, with a full knowledge of all the circumstances. It is wholly unnecessary for me to go into a minute examination of the acts relied upon to establish such a ratification. All, I need say, is, that I can perceive no sufficient grounds in any part of the evidence to establish it as a matter of fact. And, in a case of this sort, nothing but a clear and unequivocal ratification, after full deliberation, and a complete review of all the material circumstances, ought to be held satisfactory by a court of equity.

My opinion, therefore, is, that the plaintiff is entitled to have a decree, that the agreement of the 27th of January, 1832, be delivered up and cancelled, and that a perpetual injunction issue to prohibit the defendant, from asserting any title at law, or in equity, under the same. But this decree ought to be upon the terms, that the plaintiff bring into court, to be paid over to the defendant, upon his compliance with this decree, the sum of $268, with interest on the same, from the 27th day of January, 1832, which the defendant asserts to be a compensation due to him, and which is not put into contestation on the other side. I think, also, under all the circumstances, there should be no costs to either party.

[From this decree the defendant appealed to the supreme court. 11 Pet. (36 U. S.) 63. In an opinion by Mr. Justice McLean, the decree was affirmed, upon the ground of the strong eq-

uity in the case of the complainant. "The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration."]

HAMMOND (ASTROM v.). See Case No. 596.

HAMMOND (BROCKETT v.). See Case No. 1,916.

HAMMOND (BURBANK v.). See Case No. 2,137.

HAMMOND (COOK v.). See Case No. 3,159.

HAMMOND v. COOLIDGE. See Case No. 5,999.

Case No. 6,001.

HAMMOND v. ESSEX FIRE & MARINE INS. CO.

[4 Mason, 196.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

MARINE INSURANCE — ABANDONMENT—WAGES OF SEAMEN—UNDERWRITER'S LIABILITY.

1. After an abandonment of a vessel is accepted by the underwriters, they become owners for the voyage, and are liable for seamen's wages from the time they become owners. They are entitled to the freight earned from that period.

2. Where the vessel and freight are separately insured, after an abandonment made to each set of underwriters, the underwriters on the freight are entitled to the freight earned before that time, and the underwriters on the vessel to that earned after.

3. If after an abandonment, the voyage is continued by the underwriters without objections, it is presumed to be continued on the original terms as to compensation of the master and seamen.

[Cited in The Merchant, Case No. 9,434.]

4. A master, it seems, may maintain a suit in personam in the admiralty for wages, or for compensation in the nature of wages.

5. If the master make a special contract to receive a moiety of the freight in lieu of wages, and procures insurance on his part of the freight, and abandons as for a total loss, and freight is subsequently earned, his abandonment does not operate as an assignment of the freight so subsequently earned, and he is entitled to recover his moiety of the same freight against the owners, or abandonees, who have received it.

This was a suit in admiralty in personam, brought by [William Hammond], the master of the schooner Sally, for his wages and supplies for part of the voyage, of which the defendants became owners by an abandonment to them as underwriters. The facts were as follows: The schooner belonged to Messrs. Putnam, Cheever, and others, of Danvers, and on the 21st of October, 1824, was lying at the port of New York. On that day the owners entered into an agreement with the libellant as follows: "Articles of agreement &c. between &c. Said Hammond agrees to take the schooner Sally, owned &c., for the purpose of freighting from New York to the southward and elsewhere, as he may deem most for their interests. Said Hammond agrees to victual, man, and load and unload said vessel at his own expense, excepting boat hire, which is to be taken from the whole stock, and pay to the owners one half of her earnings or freight money, and one quarter of the passage money, after deducting the pilotage and dockage out of the whole stock. The owners agree, on their part, to keep the hull, rigging, and sails of said schooner in good repair at their own expense. Said Hammond agrees to pay over to the owners their proportion of the earnings of said schooner, as fast as it becomes due. Said (owners) agree, that in case Capt. Hammond should make a voyage to any foreign port, that they will pay one half of the charge for tonnage duty, anchorage duty, and custom-house expenses." In consequence of this agreement, the libellant took the command of the schooner as master, and performed several voyages therein. Afterwards, in July, 1825, he procured a cargo at New York, on freight, or a charter for a voyage to Surinam and back to New York. In the course of the voyage the vessel encountered a very severe gale or hurricane, and was so much injured, that she put into Norfolk for repairs. She was there repaired at an expense exceeding her value, and after being repaired, the libellant pursued the voyage, and earned the whole freight by the return of the vessel to New York. In November, 1824, the owners of the schooner procured the defendants to underwrite a policy on the schooner for 2000 dollars, valuing her at 2000 dollars, for a period not exceeding twelve months, at and from all places &c. &c., for all purposes of trade &c. &c., comprehending the voyage in question. Upon hearing of the disasters to the vessel, the owners abandoned to the underwriters on this policy on the 10th of September, 1825, and the abandonment was duly accepted, and the loss paid. In July, 1825, Messrs. Putnam and Cheever, "for themselves and whom it may concern," procured another policy to be underwritten by the Mercantile Insurance Company in Salem, of 2000 dollars on the freight of the schooner (whole freight valued at the same sum), at and from New York to Surinam, and at and from thence to New York, the company not to be accountable for wages and provisions, unless as a general average. The sum of 1000 dollars, insured by this policy, was for the account of the libellant. An abandonment of the freight was also made upon this policy, and a total loss paid by the underwriters, 1000 dollars of which has been received by the libellant. While the vessel was at Norfolk repairing, the owners wrote (in January, 1826) to the libellant, informing him that he was to consider himself in the employ of the underwriters from the time of the abandonment, as they had paid for her. They had written him, in the previous September, that the abandonment was made on

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

the 10th of the same month. The freight earned by the voyage to Surinam and back to New York had been received by the defendants before the suit was brought. The libellant claimed wages for the voyage from the time of the abandonment; and also compensation for provisions belonging to him then on board, and afterwards expended on the voyage. It was agreed that, if the libellant was entitled to any wages, fifty dollars per month was a reasonable compensation.

Mr. Dunlap, for libellant, contended, that the common principles of equity sustained the claim of the libellant; he had, in the course of his regular business, when no voluntary courtesy could be presumed, rendered a service to the respondents, which entitled him to a reasonable recompense. 1 Esp. 178. This service was also rendered almost by the express direction, and clearly with the subsequent assent of the respondents. Upon the happening of the loss, he became by law the agent of all concerned, bound to do every thing in his power for their benefit, and his acts bona fide were binding upon them. Cond. Marsh. 578; Milles v. Fletcher, 1 Doug. 231. That it was evident, from the correspondence, that he was considered in this light by the parties. By the French law the insurer on the ship, upon an abandonment, became entitled not only to the freight which might be subsequently earned, but to that previously earned, and growing due. Cond. Marsh. 602; cites Emerig. Ins. tome 2, p. 221. By the English law, where there are different sets of underwriters upon ship and freight, upon an abandonment, it seemed clear, that the underwriters upon freight were, at all events, entitled to no more than that part of the freight growing due at the time of the loss. That was the utmost extent of their right, and their right even to that has been denied. Phil. Ins. 478. But that the freight subsequently earned passed with the abandonment of the ship, of which the insurer became the owner, entitled "to all her future earnings," and "liable for all her future outgoings:" Marsh. Ins. lib. 1, c. 13, § 4. That in the United States, especially in Massachusetts, the doctrine was considered as settled, that when a ship and freight were both insured, as in this case, by different policies, and an abandonment took place, the underwriters upon the freight were entitled to all the freight which might be previously earned, and those on the ship to all which might be subsequently acquired. 1 Johns. Cas. 377; 2 Johns. Cas. 443; 1 Caines, 578; 3 Caines, 20; 15 Mass. 541. That if these positions were correct, the respondents became the owners, and the libellant became their agent and master from the time of the loss. The respondents could not expect to obtain a master for their vessel without paying for his services, nor could the libellant be required to devote his time and services without a recompense. The objection raised was, that the master's interest in the freight for the whole voyage was insured; that upon the happening of the loss, and his abandonment, he received from the insurers of the freight all that he could have received in case no loss had happened, and that all his interest in the freight passed, and became assigned to the underwriters upon the freight; that the answer to this objection was, that what the libellant received from the insurers of freight, was the fruit of a contract to which the insurers of the ship were neither parties nor privies. It was a wager of his own, where he paid the whole stake, the premium, and with the gain or loss of which they had no concern. A creditor insures for a term the life of his debtor, who dies within the term, and he receives the whole sum insured; yet the debt remains unaffected and undischarged. The owners of the ship were jointly interested with the libellant in the policy upon the freight. It would not be pretended, that he was bound to prosecute the voyage farther after the loss; that there can be no greater obligation upon the libellant than upon the owners; it being clear, that the underwriters upon the freight could claim none of the freight subsequently earned, and derive none of the benefit of the libellant's services in the continuation of the voyage. It seemed difficult to perceive, why the circumstance of the libellant's having effected a policy upon the freight, should furnish a reason for repelling the present claim.

Mr. Nichols, for respondent, contra.

STORY, Circuit Justice. In this case it is not disputed, as I understand the argument, that after an abandonment is accepted, the underwriters, as owners of the ship, are liable to the payment of the wages of the master and mariners for the residue of the voyage after they become owners. This is a doctrine so consonant with the general principles of law, and, as far as authorities go, so well supported, that in ordinary cases of hire, there would not seem much room for controversy. Marsh. Ins. c. 13, § 4, p. 602; Thompson v. Rowcroft, 4 East, 34; Sharp v. Gladstone, 7 East, 24; Case v. Davidson, 5 Maule & S. 79, 8 Price, 569; McBride v. Marine Ins. Co., 7 Johns. 431; Coolidge v. Gloucester Ins. Co., 15 Mass. 347; Marsh. Ins. bk. 1, c. 13, § 4, p. 602. The abandonee of a ship is entitled to her earnings acquired after the abandonment; and whether the freight be earned upon a general contract, or upon a charter-party, although it may make a difference as to the form of the remedy to recover it; yet it does not seem to make any difference as to the right of the abandonee. Splidt v. Bowles, 10 East, 279; Chinnery v. Blackburne, 1 H. Bl. 117, note; Morrison v. Parsons, 2 Taunt. 407; Case v. Davidson, 5 Maule & S. 79; Livingston v. Columbian Ins. Co., 3 Johns. 49; United Ins. Co. v. Lenox, 1 Johns. Cas. 377,

2 Johns. Cas. 443. If so, then he, who receives the benefit, ought to bear the burthens.

In respect to the relative rights of the underwriters on ship and freight, in cases of constructive total losses, and an abandonment by the ship-owner to the respective underwriters, there is a diversity between the English and the American doctrine. In England the doctrine is established, that the underwriter on the ship, after an abandonment, is entitled to the whole freight of the voyage then in the course of being earned, as incident to the ownership of the ship. That was finally adjudged in Case v. Davidson, first by the court of king's bench (5 Maule & S. 79), and afterwards upon error in the executive chamber (8 Price, 559). No distinction was admitted in that case between the portion of freight, which might be deemed earned as a pro rata freight antecedent to the abandonment, and that earned afterward. In America a rule somewhat different has been established in some of our commercial tribunals, which is entitled to the highest respect. The rule is, that up to the time of the loss, the underwriter on freight (like the ship-owner) is entitled to a freight pro rata itineris; and the underwriter on the ship to all which is subsequently earned. In all cases, therefore, where there is a growing freight not absolutely earned, the parties take it, when earned, in the proportion of the voyage performed before and after the abandonment. The cases cited at the bar fully support this doctrine; and what is more material, it has been recognised by the supreme court of Massachusetts, to which state these parties belong. United Ins. Co. v. Lenox, 1 Johns. Cas. 377; 2 Johns. Cas. 443; Davy v. Hallett, 3 Caines, 16; Livingston v. Columbian Ins. Co., 3 Johns. 54; Marine Ins. Co. v. United Ins. Co., 9 Johns. 186; Coolidge v. Gloucester Ins. Co., 15 Mass. 347. As between the different underwriters on ship and freight in the present case, it is clear, upon these principles, that, by the abandonment, the former became entitled to so much freight only as was earned antecedent to the loss for which the abandonment was made, and the underwriters on the ship are entitled to all earned afterwards.

This, then, being the posture of the case as between the respective underwriters, how is it as between the parties now litigating before the court. It is plain that the libellant has, as master, been in the service of the respondents since the time of the acceptance of the abandonment, and retroactively, by operation of law, from the time of the loss. The present case is yet stronger, for the respondents must be deemed by their own acts, with the fullest means of directing the voyage, to have justified the master in the prosecution of it. Whether, after an abandonment to the underwriters on the ship, the latter are bound to prosecute the voyage, as succeeding to the rights and obligations of the owner in statu quo; or whether they may give up the voyage, and undertake any new enterprise, it is unnecessary, in this case, to decide. The language of the books is very direct on this subject (Marsh. Ins. bk. 1, c. 13, § 4; Coolidge v. Gloucester Ins. Co, 15 Mass. 341; Case v. Davidson, 5 Maule & S. 79, 89, S Price, 559), but it may be well to reserve any absolute opinion respecting it, until it forms the very point in judgment. Here the original voyage was, in fact, pursued with the unquestionable assent of the respondents, and the freight earned on that voyage has been received by them without objection. Under such circumstances, in ordinary cases, the master would be entitled to receive wages, or an equivalent, for the period of his employment in the service of the respondents. What, then, are the grounds on which his claim is resisted? First, it is said, that he is not entitled to wages as upon the ordinary contract of hire, because here was a special contract, which superseded it. The latter was not extinguished by the abandonment of the ship, and the master's claim must stand, if at all, upon the terms of his original engagement with the ship-owner. In considering this point, it is important to look at the situation of the parties after the abandonment. By that event the respondents became owners of the ship. They elected to pursue the original voyage, and the master also elected to pursue it. If it was competent for either party to break it up, still it was as competent for either party to waive that right. No objection having been made, on either side, to the terms of the original engagement, the fair inference is, that for the residue of the voyage they adopted them, and consequently the master must be understood to be entitled, not to wages as upon ordinary hire, but to his share of the freight in lieu of wages. So far I go along with the argument. But the result of this reasoning is, that if there had been no abandonment, the libellant would have been clearly entitled to his moiety of the freight, subject to the expenditures provided for in the original agreement.

This leads me to the consideration of another objection, which is, that the abandonment of the freight by the master is an extinguishment of his right of recovery; first, because he has been fully indemnified and paid by the abandonees; and secondly, because the abandonment operated as an assignment of the freight now in controversy; and the respondents, having notice, are bound to pay it over to the assignees, and not to the libellant. The first ground is not well founded in point of law. The respondents have nothing to do with the contract of insurance with the underwriters on freight. They are not parties or privies to it. They have paid no premium, and are entitled to no interest in it. It is, as to them, res inter alios acta. Their contract with the master is to pay him his share of the freight; and whether he has been indemnified by others or not,

furnishes no discharge of their obligation. Suppose the master had received the whole freight, there is no pretence to say, that the respondents could recover from him any more than their own moiety.

The other constitutes the main ground of defence. And if it be well founded in law and fact, there will be no difficulty in giving effect to it in the present suit. A court of admiralty is not, like a court of common law, bound by technical rules as to remedies. It acts like a court of equity, ex aequo et bono, and will give effect to the rights of parties, and recognise them, as they would be recognised in a court of equity. If, therefore, the master has made an assignment of his moiety of the freight, valid in equity, this court will give it entire effect, although it may not be such an assignment as would have transferred a remedy at law. See Morrison v. Parsons, 2 Taunt. 407. I agree also to the position, that an abandonment does operate as an assignment, valid between the parties, and sufficient to bind their rights to the extent of its purport. But the difficulty is of another sort. It is to establish, that the abandonment did assign the right to this freight to the abandonees. The general principle has been already stated, viz. that the abandonment to the underwriters on freight conveys no title to the freight subsequently earned. As to them, such freight is deemed a total loss. Whatever is so earned is deemed to be earned by and for the benefit of the new ship-owners; and all contracts respecting the future progress and consummation of the voyage, are at the expense and for the benefit of the new ship-owners. That was the doctrine in Davy v. Hallett, 3 Caines, 16, and it was acted upon to its full extent in Coolidge v. Gloucester Ins. Co., 15 Mass. 341. The whole embarrassment in this case arises from confounding the American with the English doctrine on this subject. By the latter the abandonees of freight, so far as respects the original ship-owner, would, in an adjustment with him, be entitled to an allowance of all the freight earned in the voyage, and received or receivable by him. If the whole freight was earned, they would be entitled to the whole as against him, though as between themselves and the abandonees of the ship, they could make no claim to any of the freight. As has been already stated, the American doctrine is otherwise; and it ought to be adhered to on the present occasion.

The true posture of the present case, with reference to the American doctrine, is, that there was an entire loss of the original voyage and freight, upon the abandonment. In respect to the underwriters on freight and the assured, the voyage from Norfolk to Surinam, and back to New York, was a new voyage, carried on by new parties, under a new contract, grounded, indeed, by the assent of these parties, upon the same stipulations as the original contract, but still substantially new. The master, after the abandonment at least, so far as the underwriters on freight are concerned, was under no obligation to pursue the voyage. It was, as between them and him, entirely at an end. If he elected to go, it was for his own benefit, and not for theirs. They were not subject to the charges of victualling or manning the ship, and there would be no equity in giving them his earnings. If he was under no obligation to go the voyage on their account, or to labor further in their service, it is clear that his acts ought to be referred to his own rights and interests. The short view of the matter, however, is, that the underwriters on freight can claim no more than was assigned to them by the abandonment, and that was only the freight antecedently earned. As, therefore, the freight afterwards earned has not been assigned by the master to any one, he is entitled to recover his moiety of it from the respondents, as an equivalent for his wages. Upon these principles I shall refer the c to a commissioner to report the sum due to the master. The freight for the portion of the voyage from New York to Norfolk, pro rata itineris, belongs to the underwriters on the freight, and the master has no claim upon it. As to the residue, he is to bear all the expenditures provided for in the original agreement with the ship-owners, and with these deductions he is to be allowed his moiety of the freight subsequently earned. Considering the circumstances of this case, it appears to me that the expenses ought to be equally borne by both parties. Decree accordingly.

HAMMOND (GOULD v.). See Case No. 5,638.

Case No. 6,002.

HAMMOND v. HAWS.

[Wall. Sr. 1.] [1]

Circuit Court, D. Pennsylvania. May 11, 1801.

RULE FOR TRIAL OR NON PROS.—CONTINUANCE—REASON FOR.

To obtain the further continuance of a cause, where a rule has been taken for trial or non pros., the plaintiff must show some precise legal, or strong equitable ground; and it is not sufficient to allege, that the attorney in fact or law, from attention to other necessary concerns, could not be prepared.

The defendant had obtained a rule in October term last for a trial at this term or non pros.[2] E. Tilghman now moved to make the rule absolute, the counsel for the plaintiff stating that the cause was not ready to be brought on by him at this term. The issue was joined in October term, 1795, and according to the practice in Pennsylvania, was handed up on the trial list for this term.

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

[2] In Pennsylvania, this is the rule in practice, and not for a proviso trial; though the latter rule may be taken at the option of the defendant.

Mr. Rawle, for plaintiff [Hammond's lessee], moved for a continuance, (which it seems is the mode of taking the opinion of the court against the application for a non pros.). He said, that the non pros. under the rule of last term, and now called for, was within the discretion of the court; and if the plaintiff could assign either legal or equitable ground against it, a continuance ought to be granted. That there existed several very forcible reasons in favour of his motion; which he stated as follows: That Wilcocks, attorney for plaintiff, had, since the last term, from advanced life, and other reasons, declined the practice of the law: that the lessors were in England, and managed their concerns by Mr. Morris, of New Jersey, as their attorney in fact, who, since October last, had been so pressed by his private avocations and professional duties in his office of judge of the district court of the United States, as to have rendered his attention to the preparation of the cause impracticable: that Mr. Morris, finding he could not conveniently manage the business of the lessors, had last fall written to England, that he wished them to send over powers of attorney to some other person, in consequence of which, Mr. Bond had been substituted, and received his letters in February last:[3] that Mr. Wilcocks declining to act, as before stated, Mr. Bond applied to him (Rawle) the latter end of March; and as the title was very complex and voluminous, and he himself not having enjoyed good health, the fact was, that the plaintiff, from these circumstances, was not prepared. He further stated, that the defendant relied on a long possession against title; and if a non pros. took place, it would add five years more to this possession: that no inconvenience resulted to the defendant from the continuance; his costs would be paid, and it would be better for him, than to succeed in this motion, only to be served with new process.

E. Tilghman, for defendant, said, that the plaintiff had kept the action pending for six years; his client poor and attending every term; that worn out with delay, he had taken this rule last term to force a trial or be dismissed from the action. He admitted the court were to decide questions of this sort upon liberal principles, and ought to be satisfied with delay, if the party could assign any solid and satisfactory excuse, but that in this case, none had been made out.

Mr. Rawle replied.

Before TILGHMAN, Chief Judge, and GRIFFITH and BASSETT, Circuit Judges.

GRIFFITH, Circuit Judge.[4] I have no hesitation in this case to say the rule for a non pros. should be made absolute. The plaintiff let the cause sleep from October, 1795 to October, 1800. The defendant harassed with attendances, then took the rule for trial or non pros. This was served on Mr. Wilcocks, and was a solemn notice, that the defendant would be tried or discharged. Since then seven months have elapsed; the lessors having a regular agent, and an attorney for transacting their business. The vague allegations that their attorney had about that time or since, declined business, and their agent, Mr. Morris, been so overburthened with other affairs, that he could not attend to this, furnish no grounds, upon which a court of justice can act; such representations, if admitted to prevail, may be always urged. As to the change of the attorney in fact, it makes no alteration; one continued until the other was appointed. Besides, Mr. Bond's powers arrived in February; so that there has been an agent on the spot three months, and nothing done but to put some papers into the hands of counsel, and that not until April. We cannot be influenced by such reasons. The plaintiff ought to proceed to trial, unless he can lay before us a precise legal ground for postponement, or such circumstances of hardship, not resulting from inattention, or the acts of his agent and attorney, as would make us feel that it was essential to justice to retain the cause.

BASSETT, Circuit Judge. I am always desirous to give indulgence where it may advance justice, and work no considerable injury or infringe any established rule of law. But one party must not be wronged by the extension of accommodations to the other. The only question is, whether the plaintiff has used due diligence to bring this cause to trial, and has been prevented by obstructions which furnish a precise and reasonable ground for a continuance. I do not think he has. I am therefore against it.

TILGHMAN, Chief Judge. The case made by Mr. Rawle for the plaintiff, is insufficient to authorize us to continue the cause: no legal reason is assigned to justify the want of preparation for trial.

Let the rule for a non pros. be made absolute.

[3] This representation he made from a letter to him, written by Mr. Bond, from New Brunswick, who had gone there to consult Mr. Morris.

[4] It seems the practice for the youngest judge first to deliver his opinion, and the chief judge last.

Case No. 6,003.

HAMMOND v. HUNT et al.

[4 Ban. & A. 111.][1]

Circuit Court, D. Massachusetts. Feb., 1879.

PATENT—INFRINGEMENT—LICENSE—DELIVERY OF —PRACTICE AND PLEADING.

1. The question of what amounts to a delivery of a license, considered.

[Cited in Dietz v. Ham Manuf'g Co., 47 Fed. 321.]

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

2. Where an exclusive license has been granted, the licensee and the patentee are both necessary parties to a suit for infringement.

[Cited in Clement Manuf'g Co. v. Upson & Hart Co., 40 Fed. 472; Rice v. Boss, 46 Fed. 196; Brush Electric Co. v. California Electric Light Co., 3 C. C. A. 368, 52 Fed. 961.]

3. As a general rule, a cestui que trust is a necessary party to a bill in respect to the trust property.

4. The practice, with reference to a plea in bar for want of parties, stated.

[This was a suit in equity by Andrew H. Hammond against Howard B. Hunt and others.]

B. E. Valentine, for complainant.
F. H. Betts, for defendants.

LOWELL, Circuit Judge. In the case of Hammond v. Mason & Hamlin Organ Co. [Case No. 6,004], affirmed 92 U. S. 724, this plaintiff sued for an infringement of the same patent, and in respect to the same form of machinery which is in controversy here. Certain agreements between the patentee, through whom the plaintiff derives title, and the organ company, were pleaded in bar of that suit, and the plea was adjudged good; it being held that the company were licensees under the patent in respect to the particular machinery then and now under judgment. The defendants here pleaded the same agreements, and that, by virtue thereof, the organ company were not only licensees, but exclusive licensees. In this case issue was taken on the plea, to settle the fact whether the agreements were ever duly delivered and recorded, and the case has now been argued on those points, as well as on the matters of law involved in the plea. The substance of those contracts is stated in the reports of the former case.

The plea does not allege that the plaintiff is not suing for the benefit of the Mason & Hamlin Organ Company, the licensees; nor that the defendants are acting under the license. The questions, therefore, are: Whether the agreements were all fully operative by delivery and due record? Whether the license is an exclusive one? If it is, whether the plaintiff can maintain his bill at all? If he can, whether the licensees are not necessary parties plaintiff with him?

The complainant denies that there is sufficient evidence of the delivery of the Exhibits B and D (lettered in the former suit "C" and "E"), and points out that they were recorded—one of them some weeks, and the other some months—after the death of the patentee, and both of them more than three months after they were made. As to the amount of evidence; it requires very little to prove that a deed duly and carefully made and executed, and especially if it is but one of several made at the same time, some of which are admitted to have gone into effect, has been delivered. Delivery is not now a deliberate ceremony performed in the presence of witnesses, and if it is questioned, must often be inferred from conduct or other circumstances. In the present case there is ample evidence of that character. All that could possibly be inferred from the evidence, looked at in the most favorable way for the complainant, is, that Louis, the patentee, left these papers with Crosby & Gould, his solicitors, to be recorded in case the new patent, then applied for, should not be issued. That patent was not issued, and the papers were recorded. The argument thereupon is that the power to record was revoked by Louis' death. This is a misapprehension of the law. If a deed is left with a stranger to be delivered to the grantee on the happening of a contingency, the first delivery is complete, and irrevocable by death or otherwise. And by a stranger is meant one who is not a party to the deed. The fact that the persons with whom the deed was left had been acting for Louis in the matter is immaterial. Their possession would not be his possession in such a case. Or, to put it another way, if a grantor puts into his own solicitor's hands a deed, as his deed, to be delivered thereafter, the technical delivery is already made. As to this, and the evidence necessary to prove delivery under various circumstances, see Com. Dig. Fait, A 3; Shelton's Case, Cro. Eliz. 7; Bushell v. Pasmore, 6 Mod. 217; Wheelwright v. Wheelwright, 2 Mass. 447; Souverbye v. Arden, 1 Johns. Ch. 240; Jaques v. Trustees of Methodist Episcopal Church, 17 Johns. 548, 577; Hedge v. Drew, 12 Pick. 141; Doe v. Knight, 5 Barn. & C. 671. I do not mean to say that the evidence is as favorable to the complainant as I have above supposed. If these agreements are such as require to be recorded, they were recorded in due time so far as the complainant is concerned, because his title was acquired long after that time. Curtis, Pat. § 182.

Are the organ company exclusive licensees, or merely licensees? In the former case, Mr. Justice Miller says: "Without elaborating this matter, we concur in the opinion of the circuit court that Louis, having sold this invention, and doubt existing whether the purchasers would obtain a patent for it, intended by this contract and by Exhibit D to secure to them the exclusive use of that invention in connection with the first mechanism, so long as the latter was protected by any patent founded on his right as inventor." 92 U. S. 727. It is argued that this statement of the use being exclusive was not necessary to the decision, and that Judge Shepley had intimated that perhaps the use would not be exclusive after the patent had been extended. Both statements are true; but the opinion in the circuit court was much less decidedly expressed than that in the supreme court, and the reason given for the latter opinion appears to be conclusive of the point. The sale of the invention carried with it the exclusive right to all present

or future patents by the same inventor for the particular invention sold, which is admitted to be the one in question here.

Can an exclusive licensee maintain a bill in equity for infringement without joining the patentee? And can the patentee maintain one without joining the licensee? I answer both of these questions in the negative. By an exclusive license I mean one which does not amount to an assignment, by reason of something reserved to the patentee, as in Gayler v. Wilder, 10 How. [51 U. S.] 477, where the patentee excepted out of his grant the right to make the machines within a certain part of the territory granted; or in several cases like this at the bar, in which the patent has been divided by subjects, and the grant is to make certain articles exclusively.

It is familiar learning that the patent act of 1836, which was in force when these contracts were made, expressly recognized the assignment of the whole or of any undivided part of a patent, and an assignment of the entire right for any specified part of the United States, and provided that an action for damages against an infringer might be brought by any patentee, assignee or grantee of the exclusive right. St. 1836, §§ 11, 14; 5 Stat. 121, 123. It has been uniformly held that when the interest does not come within this description, but is a license, an action at law must be in the name of the patentee. The leading case is Gayler v. Wilder, 10 How. [51 U. S.] 477. Judge Shepley has held that the same rule holds good in equity (Hill v. Whitcomb [Case No. 6,502]); or rather that the licensee himself could not maintain the suit alone. He said that the contract was valid, and could probably be enforced in equity against the grantor and persons trespassing with notice of the contract, but not as a patent suit, and he dismissed the bill, because the jurisdiction of the circuit court in that case depended on the suit being maintained under the patent law.

This last point has since been ruled otherwise by the supreme court, and by Mr. Justice Clifford in this court. Two bills in equity have been sustained as patent suits between citizens of the same state, by an exclusive licensee himself, against the patentee and others jointly trespassing with him, knowing of the license. Littlefield v. Perry, 21 Wall. [88 U. S.] 205; Star Salt Caster Co. v. Crossman [Case No. 13,321]. In both these cases the owner of the patent was a defendant, and of course could not sue himself. Therefore, the question whether a third person could be thus sued, was not touched. I must adhere to Judge Shepley's decision on that point. It is to my mind much more clear that the licensee should be made a party plaintiff, because the profits and damages are his.

It may be stated broadly that the cestui que trust is a necessary party to a bill in respect to the trust property. This general rule may, undoubtedly, be relaxed when the deed or will under which the trustee holds, gives him not only the legal title, but invests him with the whole duty of receiving and distributing the fund, such, for instance, as an assignment to the assignee in bankruptcy. But I have never seen a case in which a mere nominal trustee, not having any lawful power in the premises, has been held a sufficient sole plaintiff in equity. The chief reason for making him a plaintiff at all is to prevent a future vexatious action at law by him against the defendant, which would be at once enjoined by the court of equity, but would need new pleadings and evidence. In all such cases the beneficial owner must be joined.

This plea is framed in bar, and the complainant objects that it cannot be sustained in that form as a plea for want of parties. It is true that the court would not dispose of the case on such a ground without giving the complainant an opportunity to add the necessary parties, if he is able to procure their consent, which I suppose, in this case, is unlikely. Here the plaintiff cannot make them defendants because he then would have no equity left in his bill. There is some evidence that he bought the patent without actual notice of the agreements. But that he is bound by them as against the organ company, is conclusively decided by the former case; and, therefore, he cannot now say that they should be brought in as defendants to try that title. Although the effect of this plea will not be a peremptory dismissal of the bill, it is usual to frame it as a plea in bar, and the plea in this case contains the requisites of such a plea, the principal of which is that it should describe the persons whose absence is objected to. In this respect it resembles a plea in abatement, at law. In equity, the objection may be taken by demurrer, if the want of parties appears on the face of the bill, or by plea, or answer, or orally at the hearing. Rule 53, in equity, limits the right to this extent, that if the objection is taken for the first time at the hearing, the court shall be at liberty, if it think fit, to make a decree, saving the rights of the absent parties.

Plea sustained for want of parties; complainant has leave to amend on or before March rules.

HAMMOND (KING v.). See Case No. 7,797.

Case No. 6,004.

HAMMOND et al. v. MASON & HAMLIN ORGAN CO.

[6 Fish. Pat. Cas. 599; Holmes, 296; 5 O. G. 31.][1]

Circuit Court, D. Massachusetts. Dec. 2, 1873.[2]

PATENTS—SALE OF INVENTION NOT PATENTED—EFFECT OF.

Where a patentee applied for a patent on a new combination of parts, which parts had before been patented by him, and, at the time of such application, granted the defendants the exclusive right to make, use, and vend under the patent for the parts as such; also, by another contract, the right to make, use, and sell the parts in the particular combination described in said application, without limitation of time; and a patent for the combination not having been granted, the assignees of the extended term of the patent for the parts bring suit against defendants for the use of these parts in said combination: *Held*, that defendants' contract with the inventor at the time of his application, for a patent on the combination, secured them the right to make, use, and sell this specific combination, without reference to their license under the patent for the parts; that as they use only this specific combination, they are not liable to complainants, and it is unnecessary for the court to discuss the effect of the licenses under the original term upon the extended term. Defendants' right under the contract was independent of the existence or duration of their licenses.

[See note at end of case.]

[Bill in equity for an injunction to restrain alleged infringement of reissued letters patent [No. 4,486], for an improvement in melodeons or reed instruments, granted El Dora Louis, as administratrix of La Fayette Louis, July 25, 1871; and for an account. The original patent was granted to Louis Nov. 18, 1856 [No. 16,094], and extended for an additional term of seven years. The defendant pleaded in bar a license from Louis, the patentee, by virtue of certain agreements between it and Louis, the material parts of which are stated in the opinion.][1]

[This suit was by Andrew H. Hammond and others against the Mason & Hamlin Organ Company.]

B. E. Valentine, for complainants.

Frederic H. Betts, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity by the complainants, as assignees and owners of the letters patent reissued to El Dora Louis, as administratrix of Lafayette Louis, on July 25, 1871, for an improvement in melodeons or reed instruments, consisting of the application of mechanism to produce a "tremolo" in the musical note on said instruments. The original patent to Lafayette Louis was issued November 18, 1856.

Defendants, by their plea, admit that they manufacture and sell, in connection with their own organs, tremolo attachments, made precisely in accordance with the specification, drawing, and model of an application for letters patent, dated September 25, 1868, made by Lafayette Louis, the assignor of the complainants. The plea admits, for the purposes of this hearing, that this mechanism embodies the invention described in the patent of said Louis, on which this bill in equity is brought. The plea sets up a justification in using these mechanisms under a license under the original patent granted by Louis to Mason & Hamlin, the assignors of these defendants, and also under a series of contracts between Louis and the defendants themselves, relating to the specific device used by them.

It is not necessary to consider the questions discussed at the bar in relation to the license set up in the plea under the original patent, as we are satisfied that the defendants are protected under their agreements with Louis, dated September 25, 1868.

It appears that Louis, prior to September 25, 1868, made an invention of a combination of the fan-tremolo with a rotary wind-wheel, and applied for a patent for this combination. On the same day he entered into three contracts with these defendants. The first was an absolute conveyance to the defendants of all his "right, title, and interest in and to said invention and letters patent which may issue therefor," and authorized the commissioner of patents to issue said patent to the Mason & Hamlin Organ Company, as the assignees of all his right, title, and interest in and to said invention and letters patent. The second agreement grants to the defendants the right to make, use, and sell the invention above named, and assigned to them, as above stated, in connection with so much of the inventions secured by the letters patent of November 16, 1856 (on which this suit is brought), and by a patent of June 10, 1862, "as is contained in the said mechanism." The defendants agree to pay a royalty for each and every tremolo mechanism, substantially the same as that described and shown in the said application and accompanying specifications, drawing, and model, until the expiration of the term for which the said letters patent shall be granted, referring to the letters patent for which application was on that day made. This contract provided for one contingency—that was the granting of letters patent on the application then made. The invention and the right to use the specific mechanism had been conveyed to the defendants. If, by the granting of letters patent to them, as assignees of Louis, they should obtain the exclusive right to use the invention, then, in such case, they were to pay Louis a royalty of one dollar for each tremolo manufactured by them during the term of the patent. The contingency contemplated did not happen. Letters patent were not granted for the combination applied for. The third agreement provided for another contingency, namely, the failure of the

[1] [Reported by Samuel S. Fisher, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The statement is from Holmes, 296, and the syllabus and opinion are from 6 Fish. Pat. Cas. 599.]

[2] [Affirmed in 92 U. S. 724.]

defendants to obtain a patent for the invention of 1868, which is the case as it now exists. This agreement provided "that, whereas, the said Louis has invented an improvement in keyed reed musical instruments, and has this day executed his application for the grant of letters patent of the United States to secure the same, and has also made and executed an assignment thereof to the said Mason & Hamlin Organ Company, and a license to make, use, and sell the mechanism described in the specifications, drawings, and model accompanying the said application, under letters patent originally issued as No. 16,094, and dated November 18, 1856, and subsequently reissued as No. 2,498, dated February 26, 1867, and again reissued as No. 2,944, dated May 26, 1868, and also under letters patent numbered 35,528, and dated June 10, 1862; now, therefore, in consideration of one dollar to him paid, and for other good and valuable consideration, the said Louis hereby covenants and agrees with the said company that, if the said company fail to procure said letters patent, for which application has been executed as aforesaid, then he, the said Louis, will, and does hereby grant unto the said Mason & Hamlin Organ Company the exclusive right, under the said letters patent, already granted, and under any and all reissues thereof, to make, use, and sell the specific mechanism described and set forth in the said executed application, and the specification, drawings, and model accompanying the same."

Taking into consideration the three contracts, it is plain that Louis had invented a new combination of the old parts patented by him. He applied for letters patent for this new combination. He conveyed to defendants for a valuable consideration, and unconditionally, the invention, and the right to make, use, and sell the specific mechanism described in the application, including the old parts, as well as the new combination. If the defendants succeeded in obtaining a patent for the new combination, they were to pay a royalty in addition to the consideration they had already paid for the invention. But if no letters patent could be obtained, the defendants were none the less the owners of the right to make, use, and sell the "invention," and "the mechanism it contains," and "the specific mechanism" described in the application. Independent of the granting, reissuing, or extension of any letters patent, without limitation of time, they had purchased and taken a conveyance of the right to make, use, and sell those specific devices, in that specific combination. This is what they do use, and this only, and this they have a right to use. Their right is not limited to the term of the original patents, embracing the parts of the combination. It is true that the third contract, in case of failure to obtain a patent for the new combination, grants to the defendants the exclusive right, under the patents already granted for the parts, to make, use, and sell the specific mechanism described in the application for letters patent for the new combination. But they had the right to use this specific mechanism. The license under the old patents was only intended to make this right exclusive. Their exclusive right under them might end with the expiration of the term of the old patents, but their right was independent of their existence, or duration.

Bill dismissed.

[NOTE. Upon appeal to the supreme court by the complainants the decree of the circuit court was affirmed in an opinion by Mr. Justice Miller (92 U. S. 724) in which it was held that it was not necessary to decide whether in any case a sale of an invention which is never patented carries with it anything of value, it being evident that the rights growing out of an invention may be sold; and, further, that this sale, with the right to use it in connection with the existing patent and its reissues or renewals, protected defendants from liability as infringers.

[For another case involving this patent, see Hammond v. Hunt, Case No. 6,003.]

HAMMOND (SAXE v.). See Case No. 12,411.

HAMMOND (SMITH v.). See Case No. 13,053.

HAMMOND (THORP v.). See Case No. 14,004.

HAMMOND (UNITED STATES v.). See Cases Nos. 15,292–15,294.

Case No. 6,005.

The HAMMONIA.

[4 Ben. 515.] [1]

District Court, S. D. New York. Feb., 1871.[2]

COLLISION OFF NANTUCKET—STEAMER AND BARK—FOG—IGNORANTLY CHANGING COURSE—EVIDENCE.

1. A steamer and a bark came in collision off Nantucket Shoals in the day time, in a fog. There was a dispute as to the wind, the steamer claiming that it was south southwest, and free for the bark, which was sailing east half north, while the bark claimed that it was south southeast, and that she was close-hauled. The steamer's whistle was heard on the bark, off her weather bow, and, at the second whistle, the course of the bark was changed to port about half a point, to give her a good full. The fog-horn of the bark, which was properly blown, was heard ahead of the steamer, which was heading west half south. The steamer ported her helm, so that, at the collision, she was heading north northwest, and she struck the bark on the starboard side, stem on, at nearly right angles: *Held*, that the bark was not in fault.

2. The steamer was in fault in porting, in ignorance of the bark's position and course, which, though parallel, was not end on to her own. She should have stopped and reversed, without changing her helm. She could only infer, from hearing the fog-horn, that it came from a sailing vessel under way, and she was, therefore, chargeable with knowledge that, if there was any risk of collision, it was her duty

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

[2] [Affirmed in Case No. 6,007.]

to keep out of the way, and also her duty to slacken her speed, and, if necessary, to stop and reverse, and the duty of the sailing vessel to keep her course.

[Cited in The City of New York, 35 Fed. 609.]

[See The Aleppo, Case No. 157.]

3. The testimony of the witnesses from the bark, as to the wind, was more reliable than that of the witnesses from the steamer.

In admiralty.

Vose & McDaniel and Everett P. Wheeler, for libellants.

William C. Barrett and Charles Donohue, for claimants.

BLATCHFORD, District Judge. On the afternoon of the 28th of June, 1869, about three o'clock, in a dense fog, off Nantucket Shoals, the bark Harriet Lievesley, a vessel of 365 tons burthen, owned by the libellants, and on a voyage from New York to Pictou, Nova Scotia, was run into by the iron screw steamer Hammonia, a vessel of 3,000 tons burthen, bound from Havre to New York. The stem of the steamer struck the starboard side of the bark about amidships, and penetrated into the bark several feet, crushing in her starboard side and throwing her on her beam ends on her port side, with her sails and masts lying flat on the water. She was abandoned, her crew, with the exception of one man, who was drowned, having been taken off by the Hammonia, and carried to New York. She was subsequently raised by wreckers.

The libel alleges, that the bark had her fog-horn constantly blowing; that, about ten minutes past three o'clock, p. m., she was steering east half north, the wind being south southeast, the fog very dense and the fog-horn blowing, when the whistle of a steamer was heard about two or three points on the weather bow, which afterwards proved to be from the Hammonia; that the fog-horn was kept constantly blowing on board of the bark, and was plainly heard by those in charge of the steamer; that, in one or two minutes after hearing the first whistle, a second whistle was heard, then about four points on the weather bow; that, almost immediately afterwards, the steamer was close upon the bark, proceeding almost directly across the track of the bark; that the collision then ensued; that the bark had a competent lookout, who was on his post and attending to his duties; that the steamer, at the time the fog-horn of the bark was first heard by those in charge of the steamer, was proceeding at a high rate of speed, much faster than was safe or prudent during so dense a fog; that, notwithstanding the fog, if the steamer had kept the course upon which she was at the time, she might have avoided the collision; that, even in the fog, the collision would not have occurred if the steamer had been going at a reasonable rate; and that the collision would not have occurred if the steamer had done anything to avoid it, or anything except what she did do. The libellants claim to recover against the steamer the damages sustained by them by the collision.

The answer avers, that, about noon on the day of the collision, a dense fog set in; that the speed of the steamer was then slackened, and six men were put on the watch and lookout, and the master, the second officer, and a New York pilot, who had been taken on board that day, took positions on the bridge, and another officer was placed on the quarter deck, and four men were kept at the wheel; that, owing to the fog, every possible precaution was adopted and used which long nautical experience could suggest; that, at three o'clock, p. m., the sound of a fog-horn was heard directly ahead of the steamer; that, immediately on hearing the fog-horn, the helm of the steamer was put hard-a-port, and her engines were stopped and then reversed at full speed; that, notwithstanding such precaution, the stem of the steamer struck in the middle of the starboard side of the bark; that, prior to and at the time of the collision, the wind was from south to south southwest, and free for the bark, and the bark starboarded her helm; that, during the continuance of the fog, and long prior to, and up to the moment of, the collision, the whistle of the steamer was blown every thirty seconds, and those in charge of her used the greatest care and skill in managing her, and took every possible precaution to prevent the occurrence of any accident; and that the collision was occasioned by the gross negligence and want of care and skill of those on board of the bark, in not keeping a good lookout, in not blowing the horn and in starboarding her helm.

The theory of the claimants as to how the collision occurred is, that the vessels were meeting directly end on, that the steamer ported and the bark starboarded, and that thus they came in contact. It is shown, that, before the steamer heard the bark's fog-horn, the course of the steamer was west half south, and that, before the bark heard the steamer's whistle, the course of the bark was east half north. These courses, though in direct antagonism to each other, do not necessarily indicate a meeting end on. They may as well indicate parallelism of courses. It is admitted by the steamer, that she changed her course by porting before she struck the bark, to such an extent, that, when she struck the bark, she was heading north northwest—a change of six points and a half. The pilot makes it this, though other testimony is to a change of only six points. I am entirely satisfied, from the evidence, that the blow was given as the steamer headed nearly at right angles to the course of the bark. An east northeast course is a course at right angles to a north northwest course. If the bark was heading east northeast when struck, she was only a point and a half off from her east half north

course. The testimony on the part of the bark is, that the wind was from south by east to south southeast, or, as the man at her wheel says, south by east half east. If so, and her course was east half north, she was sailing within seven points of the wind and was close-hauled on her starboard tack. Nicholson, the man at her wheel, says he was steering full and by all the time. The testimony of the witnesses on the bark, which was using her sails, and going three or four knots an hour, is more reliable as to the direction of the wind, than that of the witnesses on the steamer, which was not using any sails, and was going from eight to nine knots an hour. The testimony on the part of the steamer makes the wind south southwest, or three points and a half more free for the bark. The testimony on the part of the bark is, that the first whistle from the steamer was heard on the bark by Nicholson, and by the master, and by the cook, from three to three and a half points on the starboard or weather bow of the bark; that the master immediately said that there was the whistle of a steamer; that, almost at the same time, a report came from the lookout on the bow, a Norwegian, that there was a whistle on the weather bow; that the fog-horn had been, up to that time, being constantly blown by such lookout; that the master, on hearing the whistle, told the lookout to blow the horn freely, which was done all the time; that then a second whistle was heard further on the starboard bow, and from five and a half or six points on that bow; that, when the second whistle was heard, the master said to Nicholson that it was from a steamer going to the westward, and that they were clear of her, and asked Nicholson how the bark was heading, and Nicholson replied, east half north, and the master told Nicholson to keep the bark a good full, and Nicholson kept her off half a point; that then a third whistle was heard from the steamer, about abeam of the bark, and the master said that the steamer had ported her helm and was coming right down on the bark; and that then, almost immediately, the steamer came in sight, heading directly for the starboard side of the bark. The man on the lookout at the bow of the bark, and who was the man who was blowing the horn, was drowned in the confusion which ensued upon the collision.

The theory of the claimants, in order to be maintainable, requires not only that the bark and the steamer should have been approaching each other about end on, but that the bark should have starboarded to an extent sufficient to have carried her to the same place to which the steamer was carried by her porting of six points or six points and a half, so as to be there struck at right angles, about amidships, on her starboard side, by the stem of the steamer. The whistle of the steamer was undoubtedly heard by the bark before the fog-horn of the bark was heard by the steamer. The bark did not starboard at all until after the second whistle of the steamer was heard, and then she starboarded, at the utmost, not over a point and a half, if as much. The steamer, the moment she heard the fog-horn of the bark, put her helm hard-a-port and stopped and reversed. If the vessels had been meeting end on, the greater speed of the steamer, when she so ported, would unquestionably have carried her safely across the bows of the bark, even with the starboarding of the bark to the extent she did starboard. The claim on the part of the steamer, that the bark was heading north northeast at the time of the collision, and that, therefore, as the steamer headed north northwest at that time, the bark was struck at an angle of forty-five degrees, angling towards her bow, requires that the bark should have starboarded five points and a half, and traversed, between the time the second whistle from the steamer was heard and the actual collision, the distance from the line of the course of the steamer to the point of collision. The evidence shows that this was not the case. The fact is, that the bark was well off the starboard hand of the steamer, and that the steamer was grossly in fault in porting in ignorance of the true position of the vessel whose fog-horn she heard. In face of the actual porting by the steamer, the only defence that could be suggested for her was, that the bark was directly ahead of her, and in the line of her course, and starboarded. The libel was filed on the 17th of September, 1869. The master and wheelsman of the bark was examined by deposition, September 30th, 1869. By the libel, it appeared that the bark's course was east half north, and that the steamer's whistle was heard well off to the starboard of the bark. But it did not appear by the libel that the bark had starboarded at all. That did appear by the depositions of the master and the wheelsman of the bark. With this information, the answer of the steamer was put in, on the 19th of October, 1869. It avers, that the wind was south to south southwest, and free for the bark, and that the bark starboarded her helm, and that the collision was occasioned by the negligence and want of care and skill of those on board of the bark in, among other things, starboarding her helm. It does not aver that the vessels were meeting end on or nearly end on, nor does it aver what was the course either of the steamer or of the bark, although it avers that the sound of the fog-horn was heard directly ahead of the steamer. Nor does it aver that the bark, by starboarding, changed her course. The theory of the answer manifestly is, that the bark ought to have ported her helm, and was in fault in not porting, and in starboarding instead of porting, and that the steamer made a proper manoeuvre in porting when she heard a fog-horn directly ahead of her, and was, therefore, without fault. Hence, the allegation in the answer, and such tes-

timony in regard to the wind, as there is on the part of the steamer, that the wind was free for the bark and that she starboarded. This means that the wind was free for her, so that she could have ported and yet not have come into the wind, and that, if she had ported, meeting the steamer end on, there would have been no collision, as the steamer also ported. From the fact that the steamer ported to the extent of six points or more from a course west half south, and that the witnesses for the bark had testified to the starboarding of the bark half a point from a course east half north, the conclusion was jumped at by the only witness for the steamer, Fokkes, her second officer, who testifies on the subject, that the vessels were meeting end on, and that the bark caused the collision by starboarding and not porting. This is shown by his testimony. He was asked: "You have stated that your steamer was steering west half south at the time you heard the fog-horn, and when the order was given to port. Suppose the bark was steering east half north, in what relative position would that bring or place the steamer and the bark at that time?" He answered: "Stem to stem." He was also asked: "You have stated, in your direct testimony, that, for some time prior to, and at the time of, the collision, the wind was south southwest. How was that wind for the bark, on the course she was going before the collision?" He answered: "She had a free wind, and could easily put her helm a-port without having her sails aback."

Independently of the question as to whether the rate of speed of the steamer was at all justifiable, there was gross incompetency in her management. She ported in entire ignorance of the course or position of the vessel whose fog-horn she heard. She should have stopped and reversed, without changing her helm. She could only infer, from hearing the fog-horn, that it came from a sailing vessel under way. She is, therefore, chargeable with the knowledge, that, if there was any risk of collision, it was her duty to keep out of the way of the sailing vessel, and also her duty to slacken her speed; and, if necessary, to stop and reverse, and the duty of the sailing vessel to keep her course. Yet Fokkes shows his entire ignorance of the rule of the road, and the same ignorance must have existed on the part of his superior officers, judging by the course they pursued. Thus, Fokkes was asked: "Why was the steamer's helm ported?" He answered: "Because, it is the law for two vessels meeting at sea end on, both to put their helms a-port, to go clear of each other."

The attempt to show that the helm of the bark was put hard-a-starboard, by the testimony of those who saw its position in the water after the bark had been capsized, and while a boat from the steamer was engaged in saving her crew, cannot outweigh the direct testimony of those on the bark. Capsized as the bark was, and lying on her port side, her rudder may very well have hung over to port, without her helm having been starboarded to any greater extent than is testified to by Nicholson.

In any view I can take of the evidence in this case, I must regard the steamer as wholly in fault, and the bark as entirely free from fault. There must, therefore, be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

[This decision was affirmed in the circuit court in an opinion by Woodruff, Circuit Judge. Case No. 6,007.]

Case No. 6,006.

The HAMMONIA.

[10 Ben. 512.] [1]

District Court, S. D. New York. July, 1879.

PASSENGER'S CONTRACT—CONTAGIOUS DISEASE—DUTY OF MASTER—JURISDICTION.

1. F. filed a libel against a steamship, alleging that he took passage on her for Hamburg, with his wife and son, and that when two days out from New York, the master compelled them to leave the stateroom in the first cabin and confined them during the voyage, in another room which was unfit for them. It appeared that the child was taken with an attack of small-pox or varioloid, and that the master of the ship directed the child to be removed to the steward's room, telling the father and mother that, if they went with it they must stay and would not be allowed to come into the first cabin again, and accordingly they were all removed and were not allowed thereafter to come to the first cabin: *Held*, that the court had jurisdiction of the cause of action.

2. The act of the master was but the performance of his duty towards the other passengers.

3. The accommodations provided were reasonable, and there was no unreasonable confinement, and the libellant had no cause of action.

In admiralty.

Chas. E. Soule and Geo. F. Betts, for libellant.

Redfield & Hill, for claimants.

CHOATE, District Judge. The libellant in this suit, Henry A. Fleischmann, took a first-class passage for himself, his wife and son, a boy of three and a half years old, on board the steamship Hammonia, in April, 1873, for Hamburg. He complains in his libel that, when two days out from New York, the master compelled them to leave the state-room in the first cabin upper saloon, and confined them without cause in another room opposite the kitchen and known as the steward's room; that from the 5th to the 14th of April they were all confined in this room and not allowed to leave it "for air, or exercise, or to fulfil the calls of nature;" that this room "was filled with bad odor, was filthy, overrun

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

with rats, cockroaches and other vermin, and was not suitable for nor fitted or intended for the accommodation of three persons;" that the libellant and his son were obliged to "sleep in and occupy the same berth," and that he was often "bitten by rats which infested said room," and that "when he expostulated and demanded that he should have the stateroom which he had engaged," the master "insolently refused." And he claims damages in the sum of $10,000, alleging not only the loss and deprivation of the comforts and accommodations engaged and agreed to be furnished to him and his family, but great bodily and mental "distress and agony," and injury to health during the voyage and for a long time afterwards, resulting from the confinement in said room. Upon the trial the libellant was allowed to amend his libel, alleging injuries to his baggage from the gnawing of his trunks by rats. The defence is that the child had the small-pox, and that it became necessary to isolate him from the other passengers, and that the libellant and his wife voluntarily accompanied him when the master caused him to be removed to the chief steward's room; that they were informed that if they remained with the child they could not be allowed to go into the first cabin or mingle with the other passengers; that these precautions were necessary to prevent the disease from spreading among the passengers and crew. And the claimants deny in all other respects the averments of the libel as to the alleged discomforts and injuries suffered by the libellant and his wife and son, and also all the averments as to the filthy and improper condition of the room to which they were removed. There is no doubt that this court has jurisdiction of the cause. The Moses Taylor, 4 Wall. [71 U. S.] 411; The New World, 16 How. [57 U. S.] 469.

There can be no doubt, also, that the master of a ship has authority, and that it is his duty, in case of the appearance of a dangerous and infectious disease, to isolate the sick person from all others on board, so far as it can be done with a reasonable regard to his comfort and welfare, so as to protect from infection as far as possible the other passengers and the crew. And in this case, upon the master's receiving information from the physician that the disease was small-pox, he did no more than his duty in removing the child from the first cabin; and the restraint put upon the parents who went with him to another part of the ship, in preventing them, while living in the room with the child, from going into the first cabin again, was reasonable and proper. The fact that the claimants had sold the libellant first-class tickets and assigned to him a room in the first cabin, with the comforts and accommodations appertaining thereto, did not and could not abridge the master's authority in this respect. The safety of the ship and the passengers and the ship's company is the first consideration with the master, and overrides any special assignment to a passenger of particular accommodations, where the continuance of the enjoyment by him of such special accommodations will during the voyage seriously endanger the lives or the health of all on board. I think the testimony shows that in this case the child had a very light case of small-pox or varioloid, and that his removal from the state-room in the first cabin was necessary and proper.

The libellant has testified to nearly all the discomforts, inconveniences and injuries set forth in the libel and some others as serious, except that there is no evidence offered of any ill health resulting from the alleged confinement; but on all the material points in respect to the manner in which the change of rooms was effected and the hardships and discomforts attending and following it, the libellant is contradicted and his statements shown not to be founded in fact. The proof is that the chief steward's room was fitted with two berths and a sofa; that it was a suitable room for three persons; that the libellant was not obliged to sleep in the same berth with his son; that the room was well ventilated and comfortable; that it was not filled with bad odors from the kitchen; that the libellant and his wife were not confined in the room; that he was not restrained in any way from going to other parts of the ship except the first cabin; that he went when he pleased on deck; that he went into the smoking room and elsewhere; that his wife was not prevented from leaving the room; that she occasionally went on deck; that one servant was specially detailed to wait on them and that they had as much comfort and as good accommodations as their exclusion from the first cabin rendered possible; that the steward's room itself was substantially fitted up as well as the staterooms, and when the ship was full it was occupied by first cabin passengers. The libellant testifies that it was infested by rats and cockroaches, and that he complained of the rats to the captain and that the captain passed the matter off as a joke. I am satisfied from the testimony of the captain, and the seamen who served the libellant's family, and the doctor, that this story about the rats and cockroaches is greatly exaggerated or wholly unfounded. It is certainly proved that he made no complaints of the room; on the contrary, that he expressed himself much pleased with it, and with the manner in which he was treated. That the libellant and his wife suffered some inconveniences from their necessary isolation from the rest of the passengers, is undoubtedly true; but these were as slight as could be expected, under the circumstances, and were not aggravated by any neglect or ill-treatment on the part of the master or officers of the ship. They left the ship voluntarily at Cherbourg. At that time they made no complaint of ill-treatment. The libellant has failed to make out any cause of action. Libel dismissed, with costs.

Case No. 6,007.

The HAMMONIA.

[11 Blatchf. 413.] [1]

Circuit Court, S. D. New York. Dec. 15, 1873.[2]

COLLISION—FOG—EXCESSIVE SPEED—STEAMER AND SAILING VESSEL.

1. If there is not time, after the sound of a fog-horn from a sailing vessel, in a fog, becomes audible to a steamer, for the latter to slow and deliberate sufficiently to learn the position and course of the sailing vessel, and thereupon take the proper measures to avoid her, that fact shows, per se, that the steamer is moving at too great speed.

2. In a fog so dense that another vessel cannot be seen, it is the duty of a steamer to move at such a rate, and with such control of herself, that, when apprised, by the means prescribed by statute, of the neighborhood of a sailing vessel, she san slow or stop in season to learn the position and course of the latter, and what measures are suitable and proper to avoid her.

3. It is no satisfactory test of the propriety of the speed of the steamer, that it is proved to be half-speed.

In admiralty.

Everett P. Wheeler, for libellants.
William C. Barrett, for claimants.

WOODRUFF, Circuit Judge. The decision of this case made in the district court [Case No. 6,005] was correct, upon the ground that the officers of the Hammonia mistook the position of the bark, and hastily, without due care, ported, and so caused the collision. But I desire to add further, that, if there was not time, after the sound of the fog-horn, from the bark, became audible on the steamer, for the latter to slow and deliberate sufficiently to learn the position and course of the bark, and thereupon take the proper measures to avoid her, that fact shows, per se, that the steamer was moving at too great speed. In a fog so dense that another vessel cannot be seen, it is the duty of a steamer to move at such a rate, and with such control of herself, that, when apprised, by the means prescribed by statute, of the neighborhood of a sailing vessel, she can slow or stop in season to learn the position and course of the latter, and what measures are suitable and proper to avoid her. It is unnecessary to fix a precise rate of speed. That will depend upon circumstances. But, a steamer should not rush on at such speed that, when peril arises, she cannot adopt the precautions which, on hearing a fog-horn, will be effectual to prevent collision; and, to that end, nothing is more important than that she should have reasonable time to ascertain the position and course of the vessel which she is to avoid. Nor is it any satisfactory test of the propriety of the speed of the steamer, that it is proved to be half-speed. To adopt such a test would be, in effect, to authorize the steamer that had the greatest power of motion to move the fastest through a fog; or, in other words, to make reasonable speed in a dense fog depend, not upon the place, the liability to meet other vessels, or like circumstances, but upon the rate at which she is capable of moving when no fog exists.

The libellant must have a decree for the amount awarded in the district court, with interest and costs.

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

[2] [Affirming Case No. 6,005.]

Case No. 6,008.

HAMPDEN BANK v. MORGAN et al.

[2 Haz. Reg. U. S. 57.]

Circuit Court, S. D. New York. Jan., 1840.

SPECIAL PARTNERSHIPS—GENERAL LIABILITY—WITHDRAWAL OF CAPITAL.

[1. The use of the word "Company" in the title of a firm formed as a special partnership under the New York statute renders all the partners liable as general partners.]

[2. A special partner, who has withdrawn any part of his capital from the firm, is liable, at suit of creditors, to pay it back.]

This was an action [by the president, directors, and company of the Hampden Bank against Edward M. Morgan, Henry F. Morgan, Knowles Taylor, and William H. Jessup] to recover about $14,000, being the balance of an account. The action, though nominally against all the defendants, was virtually but against Knowles Taylor, the other parties making no defense. On the part of Taylor the defense set up was that he had been only the special, and not general, partner of the other defendants, and as such, was not liable in the present action. It appeared that in the latter part of December, 1836, Taylor and the other defendants formed a partnership, in which it was agreed that Taylor was to put in $75,000 and be only a special partner. This partnership was advertised in the usual way, and the other requisitions of the law complied with as the defendant alleged. The advertisement announced the formation of the partnership under the different names which composed the firm, and also contained the word "Company," and it was now contended that the use of the word "Company" was contrary to the express provisions of the statute relative to special partnerships, and rendered all the members of the firm general partners. It was also alleged that there was not sufficient proof of Taylor's having put in a cash capital of $75,000, and that if he had done so, he afterwards withdrew it. In proof of the latter allegation, it was shown that during the existence of the firm, which failed in about three months after its commencement, Taylor had obtained small sums at various times from the firm. But in relation to his having paid into the firm the cash

capital of $75,000, it was so fully proved as to admit no doubt of it. It was also contended on the part of the plaintiff, that the certificate of the partnership had not been sworn before the proper officer, as it was sworn before the recorder, who is not a judge of the county court within the meaning of the law.

D. D. Field, for plaintiffs.

E. H. Blatchford and G. G. Moore, for defendants.

THE COURT (BETTS, District Judge), charged the jury that it was conceded that a cash capital must be paid bona fide by the special partner, and if he fails to do so, he is to be considered a general partner. But the court held that the certificate and affidavit was prima facie evidence that the money had been paid, and required no further evidence until this proof was impeached by the other party, and evidence adduced on their part to show that the money never had been paid. But in the present case, besides the certificate and affidavit the defendant had also produced other proof that he paid the money. If the jury found the fact that the defendant had not paid in the capital, they should on that ground find a verdict for the plaintiff.

The court also ruled that the word "Company," in the title of the firm, rendered the defendant and all the other members of it general partners.

The court considered that the withdrawal of part of his capital only rendered the defendant responsible to pay it back, but in order to raise the point of law, it was necessary to ascertain the fact, and the jury were to say whether he had withdrawn any part of his capital.

The jury would, therefore, find two facts, whether the defendant had paid in the capital, and whether he had withdrawn any part of it. And then on the other questions of law involved in the case, the jury would, under the direction of the court, find a verdict for the plaintiff.

The jury find that the sum of seventy-five thousand dollars was paid into the concern of E. M. Morgan & Co. by the defendant, Knowles Taylor. They find also that no part of said money has been withdrawn by the said defendant. And under the charge of the court, they find a general verdict for plaintiff in the sum of $14,116.29.

HAMPDEN STOCK & MUT. FIRE INS. CO. (EDDY STREET IRON FOUNDRY v.). See Case No. 4,277.

HAMPTON (ROUSE v.). See Case No. 12,088.

HANAN, The NATHAN. See Case No. 10,029.

HANBERRY (GREEN v.). See Case No. 5,759.

Case No. 6,009.

HANCE v. McCORMICK.

[1 Cranch, C. C. 522.] [1]

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

TROVER—EVIDENCE OF POSSESSION—WITNESS FEES.

1. The possession of the tobacco notes, is evidence of the possession of the tobacco which they represent.

2. If a cause be postponed for two or three days, witnesses attending from Baltimore will be allowed pay for those days.

Trover for seven hogsheads of tobacco.

The plaintiff had put the tobacco notes into the hands of Mr. Heigh, for sale, who lost them; they came to the hands of the defendant [James McCormick, Jr.]. These tobacco notes were certificates given by the public inspector and keeper of the public warehouse; that A. B. has a hogshead of tobacco, of such a weight and quality, in the public warehouse, to be delivered to the bearer of the certificate.

Mr. Law, for defendant, contended that there was no evidence that the tobacco was in the defendant's possession, although he had the notes, and sold the tobacco to Mr. Levy, who received and sold the same.

But THE COURT overruled the objection. Witnesses living in Baltimore were allowed for attendance, although THE COURT postponed the civil cases for two or three days.

HANCOCK (FOOTE v.). See Case No. 4,911.

Case No. 6,010.

HANCOCK v. HILLEGAS.

[2 Dall. 380.] [2]

Circuit Court, D. Pennsylvania. 1797.

AGREEMENT TO ENTER JUDGMENT—AMOUNT DUE.

Agreement to enter judgment for amount due on promissory note. *Held*, plaintiff should have settled the amount due on notice to defendant, before he issued execution.

The defendant [Hillegas] had given a promissory note to the plaintiff [Hancock, administrator] for a specific sum, on which, in different modes, there had been several partial payments. Before any settlement of accounts, however, the defendant entered into an agreement, that judgment should be entered against him by an attorney, "for the amount that may be due." In pursuance of this agreement judgment was confessed, generally, on the 12th of March, 1796; and on the 14th of May following, without any previous trial, writ of enquiry, or notice to the defendant, a fi. fa. was issued and levied, for the full amount of the promissory note.

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

[2] [Reported by A. J. Dallas, Esq.].

Mr. Thomas, thereupon, obtained a rule to shew cause why the defendant should not be allowed a set-off for the amount of his payments, and that, in the meantime, proceedings on the execution be stayed.

The rule was afterwards opposed by Mr. Lee, the attorney-general, who contended, that the regular relief was by application to the equity side of the court, for an injunction; which would only be granted, upon the defendant's bringing the money into court, or giving security to pay the balance.

But it was answered by Rawle and Thomas, that the amount due must be ascertained, before any use could be made of the agreement to enter judgment. It was the express stipulation of the parties; and as the judgment has been improperly entered at common law, it is on the same side of the court that relief should be sought. The courts in England and in Pennsylvania are in the constant practice of staying the proceedings on executions, which are issued either for more than is due, or before the day of payment. See 1 Bac. Abr. 195.

BY THE COURT. The agreement is to enter judgment for what may be due. The plaintiff has no right to decide the question. It is evident, from the terms of the agreement, that there was something to settle; and the plaintiff, either by arbitration, or by a jury, should have proceeded to make the settlement, with notice to the defendant, before he entered the judgment; or, at least before he issued the execution. The rule made absolute.

Case No. 6,011.

HANCOCK v. NEW YORK LIFE INS. CO.

[13 Am. Law Reg. (N. S.) 103; 2 Ins. Law J. 903; 4 Bigelow, Ins. Cas. 488.]

Circuit Court, E. D. Virginia. Fall Term, 1873.

LIFE INSURANCE — FAILURE TO PAY PREMIUMS DURING WAR—REPUDIATION OF CONTRACT BY INSURER—RIGHT OF ACTION.

[1. Failure of one living within the military lines of the Confederate States to pay premiums as they accrued, during the war, upon a policy issued by a company domiciled in a loyal state, did not put an end to the policy, where such premiums were tendered after the close of the war.]

[2. Repudiation by the insurer of any obligation under the policy, while the same is still legally binding upon it, is a breach of the contract, giving the insured an immediate right to sue for such damages as he has suffered, although the time for performance by the company has not yet arrived.]

In the year 1851, Augustus Hancock insured his life with the defendant, in the sum of $5000, payable to his wife at his death, he, Hancock, agreeing to pay the defendant $142 annually at Richmond, Va., by way of premium on the same. He paid his premiums regularly until the war, when the defendant removed its agency from Richmond, and had no agency within the military lines of the Confederate States during the war. As soon after the war as the defendant re-established an agency in Richmond, Hancock went to it and offered to pay up all his premiums that had accumulated during that period, and offered to continue to pay all such as should accrue in the future. But the defendant refused to receive his premiums, and declared the contract at an end, upon the ground that all his rights under it had been forfeited by his failure to pay his annual premiums as they fell due, between the years 1861 and 1865. And they at the same time required him to take notice that they were under no obligations whatever to him in respect of said policy. The plaintiff's declaration set out the case as stated above. The defendant demurred to the declaration upon two grounds: 1st. That the failure to pay the annual premiums as they accumulated, forfeited the plaintiff's rights under the policy, and 2d, that, though this were not so, yet no sufficient breach of the contract was alleged, as the time when the contract was to be performed had not yet arrived.

Johnston, Williams & Boulware, for demurrer.

Wm. L. Royall, for plaintiffs.

On the first point, see Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614; New York Life Ins. Co. v. Clopton, 7 Bush, 179; Hamilton v. Mutual Life Ins. Co. [Case No. 5,986].

Upon the second point: It is settled now, that a contract may be broken before the time for its performance arrives, by one party disclaiming its obligation, thereby giving the other party the right to treat it as though the time for its fulfilment had passed. Chit. Cont. (10th Am. Ed.) 799; Hochster v. De la Tour, 2 El. & Bl. 678; Frost v. Knight, L. R. 7 Exch. 111; Avery v. Bowden, 5 El. & Bl. 714; Danube & Black Sea, etc., Co. v. Xenos, 13 C. B. (N. S.) 825; Dugan v. Anderson, 36 Md. 567; Mountjoy v. Metzger [9 Phila. 10]. It is true it has been many times decided that when a promise is made to pay money on a certain day, no action will lie until the day has passed. As, for instance, if A. buy a horse from B., and promise to pay him $100 for the same one year from that day, no action will lie for the $100, until the year has passed, and this is what was held by Taney, C. J., in the case of Greenway v. Gaither [Case No. 5,788], with the leading case of Hochster v. De la Tour [supra] before him. But there is a radical distinction between such a case and the case at bar. Where a promise is made to pay money at a future day, as in the illustration in regard to the purchase of a horse, time is of the essence of the contract. But time is not what is stipulated for by the insurer in a policy of insurance. What he stipulates for is money. He promises to pay the insured $5000, provided the insured will pay him $142 every year that he, the insured, shall live. And if

the insurer get that number of annual payments, it is of no consequence to him at what time he pays the $5000, and he will have got all that he stipulated for. The plaintiff ought then to recover in this case $5000, less as many annual premiums as have accrued since the beginning of the war up to this time, and less as many more as will accrue during such time as a jury may think the plaintiff will live. Each party will then receive what he originally contracted to get, and no injustice will be done to any one.

The demurrer was overruled, and at the trial BOND, Circuit Judge, instructed the jury as follows:

If the jury find that the defendant, the New York Life Ins. Co., did insure the life of Augustus Hancock, for the term of his natural life, and for the benefit of Sarah A. Hancock, as set out in the policy of insurance offered by the plaintiff in evidence; and if the jury find that the said Sarah A. Hancock complied with the terms of said policy on her part to be performed by the payment of the annual premium of $142 to the agent of said company, until the said agency was withdrawn by the company because of the outbreak of hostilities; and if the jury find that within a reasonable time after the close of hostilities and the re-establishment of the company's agency at Richmond, the plaintiffs offered to pay the premiums fallen due during the war, but that the company refused to receive such premiums unless the said Hancock would submit to a medical examination for a new policy, and wholly refused to be bound by said contract of life insurance, then the plaintiff is entitled to recover such damages as they may find, from the evidence in the cause, the plaintiffs have suffered by reason of the defendant's breach of contract.

The jury found a verdict for plaintiff for $1371.

HANCOCK (UNITED STATES v.). See Case No. 15,295.

Case No. 6,012.

HANCOCK v. WALSH.

[3 Woods, 351; 8 Cent. Law J. 393; 25 Int. Rev. Rec. 160; 8 Reporter, 71.] [1]

Circuit Court, W. D. Texas. April, 1879.

SUIT AGAINST A STATE — ACCEPTANCE BY A STATE OF RESOLUTIONS OF CONGRESS — ANNEXATION OF TEXAS — ENFORCEMENT OF TRUST AGAINST A STATE.

1. A bill filed against the commissioner of the general land office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state of Texas, is not a suit against the state.

[Cited in Chaffraix v. Board of Liquidation, 11 Fed. 644.]

2. The colonization contract made by the republic of Texas, acting by Samuel Houston, president, on January 22, 1844, with Charles Fenton Mercer, was valid and binding on the republic.

3. By the terms of the joint resolution of the congress of the United States for the annexation of Texas as a state in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the republic of Texas. This resolution having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions.

4. Whether the resolution of annexation, and its acceptance by Texas, is to be considered as a treaty or a contract, it is equally binding on the state, and she cannot escape from its obligation.

5. A state may become a trustee.

6. A trust assumed by the republic of Texas was not extinguished by the formation of the state of Texas and her annexation to the Union, but was fastened upon the state as the sovereign successor of the republic.

7. Neither lapse of time nor any defense analogous to the statute of limitations can be set up by the trustee of an express trust, as a defense to his liability to execute the trust.

[Followed in Preston v. Walsh, 10 Fed. 317. Cited in Claybrook v. Owensboro, 16 Fed. 305.]

In equity. Heard on demurrer to the bill and on motion for injunction pendente lite. The original bill was filed on March 6, 1875, by George Hancock, a citizen of Kentucky, against J. J. Groos, who at that time was commissioner of the general land office of the state of Texas. After the filing of the original bill, to wit, on August 27, 1875, Hancock, the complainant, died, and the suit was revived in the name of William Preston, his devisee, upon a bill of revivor, filed January 26, 1876. Afterwards Groos, the defendant, died, and on April 12, 1879, a bill of revivor and supplement was filed against William C. Walsh, his successor in office, who entered his appearance and filed his demurrer to the original and supplemental bills.

The case made by the original and supplemental bills was as follows: The republic of Texas, after establishing her independence, adopted, substantially, the colonial policy commenced in 1825 by the government of Mexico to induce the settlement and colonization of its lands in Coahuila and Texas. Several acts of the congress of the republic were passed to carry out this policy. By authority of these acts thirteen colonial contracts were entered into by the republic of Texas, through the agency of its president, with various colonial contractors. Among these contracts was one made on January 29, 1844, between Samuel Houston, president of the republic of Texas, and Charles Fenton Mercer, a citizen of Florida, and such associates as he should choose, the original of

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 8 Reporter, 71, contains only a partial report.]

which is on file in the state department of the state of Texas. By the terms of this contract it was stipulated that Mercer should, within five years from the date of the contract, settle upon so much of the public domain of Texas as was designated in the contract as "Mercer's Colony," and described by metes and bounds, as many immigrant families as he and his associates could induce to move thereon, at the rate of one family for every section of one square mile of vacant and unappropriated land, with the proviso that at least one hundred families should be settled on said lands during every year of the term of five years for which the contract was to run.

In consideration of the performance by Mercer and his associates of their part of the contract, the republic of Texas agreed to convey to Mercer and his associates one section of six hundred and forty acres of land for every family that they should introduce and settle upon said lands, and to make a full and perfect title therefor to him and his associates as soon as they should exhibit to the proper officers the evidence that said families had been settled on the lands embraced within the limits of the colony, and as a premium and recompense for their labor and expenditures in the performance of the contract, the republic of Texas agreed and covenanted to give, grant and convey to Mercer and his associates, or their legal representatives, one section of six hundred and forty acres, or two half sections of three hundred and twenty acres each, for every ten families introduced and settled by them on said lands in pursuance of the contract. Mercer at once entered into possession of said lands and surveyed and occupied the same by his agents and colonists, in conformity with the provisions of the contract, and did manage and control the same as proprietor thereof, and in order to perform the contract on his part, and as authorized by the contract itself, at once organized a joint stock company, which was called "The Texas Association," composed of many men of wealth and character, and he and his associates in said company, in compliance with the stipulations of their contract, gave their time, labor and services to establish said colony, and did introduce and settle upon said lands not less than one hundred families in each and every year of the five years for which said contract was to run, and well and truly performed all the covenants by them to be performed under the terms of the contract, and for the accomplishment of these ends they subscribed and paid money exceeding twenty thousand dollars. Twelve hundred and fifty-six families were, in fact, introduced and settled within the limits of said colony within five years after the date of the contract by Mercer and his associates, which, under the terms of the contract, would have entitled them to one thousand three hundred and seventy-six sections of land of six hundred and forty acres each. On January 29, 1849, the date at which said term of five years expired, Mercer and his associates offered to exhibit to the commissioner of the general land office of Texas proof of the facts above stated, to wit, of the introduction and settlement of said families, and did in fact make a report, which is now on file in the general land office of Texas, giving the number and names of the colonists and families introduced and settled by them within the limits of the colony, verified by affidavit, and with the names of the required witnesses attesting and verifying all the facts therein stated, and showing the strict performance by Mercer and his associates of their covenants in said contract by them to be performed. The contract between Mercer and the republic of Texas further provided that lands lying within the limits of the Mercer colony, which had not been legally located prior to the date of the contract, should be held subject to be settled by Mercer and his associates for the period of five years, and should be set apart from the public domain and kept free from all future locations and claims, to be colonized in the manner specified in the contract, for the use and benefit of Mercer and his associates. At the date of said contract the republic of Texas was seized by sovereign demesne of all the lands within the limits of the grant to Mercer, and by her statutes held out the promise that in all contracts for colonization an immediate equitable title should vest in the contractor, subject to be divested only upon the non-performance by him of the conditions annexed to the grant. The statutes and contract, taken together, created a trust whereby the state, retaining the legal title, empowered and required her proper officers to convey the legal title to the contractor as soon as evidence was produced of the performance of the contract by him. Yet, notwithstanding the premises, the former commissioner of the general land office of Texas proceeded to issue certificates for lands within the colony of Mercer to all persons holding general certificates of location, and to issue patents therefor, and the defendant Walsh continues to issue patents upon surveys made within the limits of the colony, in violation of said contract. By reason of the performance by Mercer and his associates of the terms of the said contract, they became entitled to have and receive a full and perfect title to 1,256 sections of land within the boundaries of said colony, and also 120 sections of premium lands, being ten sections for every 100 families introduced by them and settled in said colony. Full evidence was adduced, and is of record in the archives of the general land office of the state of Texas, that 1,256 families, claiming and holding under said Mercer, were introduced and settled by him upon land lying within the limits of said colony, according to the terms of said contract

The state of Texas has recognized the con-

stitutionality and binding force of said contract by the decision of her supreme court and by the issue to the colonists under Mercer of 1,256 patents for land in said colony, whereby the title to 1,256 sections was conveyed to the said colonists. There were more than 1,000,000 acres of land lying within the limits of Mercer's colony which have never been located and patented, but remain vacant, and are subject to terms of the contract between the republic of Texas and Mercer, and should, in equity, be reserved for the fulfillment of said contract, and, under the statutes of the state of Texas, it is the duty of the commissioner of the general land office to issue to complainant and his associates certificates for the lands to which the said contract entitles them. The joint stock company, known as "The Texas Association," which was formed under said contract betwen the republic of Texas and the said Mercer, had authority, under the terms of said contract, to name one or more trustees to act for said association, and said association did appoint the said Mercer sole trustee, with full authority and power to bind the association, and act for it in the premises. Mercer accepted the said trust, and continued to discharge the duties of trustee until the year 1852, when he sold and assigned his interest in the property of the association to said George Hancock, who was thereupon duly appointed and chosen trustee and chief agent of the association, in the place of Mercer, and invested with all the powers of such trustee and agent, and said Hancock continued to act as such trustee and agent up to the filing of the bill in this case, and afterwards to the time of his death. The said George Hancock, soon after the sale to him by Mercer of his interest in said contract, came to the state of Texas, and found the rights of other colonial contractors under discussion in the legislature, and in litigation in the courts. He was advised that there would be an equitable adjustment of all colonial contracts, including that of Mercer, and was, for that reason, requested by his associates to await the action of the state and confide in its justice. He did so, and urged the claims of himself and associates under said contract upon the officers of the state. He was thus delayed till 1858, when the supreme court decided in favor of the constitutionality and validity of said contract between the republic of Texas and Mercer. Soon after, the war of Rebellion broke out, which made it impossible for him, during its continuance, to assert his rights. Recently he has constantly petitioned the legislature of the state for redress, but has never received any relief.

After the appointment of said Walsh as commissioner of the general land office of Texas, the present complainant gave him notice in writing of the rights of the Texas Association and of complainant, and requested him not to issue any land certificates or patents for lands within the limits of the Mercer colony. Said Walsh refuses to comply with such request, and threatens to continue, and has continued, and still continues, to issue certificates and patents for lands within the Mercer colony to persons not claiming under or in privity with the contract of Mercer. At the same time the present complainant demanded of defendant Walsh, commissioner of the general land office, that he should issue to complainant, as chief agent of the Texas Association, certificates for 1,376 sections of land, according to the terms of said contract, but Walsh refused, and still refuses, to comply with such demand, and refuses to deliver to complainant any land certificates whatever. No land certificates, or patents for land, have ever been issued either to Mercer, Hancock, the Texas Association or the complainant, for lands to which they were entitled under said contract. George Hancock, the successor as trustee and chief agent of the Texas Association of the said Charles Fenton Mercer, by his last will and testament, appointed the present complainant, William Preston, to act as trustee and chief agent of the Texas Association, maintain and prosecute its claims under said contract, or any suit based thereon, to revive the same, and to do all things which the said Hancock, under the said agreement of association and contract, might do, and did devise or bequeath to said William Preston all his right, title and interest in and to the estate, stock and property of said association. Complainant accepted said trust, and he is now chief agent and trustee of the Texas Association, and has been and is recognized as such by the association and the members thereof.

In the convention which assembled July 4, 1845, to frame a constitution for the state of Texas, preparatory to her admission as one of the United States of America, attempts were made to declare colonial grants and contracts, including the Mercer contract, to be null and void ab initio. All such propositions were defeated, and no clause making such declaration was inserted in the constitution, but an ordinance adopted by the convention declared that the legislature should provide for proceedings in the courts by the attorney-general or district attorneys to test the constitutionality, legality and good faith of all colonization contracts, including Mercer's, entered into by the republic of Texas, and to decide whether the conditions of said contracts had been performed by the contractors. The legislature of Texas has never made any such provision of law as contemplated by the ordinance of 1845, although Mercer and Hancock, and the Texas Association, have made repeated applications for the passage of such an act, whereby they could assert and vindicate their rights in the courts. All colonial contracts made by President Houston for the republic of Texas, except the contract with Mercer, have been adjudicated and settled by

the state of Texas, either by agreement of the contractors with the state, or by judicial proceedings authorized by special legislation for the particular case. The joint resolutions of the congress of the United States, providing for the admission of Texas as one of the states of the Union, declared that the state of Texas should retain all the unappropriated lands within her borders, to be applied to the payment of the debts and liabilities of the republic of Texas, and the convention of 1845, which framed a constitution for the state of Texas, recognized and, in effect, admitted that the contract of Mercer was one of the liabilities of the republic. On February 3, 1845, the republic of Texas, by legislative act, required Mercer and his associates to have the lines of their colony actually surveyed and marked by the first day of April, 1845, and, notwithstanding the great difficulty and expense of making such survey within so short a time, the same was accomplished and marked before the time limited by the act of congress. Neither Mercer nor his associates, nor Hancock, nor the present complainant, have ever abandoned or failed to assert their rights under said contract, but have continually set up the same openly and publicly, and, in all ways open to them, have asserted the validity of said contract, and the full performance of its conditions by said Mercer and his associates.

Such were, in substance, the averments of the original and supplemental bills. The original bill prayed for an injunction restraining the defendant and his successors, in the office of commissioner of the general land office of Texas, from allowing any location or survey of lands lying within the limits of the Mercer colony not yet patented, and from issuing any patent or grant of land within said limits, except to the complainant or the Texas Association, and from doing, or suffering to be done, any act whereby such lands might be located, surveyed or patented to any other person or persons except complainant, to be held by him in trust for the Texas Association. The bill also prayed general relief.

To the original and supplemental bills demurrers were filed on the following grounds: (1) Because the suit is in effect a suit against the state of Texas, and seeks to deprive the state of the right and power of disposing, in her own way, of her own public lands. (2) That if complainant is entitled to any relief, it must be sought through the political department of the government of the state of Texas. (3) That the case made by the bills does not entitle complainant to the relief prayed. (4) That the claim is barred by lapse of time. (5) That defendant is an executive officer of the state of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law. (6) The bill is not sworn to. (7) This court is without power to restrain or enjoin defendant, he being an executive officer of a sovereign state. (8) That the acts of defendant complained of in the bill involve the exercise of official discretion, and are not merely ministerial acts, and he cannot therefore be enjoined. (9) The bill shows that defendant cannot refrain from patenting the lands mentioned, without violating an official duty. (10) The bill shows that no injury can come to the complainant pending the suit. At the hearing of the demurrer, counsel for complainant moved for an injunction pendente lite, according to the prayer of the bill. The demurrer and motion were argued at the same time.

William Preston, John Mason Brown, John Hancock, C. S. West, and W. F. North, for complainant.

George McCormick, Atty. Gen. of Texas, for defendant.

WOODS, Circuit Judge. This is not a suit against the state of Texas. In the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, it was held that "in deciding who are parties to the suit, the court will not look beyond the record; that making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest, and that a state can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case." The doctrine of this case was approved in the later case of Davis v. Gray, 16 Wall. [83 U. S.] 203. See, also, Dodger v. Woolsey, 18 How. [59 U. S.] 331; State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369; Debolt v. Ohio Life & Trust Co., Id. 432; Debolt v. Mechanics' & Traders' Bank, 18 How. [59 U. S.] 380; Jefferson Branch Bank v. Skelly, 1 Black [66 U. S.] 436.

This suit is brought, not against the state, but against an officer of the state, who, it is alleged, without the authority of any valid law of the state is, by an unwarranted assumption of power, so using his official position as to invade rights secured to complainant by the constitution and laws of the United States. This is the very case put by the supreme court of the United States in Osborn v. Bank of U. S., supra, where it is decided that "a circuit court of the United States may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of complainant. To the same effect are the cases of Davis v. Gray, supra, and Board of Liquidation v. McComb, 92 U. S. 531. It appears from the bill that Mercer concluded with the republic of Texas, a contract of colonization, that he performed its conditions, that rights have accrued to him and his associates, that these rights have been ascertained and fixed as to quantity and

character, that he and his associates have a vested interest in the lands described in the contract, and that the state of Texas now holds the nominal legal title only, and that the defendant is violating his official duty as land commissioner by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates. Is it within the power of the state of Texas to disregard the contract made by Mercer with the republic of Texas? If it is not, then, if the commissioner of the general land office is invading the rights of Mercer or his successors under the contract, either with or without the apparent authority of the legislature, his acts should be restrained by this court.

The supreme court of Texas, in the case of Melton v. Cobb, 21 Tex. 539, has held that the contract of the republic of Texas with Mercer was a valid contract. The court, in that case, declares that the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was, therefore, binding upon the republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an obligation on the part of the republic to convey the legal title to the lands as soon as the conditions had been performed. It was a liability of the republic, which held the title to lands which it had contracted to convey, and for which the consideration has been paid in full. It was as complete and binding a liability as a sovereignty could assume. And the debates in, and action of, the convention of 1845, convened to frame a constitution for the state of Texas, show that these colonial contracts, including Mercer's, were regarded as liabilities of the republic. See Debates of the Convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.

Now, what is the relation of the state of Texas to this liability? By the first of the joint resolutions passed by the congress of the United States for annexing Texas to the United States (5 Stat. 797), it was declared that "congress doth consent that the territory properly included within and rightly belonging to the republic of Texas may be erected into a new state, to be called the state of Texas, with a republican form of government, adopted by the people of said republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union." The second of said joint resolutions declared "that the foregoing assent of congress is given upon the following conditions, to wit: * * * Second, said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * and all other means pertaining to the public defense belonging to the republic of Texas, shall retain all the public funds, debts, etc., * * * and all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the state may direct, but in no event are said debts and liabilities to become a charge upon the government of the United States." These resolutions, on July 4, 1845, were accepted by an ordinance which passed the convention with but one dissenting vote, which was signed by every member of the convention, and which, after reciting the resolutions, declared, "that in order to manifest the assent of the people of this republic, as required in the above recited portions of said resolutions, we, the deputies of the people of Texas, in convention assembled, in their name and by their authority, do ordain and declare that we assent to and accept the proposed conditions and guarantees contained in the first and second resolutions of the congress of the United States aforesaid." Hart. Dig. 44, 47. On the faith of the acceptance of these resolutions, Texas was admitted as a state into the Union of states.

Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions? It seems to me to be clear that it is not. The passage of the resolutions by the congress of the United States and their acceptance by the deputies of the people of Texas constituted either a treaty or a contract. It probably cannot be considered as a treaty, because it was not made by the president by and with the advice and consent of two-thirds of the senators present, as prescribed by section 20, article 2, of the constitution, unless the long acquiescence of all departments of the government gives it the force and effect of a treaty. Whether it be a treaty or a contract, it is alike within the clause of the constitution of the United States which forbids a state from impairing the obligation of contracts: Green v. Biddle, 8 Wheat. [21 U. S.] 1. If it is to be considered a treaty, it is protected by the second clause of article 6 of the constitution of the United States, which declares: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." If this is a treaty, the legislature of Texas can no more repeal or annul it than it can annul or repeal a clause in the constitution of the United States. If it is to be considered as a contract it is equally beyond the power of the legislature; for a state is as much forbidden by the constitution from passing laws to impair the obligation of contracts made by herself as by other parties. By no device that a state can resort to can she escape this constitutional prohibition. It is perfectly clear that she cannot authorize her agents to violate her own contracts by leaving it to their

discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the state of Texas may be enjoined from invading his rights by a disregard of the compact made by the state of Texas on the faith of which she was admitted as a state of the Union. The state of Texas has never repudiated the contract made with Mercer. On the contrary, it has been pronounced valid and binding by her supreme court, as we have seen in Melton v. Cobb, supra. The act of the legislature of Texas of February 2, 1850 (Hart. Dig. 702), is the only act to which we have been referred that gives authority to any one to issue certificates to be located within the Mercer colony, and those were to be issued, not generally, but only to settlers in the colony who were entitled to lands under the Mercer contract, and not by the commissioner of the general land office, but by a special commissioner appointed by the governor, who was to hear proof and determine what colonists were entitled to the lands. This is a recognition, rather than a repudiation, of the contract. There is no act of the legislature of Texas directly imposing upon the commissioner of the general land office the duty of issuing certificates for location within the Mercer colony, and if there were, it would be null and void. Nor have we been referred to, or have we been able to find, any act which clothes the commissioner of the general land office with judicial or quasi-judicial functions in regard to the issue of certificates and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that, by reason of the facts stated in the bill, the state of Texas becomes a trustee for him and his associates, seems to be well taken. A state may become a trustee. Perry, Trusts, § 41. The contract between the republic of Texas and Mercer was a grant of lands to Mercer upon a condition subsequent, which, according to averments of the bill, was performed. The legal title remained in the republic, which thereby became a trustee for Mercer and his associates. 3 Washb. Real Prop. (3d Ed.) 525 et seq. On the execution of the contract, Mercer took a vested estate, defeasible only on the non-performance of the condition. This trust imposed upon the republic of Texas was not extinguished by the formation of the state of Texas and her annexation to the Union, but was imposed and fastened upon the state as the sovereign successor of the republic. New Orleans v. U. S., 10 Pet. [35 U. S.] 662; Smith v. U. S., Id. 326; U. S. v. Arredondo, 6 Pet. [31 U. S.] 691; Pollard's Heirs v. Kibbe, 14 Pet. [39 U. S.] 353.

The state of Texas therefore is in the same plight, as regards the rights of Mercer and his associates, as the republic was, and holds the relation to them of trustee to cestui que trust. We have already seen that the state of Texas, by her own express consent, given in the most solemn manner, agreed to hold the public domain of the republic and apply it to the extinguishment of the liabilities of the republic. She therefore became a trustee for the parties to whom the republic was liable, not only by operation of law, but also by her own express contract. This is an express trust which is defined to be a trust created by instruments that point out, directly and expressly, the property, persons and purposes of the trust. Perry, Trusts, § 24. If the state were, therefore, a party to this suit, it would not be competent for her to set up lapse of time or any defense analogous to the statute of limitations to protect her from being called on to execute the trust. For, as between trustee and cestui que trust, in the case of an express trust, such as this, the statute of limitations has no application and no length of time is a bar. Perry, Trusts, § 836, and cases cited. Much less can an officer of the state—who, according to the averments of the bill, is by his acts, done without warrant of any valid law of the state, invading the rights of the beneficiaries of a trust assumed by the state—plead the lapse of time against the enforcement of the trust. But, even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the averments of the bill offer reasonable excuse for the delay in bringing the suit, and it is the law of this state that, when such excuse is offered, the court will not apply the limitation. McKin v. Williams, 48 Tex. 89.

It is objected that the bill is not sworn to. The want of verification of the bill is not ground of demurrer. If the bill is not sworn to, the court will not allow an injunction to go unless its averments are sustained by evidence. The laws of congress, of the republic and of the state of Texas, and the facts of public history, of all of which the court takes judicial notice, the exhibits to the bill and the affidavits on file, sufficiently establish its averments.

The foregoing discussion has covered all the grounds of demurrer, and, in the opinion of this court, none of the grounds are well taken. This is not a suit against the state, and does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which the complainant seeks to appropriate are not the property of the state. The relief sought by the bill may be properly granted by a court of the United States, and the complainant is not compelled to seek his rights through the political department of the state government, to which he and his predecessors have, according to the bill, repeatedly appealed in vain. The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorizes the defendant to disregard the contract of the state is null and void, and therefore is not binding in law. If the defendant violates the provisions of a contract protected by the constitution of the United States, it is immaterial whether he is doing it with or without

the apparent sanction of a law of this state, and no claim that defendant is performing an official duty will avail him. The averments of the bill make a case of the highest equity, which imperatively demands the interference of this court to prevent irreparable injury to complainant and his associates. The complainant seeks to enforce an express trust, which no lapse of time can render stale. The case seems to run on all fours with the case of Davis v. Gray, supra, which went up from this district, and in which the governor of the state and the commissioner of the general land office were enjoined from issuing patents for lands within the territory granted by the state of Texas to the Memphis & El Paso Railroad Company. The conclusion seems inevitable that the demurrer must be overruled and that the injunction should go as prayed in the bill. And it is so ordered.

HANCOCK MUT. LIFE INS CO. (WINCHELL v.). See Case No. 17,866.

Case No. 6,013.

HANCOX v. FISHING INS. CO.

[3 Sumn. 132; 1 Law Rep. 5.] [1]

Circuit Court, D. Massachusetts. Jan., 1838.

INSURABLE INTEREST—PROFITS OF WHALING VOYAGE.

1. The usage of trade must be taken into consideration in the construction of policies of insurance.

2. An insurance on outfits in a whaling voyage does not terminate pro tanto with their consumption or distribution; but attaches to the proceeds of the adventure.

3. A lien, or an interest in the nature of a lien, is an insurable interest. And it will make no difference, if the party has a right to pursue his debtor personally for the debt, on account of which the lien attached.

[Cited in Merchants' Mut. Ins. Co. v. Baring, 20 Wall. (87 U. S.) 163.]

4. An interest does not cease to be insurable in the progress of the voyage, simply because it is subject to contingencies, or has not at the moment any thing corporeal or tangible, to which it is attached.

[Cited in French v. Rogers, 16 N. H. 180; Sawyer v. Dodge Co. Mut. Ins. Co., 37 Wis. 541.]

5. On sealing voyages to the South Sea, it is the usage to take on board stores, for the use of the crew, which are dealt out and sold to them during the voyage, and constitute a lien upon their lay, or share of the profits. The plaintiff, who had shipped clothes under this usage, to the amount of $1,000, caused the same to be insured, "and the proceeds thereof," by a valued policy. After clothes to the amount of $950 had been dealt out and sold to the crew, the vessel was lost. *Held*, that the property insured was in the nature of an outfit, and that the plaintiff was entitled to recover the full amount of the insurance, according to the valuation in the policy, leaving to the underwriters all their rights to salvage under the abandonment.

[Cited in Greely v. Smith, Case No. 5,750; The Fern Holme, 46 Fed. 122.]

[Cited in Forbes v. Manufacturers' Ins. Co., 1 Gray, 373; Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool, 55 N. Y. 357.]

6. Quaere; as to the validity of an insurance by seamen of their shares in the proceeds of an adventure, where the shares are in the nature of wages, though given in lieu thereof.

[Cited in Henshaw v. Mutual Safety Ins. Co., Case No. 6,387; Niphon's Crew, Id. 10,277.]

7. Quaere; where the assured had property in the goods insured at the time of the insurance, whether a subsequent change of interest, before or after loss, would affect his right to recover.

[Cited in Henshaw v. Mutual Safety Ins. Co., Case No. 6,387; Spare v. Home Mut. Ins. Co., 15 Fed. 709.]

[Cited in McDonald v. Black, 20 Ohio, 193.]

Assumpsit on a policy of insurance. The policy was as follows: "The president, &c., of the Fishing Insurance Company, do by these presents, cause Z. Cook, Jr., for P. Hancox, to be insured lost or not lost one thousand dollars on clothes and the proceeds thereof, on board schooner Emily, at and from New York, on the first day of September, at noon, to the South Seas, and elsewhere, for the purpose of taking seals and oil, and to continue to the termination of her voyage at any port in the United States, with general liberty and the privilege of taking skins and procuring refreshments, and information and any thing else, at any port or place that the master may think for the benefit of the voyage, entitled to the same average as outfits and cargo." Liberty was also given to ship home skins by any other vessel or vessels. In case of loss, the policy was to be sufficient proof of interest. The premium was eight per cent., per annum, warranting eight per cent. The clothing and proceeds were valued at the sum insured. The policy contained the usual perils in Boston policies. The declaration alleged a loss by the perils of the seas. Plea, the general issue. By consent of the parties, a verdict was taken for the plaintiff, for $1200, subject to the opinion of the court upon a statement of facts admitted by the parties; and the verdict to be altered and amended according to the opinion of the court.

The facts will be found embodied in the opinion of the court.

Mr. Parsons and P. W. Chandler, for defendants, insisted:

1. That the policy was to continue only until the clothes were sold. If it was to continue till they were sold, delivered, and paid for, it amounted to an insurance on seamen's wages, and was void.

2. That the plaintiff had no insurable interest, after the goods were sold. That, to recover on the policy, his interest must have continued till the loss happened. But at that time he had no control over the property, and

[1] [Reported by Charles Sumner, Esq. 1 Law Rep. 5, contains only a partial report.]

no right of property in it. He had suffered no loss, as the crew were personally liable to him.

3. That the proceeds of the cargo had been paid for once, by the other policies, and the plaintiff must look to the amount there received for his remuneration.

4. That so far as the clothes were affected, there were no proceeds, other than the debts of the sailors. If the catchings were insufficient to pay the master and owners for advances, and if Hancox could recover, it must be because there were no catchings,—and the policy was held by the court to guarantee the catchings, as well as the sailors' debts.

5. That the plaintiff, as one of the owners, was fully insured by the other policies, and was fully paid, and if he now recovered, he would have, from the same office, a double payment of his loss.

C. G. & F. C. Loring, for plaintiff.

STORY, Circuit Justice. The questions arising upon this policy are of a somewhat novel character. The insurance is upon "clothes and the proceeds thereof," on a sealing voyage for seals and oil, in the South Seas, and back to the United States. In the course of the voyage, the schooner was shipwrecked on Refreshment Island, one of the group of the Tristan d'Acunha Islands, in the South Seas; and the vessel and cargo, then consisting of about ninety barrels of whale and elephant oil, and thirty-six seal-skins, were totally lost, with the exception of the thirty-six seal-skins, about fifty barrels of whale oil, worth $600 or $700, and one hundred and eighty-two skins, worth about $2600, which had been previously sent home in another vessel, and had safely arrived. According to the usage of this trade, it is customary to take on board clothing, bedding, and stores of all kinds for the use of the crew during the voyage, which are dealt out and sold to the crew, according to their wants during the voyage, by the master, and they are charged against the crew accordingly. They are sometimes put on board by the owner, and sometimes by other persons; and upon all such sales, the master is entitled to a commission. The crew in these voyages, receive a certain portion of the profits and proceeds of the oil and skins taken during the voyage, in lieu of wages. Their shares of the proceeds of the voyage are received, and sold by the owners, and are liable for all advances made to them by the owners, the master, and the shippers of clothes during the voyage, in the following order; first, the advances of the owners are to be paid; next, those of the master; and lastly, those of the shippers.

In the present case, the plaintiff was a shipper of clothes to an amount as invoiced, exceeding $1000, under the usage; and it was agreed, that they should be taken on board and dealt out by the master to the crew, as they should need them; and be charged to them accordingly. The master was to receive a commission of seven per cent. for his services. Accordingly, in the course of the voyage, and before the shipwreck, the master had dealt out and sold to the crew about $950 worth of the clothing; and there remained at the time of the shipwreck, unsold, about $50 or $100 worth of the clothing, which was then lost. It seems, that the shares of the crew, in the proceeds of the cargo sent home, were insufficient to pay the advances due to the owners and master; and therefore, nothing could be obtained from that source by the plaintiff. Some of the crew ran away; others of them have gone to places unknown; and others have no known places of residence. Upon receiving information of the loss, the plaintiff, through his agent, abandoned to the underwriters for a total loss. Three other policies had been effected by the owners of the schooner Emily, on the schooner and her outfits, for the same voyage; upon which also, it seems, abandonments have been made, and they have received payment, as for a total loss.

Such are the general facts; and upon these the question arises, whether the plaintiff is entitled to recover for a total loss; if not, whether he is entitled to recover for a partial loss. That he is entitled to recover the amount of the clothing which actually perished in the shipwreck, does not seem to me a matter upon which there can be any real dispute. No point of this sort was made at the argument; and I do not well see how any can be made. The real question turns upon the right to recover for a total loss. That this was a policy upon a real interest is clear; and the policy attached upon that interest to the full amount insured. The point of controversy is, whether the policy upon the goods sold had terminated at the time of the shipwreck. The argument for the plaintiff is, that, upon the construction of the policy, it was either (1) a policy upon the clothing, until sold to the crew; or (2) it was a policy upon the clothing, until it was sold, delivered, and paid for. If the former be the true construction, then it is said that by the sales to the crew the policy pro tanto was discharged. If the latter be the true construction, then it amounts in effect to an insurance upon the seamen's wages; for their shares of the proceeds are in the nature of wages; and the policy of the law prohibits such an insurance. The terms of the policy, construed without any reference to the usage of the trade, would not involve any real difficulty. A policy upon goods and their proceeds is a policy, which covers the original goods, while they remain subject to the risks in the policy; and any other property, in which the proceeds of those goods are invested, when taken on board in lieu thereof, and subjected to the like risks. But it is plain, that such could not have been the intention of

the parties to this policy; for though it was contemplated, that the clothing should be sold, it was never contemplated, that the proceeds should be, in a strict sense, specifically invested in any other property during the voyage. The usage of the trade, which must be taken into consideration in construing all policies, fully explains this whole matter. Stripped of its artificial texture, the real object of the policy was to cover the risks of the shippers, arising from the loss of the goods, or the frustration of the voyage, by any of the perils insured against. The goods were to be put at risk. They were to be sold to the seamen; and if the voyage was successful, the shipper confidently looked to the proceeds of the adventure for the due payment of the sales made to the seamen. His reliance upon their personal responsibility was altogether a secondary consideration. As soon as the goods were sold to the seamen, the shipper acquired an interest in the success of the voyage, equal to the sales. It was something in the nature of an inchoate lien, and which became an actual lien upon the shares of the seamen in the proceeds of the adventure pro tanto, as fast as they were obtained. It was not against the marine perils alone to the goods themselves, while they were unsold, that the policy meant to protect the shipper; but also against the hazards of a loss of the voyage and adventure. It is analogous to an insurance upon outfits in a fishing or whaling voyage, where a large portion of the outfits are continually in the process of consumption in the progress of the voyage, and are expected to be repaid out of the proceeds of the adventure. No one ever supposed, that an insurance upon outfits terminated pro tanto with every day's consumption or destruction of the outfits; or, that such a policy did not attach upon the proceeds of the adventure, though they could not be deemed in a strict sense the proceeds of the outfits. This is sufficiently apparent from what was said by the court in Brough v. Whitmore, 4 Term R. 206, and Hill v. Patten, 8 East, 373. An insurance on the ship always includes the provisions of the crew for the voyage; and if the ship be totally lost during the voyage, no deduction is ever made on account of the provisions antecedently consumed, whether the policy on the ship be open or valued. See, also, Haskins v. Pickersgill, 2 Marsh. Ins. 727; 1 Phil. Ins. (1st Ed.) 71, 72; 2 Phil. Ins. (2d Ed.) 43. The terms of the present policy appear to me clearly to require this interpretation. It is a policy, as has been already stated, on the "clothes, and the proceeds thereof." The word "proceeds" can here have no sensible meaning with reference to the usage of the trade, unless it means the proceeds of the adventure. And then, again, it is added, that the insured is to be "entitled to the same average as outfits and cargo." So that the subject-matter of the insurance in this case is treated by the underwriters themselves as governed by the same principles and entitled to the same average losses as outfits and cargo in such voyages are. The valuation in the policy, also, in a case of this sort, seems to me to point clearly to an understanding of the parties, that the interest insured and property put on board are to be treated as of the same value during the whole of the adventure, for all the purposes of the voyage. Nor does the policy stop here; for it goes on to provide, that in case of loss the policy itself is to be sufficient proof of interest.

If, then, under the usage of trade and the terms of the policy, we are to treat this as in the nature of a policy on outfits, it would seem that there was no substantial objection in the way of the right of the plaintiff to recover for a total loss under the abandonment. If, in the present case, the vessel had been successful in her outward voyage, and upon the homeward voyage had been lost, with her catchings and other proceeds on board, it would be difficult to resist the claim of the plaintiff to a recovery for a total loss. He would have had a lien on the shares of the seamen in those proceeds, or some interest in the nature of a lien. It seems perfectly clear, that a person having a lien, or an interest in the nature of a lien, on the property on board, has an insurable interest. And it will make no difference in such a case, that he might still have a right to pursue his debtor personally for the debt, on account of which the lien attached. There are many authorities in the books to this effect; and among them are Godin v. London Assur. Co., 1 Burrows, 90; Lucena v. Craufurd, 2 Bos. & P. (N. R.) 294; Hill v. Secretan, 1 Bos. & P. 315; Wolff v. Horncastle, Id. 316; Wells v. Philadelphia Ins. Co., 9 Serg. & R. 103; Seamans v. Loring [Case No. 12,583]; Russel v. Union Ins. Co. [Id. 12,146]; and the cases of mortgagees, factors, and agents, cited by Mr. Phillips, in his excellent treatise on Insurance. 1 Phil. Ins. (1st Ed.) 27, 41–51; Id. (2d Ed.) pp. 105–122; 2 Phil. Ins. (1st Ed.) 32–34; Id. 41–47, 61.

But, then, it is said, that in this case there were no proceeds, to which the lien did in fact attach; and the mere possibility of a lien is not sufficient to found an interest. This may be true sub modo. But here the question is not, as to an original interest in the clothing on and for the voyage; for that is clear. But the question is, whether the interest, once having attached to the policy, is gone by the subsequent sales; so that the plaintiff has ceased to have an insurable interest. Now, I am not aware, that any decision has been made, by which it has been established, that an interest ceases to be insurable in the progress of a voyage, simply because it is subject to contingencies, or has not at the moment any thing corporeal or tangible to which it is attached. What, in-

deed, upon such an interpretation, would become of insurances upon profits, or commissions, or freight, which are in the course of being earned?

One of the difficulties of the argument is in likening an insurable interest to any other interest in property. The truth is, that an insurable interest is sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or jus in re, or jus ad rem. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable; as, for example, freight, respondentia, and bottomry. So it was held by a majority of the judges in Lucena v. Craufurd, 2 Bos. & P. (N. R.) 294, 295. They also held, that, where there is an expectancy, coupled with a present existing title, there is an insurable interest; words which approach very near to a description of the present case. After referring to the definitions by foreign jurists of the contract of insurance, they added: "These definitions clearly embrace a contingent interest, which is subject to the perils of the seas, and for the loss of which a compensation can be made." Lord Eldon, although he differed from some of the views of the majority of the judges, in that case said: "I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property; or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the property."[2] Now, these words are very expressive and direct, as to the nature of the very interest of the plaintiff in the present case. He had a right in the original property, and he had a right founded upon a contract about that property, which has been lost by the contingencies of the present voyage. Indeed, the policy in the present case seems studiously to have provided for the very case, which has happened, by the agreement of the underwriters, that in case of loss the policy itself shall be a sufficient proof of interest. In regard to another suggestion, that the policy is void as against public policy, because it in effect amounts to an insurance of seamen's wages, a few words may suffice. Assuming, for the purposes of the argument, that an insurance by the seamen themselves on their shares of the proceeds of the adventure would not be good, because they are in the nature of wages, though given in lieu of wages, (a point, upon which I desire to be understood as giving no opinion,) it is a sufficient answer to the argument to say, that the present is not the case of such an insurance. The plaintiff has insured his own interest in the voyage, and not theirs. They may, indeed, in a possible case be benefited by this insurance; but the policy itself is not on wages or on shares in lieu of wages; but simply on the property originally shipped, and upon the proceeds of the adventure, so far as the plaintiff could or might have a lien thereon for his advances to the seamen.

It has been suggested, that the plaintiff has in fact sustained no loss, because for any thing that appears, he may still recover the debts due to him from the seamen; and if so, he has sustained no loss. This objection has already been in effect answered. The question is not, in cases of this sort, whether the party has actually lost his debt, which, if caused by the insolvency or death of the debtor, would not be by a peril within this policy; but the question is, whether he has lost the security for that debt by the perils insured against, which the underwriters agreed to assume upon themselves. A mortgagee or consignee of property may recover his insurance, if the property mortgaged or consigned is lost in the voyage, although the mortgagor or consignor still remains his debtor and is solvent. Then, again, it has been suggested, that the party insured must not only have an interest in the property at the time when the insurance was made, but also at the time of the loss. This I certainly have been accustomed to consider the established doctrine, not only in the American but in the English courts. It was certainly so laid down by a majority of the judges in the case of Lucena v. Craufurd, 2 Bos. & P. (N. R.) 295; and it has been repeatedly recognized in the American courts. See 1 Phil. Ins. 27; Carroll v. Boston Marine Ins. Co., 8 Mass. 515; Stetson v. Massachusetts Mut. Fire Ins. Co., 4 Mass. 330, 336, 337; 2 Phil. Ins. 27; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 249; Lazarus v. Commonwealth Ins. Co., 5 Pick. 76, 81. However, in the recent case of Sparkes v. Marshall, 3 Scott, 186, 2 Bing. N. C. 761, 774, 776, there are intimations of opinion by the court of common pleas in England that, if the assured had property in the goods insured at the time of the insurance, no change of interest afterwards, before or after the loss happened, would affect the right of the insurer to recover. Whether this doctrine, so novel and so difficult to be sustained upon principle, will be adhered to, is more than I am able to conjecture. I can only say, that nothing in my judgment in the present case proceeds upon the admission of any such doctrine. And, indeed, it is quite possible, that the court may have intended to restrict their observations to the particular frame of the policy in that case (the words of which are not given in the report), and under the peculiar circumstances there stated. The policy may

[2] Id. p. 321. See, also, on this same point, Wiggin v. Mercantile Ins. Co., 7 Pick. 271; Buck v. Chesapeake Ins. Co., 1 Pet. [26 U. S.] 151, 162, 163; and Columbian Ins. Co. v. Lawrence, 2 Pet. [27 U. S.] 25, 46, 47. See, also, what was said by Lawrence, J., in Lucena v. Craufurd, on this point (2 Bos. & P., N. R. 301.)

have been drawn up in general terms, "for whom it may concern."

Upon the whole, my opinion is, that the plaintiff in the present case is entitled to recover for a total loss. This opinion is founded upon the nature and terms of the present policy, operating upon the usage in this particular trade. I consider, that the parties to this policy intended to cover the whole interest of the plaintiff, as a valued interest for the whole voyage, not only in the original clothing, but in the proceeds thereof, when attached by a lien, or a claim in the nature thereof, to the shares of the seamen in the proceeds of the adventure; and further, that the property insured was to be treated, as in the nature of an outfit; and that, if by the perils insured against, the voyage was totally lost and frustrated, then that the plaintiff was entitled to recover the full amount of the insurance, according to the valuation in the policy, leaving to the underwriters all their rights to salvage, &c., under the abandonment, as in the common cases of an insurance upon outfits, and other special interests.

Case No. 6,014.

HANCOX v. The PHENIX.

[See Case No. 11,111.]

Case No. 6,015.

HAND et al. v. The ELVIRA.

[Gilp. 60.] [1]

District Court, E. D. Pennsylvania. April 14, 1829.

SALVAGE—CLAIM OF PILOT—CONTESTING SALVORS.

1. What a pilot does beyond the limits of his duty as such may be the foundation of a claim for salvage, but not such acts as are within them.

[Cited in Lea v. The Alexander, Case No. 8,153; The Wave, Id. 17,297.]

2. If property abandoned by the master and crew, be taken possession of by a set of salvors; a second set have no right to interfere with them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others.

3. The amount of salvage to be allowed must be estimated by the compound consideration of the danger and importance of the service; the value of the property saved is an essential circumstance in estimating the latter.

[Cited in The Wave, Case No. 17,297. Applied in The Charles, Id. 4,556. Cited in The Choteau, 9 Fed. 212; The Sandringham, 10 Fed. 571.]

4. A previous and contradictory statement of a witness may be given in evidence to impeach his credit, but not as proof of the facts formerly stated.

[Cited in Merriman v. The May Queen, Case No. 9,481.]

[This was a libel in admiralty by Recompense Hand, Daniel Hildreth, Enoch Eldridge, John Reeve, Isaac Smith, William Curgie, Francis Elbertson, Humphrey Hughes, assignee of Simeon Palmer, Jeremiah Bennett, Aaron Bennett, Albert Hughes, and Enoch Willis against the schooner Elvira and her cargo.]

P. A. Browne, for libellants.

Mr. Chauncey, for owner and claimant.

HOPKINSON, District Judge. This is a claim of salvage by the owners and crew of the pilot boat Leo, for services rendered to the schooner Elvira, by which it is alleged she was relieved from great danger and distress, and brought safely into the port of Philadelphia. A correct and careful understanding of the facts of the case is peculiarly indispensable to a just decision of it, for every claim of this description turns on its own circumstances. The argument of the counsel for the libellants has been mainly raised on the statement published in a paper of this city, and furnished by John Seabury, the second mate of the Elvira, which narrates the occurrences of the voyage in the usual animated and exaggerated style of such communications made for the public, and not for the more accurate purposes of a judicial inquiry. I cannot receive this publication as any evidence of the facts stated in it. John Seabury was examined as a witness on behalf of the respondent; what, therefore, he had said or published at another time, was properly admitted to impeach or test his credibility; and so far but no farther was it legal evidence. If a witness at another time has given an account of a transaction different from that given at the trial, he may be impeached by proving what he has said at another time, on the question of his credit; but you cannot substitute the other account in the place of that which you have discredited, making it thus the evidence of the cause. In this case, the difference is rather in the force of the expressions used, in the colouring of the description, in swelling exaggerations, than in matters of fact and essential importance. In a seaman's protest and reports the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these compositions, and the writer may aim to exhibit his power and skill in describing dangers.

I will take the facts as they have been given by the witnesses examined here; and there is no material variance between those on the one side and on the other, where they speak of the same transactions. The Elvira sailed from St. Augustine, in Florida, on the 8th day of February last, loaded with live oak for the navy yard, at Norfolk, and bound for that port. She had on board the captain, the first mate, the second mate, two hands before the mast, two cabin passengers and seven steerage passengers who had been em-

[1] [Reported by Henry D. Gilpin, Esq.]

ployed in cutting the live oak. From the 8th to the 21st February nothing occurred that was remarkable; but on the 21st the schooner was knocked down on her beam ends; about 8 o'clock in the morning they cut away the mainmast; the schooner righted and fell off before the wind. On the 22d they cut away the stauncheons and hove the deck load overboard, part of which had been previously washed off. On the morning of the 23d, the foremast was carried away. They then rigged two jury masts and determined to put into the first port in the United States. They could manage the schooner with the jury masts pretty well; so that they could steer an eight point course. From the 23d of February to the 13th of March, we have no regular or continued accounts of the occurrences that happened. It seems that the schooner had been blown off, and had been navigated as above stated. It is important to be here noticed, that the effect of the gale was confined to the destruction of her masts and rigging; her hull does not appear to have received any injury. When she was knocked down on the 21st she took in about three feet of water; but after she righted and was got before the wind, she was cleared of this water by the pumps and leaked very little; about fifteen strokes in two hours, and this came through the deck. From the 21st of February to the 6th of March, the first mate says they were much fatigued, but after that they were better and thought themselves safe. On the 6th of March a man was washed overboard, by their shipping a heavy sea, which did not hurt the vessel. On the 13th of March, they fell in with the schooner Milo, bound from Carolina to New York, and put on board of her the two cabin passengers and two of the steerage passengers, who, I think, it was said, wanted to go there. From the Milo they received some bread and beef, being all the assistance they thought they wanted at that time. On the 14th of March they spoke a ship from round Cape Horn, belonging to Nantucket, but required nothing from her. The mate says that between the 23d of February and 13th of March, they saw several vessels, but did not speak them. During the period mentioned, it was blowing a considerable part of the time, and as an excuse for neglecting his log book, the mate says they had enough to do to keep the ship from going to the bottom. This was between the 23d of February and the 6th of March, after which, he says, they thought themselves safe. On the 17th of March at night, they made the lights on the Highlands, and, but for an unfortunate change of the wind, a few hours would have brought them to New York. But the wind came around to the westward; and the Elvira, unable to get to New York, bore away for Cape Henry, her original destination. On the morning of the 19th they saw a schooner to the west of them, about six miles. At 11 o'clock the wind died away calm. In the afternoon about 2 o'clock, or, as Palmer the pilot says, about 4 o'clock, they saw a small schooner, in the westward, which they took to be a pilot boat, and proved to be the Leo. She was steering on the wind S. S. E., and the Elvira W. S. W. The pilot boat made one tack and fetched them, ran across her bow, launched a boat and came on board. There is no material difference, I may say, none of any kind, between the narrative of the mate and that of Palmer one of the pilots. Palmer says the weather was suspicious, that the sun was about crossing the line, and they generally look for a breeze. But the fact was that the weather was good, and so continued throughout their service. The situation of the Elvira at the time she fell in with the Leo was, that her masts and rigging were gone, but they had replaced them by jury masts and sails, under which she had navigated the ocean for three weeks; had been blown off the coast and returned to it; by the aid of which she would have safely entered the port of New York, but for a critical change of the wind; and with which she was at that moment making her way under a free sail to Cape Henry, her place of destination. Whether she would have reached there we cannot positively say; but we have had no account of the wind or the weather to render it improbable. I confess that I am not without some doubt, whether, in such circumstances, the captain of the Elvira was justified in coming to Philadelphia at all, and whether it was not his duty to pursue his course to Norfolk. He thought otherwise and may have been right; at any rate he asked and accepted the service of the libellants to bring him to Philadelphia; and he is bound to pay for it.

What was that service in relation to those who offered it, and whose claim to be remunerated for it, is now to be decided? When the Leo saw the Elvira, the former was running with a free wind to her harbour, within the Capes of Delaware for the night. Jeremiah Bennett first discovered the schooner from the mast head. The Leo of her own accord, uncalled by any signal from the Elvira, not knowing of her distress, and perhaps supposing she wanted a pilot (for the Leo was a pilot boat, then actually cruising in her vocation) immediately brought towards the Elvira, making signals for her. These signals were answered by the Elvira, who was then between thirty and forty miles outside of the capes. When the Leo came up with the Elvira, she was under low sail: the longest mast was not above twenty feet long, and she had two masts with temporary sails. When the pilots got on board, the inquiry was not about any danger or distress on board the Elvira, but the usual salutation where are you from, and where bound? The answer was, from St. Augustine, East Florida, and bound to Norfolk. The pilot then asked the master of the Elvira, if he did not want to go into the Capes of Delaware. The

second mate, Seabury, says the pilots asked if they wanted the assistance of their boat. Palmer did not go on board the Elvira, and testifies nothing of this part of the transaction. A negotiation commenced for taking the Elvira into the Delaware, the pilots having declined to take her to New York, or Cape Henry, as the captain desired; and a line is given from the Elvira to the Leo, and both vessels proceeded to the Capes of Delaware, the Leo towing the Elvira, but assisted by her sails. The witnesses differ a few hours about the time they came to anchor, within the capes; but there is no dispute that the weather was good, the night light, and no difficulty, danger or fatigue in the navigation; Palmer says, "we towed the schooner along very easily." During the day of the 20th, the wind being unfavourable, they remained at their anchorage within the capes. They left there on the 21st, in the morning, and anchored about three miles below Reedy island. They got under way next morning about eight o'clock; and about two or three o'clock, of the same day, came to, a little below the Point House, that is, about three miles from this city, and were at the wharf in the evening. Both of the mates assert that the Elvira had on board, when the Leo came to her, fifteen days of provision of beef, bread, and water, although their allowance had been reduced. Such are the leading facts of this case; and it is by them, that the claim of the libellants must be decided.

The first question is, whether the official character of the libellants, they being pilots of the Bay and River Delaware, made it their duty to do all they have done for the relief of the Elvira; and whether under these circumstances they can present themselves before the court as salvors. I have no difficulty on this point; nor has it been insisted upon by the counsel of the respondent, although very fully argued for the libellants. The law makes the true discrimination. That which a pilot does in the ordinary course of his duty, can never be made the foundation of a claim for salvage; and the difficulty and exertion being more or less in such a case, can make no difference. He takes his chance for such hazards; he knows he must be exposed to them; and it must be presumed that his official compensation is calculated on the probability of such exposures. He cannot be at the same time, and in the same act, a pilot and a salvor. But he may become the latter, for services beyond the limits of the duty of the former. If when a pilot is put on board a vessel to bring her into port, a violent wind arises, and she is threatened with a casting upon the shore, assuredly it is the duty of the pilot to exert his utmost labour and skill to preserve her: and for so doing he could not set up a claim for compensation as a salvor. On the other hand, cases have occurred, and many may be imagined, in which the assistance rendered by a pilot is clearly beyond what could have been required of him by his official duty; and which, as Sir William Scott says, "may exalt a pilotage service into something of a salvage service." I consider this case to be one of that description; and that the libellants are entitled to compensation for the assistance given to the Elvira, according to the circumstances of the case, and the principles of law applicable to it. Whether a seaman can, in any case, become a salvor for services rendered to his ship, in any extremity of danger or distress, is another question, upon which I do not now give any opinion. Great judges have differed about it, but it is clear that a seaman is much more closely bound to a ship than a pilot, and his duties to her are far more extensive, permanent and severe.

In deciding a case of this sort, where every thing is left to the discretion of the judge, I would not exercise that discretion arbitrarily, but hold it under the control of judicial principles and precedents. It is true it is difficult to find or force a rule, by which to measure the quantum of salvage. Circumstances vary so infinitely in the degree of danger; in the extent and risk of the service; in the value of the property; in the conduct and merit of the salvors, that a standard cannot be established to govern every case that occurs; nor even for classes of cases. There are nevertheless some general principles and precedents which have grown out of the experience of the courts, and afford strong lights to guide us in every new case. I will as briefly as it may be done, take a review of the English and American adjudications upon this subject. This review will be somewhat tedious; but as many decisions of high authority have been given, since the subject has been agitated in this court, it may save us trouble in future, to look to them now.

The definition of salvage given by Abbott is clear, comprehensive and accurate. It is "the compensation that is to be made to persons, other than those connected with the ship, by whose assistance a ship or its loading may be saved from impending peril, or recovered from actual loss." A difficulty has seldom occurred in deciding whether any given case was or was not a case of salvage. The question has generally arisen upon the quantum to be allowed. Now whether it be a case of impending danger, or of actual loss, it seems to be required that the property must be saved or recovered by the assistance for which this compensation is claimed. We may not perhaps be so rigorous as to say, that it must be absolutely certain, that the property was saved by the assistance of the salvors, but it should be reasonably probable, that this was the case; and that the ship or cargo was preserved from loss or damage by their labour, skill and exertions. If goods are abandoned by those whose duty it was to take care of them; or if those persons are unable to preserve and protect them, it may be correctly said they owed their preservation to

those who came to their aid; but it is difficult to maintain this proposition, when the proper guardians of the property remain with it; and have both the ability and inclination to protect it from loss or damage. Therefore, if property abandoned by the master and crew be taken possession of by a set of salvors, a second set have no right to interfere with them and become participators of the salvage, unless it appears that the first would not have been able to effect their purpose without the aid of the others. The same principle must apply to a case, when the master and crew of the vessel are able to effect the purpose of preserving and bringing her safely in, without the aid of others. My main doubt throughout this case has been upon this point. I have not clearly seen the necessity of any interference on the part of these salvors. I have not been satisfied that the Elvira could not have made her proper port, or some other, in safety; that she might not have come into the Delaware without the assistance of the pilot boat; that she was "saved from an impending peril." A service may be convenient, beneficial, meritorious, and not necessarily, a salvage service. I will not, however, urge this objection upon the libellants. The master of the Elvira thought proper to accept the assistance offered to him; and the owner now is willing to pay what may be considered a just and reasonable compensation for it. No exception has been taken to it, on this account. The respondent has met the claim on liberal grounds. It may be that the master of the Elvira acted with a proper precaution, and attention to the interests of her owner, in coming here to refit. A change of weather might have been apprehended at that season, which would have been dangerous to him; but in the actual state of things, when he put himself under the protection of the Leo, his danger was not pressing or apparent. The "impending peril" was not immediate, or perceptible. This schooner had previously met with several vessels; had asked no assistance from any of them, further than some small articles of provision and water; her master and crew had never intimated any apprehension of personal danger, nor any intention of seeking safety by leaving her. She was sound and tight in her hull, and with masts and sails, with which she could be pretty well managed. She had encountered and conquered much greater hardships and dangers than any that lay between her and her port; and the fair presumption is that she would have reached it.

We must inquire into the quantum of salvage that should be allowed in such a case, according to the principles and practice of admiralty courts in other cases.

The compensation, which may be justly allowed for this service, should be governed by a compound consideration of the importance of the service rendered, and the danger and labour to which the salvors were exposed in rendering it; and the importance of the service depends upon the value of the property saved, and the extent of the danger, which threatened it. With a view to public policy this allowance should be weighed in a liberal scale; but with a primary regard for the unfortunate sufferer, whose protection, relief, and interests are the true objects of policy. It has frequently fallen to the lot of Sir William Scott, a most liberal admiralty judge, to estimate the value of salvage services, and we shall see the measure he has adopted in the case of The Aquila, 1 C. Rob. Adm. 37. In that case the ship and cargo were found at sea, absolutely deserted by those, whose duty it was to protect them, and a total loss was certain unless prevented by strangers. The finders contended for a property in the goods as their own; and not merely for a reward as salvors. This, and several other interesting questions, were discussed in the case, which are not to our present purpose. The rate of salvage is our inquiry, and in this most desperate case, in which the owners owed every dollar that was restored to them to the services of the salvors, Sir William Scott gave them but two-fifths; or less than one-half. In the same volume, page 306, the case of The Joseph Harvey is reported. This was the petition of a pilot for salvage, in which it was decided that a pilot may render a service to a ship in distress, which will entitle him to be considered something of a salvor. The petitioner espied the Joseph Harvey under a signal of distress; the wind blowing hard; the waves running high. He went to her and got on board with great difficulty; this the judge thought gave no claim to any thing more than common pilotage. It is not, says he, for such reasons that pilots can be entitled as salvors; their occupation is hazardous from its nature. In the case of The William Beckford, 3 C. Rob. Adm. 355, Sir William Scott, says: "The principles, on which the court of admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, when necessary, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of the salvors most, is the actual danger which they have incurred." I cannot forbear to observe, that not one of these elements of salvage, so eloquently described, is found in the case before us. Neither fatigue; nor anxiety; nor courage; nor spirit of adventure; nor skill and dexterity; nor the least actual danger. In the case of The William Beckford, the judge thought there was no peril of life, in the degree contended for

by the salvor's counsel; from which expression we must presume it did exist in some degree; but there was great alarm about the possibility of saving the ship after she got upon the sand. It was proposed to the master to throw the cargo overboard, and he acquiesced in it, and it was resisted by the salvors, who used their efforts and employed their skill, and the ship and cargo were finally saved. These exertions were continued through the third day, and the salvors were numerous. A circumstance always, and properly considered. The judge acting in so strong a case of labour, skill and service, and applying to it the liberal principles with which he prefaces his decree, gave to the salvors, less than one-fourteenth part of the value of the property saved; that is something more than one thousand two hundred pounds, on seventeen thousand six hundred and four pounds.

In the case of The Trelawney, 4 C. Rob. Adm. 223, the Lord Nelson a slave ship had recovered the Trelawney, another slave ship, on the coast of Africa from some insurgent slaves, who had dispossessed the master and crew and set them on shore. This was done after a severe conflict, with very desperate persons, in which some of the crew of the Lord Nelson were wounded. Without this adventurous effort, the Trelawney and her cargo would have been inevitably lost. The judge in deciding the case says, he will consider the value of the property and the service performed, which, he adds, "is to be considered as a rescue effected from pirates, and, to say the least of it, full as meritorious as recovering property out of the hands of a public enemy." On this view he would have given salvage in as high a proportion as directed by the prize act, for cases of recapture of war. But he remembers the nature of the trade, in which the two ships were employed; their common danger, and the policy and duty of rendering mutual assistance, and not as ships accidentally rendering such assistance—considerations having some bearing on the case before us. Under these circumstances the court allowed one-tenth of the ship and cargo, both confessedly saved from total and inevitable loss. In the case of The Blenden Hall, 1 Dod. 414, the vessel, loaded with naval stores, was separated from her convoy by tempestuous weather, by which she was greatly damaged in her hull and rigging; she was taken by a French frigate, her master and crew taken out, and the ship scuttled. She was found in this situation, by the packet Eliza, who put a number of her crew on board of her. Afterwards, being in great peril from stormy weather, and in great distress, she was relieved by the Challenge who put men on board of her, and she was brought to Plymouth. Sir William Scott gave one-tenth of the value of the property saved to the salvors. The case of The Raikes, 1 Hagg. Adm. 246, was the first case of salvage service by a steamboat. Lord Stowell declares his inclination to encourage, as much as possible, similar exertions, on account of the great skill and power of vessels of this description. The ship saved was delivered from a perilous situation; there was great alacrity in rendering the assistance; the steamboat went out from Dover, being sent for on purpose to relieve the Raikes; she lay by her all night in the month of December, watching and attending her, and finally brought her safe in. The vessel and cargo were estimated at the value of twelve thousand five hundred pounds, and the judge meaning, for the reasons stated, to be exceedingly liberal, allowed the salvors two hundred pounds. The commissioners, from whose award this was an appeal, had given but one hundred and fifty pounds.

These are the leading English cases, and fix a principle of liberality tempered by moderation, and a just regard to the rights of the owners of property exposed to marine hazards, that may be safely followed. The American decisions, on this subject, do not differ in their principles from those cited from abroad, although the allowances appear to be rather more liberal.

I shall refer to some of the best authority. An early and leading case in this district, is that of Warder v. La Belle Creole [Case No. 17,165]. Judge Peters, who examined the question very carefully, says that the compensation is not to be a mere quantum meruerunt, but an exemplary reward; comprehending a reward for the risk of life and property by the salvors; labour and danger; and even as a premium for similar exertions. He quotes the principle that "he, who has recovered the property of another from imminent danger, by great labour, or perhaps, at the hazard of his life, should be rewarded by him, who has been so materially benefited by that labour." Thus an imminent danger, great labour, hazard of life, and material benefit, are the ingredients of a meritorious salvage. The judge says, "that the maritime law has varied from twentieth to one half, according to the description and value of the article saved, and the risk, labour and expense of salvage." In this case of The Belle Creole, the court allowed a salvage of one-third. The circumstances were these. The libel stated that when the saving ship fell in with the Belle Creole, she was declared to be sinking; her master desired the salvors to remain by him; the weather was tempestuous; and the captain and crew, at their repeated solicitations, were taken on board of the Amiable. A proposition was made to burn the Creole. Her captain and crew declared when they left her, that they relinquished and abandoned her, and every thing on board of her; she was left without a living person on board; the next day the master and crew of the Amiable took from her a quantity of merchandise, and she was set on fire at the request of her master. The

answer admitted, that she was in great distress, and in danger of perishing; and the leading facts stated in the libel, were established by the evidence. She had eleven feet of water in the hold, when the articles were taken out of her; and one half of her cargo had been thrown overboard, before she fell in with the Amiable. The judge speaks of her situation as distressed and hopeless. In the case of The Cato [Taylor v. The Cato, Id. 13,786], she was found by the Alexander "in great distress, and on the point of perishing." Her master, crew, and part of her cargo were taken out of her, and she was abandoned. A gross sum of one thousand five hundred dollars, was allowed to the salvors, being about two fifths of the property saved. The schooner Polly [Tyson v. Prior, Id. 14,319], with a cargo of flour, was dismasted at sea; continued nine days under jury masts, and was in a very distressed situation. She fell in with the Triton, on board of which her whole crew went; and which remained by her that day and the following night. Then another ship, the Reserve, came up, and the Triton being heavily laden, the captain and crew of the Polly went on board of the Reserve. The Triton left them; the Reserve took the Polly in tow for five or six days; and during that time took out the articles libelled, having been detained by this service a week on her voyage. Judge Story, affirming the decree of the district court, allowed a salvage of one-third. Observing that "by the stoppage, it seems to have been generally considered, that a deviation resulted, and of course that the ship was put at the hazard of the owner." In the case of The Blaireau, 2 Cranch [6 U. S.] 240, two fifths were allowed by the supreme court of the United States, in a very hopeless case, recovered altogether by the salvors. The case of The Cora [Bond v. The Cora, Case No. 1,621] was a deplorable case of distress. She was deserted by her crew, with five feet of water in her hold; and brought into port by part of the crew of the Ceres with great difficulty; exposing the Ceres to great danger from the absence of so many of her hands. The men put on board the Cora were also exposed to much danger, during a storm. In such a case, one third of the gross amount of sales, was given to the salvors, by the district court, and affirmed on appeal, by the circuit court. The Maria [Jurgenson v. The Catharina Maria, Id. 7,587] suffered in a storm "so long and so much, that she became a mere wreck, and no hope of safety was left." One third of the articles saved from her was allowed to the salvors. The Maria sunk and was lost.

With these precedents in our view, I will recur to the case of these libellants. I have already shown, that the "impending peril," if any existed, was inconsiderable, uncertain, and distant; resting rather in apprehension than reality. The danger of the original disaster had gone by; "we thought ourselves safe," says the mate, and the conduct of all on board shows that they really did think so. Such being the condition of those to whom the assistance of the libellants was tendered and given; what is the amount of the merit of this assistance, in reference to the labour, skill, risk, and expense with which it was attended? When the libellants descried the Elvira, they were cruising in their ordinary vocation, looking out for employment; they were, it is true, without the prescribed limits of their pilotage ground, but they had gone there for their own pleasure or profit, and not in the service of the Elvira; at the moment they were steering for their harbour, within the capes, for the night. They return six or eight miles to the Elvira; and this was all the distance they went out of their way. They made fast a tow line; resumed their course to their harbour, and came to it, in fine weather, and with a favouring wind, a few hours later than they would have done, had they left the Elvira to her fate. So far they had endured neither labour, risk nor expense in this service. On account of a head wind they remain snug and safe in this harbour during the next day, which was the 20th of March; in the morning of the 21st, they make sail and proceed up the bay; and in the evening come to anchor about three miles below Reedy island. The next morning, at about eight o'clock, they are under way again; and come to, above the Point House, that is, about three miles below the city, at between two and three o'clock, in the same afternoon; in a short time they are at the wharf in this city. All this was done without one moment of anxiety or danger; one effort of labour; and a very small expense. The sails of the Leo and the Elvira, acted upon by a favouring breeze, performed the whole duty, and for aught we know, the crews of both vessels reposed in total inactivity, during the whole passage. In coming within the capes, on the night of the 19th, the libellants only did what they would have done for their own purpose and accommodation: and all they added to their labour in the service of the Elvira, was the passage from thence to Philadelphia, and the towing of her into the capes. The Elvira appears to me to have been so entirely able to get up to the city of herself, that I am inclined to believe, the Leo accompanied her, not because her aid was necessary, but to look after her reward. When we consider the rate, at which these vessels came up the bay and river, sailing from their anchorage, a few miles below Reedy island, to Gloucester Point, a distance of fifty-five miles, in about seven hours, it is clear the Elvira did not hang very heavily on her conductor, but must have been greatly aided by her own sails in her progress. I must repeat, that it can hardly be doubted, that she could have come up of herself; that after she got within the capes, she was no longer in any danger; and that the necessary, indeed the useful service, she received from the Leo, ended on their anchor-

ing in their harbour, on the first night. It will be recollected, that she there got a new anchor from the shore, and her danger at least was at an end.

In assessing the compensation, which should be paid to these libellants, we must not overlook the great loss irretrievably sustained by the owner of the Elvira and her cargo, by this disaster. Her masts, sails, and rigging entirely demolished; her anchor and chain cable lost; her load thrown or swept overboard; and a voyage protracted for six weeks, that might have been performed in as many days. It is perhaps not too much to say, that half of his property has been sunk in this misfortune. It would be cruel and unjust to aggravate so much suffering, by an extravagant charge for such inconsiderable services. We must not teach a salvor, that he may stand ready to devour what the ocean may spare; he must not be permitted to believe, that he brings in a prize of war, and not a friend in distress. If he has afforded his assistance to the distressed in a proper spirit, he will be satisfied with a just and fair remuneration for the labour, hazard, and expense he has encountered in the service; and it is only a proper spirit that we should seek or desire to satisfy. To this measure of compensation the judge, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need, to prompt men to exertions to relieve their fellow men in danger and distress. But we must remember that the policy of the law is not to provoke or satisfy the appetite of avarice; but to hold an inducement to such as require it, to make extraordinary efforts to save those, who may be encompassed with perils beyond their own strength to subdue. In the present case we can hardly say, that any extraordinary effort was made; to take a tow line for a disabled vessel, is one of the most ordinary acts of courtesy among seafaring men. I know of no probable or plausible calculation, on which I can suppose that this pilot boat, and those on board of her, could have earned half the amount tendered by the respondent, while engaged with the Elvira, and certainly they could not have earned it, with less labour, risk and expense. I decree that the sum of three hundred dollars, which is above one ninth of the value of the property saved, be paid, clear of costs to the libellants for their services rendered to the schooner Elvira, and her cargo. If in fixing this amount of salvage, I have been influenced by the sum offered by the respondent, I can assure the libellants that that influence has been altogether favourable to them. I make no order of distribution among the salvors, as their counsel has informed the court, they have arranged, or will arrange, this matter among themselves.

HAND (TURNER v.). See Case No. 14,257.

HAND (UNITED STATES v.). See Cases Nos. 15,296 and 15,297.

Case No. 6,016.

HAND v. YAHOOLA MIN. CO.

[2 Woods, 407.] [1]

Circuit Court, W. D. Georgia. March Term, 1873.

JUDGMENT BY DEFAULT—OPENING OF SAME.

A default was set aside, and judgment opened where defendant, by affidavit, excused his neglect in not making defense, and made it appear that he had a good defense, and offered to pay costs and plead instanter; the motion to set aside the default having been made at the term at which the judgment was rendered, and continued several terms without fault of defendant.

[Suit by Nathan H. Hand against the Yahoola Mining Company.] This cause was submitted on motion to open a judgment by default.

E. N. Broyles, for the motion.

L. E. Bleckley, contra.

WOODS, Circuit Judge. The declaration was filed on the 15th day of February, 1871, and summons was served in the same month. On the 10th of March, 1871, Printup & Forché, attorneys, filed for the defendant, the plea of the general issue, signing themselves as attorneys for defendant, and for the stockholders of the company. On March 22, 1871, the court struck said plea from the files, because said attorneys, on a rule to show their authority to appear for said company failed to do so, and on the ground that the stockholders could not be admitted to defend the suit, and the court refused to allow John A. Wimpey, another attorney of the court, to file a plea of the general issue for certain named stockholders, but said Wimpey did file the general issue, signing himself as attorney for the said company. This plea the court ignored as filed without authority, and on the same day, to wit, on the 22d day of March, 1871, plaintiff's counsel took a default and moved for a writ of inquiry, which was granted, and the jury returned a verdict for over $50,000, on which final judgment was entered. On the 9th of June, 1871, and during the same term and ten days before its end, the motion, now on hearing to set aside the default and open the judgment, was filed.

In the view we take of the case, it is unnecessary to consider whether the plea of the general issue, filed by Wimpey for the company, was properly stricken or not. We assume that the defendant was in default, and that judgment by default was properly taken. The question then, for decision is, should the judgment be opened on the showing made by defendant? The affidavit, filed in support of the motion, alleges as an excuse for the default in filing a plea to the merits that the plaintiff, who was the acting treasurer of said company and had control of

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

its affairs up to March 13, 1871, colluded with one F. W. Hall, the then clerk of said company, they being the only officers of the company then residing in Georgia, and that they did all in their power to prevent the making of any defense to said action; that on the 13th of March, 1871, new officers were elected for the company, and that the new officers were unable to organize and provide for the defense of the suit until after the judgment by default had been taken. The affidavit further declares that the defendant is not indebted to plaintiff upon the claim sued on, which is entirely unjust and unfounded. The defendant, on making the motion to open the judgment, offered to pay all costs, to plead instanter, and to go to trial so that the plaintiff should not lose a term by the opening of the default. The hearing of this motion has, without the fault of defendant, been delayed from time to time until now. It should therefore be considered as if brought to hearing on the day it was made. We are clear in the opinion that the motion should be sustained.

It is almost a matter of course to open a default on an affidavit showing a meritorious defense, and excusing the neglect in not pleading within the rules, the defendant offering to pay costs and plead instanter. 1 Tidd, Pr. 562, note, and 567; Bennet v. Fuller, 4 Johns. 486; Davenport v. Ferris, 6 Johns. 131; Tallmadge v. Stockholm, 14 Johns. 342. Great injustice might be done the defendant by refusing this motion, and if loss comes to the plaintiff by opening the judgment at this late day, it is the consequence of his own neglect, for he might have had this motion disposed of and a new trial, at the same term at which he recovered his judgment by default. The motion will be sustained on the payment by defendant of all costs made up to the date of filing the motion, and upon the condition that defendant plead instanter.

Case No. 6,017.

In re HANDELL.

[15 N. B. R. 71.] [1]

District Court, W. D. Texas. July 1, 1876.

BANKRUPTCY — SERVICES OF ATTORNEY—PRIORITY OF CLAIM FOR.

1. The claim of an attorney for services rendered in defending a suit prior to the commencement of the proceedings in bankruptcy is not entitled to priority.

2. The claim of an attorney for services rendered in preparing the petition and schedules and filing the same is not entitled to priority.

[In bankruptcy. In the matter of Richard Handell.]

[1] [Reprinted by permission.]

By S. T. NEWTON, Register:

I, the undersigned, register of said district, pursuant to the special order of reference made herein of the claim of Messrs. Good & Coombes, attorneys, for compensation, would respectfully report: That, from a careful examination of the petition exhibited, and deposition for proof of debt filed by said parties, it appears that the services for which they claim compensation were rendered at the instance of the bankrupt, in part, in defense of a suit pending in the state court at Dallas, in said district, prior to the commencement of proceedings in bankruptcy, and for preparing, subsequently, the petition and schedules of said bankrupt and filing the same. While I am not prepared to say, in view of the amount involved in the suit which they defended in said court, that the amount charged by said attorneys is unreasonable, I do not think the claim, as is contended for by said attorneys, is embraced in that class of claims provided for by section 5101, Rev. St. [14 Stat. 531], which declares "that in the order for a dividend the following claims shall be entitled to priority. First, the fees, costs and expenses of suits, and of their several proceedings in bankruptcy, under this title, and for the custody of property as herein provided." This subdivision of said section has been construed to include only the costs due the register, clerk, marshal, and assignee; and not any expenses incurred by the bankrupt, or for services rendered by attorneys for the bankrupt in preparing the petition and schedules of the bankrupt. "An attorney is a general creditor in respect to services rendered in the preparation of the petition, schedules, and consultation therefor, and must prove his debt in the usual form and take his dividend in concurrence with the other creditors of the bankrupt." In re Jaycox [Case No. 7,239]. See, also, rule 30, General Orders in Bankruptcy. This case and rule seem to be decisive of the question presented by this claim, and that the parties are entitled to receive but a pro rata dividend with the other creditors of the estate in bankruptcy.

DUVAL, District Judge. The above report of Mr. Register Newton and all the papers connected with the claim of Messrs. Good & Coombes, attorneys, etc., against the estate of Richard Handell, bankrupt, having been considered by me, I concur in the opinion of the register, that under the law the said claim cannot be regarded as having priority over the creditors, and while it is just and meritorious, it can only be paid pro rata with others.

The opinion of the register is affirmed and approved.

Case No. 6,018.

In re HANDLIN et al.

[3 Dill. 290;[1] 12 N. B. R. 49; 2 Cent. Law J. 264.]

Circuit Court, E. D. Arkansas. April Term, 1875.

BANKRUPT ACT—EXEMPTIONS OUT OF PARTNERSHIP ASSETS—CONSTITUTIONAL PROVISION AS TO EXEMPTIONS CONSTRUED.

Under the bankrupt act of 1867, §§ 14, 36 [14 Stat. 522, 534], and constitution of the state of Arkansas of 1868 (article 12, § 1), bankrupts who are co-partners are not entitled to separate or individual exemptions out of the partnership effects.

[Cited in Re Stewart, Case No. 13,420; Re Boothroyd, Id. 1,652; Re Hughes, Id. 6,842; Re Melvin, Id. 9,406.]

[Cited in Giovanni v. First Nat. Bank, 55 Ala. 305; State v. Spencer, 64 Mo. 357.]

Petition for review under section 2 of the bankrupt act. This case came before the court on a question as to the right of individuals composing a bankrupt firm to claim individual exemptions out of partnership effects. The individual schedules of each of the partners aforesaid disclose personal property of Handlin to the amount of $532.85, and of Venny to the amount of $150.00. The partnership schedules disclose personal property sufficient to make up the sum of $2,000 claimed by each of the partners. This latter sum is the amount allowed to "any resident" of the state of Arkansas, as exempt from execution or other final process, by the exemption laws of the state as they existed in the year 1871. Const. 1868, art. 12, § 1. Each of the partners claims as follows: Handlin, $1,467.15; which, added to his $532.85, amounts to $2,000. Venny claims $1,850.00; which, added to his $150.00, amounts to $2,000. Hubbard Stone, the assignee of said bankrupt estate, refused to allow the $1,467.15 and the $1,850 claimed above, and on the 20th of February, 1875, set apart as exempt, and issued certificates as follows:—To Handlin, specified articles of personalty to the value of $532.85; to Venny, same, amounting to $150,—being the amount of personal property shown by the schedules of each to be their individual property respectively. To this action of the assignee, the bankrupts by their attorneys, excepted, and the matter was brought before the district court upon the statement of facts herein set forth. Whereupon the action of the assignee, as aforesaid, was by the court disapproved and set aside, and the assignee was pro forma ordered to allow each of the bankrupts, Handlin and Venny, the balance claimed by each of them as above stated, out of the partnership effects. The order of the district court was as follows:—"The assignee is directed to allow to each of the bankrupts out of the partnership effects a sum which, added to their respective individual effects, will give to each an exemption of personal effects to the value of $2,000." The assignee excepted, and brings the matter before the circuit court on a petition for review. It was admitted that the bankrupts constituted all the members of the firm; that they were adjudged bankrupts on their own petition, prior to the taking effect of the constitution of the state, of 1874, and while section 1, art. 12, of the constitution of 1868 was in force; and that neither of them had a homestead, or claimed a homestead exemption.

Dodge & Johnson, for assignee.
N. & J. Erb, for bankrupts.

DILLON, Circuit Judge. The bankrupt act (section 14), after excepting from its operation the household and kitchen furniture and other articles and necessaries of the bankrupt, not exceeding in value, in any case, the sum of $500, also excepts "such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process * * * by the laws of the state in which the bankrupt has his domicile."

The constitution of the state, of 1868, in force until after the bankruptcy here in question, contained this provision:—"The personal property of any resident of this state, to the value of $2,000, to be selected by such resident, shall be exempted from sale on execution, or other final process of any court, issued for the collection of any debt, contracted after the adoption of this constitution" (article 12, § 1). This provision is self-executing. In re Hezekiah [Case No. 6,448]. The bankrupts were co-partners and were adjudged bankrupts as such; one of them had individual assets to the amount of $532.85, and the other to the amount of $150.00. The firm assets amounted to several thousand dollars, but not enough to pay all the firm debts. Each of the bankrupts claims out of the firm assets a sum sufficient, with the individual property set apart to him, to give him an exemption of personal effects to the value of two thousand dollars. This claim was sustained, pro forma, by the district court, and the assignee contests its rightfulness.

Upon the best consideration I have been able to give to the subject, my conclusion is that the claim of the bankrupts in this behalf cannot be sustained. This opinion rests upon the language of sections 14 and 36 of the bankrupt act, and of the constitutional provision above quoted; upon the general principles of the bankrupt law and the law of partnership, and upon the weight of authority upon the subject. Whatever property is exempted by section 14 of the bankrupt act is excepted from the operation of the act, and the title to it does not vest in the assignee. This is not denied, and has been frequently decided.

Section 36 relates to the bankruptcy of partnerships, and contains the provision that

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

when persons who are partners in trade are adjudged bankrupt, "a warrant shall issue, upon which all the joint stock and property of the co-partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted." That is, all of the firm property is to be seized on the warrant, and all of the individual property of the partners, except such of the individual property as is exempted to the partners severally. And the further provision is that, after deducting expenses and disbursements, "the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors," etc. Taken all together, this language does not contain anything to favor, but much to contravene, the notion that individual exemptions should be allowed out of the partnership estate. And the same observation applies to the language of the constitutional provision.

But conceding that the language of the bankrupt act and of the constitution of the state is not so clear to this end as to exclude doubt, the general principles of the law are against the allowance of the exemption claimed. Where, as in this case, the partnership and all its members are declared bankrupt, the firm is treated as being dead, except to close up its affairs. There is no exemption to the firm, as such; nor is it contended that there can be. But each of the partners claims an individual exemption to the amount of two thousand dollars out of the firm property, and at the expense of the firm creditors; and if the claim is valid, it would be equally so if there were six partners, instead of two. It is a claim not depending upon the amount of capital which the partner making the claim contributed to the firm, nor upon the state of the accounts between him and his co-partners. He may never have put a dollar of capital into the firm, or he may have drawn out all of his capital and owe the firm, and yet it is insisted that, not only as against his co-partners, but as against the creditors of the firm, he may, in default of not possessing individual estate, lay his hands upon two thousand dollars of the joint estate and appropriate it as exempt. This I am sure he could not do before bankruptcy without his co-partner's consent, and after the bankruptcy the co-partner is incapable of giving any consent to affect rights fixed by that event.

The pretension set up in this case, whether considered with reference to the right of co-partners or the rights of the firm creditors, cannot be maintained. The case might be different as to mere joint ownership where no partnership relation existed, but it is not necessary to consider this point.

While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate, at the expense of the joint creditors. Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 30, a well-considered case, following Pond v. Kimball, and disapproving Stewart v. Brown, 37 N. Y. 350; Burns v. Harris, 67 N. C. 140; Bonsall v. Comly, 44 Pa. St. 442, 447; In re Blodgett [Case No. 1,555]; In re Hafer [Id. 5,896]; Amphtel v. Hibbard [29 Mich. 298]; In re Price [Case No. 11,410]; Wright v. Pratt, 31 Wis. 99. Contra: In re Young [Case No. 18,148]; In re Rupp [Id. 12,141]; Stewart v. Brown, 37 N. Y. 350; Radcliff v. Wood, 25 Barb. 52; In re McKercher, 8 N. B. R. 409.

Reversed.

Case No. 6,019.

HANDY v. BROWN.

[1 Cranch, C. C. 610.] [1]

Circuit Court, District of Columbia. April, 1810.

APPRENTICESHIP — INFANCY — ASSIGNMENT OF INDENTURE.

An infant cannot bind himself as an apprentice; nor can a master assign the indenture of his apprentice.

[Cited in Charles v. Matlock, Case No. 2,615.]

Habeas corpus and petition to discharge an apprentice. [Joel] Brown, the master, being about to leave Georgetown, assigned the apprentice, with his shop, to another person. The articles of apprenticeship were merely a contract between the boy (who was sixteen years old) and the master.

Mr. Jones, for petitioner. There are only three modes of binding under the act of Maryland, namely, by the orphans' court, by two justices of the peace, or by the father. These indentures are not binding on the infant; and whether binding or not, the master could not assign them.

F. S. Key, contrà. This is not a contract for personal instruction. The indentures say, "teach or cause to be taught." All contracts for necessaries are binding on an infant. This is a contract for food, clothing, and instruction; all of which are necessaries.

THE COURT (FITZHUGH, Circuit Judge, absent) discharged the petitioner; it not being a binding within Act Assem. Md. 1793, c. 45. If the indenture is binding as an agreement, still it does not create the relative obligations of master and apprentice, under the act; and if it did, the 14th section forbids the assignment except in the case of the death of the master.

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

Case No. 6,020.

HANEY et al. v. The LOUISIANA.

[6 Am. Law Reg. 422.]

District Court, D. Maryland. March Term, 1858.[1]

COLLISION—STEAMER AND SAILING VESSEL—MUTUAL FAULT—LOOK-OUT—RULES OF NAVIGATION.

1. Where a steamboat and sail vessel are approaching each other, and a collision takes place between them, if there is mutual fault, the loss that is occasioned must be divided.

2. A steamboat in the night time navigating the waters of a bay or river, must always have a look-out, who, for the time, has no other duty or occupation.

[Cited in The City of Washington, 92 U. S. 33.]

3. The rules of navigation, as settled in St. John v. Paine, 10 How. [51 U. S.] 583, The Genesee Chief, 12 How. [53 U. S.] 461, and The Oregon v. Rocca [18 How. (59 U. S.) 572], re-affirmed and acted upon.

[Libel in admiralty by Benjamin Haney, Charles Ogden, and John Trenchard, owners of the schooner Wm. K. Perrin, against the steamer Louisiana, and her captain, George W. Russell.]

GILES, District Judge. The libel in this case was filed to recover the value of the schooner Wm. K. Perrin, her cargo of oysters, and personal property on board, consisting of schooner's furniture, master's clothing, &c., amounting in all to between four and five thousand dollars. The schooner was sunk, with every thing on board, on the night of the 20th February last, in the Chesapeake Bay, in consequence of a collision with the steamer Louisiana.

The libellants, in their said libel, state that the collision occurred in the following manner: "That on Saturday, the 20th February, 1858, the said schooner sailed from Drum Point Harbor, in the Patuxent river; and between nine and ten o'clock that evening, while making her course down the Chesapeake Bay, about five miles below the Rappahannock light boat, she was run into by the steamer Louisiana, whose master the said George W. Russell then was; and that said schooner was so much injured that she sunk in three minutes, in deep water, and before any property could be saved from the vessel; and that the said collision was the result of no want of care, negligence, seamanship, prudence or precaution on the part of the said master or crew of the said schooner, but resulted altogether from the negligence, default, misconduct and wrong of the master and crew of the said steamer." And they proved, by the depositions of Isaac Matthews and Daniel B. Burrows, that the said schooner was two years old, and was worth at least $3,000; and that she would carry 200,000 oysters: 150,000 prime and 50,000 cullings. That the prime were worth $7 per thousand, and the cullings $3 per thousand; or by the bushel the oysters were worth $1 per bushel. And by the testimony of Kelly and Coney, that she carried 1,200 bushels; and Coney also proved that her owners were to have one-third of the gross value of her cargo, and the remaining two-thirds, after deducting expenses, were to be divided as follows: one-third to the captain (Ogden), one-third to the mate, and one-third to himself. They also proved by William Miles, that he was mate on board the Wm. K. Perrin, at the time of the collision, and had hold of the tiller at the time; that he was steering a due south course; that when he first saw the steamer she bore from the schooner south half east, on the larboard bow; when the steamer came quite near, he discovered that she was going more to the west, and would come bows on to the schooner if some change of the course of the schooner was not made; that he immediately shoved his helm down, and called out to the men in the cabin to turn out; that the captain jumped up and got on the helm with him, but that within two seconds from the time he shoved his helm down, the steamer struck her, two feet aft the main rigging, and fifteen feet from the stern on the larboard quarter; and the schooner sunk immediately, hardly giving them time to save their lives by getting on board the steamer. That the schooner was going at the time about six knots per hour, and that Charles Corey was the only boy or person on deck with him at the time, and he was forward. That he believed if he had held on his course, and not ported his helm, the steamer would have struck the schooner bows on. They also proved by Charles Corey, that he was forward, on the larboard side of the said schooner, and when he saw the steamer she was about three-fourths of a mile distant, and to the leeward of them; thinks if they had held on their course the steamer would have run into them bows on, but that they might have cleared the steamer by putting up the schooner's helm; and that he called out to Miles to do so, but received from him no answer. Burrows, in his deposition, testified, that when he first saw the steamer from his vessel, she was four and a half miles ahead, and bore one point to leeward of his course; and at that time the schooner Wm. K. Perrin was about three-fourths of his (witness') schooner, and bore about a south-east course from it, and was distant from the steamer about three miles and a half.

The claimants, in their answer, allege, that on the night of the collision, the steamer Louisiana, being on her regular trip up the Chesapeake Bay, from Norfolk, in Virginia, to Baltimore, heading due north, discried said schooner at the distance of seven miles, standing down the bay, and holding a course nearly due south; at that time the schooner bore about two points to the east of north from the starboard bow of the steamer. It was the captain's watch on board the steam-

[1] [Reversed in Case No. 6,021.]

er; and the second mate, a skillful officer, was running the steamer, and was at his proper place in the wheelhouse, a position from which he had a full and perfect view ahead, and on both sides of the steamer. That Captain Russell was on the look-out, and several other persons were at the time on the deck of the steamer; and it was certain, from the course of the two vessels, that they would pass in safety at the distance of several hundred yards, if no change was made in the course of either vessel. That there was a pretty stiff breeze blowing at the time from N. N. West, so that the schooner had a free and fair wind. That when the schooner was within a hundred yards or thereabouts of being on a parallel line with the steamer, the schooner put her helm down, which turned the head of the schooner towards the western shore, and ran the schooner across the steamer's bows. The instant this unexpected movement was perceived, the wheel of the steamer was rapidly plied, so as to cause the steamer, as far as possible, to head towards the west, and at the same instant, orders were given to stop, and back the steamer. Both of which orders were promptly obeyed, but it was then impossible to prevent a collision. And that such a collision was the inevitable result of the change of the schooner's course. And the claimants proved by A. T. Ward, that he was the second mate and pilot of the steamer, and was on board, and in the pilot-house on the night of the collision; and a black man was at the wheel; the captain was on the deck. That he saw the schooner three or four miles off, and that she was then half point on the starboard bow of the steamer. When she got within 200 yards of the steamer she bore north by east on his starboard bow. In order to give plenty of room, he put the steamer's helm a-starboard, and held a course north by west. After he had done this, he discovered that the schooner had altered her course to the west, and was steering across the steamer's bows. That he then rang the gong and signaled the engineer to stop the steamer, and hove his wheel a-starboard to endeavor to come alongside of the schooner. That if the schooner had held on her course she would have passed two hundred yards to the east of the steamer. And that the schooner when she changed her course was about one hundred yards from the steamer. And by Mr. Rice, that he was on board the steamer on the night of the collision, and came on deck after the gong sounded, and that the schooner was then about seventy-five yards from the steamer, and was standing to the west, and seemed to be wavering in her course, as though no one was at the helm; and that the collision took place almost immediately afterwards.

I have thus given a brief outline of the allegations and testimony on either side; and as it frequently occurs in collision cases, there is a conflict as to the most important points in the case. But I am left without the advice and information of experienced nautical men to ascertain who was in fault on this occasion. This information from old and experienced ship-masters is always within the reach of the judges in the high court of admiralty in England, and who sit in that court as the "Trinity Masters." But in determining this question, I have to guide me, rules of navigation which have been recognized throughout the commercial world, and have been sanctioned and adopted by the supreme court. The first, and one of the most important of these rules of navigation (in reference to the large increase of vessels propelled by steam) is, that "when meeting a sailing vessel, whether close hauled or with the wind free, the latter has a right to keep her course; and it is the duty of the steamer to adopt such precaution as will avoid her." See St. John v. Paine, 10 How. [51 U. S.] 583. And that although just before a collision the master of a sailing vessel may have given an order or executed a change in the course of his vessel which was not judicious, yet this does not excuse the steamer, because it had the power to have passed at a safer distance, and had no right to place a sailing vessel in such jeopardy that the error of a moment might cause her destruction. See the case of The Genesee Chief, 12 How. [53 U. S.] 461. Another of these rules is, that when two vessels, either steam or sailing vessels, are approaching each other on parallel lines, or nearly parallel, in opposite tacks, each vessel must, if there be danger of a collision, put their helms to port, and pass on the larboard side of each other; and that this rule prevails when a steamer is meeting a sailing vessel in all cases, except where the sailing vessel is so far on the starboard bow of the steamer that its observance would, instead of avoiding, tend to bring about a collision, by causing the steamer to cross the bows of the sailing vessel. See the case of The Rose, 2 W. Rob. Adm. 4; Wheeler v. The Eastern State [Case No. 17,494]; The Oregon v. Rocca, 18 How. [59 U. S.] 572; St. John v. Paine, 10 How. [51 U. S.] 584.

Now, in this case it is by no means clear, from the evidence, that if the schooner's course had not been changed a few seconds before the collision, that it would not have taken place. I think, therefore, that the steamer was wrong, when she had such wide waters around her, in running so close to the schooner, that if she had not changed her course, the steamer must have passed within a hundred yards of her, if not over her, as two of the witnesses believed. I think the steamer was also wrong in attempting to pass to the west, or on the starboard side of the schooner; for, although it may be as the pilot, Ward, testified, that the schooner was half or one point on the starboard bow of the steamer, yet the steamer should have ported her helm and passed on the larboard side of the schooner. For, if this rule of

navigation be strictly enforced and generally acted on, every vessel can govern itself accordingly when approaching another, and many disastrous collisions may be avoided. I think also, there was gross want of skill and proper caution on the part of Miles, who was at the helm of the schooner at the time of the collision. According to his own testimony he saw the steamer was "westing on him," (to use his own language) and knew that her speed was more than double that of the schooner, and when within one hundred yards of the steamer he attempted to go to the west of her, instead of putting his helm up and going to the east, which according to Corey's testimony should have been done, and would have avoided the collision; and this, too, after Corey, who was on the look-out on the schooner, had called to him to put his helm up. This, then, makes a case of mutual fault, and I shall decide the loss as the supreme court did in the cases of The Catharine v. Dickerson, 17 How. [58 U. S.] 176; Rogers v. The St. Charles, 19 How. [60 U. S.] 108.

Before passing from this case, I would remark that if this collision had occurred without the schooner having been seen by persons on board the steamer until it was too late to avoid it, it would have been my duty to have decided the case against the steamer, without inquiring into any other circumstance of the collision. And for the reason, that on the night in question, the steamer had no proper look-out; for the pilot, Ward, testified that he was on the look-out. And the supreme court have again and again decided that a look-out must be one exclusively employed in watching the movements of vessels which they are meeting, or about to pass; and must have for the time no other occupation or duty. See [The Genesee Chief v. Fitzhugh] 12 How. [53 U. S.] 462; [St. John v. Paine] 10 How. [51 U. S.] 585; and [The New York v. Rae] 18 How. [59 U. S.] 225. I am surprised that this steamer, that has been so well managed in all that pertains to the comfort and convenience of her passengers, and has gained so large a share of the public confidence, should be found running on this occasion without such a look-out on deck.

[See Case No. 6,021.]

Case No. 6,021.

HANEY et al. v. The LOUISIANA.

[Taney, 602.] [1]

Circuit Court, D. Maryland. Nov. Term, 1858.[2]

COLLISION — STEAMBOAT AND SAILING VESSEL — RULES GOVERNING EACH—MUTUAL FAULT.

1. If a steamboat approach so near a sailing vessel, without any fault on her part, as to create a reasonable apprehension that a change in the course is necessary to save the vessel or the lives of the crew, and an error of the moment, committed by the helmsman or look-out, bring on the disaster he meant to avoid, such error will not be regarded as a fault; the steamboat alone is responsible, and must answer the loss.

2. The rule, that when two vessels are meeting in opposite directions, each one shall port her helm, so as to pass each other on the larboard side, applies only to cases where both are sailing vessels, or both are steamboats, not to cases where one is a steamboat and the other navigated only by sails. In the latter case, it is the duty of the sailing vessel to keep steadily on her course, and the duty of the steamer to get out of her way, passing either on the starboard or larboard side, as may be most convenient to her.

[See Baker v. The City of New York, Case No. 765.]

3. A steamboat carrying the mail is bound by the same laws and rules of navigation that govern any other steamer which is engaged in the transportation of passengers or merchandise and without any mail; no contract with the post-office department, or any other department of the government, can dispense with any of the duties to which steamboats, navigating the same waters, are subject.

4. The strictest supervision should always be exercised by courts of justice over steam-vessels navigating our bays and rivers, and the utmost vigilance and caution constantly exacted from them, when approaching sailing vessels.

[See note at end of case.]

This case came before the circuit court on cross-appeals from the decree of the district court in favor of the libellants [Benjamin Haney, Charles Ogden, and John Trenchard, owners of the schooner Wm. K. Perin].

R. R. Buttee and Wm. M. Addison, for libellants.

Wm. Schley and Wm. K. Falls, for respondents.

TANEY, Circuit Justice. This is a libel by the owners of the schooner William K. Perin, of Fair Town, New Jersey, against the steamboat Louisiana [George W. Russell, captain], for running into and sinking her in the Chesapeake Bay, about five miles below the Rappahannock lightboat. The collision took place between nine and ten o'clock of the night of the 26th of February, 1858.

The schooner was engaged in the oyster trade; she was sixty feet long, eighteen feet beam, and registered at thirty-two tons; she was loaded with oysters, which she had obtained in the Patuxent river, and sailed from Drum Point harbor, at the mouth of the river, on the day above mentioned, down the bay, and bound for Philadelphia. The night was a bright moonlight one, on which vessels could be seen at a considerable distance. When the collision took place, the schooner was heading directly west, and she received the blow which sunk her, about ten or twenty feet from the stern (the witnesses give these different distances); the head of the Louisiana striking her at a right angle, on the larboard side. In determining whether either or both of these vessels were in fault, I proceed to examine, in the first place, the

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

[2] [Reversing Case No. 6,020. Decree of circuit court reversed in 23 How. (64 U. S.) 287.]

manner in which the schooner was navigated.

The light of the steamboat was seen from the schooner, three or four miles off; there was no one on deck, from the time the light was seen, until after the collision, but Miles, the helmsman, and Carey, the look-out. The wind was about north-northwest, blowing a stiff breeze, and the schooner standing south, and going at the rate of six or seven miles an hour.

The look-out, Carey, states that he has been following the water, as an oysterman, for four and a half years, and during that time performing the duty of a mariner, when not dredging for oysters; that it was a part of his duty to help to navigate the vessel, to help to look out, and he was always in one of the watches; he had never been down the bay, below the Patuxent, until the night in question. He was walking on the leeward side of the vessel, when he saw the light of the Louisiana; he saw her, he says, between the night-head and foreshroud of the schooner, and of course, must have been walking abaft the foremast at the time. As soon as he saw the steamer, he called to the helmsman, and said, "Had you not better keep away?" and receiving no answer, he again called to him, about five minutes afterwards, and repeated what he had before said, but still received no answer. At the time he first saw the Louisiana, he says, she was to the leeward, and larboard, and eastward of the schooner, and distant three or four miles down the bay.

The statement of this witness shows that he was altogether unfit for the duty assigned to him. He was no seaman; he was on the leeward side of the vessel, abaft the foremast, where his view of the approaching vessel was necessarily more or less interrupted and confused than it would have been, if he had walked or stood at the head or on the starboard side, where there was no object between him and the approaching steamboat. It was a cold night, and it would seem that he was sheltering himself from the wind under the lee of the mainsail, instead of being at the appropriate place for a look-out. When he saw the light, he called to the helmsman to bear away; in other words, to stand more to the east, and received no answer; he contented himself with remaining where he was, and repeating the direction, without making the slightest effort to see the helmsman, or to ascertain why the direction had been disregarded; although a few steps would have brought him by his side. But the conclusive proof of his incompetency is, that at the time he gave these directions, he thought, he says, that the steamboat was to the eastward of the schooner; now, if the steamboat coming up the bay, was to the leeward and eastward of the vessel going down, his direction to bear away, if followed, would have placed the schooner directly in the path of the ascending boat, and rendered a collision almost inevitable. Yet he states, positively, that he twice gave the direction, although he saw the steamboat rapidly approaching on that side. The apparent inconsistency of his conduct can be accounted for only by remembering that he was an oysterman rather than a sailor, and having never before been on that part of the Chesapeake Bay, he did not know, precisely, the points of the compass, and supposed the steamboat to be to the east of south, when she was really on the west; but, however this may be, the evident inconsistency of his directions, with the position of the steamboat, as he says he believed it to be, is sufficient proof, that he was not a competent look-out, and that there was gross negligence on the part of the schooner, in confiding such an important duty to a person so little qualified to perform it.

The helmsman was hardly better. It is difficult to understand, if he was awake, and attending to his duty, how it happened that he did not hear the advice of the look-out, twice given, to bear away. The vessel was a small one, and the look-out must have been only a few yards from him; but it seems, he sought no information from the look-out, and paid no attention to him, but took upon himself the double duty of look-out and helmsman; and the position in which he placed himself, for that purpose, made it impossible that either could be performed with proper nautical skill. He was on one knee, from a half to three-quarters of an hour, watching the Louisiana, under the boom of the schooner, and at the same time attending to his helm; the boom was only three and a half feet from the deck, and the compass about two feet ten inches; so that while he was in that position, looking at the steamboat, his attention was unavoidably withdrawn from the compass, by which it was his duty to steer, and that, too, when the vessels were nearing each other, and when steadiness and precision in his course were of the first importance; and when it was also his first duty, in order that the steamboat might see how she could avoid the schooner. It necessarily, also, for the time, diverted his attention from the helm, and with the stiff breeze blowing, and her sails on the larboard or eastern side, she would, upon any relaxation of his hold on the helm, luff, and her course be to the westward of south. Although he might correct this deviation, as soon as he again looked at the compass, yet he would inevitably fall into error, as to the relative position and course of the Louisiana, if, while he was looking at her, under the boom, he supposed his own vessel was standing due south, when, in fact, she might be a half point or point to the westward. His anxiety and apprehension would seem to have impaired his self-possession, as the steamboat neared him; he knew, he says, that it was his duty to keep his course steadily, and would not, therefore, have obeyed the directions of Carey, even if he had heard him. In

this respect, he was undoubtedly right; and it was, therefore, his duty to keep his eye steadily upon his compass, without looking out for the approaching vessel, or conjecturing what course it meant to take, or on which side it intended to pass him. It was the duty of the steamboat to keep out of his way; but he watched the steamboat, until his alarm got the better of his judgment, and instead of continuing on his course, he put his helm down, and brought the head of his vessel directly west, crossing, at right angles, the line in which the Louisiana was steering.

It is evident, therefore, upon the testimony given by themselves, that the schooner, at the time of the collision, was in the charge of two men, incompetent and unfit to be trusted with her navigation, on a great thoroughfare of commerce, where she was continually meeting sailing vessels and steamboats, moving in the opposite direction; and her mistakes and mismanagement contributed to the disaster, if, indeed, they were not the sole cause of it.

It remains to inquire into the conduct of the steamboat; for, if the Louisiana was in any degree in fault, she must share in the loss. The schooner was seen from the steamer, when she was three or four miles off; it was the master's watch, in which, according to established usage, the running and course of the vessel are in charge of the second mate, who is always in the master's watch; Ward, the second mate of the Louisiana, was in charge that night, and was also the pilot; and the Perin was observed, at the distance above mentioned, by the second mate, and by Captain Russell, who was then on deck.

The mate states, that, at the time he first saw the schooner, the steamer was heading due north, and the schooner appeared to be heading a south course, and then bore about north one-half east, on the starboard side of the Louisiana. The steamboat was going at the rate of twelve or fourteen miles an hour; she continued at the same rate of speed, and upon the same course; and when the vessels had approached each other within three or four hundred yards, the schooner then bore north one point east from the steamer, on the starboard side, and when she got within about one hundred and fifty yards, the helm of the steamer was put to starboard, and the vessel headed a north-by-west course, which left the schooner bearing two points east, on the starboard bow of the Louisiana. At the moment he had steadied her in that course, he discovered that the schooner, which had been standing to the south before, had altered her course, and had put her helm down, and was heading across the bay, as near as he could judge, a west course; this led her directly across the head of the steamboat, and she kept that course until the collision. The moment the mate saw the change in the schooner's course, he gave the signals to stop and back, which were instantly obeyed; the motion of the steamboat could not, however, be stopped, within the distance then between the vessels, and the collision took place as hereinbefore described.

It has been said, there was not a sufficient look-out on board the steamboat, but I perceive no fault in that respect. Ward, the mate, who was the look-out at the time, is proved to be an experienced seaman, entirely trustworthy, and who had for years been employed in the navigation of steamboats up and down the bay, and on the Louisiana for four years. He was stationed in the pilot-house, which is proved to be the best position, for a look-out, on the steamboat; he watched the approach of the schooner, from the time she was first seen, until the collision, and promptly gave his orders to the helmsman and the engineer, as occasion required; nor did his duty as pilot, or his attention to the compass, interfere with his duty as a look-out; for the vessel was in a wide, deep water, where his duty as pilot and as a look-out was the same, that is, to conduct the vessel safely past other vessels, which she might meet with in her way; and he had, by his side, a helmsman, skilled and trustworthy, with the compass before him, who promptly obeyed the orders of the mate—he was a colored man, and cannot, therefore, be examined as a witness. But the mate would see, from the heading of his vessel, without looking at the compass, or taking his eye from the approaching schooner, whether the order he gave was attended to, and he testifies that it was immediately obeyed. And in my judgment it is evident, from the courses and position of the two vessels, from the time they came in sight of each other, that they would have passed each other in safety, if the schooner had continued, as it was her duty to have done, to hold her course due south.

So far as the witnesses on the two vessels differ, as to their relative position when first seen, and as they approached one another, the weight of the testimony is decidedly on the side of those on board the Louisiana; for there was a steersman and a look-out, each competent and experienced, and accustomed to navigate the bay for years before, each in his proper place, and each confining his attention exclusively to his appropriate duty; while the look-out on the schooner, when he formed his opinion of the relative bearing of the vessels, had no compass before him, was a stranger in the waters in which he was sailing, and could not be expected to form an accurate judgment of the points of the compass, of which he speaks; and what I have before said as to the position and conduct of the helmsman, shows that but little confidence can be placed in his opinion. Both of these witnesses say, that if the schooner had not changed her course, she would still have been struck by the steamer; but upon the whole testimony in the case, I think they are evidently mistaken. The schooner was going at the rate of six or seven miles an hour, when her helm was put down; she was not stationary while her course was

changing to the west, and her speed continued nearly the same; and she must have gone at least twice or three times her own length to the west, before she received the blow. The speed of the schooner was about one-half of that of the steamboat, when both vessels were under full headway; and after the schooner changed her course, with all her sails still set, she must have gone at least that distance west, before the steamer, backed as she was, could have passed over the one hundred and fifty yards which separated them, when the Perin put down her helm, and changed her course; and if that was the case, it shows that if she had kept steadily on, due south, she would have passed, at the distance of forty or fifty yards, on the eastern or starboard side of the Louisiana. Indeed, after the schooner headed to the west, being still under full sail, her speed must have been nearly equal to that of the steamer, when checked and retarded by the efforts to back her; and if the vessels were meeting in a direct line, when the helm was put down, as the witnesses for the libellants suppose, she must have cleared the line of the steamer some distance, and been safe on the west side; but it appears that ten or twenty feet of the schooner was still on the east side of the steamer, when the vessels came in contact.

Moreover, from the relative bearing and course of the vessels, as described by the master and mate of the steamer, when they discovered each other at the distance of three or four miles, they would have passed still further from each other, if the Perin had steadily kept her course south, as the steamer did her course north. But the unfavorable position in which the helmsman placed himself, and his anxious watching of the steamer for half or three-quarters of an hour, necessarily diverted his attention frequently from the compass, and from the strength of the wind; with the sails on the eastward side, there was a constant tendency to luff, and bring her head to the west of south, unless steadily restrained by the rudder, and in fact, without any obvious and palpable change in her general course, she was found nearer the steamboat than a due north and south line would have brought them, from their relative position, and bearing and distance, when they first came in sight of one another.

It has been urged on the part of the libellants, that this case falls within the rule laid down by the supreme court, in the case of The Genesee Chief, 12 How. [53 U. S.] 443. And undoubtedly, if a steamboat approaches so near a sailing vessel, without any fault on her part, as to create a reasonable apprehension that a change in her course is necessary to save the vessel, or the lives of the crew, and an error of the moment, committed by the helmsman or look-out, brings on the disaster he meant to avoid, the error will not be regarded as a fault, and the steamboat alone is responsible and must answer for the loss. It is a rule founded in justice, and ought to be rigidly enforced by the courts, but it does not bear upon the present case; for the contiguity of the vessels, and the collision, appear to have been occasioned altogether by the incompetency and mismanagement of the look-out and steersman of the schooner.

Nor does the rule that when two vessels are meeting in opposite directions, each one shall port the helm, so as to pass each other on the larboard side. The rule applies only to cases where both are sailing vessels, or both are steamboats, not to cases where one is a steamboat and the other navigated only by sails; in the latter case, it is the duty of the sailing vessel to keep steadily on her course, and the duty of the steamer to get out of her way, passing on either the starboard or larboard side, as may be most convenient to the latter. The rule upon this subject was stated by the supreme court, in the case of St. John v. Paine, 10 How. [51 U. S.] 583, where the whole subject was fully considered, and carefully decided; and the rules and laws of navigation there stated, have always since been adhered to.

In disposing of this case, I have spoken only of the testimony of the mate, and of the two witnesses who were on board the schooner. It is proper, however, to add, that I consider Captain Russell a competent witness, he having been first released by the owners; and his testimony strongly confirms that of the mate. He saw and observed the course of the schooner when she was descried, and the course she was steering, and also the course of his own boat, and their relative bearings, and he had been in the cabin but a minute or thereabouts, after making these observations, when he heard the bell ring to stop the engine, and upon coming out, saw the schooner standing west, across his bows. He has been twenty-five years engaged in navigating steamboats on the Chesapeake Bay, and he proved that the look-out and helmsman were both experienced, and well qualified for their respective offices, were both in their proper places, attending to their respective duties.

I have said nothing of the testimony of the master of the Keyser, which sailed from the Patuxent in company with the Perin. It is obvious, that he was at too great a distance to see, by moonlight, the exact course of the steamboat or the Perin, when they neared each other, or what passed just before, or at the moment of collision; for, he did not arrive at the place of the disaster, although he immediately made sail for it, until the steamboat had proceeded up the bay, and was out of hail, with a six or seven-mile fair wind; it must, therefore, have taken him nearly half an hour to reach the wreck; his distance must, consequently, have been between two and three miles, although he supposes it was shorter. These estimated dis-

tances, on water, especially at night, are seldom entirely accurate, and not to be relied on, unless made by a practised seaman or pilot, accustomed, necessarily, to measure the distance by his eyes.

Neither can the rate at which the steamboat was moving, be imputed to her as a fault. She was in a wide, open water, on a bright, moonlight night, in which a small sailing vessel could be seen at the distance of three or four miles, and if the sailing vessel did her duty by keeping steadily on her course, a steamer would have no difficulty in passing her at a safe distance, at the speed with which the Louisiana was then moving. But the circumstance stated in the answer, that she was carrying the mail, and bound by contract to perform the trip between Baltimore and Norfolk, within a certain time, has no influence on the decision of the court. A steamboat carrying the mail is bound by the same laws and rules of navigation that govern any other steamer, which is engaged in the transportation of passengers or merchandise, and without any mail; and no contract with the post-office department, or any other department of the government, can dispense, in any degree, with any of the duties to which other steamboats, navigating the same waters, are subject. The mail-carrier is bound to observe the same laws and regulations which govern steamboats engaged in the ordinary business of transporting passengers or merchandise. But, for the reasons before mentioned, I think the speed of the Louisiana was not an incautious or imprudent one at the time, and furnishes no ground for subjecting her to any portion of the damage.

I am sensible that the strictest supervision should always be exercised by courts of justice over steam-vessels navigating our bays and rivers, and the utmost vigilance and caution constantly exacted from them, when approaching sailing vessels; this has been the invariable rule and settled policy of the courts of the United States, in cases of collision. But it appears to me, upon a careful examination of the whole testimony, that the steamboat, in this instance, was in no respect culpable; and that the disaster was occasioned altogether by the incompetency and mismanagement of those who were in charge of the schooner; and in this view of the case, the damage must fall altogether upon those who confided their property to incompetent or negligent hands. If the steamboat committed no fault, she is not justly liable for any share of the damage. The decree of the district court must, therefore, be reversed, and the libel dismissed with costs to the respondents in this court, each party to pay his own costs in the district court.

[NOTE. This case was appealed to the supreme court by the libellants, and the decision of the circuit court was reversed in an opinion by Mr. Justice Grier. 23 How. (64 U. S.) 287. Chief Justice Taney dissented. The steamboat was condemned to pay the whole damage incurred by the collision. It was held, following Chamberlain v. Ward, 21 How. (62 U. S.) 570, that steamers must have constant and vigilant look-outs stationed in proper places on the vessel: these must be experienced persons, and occupy favorable positions, usually on the forward deck. The disregard by the defendants below of these fundamental rules of navigation on thoroughfares of commerce rendered them negligent and liable.]

HANEY (MARKSON v.). See Case No. 9,098.

Case No. 6,022.

HANFORD et al. v. WESTCOTT et al.

[16 O. G. 1181.]

Circuit Court, D. New Jersey. Nov. 10, 1879.

TRADE-MARK—INTERFERENCE OF COMMISSIONER OF PATENTS.

1. The commissioner of patents has authority under the statute and the rules of the patent office to institute an interference between opposing claimants for registration of the same trade-mark for the purpose of determining the ownership of the same.

2. The decision of the secretary of the interior in 13 O. G. 963, and of the commissioner of patents in Hoosier Drill Co. v. Ingals, 14 O. G. 785, considered and approved.

3. The decision of the examiner of interferences, not appealed from, in such an interference is conclusive upon the parties and their privies, and cannot be questioned in any other tribunal.

4. The successful party in such an interference is entitled to a provisional injunction against the licensees of the unsuccessful party when no doubt exists as to the infringement.

[Cited in Peck v. Lindsay, 2 Fed. 690; Holliday v. Pickhardt, 12 Fed. 148; Smith v. Halkyard, 16 Fed. 415; Shuter v. Davis, Id. 565; Mubel v. Tucker, 24 Fed. 702.]

In equity.

George W. Dyer, for complainants.
William B. Guild, for defendants.

NIXON, District Judge. This is an application for a provisional injunction to restrain the defendants from the use of registered trade-mark numbered 6,378. The record shows that the complainants, trading under the name of A. Hanford & Co., filed an application in the patent office on the 12th of June, 1878, for the registration of a trade-mark consisting of the letters and words "Hanford's Chesnut Grove," when used in connection with the word "Whiskey," and that the same was registered on the 16th of July, 1878. They state in their application that they had continuously used this trade-mark in their business since the commencement of their partnership on the 1st of July, 1872, and that the said Albert Hanford had used the same for four years immediately preceding that date. The defendants do not deny the infringement, but justify the use of the trade-mark as licensed by Charles Wharton, who, it is alleged, first adopted it in 1857, and has been in the

constant use of the same ever since. It further appears from certified copies of proceedings in the patent office that after the registration of the said trade-mark for the complainants, to wit, on the 16th day of October, 1878, the said Wharton made application for the registration and record of the same to him, claiming the ownership. The last clause of the eighty-sixth rule of practice of the patent office provides as follows: "In case of conflicting applications for registration, the office reserves the right to declare an interference, in order that the parties may have opportunity to prove priority of adoption or right; and the proceedings on such interference will follow as nearly as practicable the practice in interferences upon applications for patents." In accordance with this provision the patent office declared an interference in this case; notice was given to the parties; a time fixed for filing the preliminary statements, and also for taking testimony on the issue raised. After full hearing of the question the examiner of interferences filed an opinion on the 16th of June, 1879, deciding the right to the use of the said trade-mark to be in the complainants. No appeal was taken from his decision, and, under the rules, the time for appealing has long since expired.

It is insisted in behalf of the complainants that the defendants, claiming under Wharton, are estopped from denying the complainants' title, and that the question of ownership, having been determined by a tribunal authorized by the law to settle it, cannot be opened here between the same parties or their privies. Such contention raises the inquiry whether the legislation of congress has conferred upon the commissioner of patents the authority of determining the ownership of trade-marks upon application made for registration. The secretary of the interior claims, and the commissioner of patents exercises, such authority. Decision of Secretary of Interior, 13 O. G. 963; Hoosier Drill Co. v. Ingals, 14 O. G. 785. If rightly claimed and exercised, there has been an adjudication between the parties as to the ownership, which precludes them from raising the question again in another forum. The secretary of the interior, in his decision, quotes section 483 of the Revised Statutes, which authorizes the commissioner of patents, subject to the approval of the secretary, to establish regulations from time to time, not inconsistent with law, for the conduct of proceedings in the patent office. He says that, in pursuance of this provision, rules and regulations have been adopted by the office, with the approval of the secretary, wherein it is provided that all questions in relation to the priority of claims for trade-marks shall be referred to the examiner of interferences, and by him determined; and that the receipt of an application for a trade-mark, its consideration, allowance or rejection, and registration, if allowed, are all proceedings in the patent office; and that it is competent for the commissioner of patents and the secretary of the interior to make such rules and regulations in relation to the granting of certificates therefor and registration thereof as in their judgment shall seem proper. The commissioner refers to the clause of the eighty-sixth rule, hereinbefore quoted, which authorizes the declaration of an interference by the office in order that the parties may have opportunity to prove priority of adoption or right, and thinks that the phrase "or right" in the rule has a wider signification than has heretofore been given to it; that it was meant to empower the officer to inquire into all the matters specified in section 4939 of the Revised Statutes, and into the disputes which may arise concerning them between applicants for registration. He holds that the clause in that section which prohibits the commissioner of patents from receiving and recording any proposed trade-mark "which is identical with the trade-mark appropriate to the same class of merchandise, and belonging to a different owner, and already registered or received for registration," constitutes the entire basis for an interference proceeding, and that an inquiry into the title or ownership is necessarily involved in determining the question of right. I see no reason to dissent from the correctness of their reasoning and conclusions; and the more especially when the provisions of sections 4937 and 4938 of the Revised Statutes are considered, which require the commissioner to ascertain and determine the party entitled to the exclusive use of the trade-mark for the use of which protection is asked.

The right existing in the patent office to declare an interference in trade-mark cases, such a declaration affords a tribunal where the parties may, if they please, try the question of title or ownership. It is not compulsory, for sections 4944 and 4945 of the Revised Statutes give cumulative remedies, and open the courts to all persons who claim to have been wronged by false registrations, imposing penalties for fraudulent representations, verbal or written, and preserving to parties all existing rights and remedies at law or in equity. In the present case the applicant, Wharton, would have been permitted to withdraw his application for registration as soon as the interference was declared, and to go into the courts for redress. He elected to attempt to prove his right before the examiner of interferences. He put in his testimony, and acquiesced in the decision against him without appeal, and it is too late to assert that he is not bound by the result of the contest. A matter is always held to be res adjudicata where the question has been determined by a tribunal of competent jurisdiction, and where there is a concurrence of identity of parties, or privies claiming under them, and identity of purpose or object. Freem. Judgm. § 252; Aspden v. Nixon, 4 How. [45 U. S.] 497. The infringement being admitted, and the title to the trade-mark adjudicated between these parties, there is

nothing left for the court to do, at this stage of the proceedings, except to order a provisional injunction, and it is ordered accordingly.

Case No. 6,023.

In re HANIBEL et al.

[15 N. B. R. 233; 9 Chi. Leg. News, 165; 15 Alb. Law J. 271; 24 Pittsb. Leg. J. 152.] [1]

District Court, D. Colorado. Jan., 1877.

BANKRUPTCY—PETITION—CHARGES IN—VERIFICATION BY AGENT OF CORPORATION—SUPPLEMENTAL PROOFS.

1. A charge in the alternative, in an involuntary petition, that the debtor is insolvent or in contemplation of bankruptcy at the time of the alleged fraudulent preference, is not sufficient.

2. A petition filed by a corporation may be verified by an agent, who need not be an officer of such corporation; but the authority of such agent to act for the corporation must be set forth in the affidavit or otherwise established; it is not sufficient that it be stated by way of recital following deponent's name.

3. Where the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are insufficient, the court has power to allow supplemental affidavits or proofs to be filed.

[Cited in Re Donnelly, 5 Fed. 787.]

[In bankruptcy. In the matter of John R. Hanibel and others.]

The petition was filed by the Laflin & Rand Powder Company, which was described as a corporation organized under the laws of the state of New York. Whether this was sufficient to show that petitioner resided in that state, was made a subject of discussion. The defect complained of in the petition is sufficiently stated in the opinion. The part of the affidavit to the petition which is referred to in the opinion is as follows: "Thomas D. Sears, the duly authorized agent of the Laflin & Rand Powder Company, the petitioners above named, for it and in its behalf, to institute these proceedings and sign the above petition, being personally familiar with the facts above set forth, hereby makes solemn oath," etc. One of the depositions in proof of debt was attested by the clerk of the court, who is also a commissioner of the circuit court, but had not signed the deposition as commissioner. Other depositions as to acts of bankruptcy were defective, as stated in the opinion.

W. S. Rockwell, for petitioner.

Blake & Jacobson, with Morrison & White, and Post & Coulter, for respondents.

HALLETT, District Judge. This is an involuntary petition, in which an order was entered to show cause before the register. On the return day, respondents moved to vacate the order and dismiss the petition on several grounds, some of which were held to be good, and others were overruled. This decision, so far as it is adverse to respondents, is presented for review by certificate from the register, and with it there is another question, touching the right of the petitioner to amend the depositions accompanying the petition, which has been adjourned into court for decision. Referring first to the petition, three acts of bankruptcy are charged, the second of which is that respondents, on a certain day, "being insolvent or in contemplation of bankruptcy," made a conveyance with intent to give a preference, and to defeat and delay the operation of the bankrupt act [of 1867 (14 Stat. 517)]. Objection is made to this allegation on the ground that the condition of respondents at the date specified is not definitely described as whether they were insolvent or in contemplation of bankruptcy. And this objection must be upheld, unless it appear that these phrases are so nearly allied that they may be taken together as describing the status of respondents. In attachment cases it is said that acts which are so closely connected that it is difficult to distinguish the one from the other, as that a debtor has departed, or is about to depart, from the state, may be described in the manner adopted by the petitioner. Drake, Attachm. § 102. Within this rule it may be correct to charge that the debtor is "insolvent, or in contemplation of insolvency," in the language of the statute, and the rule is so laid down in Bump's Bankruptcy (8th Ed.) 36. But that phrase is not synonymous with that which was used in the petition, for bankruptcy is a legal status determined by judicial decree, which is clearly distinguishable from insolvency. In re Black [Case No. 1,457]. Therefore, to say that one is "insolvent" is not the same as saying that he "contemplates bankruptcy," and the rule referred to cannot be invoked to support the allegation. The charge in the alternative that respondents were insolvent or in contemplation of bankruptcy, is not sufficient, as it is impossible to say which is to be relied on.

It is also urged that the petition is not properly verified, because it does not appear in the accompanying affidavit that petitioner is a foreign corporation, or that deponent was authorized by petitioner to testify in its behalf, or that he is an officer of the corporation. As to the first point—the legal residence of the corporation—it was said in argument that, by the amendment to the bankrupt act of June 22, 1874 [18 Stat. 178], the first five signers to the petition must make oath to it in person unless they reside without the district, and, as there is but one petitioner here, it must show its residence before the oath of an agent can be received. When applied to natural persons the argument is undoubtedly correct, but when applied to a corporation it is without force; for a corporation can never make oath to a petition except through and by means of its authorized agent. The right of a corporation to file a petition in bankruptcy is not de-

[1] [Reprinted from 15 N. B. R. 233, by permission. 15 Alb. Law J. 271, and 24 Pittsb. Leg. J. 152, contain only partial reports.]

nied, and, whether it be a resident of the district or not, it must proceed in the same manner. In either case it cannot verify the petition by its own oath, for it is incapable of making oath. Inquiry as to the residence of petitioner is, therefore, without merit; for as we cannot deny its right to the privileges of the act, we must allow it to come into court in the only way in which it can act. Certainly if we should ascertain that the corporation has a residence within the district, we would not deny its right to appear in court, because being invisible and intangible, it cannot go before the proper officer and make oath to the petition. In all these matters where a personal act is required of a corporation, the law accommodates itself to the necessities of its offspring, and allows it to go on in the way that is possible to it. Commercial Ins. Co. v. Mehlman, 48 Ill. 313. I conclude, therefore, that upon a petition filed by a corporation, a verification by an agent is sufficient under all circumstances, and I think that it is equally clear that such agent need not be an officer of the corporation. It is true that proof of a claim against a bankrupt's estate can only be made on behalf of a corporation by its president, cashier, or treasurer, but no reason is perceived for extending the rule beyond the language of the statute. Corporations often do business at a great distance from the residence of their officers, and the remedy given by the bankrupt act may be quite as important to them in such place as at the place where the officers reside. Great inconvenience and loss would often arise from the necessity of sending to a great distance to procure the signature and oath of a principal officer to a petition or other paper, and there is really nothing to be gained by requiring it. The oath of an officer may give greater certainty as to the nature and amount of the claim which shall be finally allowed against the bankrupt's estate, but for commencing proceedings the oath of any other agent of the corporation would seem to be equally satisfactory. The authority of the agent to act for the corporation is without doubt material, and should be set forth in the affidavit, or otherwise established. In this particular the affidavit attached to the petition is defective, for although it is stated, by way of recital following deponent's name, that he is petitioner's agent, there is no averment of the fact. Deponent has sworn to those matters only which follow the declaration of his oath, and all that precedes is mere descriptio personae, not in any way verified or proved. Payne v. Young, 8 N. Y. 158; Phillips v. Prentice, 2 Hare, 542.

Passing from the petition to the proof filed with it, it is claimed that the affidavit of Sears is not sufficient to show an act of bankruptcy in respect to the time when the transfer to Cushman was made. As to the real estate, the date of the conveyance is specified, but as to the personal property no date is given. It is indeed stated that the personal property was owned by respondents prior to October 28, 1876, which, it is contended, should be accepted as an averment that it was owned by them up to and upon that day. But this construction does not accord with the meaning of the words, which may relate to a time long before the filing of the petition, and beyond the limitation of the statute. In other respects the affidavit seems to be sufficient to prove at least one of the acts charged in the petition. The affidavit of Woolfolk, failing to describe with certainty the commercial paper of which payment was suspended, is admitted to be defective, and we have now to consider whether these defects may be remedied by amendment. The right to file amended or supplemental proofs is denied in one court (May v. Harper [Case No. 9,333]), and I do not know that it is distinctly affirmed anywhere. But it has been held that the whole proceeding is founded on the petition by which the court gets jurisdiction, and such appears to be the language of the act. In re Simmons [Id. 12,864]. It has always been held that the petition may be amended, and this seems to carry with it the right to verify the amendments by the petitioner's oath, and also to file supplemental proofs in support of the amended petition. Of course the right to amend the petition is not without limits, for the cases must be rare in which a new ground of indebtedness, or a new act of bankruptcy, may be brought into the record in that way. But, conceding all that may be claimed in that direction, it must be apparent that, upon almost any amendment of a petition, it will become necessary to put in a new oath verifying the facts alleged, and in very many cases it will be necessary to add to the proofs on file. From the settled rule that a petition may be amended, therefore, we may deduce the right to change or add to auxiliary proofs, so that they may support the petition in its new form, and the right to supplement the proofs, when conceded, must be allowed in the discretion of the court, which will be so exercised as to give the petitioner the benefit of the law, and at the same time guard against deceit and fraud. Within this reasonable rule defects in the petition and depositions filed with it, touching the petitioners' demand and the acts of bankruptcy charged, obviously arising from mistake or inadvertence, may be cured. The relief here asked is of that character, and it will be granted on payment of costs to the present time. The order to show cause, having been improvidently issued upon insufficient evidence, will be set aside.

Case No. 6,024.

HANK v. CRITTENDEN.

[2 McLean, 557.] [1]

Circuit Court, D. Ohio. July Term, 1841.

GUARANTY OF DIVIDEND—INSOLVENCY OF PRINCIPAL—RESPONSIBILITY OF GUARANTOR.

1. The defendant guarantied to the holder of certain certificates of stock in the Portage Hydraulic Manufacturing and Land Company, ten per cent. on moneys paid for two years. *Held* that an averment that, within the time specified, the company neither made nor declared a dividend was insufficient.

2. The undertaking was collateral, and in all such cases a demand and notice are necessary to be averred and proved, or an excuse alledged, to charge the guarantor.

3. The total insolvency of the principal supersedes the necessity of a demand of the principal and notice to the guarantor.

At law.

Brush & Gilbert, for plaintiff.

Mr. Andrews, for defendant.

LEAVITT, District Judge. The declaration in this case is in assumpsit; and sets forth, in four special counts, the issuing of four several certificates, by the Portage Hydraulic Manufacturing and Land Company, dated February 21, 1837, in the following form: "This is to certify that Hank and Niles have ten shares in the capital stock of the Portage Hydraulic Manufacturing and Land Company, on which one thousand dollars have been paid, transferable on the books of said company, by Hank and Niles, or their attorney, on the surrender of this certificate." It is then averred, that the defendant, on the same day, made an indorsement, on each of said certificates, as follows: "I hereby guarantee unto the holder or holders of the within shares, an annual dividend or income of ten per cent. for two years, from the 13th inst., for value received." Then follows an averment that said company, for two years after the said 13th of February, 1837, "neither declared nor paid any dividend or income whatever, of which the defendant had notice," &c. The defendant has filed a demurrer to the declaration; and the first objection urged is, that no sufficient consideration for the promise or guaranty is alledged.

The principle is well settled, that in declaring on promises or contracts, which do not import a consideration, it is necessary to aver a good and sufficient consideration. Specialties, and bills of exchange and promissory notes, imply a consideration; and in such cases none need be averred. The promise or guaranty in this case, not being embraced in either of these classes, it is necessary that a consideration should be stated. The only question is, whether this is sufficiently set forth in the declaration. It is not averred with the formality and precision usual in such cases; but the promise or guaranty, on which the action is founded, is copied in the declaration; and from this it appears to have been made "for value received." These words, it may be assumed, were not used without some design; and they clearly amount to an acknowledgment by the guarantor of a benefit received from the other party, as the moving cause of the execution of the guaranty. And in this aspect of the case, we are of the opinion that a sufficient consideration for the promise, stated in the declaration, does appear. It is, also, insisted, by the demurrant, that the declaration is deficient, because it does not aver a demand on the company for the payment of the dividends on the shares transferred to the plaintiff, and a notice to the defendant of such nonpayment.

The inquiry which must be decisive of this point is, whether the promise on which this action is founded is to be regarded as absolute or collateral. If it can be viewed as an unconditional promise to pay the plaintiff ten per cent. for two years, on the stock transferred, it is not necessary to aver a demand upon the company, for the dividends, as no such demand can be required to fix the liability of the defendant; but, if it is to be regarded as a promise to pay ten per cent. on the stock transferred to the plaintiff, in the event that the company shall fail to do so, it is clearly one of those collateral undertakings, in which it is the right of the promisor, before his liability attaches, that a demand should be made of the party for whom he undertakes, and that notice should be given of the failure of that party to pay. In this latter aspect the promise, under consideration, must be viewed. And thus considered, the principles applicable to it are the same that have been long and uniformly sanctioned by courts, in the numerous cases of commercial guaranties, heretofore decided, both in this country and in England. If an individual guarantee the payment of a note or bill, although the same strictness in regard to the time of making demand, and giving notice is not required as in the case of an indorsement of commercial paper, yet the demand and notice are held to be indispensable, unless an excuse, such as the insolvency of the maker or acceptor, be averred. And it is, also, settled by repeated adjudications, that to make the writer of a letter of credit responsible for goods sold or advances made upon such letter, he must be duly notified of the acceptance of the letter, and of the amount of sales or advances made; and in default of such notice he is not liable. The position is believed to be sustainable upon principle and authority, that in all collateral undertakings, where the liability of the guarantor depends on the doing of some act by a third person, notice of a demand upon him, or an excuse for not making it must be alledged. The averment in the declaration that the company neither declared

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

nor paid any dividend within the two years, mentioned in the guaranty, does not supersede the necessity of a demand. The undertaking of the defendant in its legal effect is, that a profit on the stock transferred, equal to ten per cent. per annum, for two years, shall be made; and that if no profit be made the guarantor will be responsible for ten per cent.; or, if a less profit than ten per cent. is made, he will pay the guarantee the difference between that rate and the profit actually made. An averment, therefore, that the company neither declared or paid any dividend or profit, is not equivalent to an averment that no profit was made during the two years; and nothing short of this allegation, or, that the company was actually and notoriously insolvent, will excuse a demand on the company, and notice to the guarantor.

In this view of the promise or guaranty on which this action is founded, the assignment of the breach, as stated in the declaration, is defective. The rule on this subject is, that the breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with the import and effect of it. And if the breach vary from the sense and substance of the contract, and be either more limited or larger than the contract, it will be insufficient. In the case before the court the words of the guaranty as set forth in the declaration are: "I hereby guaranty unto the holder or holders of the within shares, an annual income or dividend of ten per cent. for two years from the 13th Feb., inst." The breach assigned is: "That the company, within the two years, neither declared or paid any dividend or income whatever." This averment does not negative the contract or promise, either in its words or according to its legal import. To make the averment coextensive with the promise or contract, according to its sense and substance, it should have alleged not only that the company did not pay or declare any dividend, but that it made no profit during the two years referred to. The allegation contained in the declaration may be strictly true, namely, that the company neither paid or declared any dividend; and yet, in entire consistency with that averment, a profit even exceeding ten per cent. may have been made by the company. If, instead of declaring and paying a dividend, the officers had deemed it more expedient to set aside the profits as a surplus or contingent fund; or, if such profits had been added to the capital stock, it cannot be doubted that this would have been a substantial compliance with the terms of the guaranty, although the company "neither declared nor paid any dividend whatever." It seems clear to us, therefore, that the averment of the breach of the guaranty in question is not coextensive with the contract; and that on this ground the declaration is defective. The demurrer to the declaration is, therefore, sustained.

Case No. 6,025.

HANKIN et al. v. SQUIRES.

[5 Biss. 186.] [1]

Circuit Court, N. D. Illinois. Oct., 1870.

BILLS AND NOTES — POSSESSION OF TIME DRAFT—PRESUMPTION—BURDEN OF PROOF—CIRCUMSTANCES — CHARGING THE JURY — STATE LAW AND PRACTICE.

1. The possession by the payee of a time draft unaccepted and uncanceled, is not evidence, prima facie, that he had paid it. There not being, until acceptance, any obligation on the part of the drawee, the rule applicable to promissory notes does not apply.

2. Burden of proof.—When payment is alleged it is on the defendant.

3. Where it is the custom of a bank to stamp all drafts paid at its counter, the jury may consider the absence of such stamp on a draft claimed to have been paid to the teller, as a suspicious circumstance; also, the fact that by the books of the bank the draft did not appear to have been paid; also, the fact that the payment or presentation of a time draft would be a circumstance which the officers of the bank would be likely to recollect.

4. State law and practice are not binding on the federal courts.

[Cited in Finlay v. Bryson, 84 Mo. 666.]

Assumpsit by the plaintiffs [Charles M. Hankin and others], merchants in New York City, to recover $658.50, balance of account for which they had drawn a ten days' draft on the defendant, July 10th, 1868, through the First National Bank of Chicago. Defendant [William H. Squires] pleaded payment of the draft, and offered the draft in evidence, but without any marks of cancellation.

Chas. Hitchcock, for plaintiffs.

Geo. W. Brandt, for defendant.

BLODGETT, District Judge (charging jury). It is claimed on the part of the defendant that the possession of this draft by the defendant, and its production in court, is prima facie evidence that he has paid it. I do not agree with the counsel for the defendant in this view of the law, but instruct you that the possession of this draft is no evidence that it has been paid by the defendant. So far as the face of the draft is concerned, the defendant is not a party to it. It has never been accepted by him, and no liability has ever been assumed upon the face of the paper by the defendant. Before a party becomes liable upon a time draft, he must accept it. As yet it is a mere request on the defendant to pay this amount of money. He might and was at liberty to refuse to accept and throw the plaintiffs back on their original account. He has not accepted the draft in any form, and therefore I do not think the rule of law with which you are all familiar, that when you take up your promissory notes and get them it is evidence you have paid them, applies in this case, because a promissory note is a completed instrument—an obli-

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

gation on the party who makes it—and when a party takes his obligation into his possession, it is at least prima facie evidence that he has paid it and is entitled to such possession. The evidence, then, as to whether this draft has been paid must rest on the testimony of the parties outside of the production of this draft by the defendant in court.

In the first place, then, I will say to you that the burden of proof in this case is on the defendant. He admits the plaintiffs' case against him; he admits that he has received the goods with which they charge him, and that he at one time certainly was lawfully indebted to them for the amount of their claim, and he sets up, by way of defense, that he has paid it in this particular manner. He must make out clearly and to your satisfaction that it has been paid. Mere surmise or guess-work, and presumption not founded on well-proven facts, ought not to be indulged in.

The draft in question does not bear upon its face, or any where upon it, the stamp of the bank which its officers state to you it should bear if it had been paid. This circumstance is a strong one which I commend to your consideration, as going to show, under all the testimony, that this draft has not been paid. We all understand that large moneyed institutions must have a systematic way of doing business, and it is an undisputed fact by the testimony here, that whenever drafts are paid at the counter of this bank, they are invariably stamped with the stamp of the bank.

The defendant claims that on the occasion he paid this ten-days'-time draft he also paid a sight draft to the same bank. He produces this sight draft in evidence, and it bears a stamp showing payment.

The defendant testifies that immediately on receiving his drafts, which he paid in the due course of his business, he transmitted them to a correspondent in New York, for the purpose of showing that he had paid them, and thereby showing that he was in good credit. It occurs to me that if a party wished to bolster his credit by showing that he had promptly met his drafts, even before maturity, by transmitting them to business men, that he should show they bore on their face the impress which business men would usually look for as evidence that they had been paid, and where one of these drafts was stamped and the other not, it seems to me that a shrewd business man, who was dealing honestly and wished to impress others with the conviction that he was not only honest, but able to pay his debts, would have insisted that the other draft should be similarly stamped; and if on inspection he had seen that one was stamped and the other was not, he would have returned it to the teller to whom he paid the money, for the purpose of having it stamped, so that it too might bear on its face the evidence of its being liquidated.

The defendant, however, testifies that on the 14th of July, 1868, the day that he paid this sight draft, he went into the bank and paid both these drafts, and for the purpose of his defense he says that he paid the money to the teller. The teller of the bank should be as much his witness as he himself to establish this fact, and the books of the bank should also show such payment. It is in evidence before you that the books of the bank show that this money was not paid; or, rather, there is no evidence that the money was ever paid or received by the bank. The evidence tends to show that the draft was handed out through the window to the defendant, for the purpose of acceptance at the time he paid the sight draft. The draft was not yet due; it had thirteen days yet to run. You are all aware that it is rather an extraordinary circumstance for a man to pay a draft of this kind thirteen days before its maturity, and you will take notice, as you have a right to do, of the fact that such a circumstance, if it occurred, would be likely to impress itself upon the agents of the bank who were charged with the duty of receiving the money on such a draft. It is true that Mr. Squires, the drawee, had a right to pay the draft when it was presented to him for acceptance, but if when it was presented to him for acceptance he had paid the money instead of accepting it, that would be a circumstance so much out of the course of business as to naturally impress itself on the memories of those concerned in the transaction; and yet the tellers who participated in the transaction, testify distinctly that the draft was not paid.

The witnesses for the plaintiff, brought here on behalf of the bank, testify that there was no money paid to them; that the draft was passed out for acceptance. It is not an extraordinary circumstance for a person to whom a draft is so presented to wish to take it to his office or place of business for the purpose of comparing it with his books and determining whether it is right or not; therefore it is not very probable that the fact that the draft was not returned immediately to the window drew much attention.

Verdict for plaintiffs.

On Motion for New Trial.

BLODGETT, District Judge. I have given this case a good deal of consideration. The authorities in this state in relation to courts charging the jury are not binding on this court. I am satisfied the court did not travel beyond the limits of the practice allowed in the federal courts. The motion for new trial is overruled.

HANKS (ELY v.). See Case No. 4,430.

HANLENBECH (ARMSTRONG v.). See Case No. 544.

HANLEY (TRIPLETT v.). See Case No. 14,179.

HANLY (SNEED v.). See Case No. 13,136.

Case No. 6,026.

In re HANNA.

[4 Ben. 469;[1] 4 N. B. R. 411 (Quarto, 139); 5 N. B. R. 292.]

District Court, S. D. New York. Jan., 1871.

MORTGAGE—SPECIAL CUSTODIAN.

Where, in a bankruptcy proceeding, an injunction was issued staying the proceedings in a foreclosure suit brought to foreclose a mortgage given by the bankrupt on certain real estate, and the mortgagees applied to the court, on petition, to set aside the stay, in order that the property might be sold under the decree in the foreclosure suit: *Held*, that the register in charge would be appointed special custodian of the property, to sell the same, and receive the proceeds subject to the order of the court, the deed to be given by the register to convey the title free from the lien of the mortgage.

[Cited in Davis v. Anderson, Case No. 3,623.]

In this case, which was a proceeding in involuntary bankruptcy, an injunction had been issued staying the proceedings in a foreclosure suit brought by the firm of A. T. Stewart & Co., to foreclose a mortgage upon real estate given by the bankrupt [Samuel Hanna]. A decree had been made in the foreclosure suit, and the property was advertised for sale when the injunction was issued. The mortgagees applied to the court, on petition, setting up that the mortgage was given bona fide, and that they proposed to maintain the validity thereof as against any assignee, alleging, also, that the property would be deteriorated greatly in value, unless the property was speedily sold, and praying that the injunction might be set aside, so as to allow them to proceed with the sale.

F. N. Bangs, for A. T. Stewart & Co.

M. A. Kursheedt, for petitioning creditors.

BLATCHFORD, District Judge. An order will be entered appointing the register in charge of this case to be special custodian of the property advertised for sale under the mortgage to A. T. Stewart & Co., and directing him to sell the same under general orders 19 and 21, and rule 11 of this court, with such other advertisement of sale as shall seem to him proper, and to receive the proceeds of such sale and pay them into this court, they then to be deposited in the United States Trust Company, on interest, to the credit of these proceedings, as a separate fund, subject to the further order of this court. The deed to be given by the register to the purchaser will convey a title under the order of this court, free from the lien of the mortgage of September 30th, 1869, in pursuance of the provisions of section 20 of the act [of 1867 (14 Stat. 526)], and the sale will be made free from such lien. The order will recite the application by A. T. Stewart & Co., and will direct that the lien of the mortgage be transferred from the property to be sold to its said proceeds. If it shall be thought desirable, in order to obtain a better price for the property, the injunction may be so far modified that the sale may take place also under the judgment, and the referee may unite in the deed. An order will be settled, on notice, to carry out these provisions.

[In case No. 6,027, A. T. Stewart & Co. claimed to have their estimate of indebtedness under the value of real estate covered by their mortgage included in the amount on which they were entitled to vote for assignee. The claim was not allowed.]

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

Case No. 6,027.

In re HANNA.

[5 Ben. 5;[1] 7 N. B. R. 502.]

District Court, S. D. New York. Feb., 1871.

AMOUNT OF DEBT—VALUE OF SECURITY.

At the meeting of creditors to choose an assignee, a creditor, who held as security for a debt a mortgage, which in his proof of debt he stated, on information and belief, to be worth less than the amount of the debt, claimed to be entitled to vote for assignee, on the difference between the value, so stated, and the amount of the debt. *Held*, that he was not entitled to vote upon such difference, or any part thereof.

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

[In the matter of Samuel Hanna, an involuntary bankrupt.]

At the meeting of creditors called for the purpose of choosing an assignee herein, the firm of A. T. Stewart & Co. had filed a proof of debt, and claimed the right to participate in the choice of assignee, and to have the sum of $50,075.82, being the difference between an item (viz., $100,075.82), of indebtedness, and the value of the securities held therefor, as such value was estimated and sworn to in said deposition, included in the amount on which they were entitled to vote. Edward S. Innes, a creditor who had proved his debt, objected, among other things, that said deposition and the matters therein stated did not entitle the said A. T. Stewart & Co. to participate in the choice of assignee, upon said sum of $100,075.82, until the value of the property held as security should have been ascertained by sale thereof, in such manner as the court should direct. Thereupon, at the request of the counsel for the respective parties, the question was adjourned into court, for decision by the judge, with the following opinion by the register:

By JAMES F. DWIGHT, Register:

The claim of A. T. Stewart & Co. consists of two parts: 1st. For $25,000 and interest, on five several notes and drafts, which amount is unsecured. 2d. For $160,513.80, secured by two mortgages, each for $150,000, and upon which indebtedness has been paid the sum of $61,591.57, leaving still unpaid (but secured by the mortgages), the sum of $98,922.23. This creditor claims to fix the

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value of the securities by the deposition of the partner making the proof of debt, that he "has been informed and believed," that the security of the two mortgages is not worth beyond the sum of $50,000; and that, although the value of these securities may prove to be more or less hereafter, the "estimate" made in this way is sufficient for the purposes of adjusting the amount on which the firm may be admitted to vote for assignee.

I do not consider this position tenable. The twentieth section of the act [of 1867 (14 Stat. 526)] seems to me to clearly determine this point, in saying: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct." The mortgages themselves were to the extent of $300,000, to cover loans and advances; and, as these loans and advances had not equaled the amount stated as that security, I am of opinion that A. T. Stewart & Co. can be 'admitted as a creditor," under this proof of debt, only in the amount of $25,000 and interest, for the notes and drafts of the first class stated; and that the indebtedness stated of the second class must rest in abeyance until the value of the securities stated are ascertained in the manner provided for in the section quoted.

Mr. Hilton, for A. T. Stewart & Co.
Mr. Kursheedt, for Edward S. Innes.

BLATCHFORD, District Judge. I concur with the register in his views.

[In Case 6,026 a special order was made appointing the register special custodian of the property put up for sale under the mortgages to A. T. Stewart & Co.]

HANNA (ROCKHILL v.). See Cases Nos. 11,979 and 11,980.

Case No. 6,028.

The HANNAH.

[Cited in The Harmony, Case No. 6,081. Nowhere reported; opinion not now accessible.]

Case No. 6,029.

HANNAH et al. v. The CARRINGTON.

[2 West. Law Month. (1860) 456.]

District Court, N. D. New York.

MARITIME LIEN—PERFORMANCE OF CHARTER-PARTY.

1. Under the general maritime law, the vessel is ordinarily bound to the cargo, and the cargo to the vessel, for the performance of the usual stipulations of the contract of affreightment; but that law gives no lien on a vessel as a security for the performance of a charter party, or a contract for the transportation of a cargo, until some lawful contract of affreightment is made, and property shipped in pursuance thereof.

[Cited in The Pauline, Case No. 10,848; The R. G. Winslow, Id. 11,736; Scott v. The Ira Chaffee, 2 Fed. 407.]

2. The cases of The Aberfoyle [Case No. 17] and The Pacific [Id. 10,643] commented upon and considered as overruled by the case of Vandewater v. Mills, 19 How. [60 U. S.] 82.

The libel in this case was filed [by Perry Hannah and others against the schooner Carrington, her tackle, apparel, and furniture, and against John Lane, claimant] for the recovery of damages alleged to have been sustained by the violation of a charter-party, or memorandum of charter, made between the libellants and certain part-owners and agents of the Carrington. By the terms of the charter, the vessel was to carry the libellants' freight, of the kind designated, at specified rates, during the season of navigation. It is alleged by the libel, that the part-owners and agents of the Carrington—finding that she could earn more freight and make greater profits by sending her to Buffalo—about the first day of October, and during the period for which she was so chartered, without the libellants' leave, and in direct violation of the charter-party, withdrew her from the trade for which she had been so chartered, and refused any longer to employ her under such charter. It also alleges that freights were then high, and that the libellants were compelled, in consequence of such refusal, to employ other vessels, at higher rates of freight: and that they were, besides, prevented from bringing to Chicago a large quantity of lumber which they then had at Grand-Traverse-Bay; by which they had sustained damages to the amount of $1,800. The claimant, by his answer, insisted, among other things, that the libellants had no lien upon the vessel, even upon the case made by the libel; and by arrangement between the parties, this question was argued without the production of evidence upon the issues of fact made by the answer.

HALL, District Judge. It can hardly be necessary to say, that this suit, being a proceeding in rem, can not be maintained, unless the libellants have a maritime lien, or some other lien or privilege against, or upon, the vessel. As general creditors, however meritorious, they can not proceed against the Carrington in this form of action; and as they have not alleged in their libel, or suggested upon the argument, that they have any lien other than the lien or privilege given by the general maritime law, it is only necessary to consider whether, under that law, they have any privilege against the vessel. Upon this point, the libellants' counsel relied upon the following cases: The Volunteer [Case No. 16,991]; Drinkwater v. The Spartan [Id. 4,085]; The Rebecca [Id. 11,619]; Clark v. Crabtree [Id.

2,847]; Airey v. Merrill [Id. 115]; The Tribune [Id. 14,171]; and he insisted that the case last cited was directly in point in this case. The cases thus cited, with the exception of that of The Tribune, are of little importance as bearing upon this question of lien or privilege; but the counsel is right in supposing that the case of The Tribune is an authority in favor of the existence of the lien insisted upon in this case. Nor is he far wide of the mark in his claim that it is a case in point. There is, however, this difference in the two cases. In the case of The Tribune [supra]; a cargo had actually been laden on board. It was afterwards ordered on shore, and the voyage broken up by the ship-owner; and, consequently the liability of the ship-owners accrued after they had had possession of a cargo, against which, upon the performance of the particular voyage for which the vessel was chartered, and such goods were laden on board, they might have proceeded to enforce their maritime lien for freight; unless, indeed, such lien was waived by the terms of the charter.

I do not, however, regard this fact, as one of much significance, and in the absence of any conflict of authority, I should not deem it material to notice the more important fact, that this question of lien does not appear to have been discussed by Judge Story; or to have been argued by the counsel in that case. The omission, of able counsel, to raise the question of lien, and a decree declaring the existence of a lien directed by a judge deservedly distinguished for his extraordinary learning and his singularly full and exact knowledge of admiralty law, might, under ordinary circumstances, be properly held sufficient to justify a judge of this court in maintaining the existence of a lien in a similar case, without farther authority, and without hesitation. But as there are later authorities, apparently in conflict with the case of The Tribune, it is certainly worthy of remark that the learned judge who decided that case, did not discuss the question upon which the present case must turn.

The case of The Tribune [supra] is only one of several authorities, each apparently sufficient to sustain the position of the advocate for the libellants. Lord Tenterden says (Abb. Shipp. marg. p. 126): "A charter-party, made by the master in his own name, furnishes no direct action against the owners, grounded upon the instrument iself, by the law of England; but when this contract is made by the master in a foreign port, in the usual course of the ship's employment, and under circumstances which do not afford evidence of frauds, or when it is made by him at the ship's home, under circumstances which afford evidence of the assent of the owners, the ship and freight, and therefore, indirectly, the owners also, to the amount of the value of the ship and freight, are, by the marine law, bound to the performance. 'The ship is bound to the merchandise, and the merchandise to the ship,' are the words of Cleriac. By the French ordinance, it is declared that the ship, with its furniture and freight, and the cargo, are respectively bound to the stipulations of the charter-party. And Valin, in his commentary says the rule is the same, whether the affreightment be made by the owner, or the master alone; even at the place of the owner's abode, if the owner does not disavow it." The doctrines thus laid down by Lord Tenterden are substantially adopted by Judge Conkling, in his excellent treatise upon the Jurisdiction, Law and Practice of the Admiralty Courts of the United States (pages 123–128, inclusive), and I infer that these principles, in substance, were acted upon, without doubt or hesitation, by Mr. Justice Nelson, in the case of The Aberfoyle [Case No. 17], and, two years later, in the case of The Pacific [Id. 10,643]. The case of The Pacific was very elaborately and ably argued; but the question of jurisdiction, rather than the question of lien, was the principal subject of discussion, both in the arguments of counsel and in the opinion of the court.—In the points and arguments of Messrs. B. F. Butler and Daniel Lord, for the respondents, it was substantially conceded, that the vessel became bound to the performance of the contract upon which the libel, in that case was filed. The reporter gives the concession in the following language (page 581): (4) "It may be admitted that the vessel became bound to the performance of the contract, and of all the terms of the contract, from the day of the making thereof; and that the particulars in which the libel alleges the breach thereof, were essential terms of such contract. But the question still recurs—Did such breach, occurring before the sailing of the ship, she being actually about to sail, give jurisdiction to a court of admiralty?" It was under this concession as to the liability of the ship, (if the case was one of admiralty jurisdiction) that the learned justice who decided the case upon appeal, entered upon the examination of that case and reached his final conclusion therein. It is therefore not probable that he examined with care, or deliberately considered, the question of lien or privilege; either as it might have been presented in that case, or as it is presented in the case now under consideration. If it was at all considered, it was probably likened to the case of the actual lading of goods under a charter-party, or bill of lading, and not to a case where the ship-owners had refused, as in the present case, to receive merchandise or other cargo which they were bound by the terms of a valid charter party to receive and transport. Nevertheless, the decision of Mr. Justice Nelson, in the case of The Pacific, would have determined me to decide the question now under discussion in favor of the libellant, had not the case of The Yankee Blade (Vandewater v. Mills), 19 How. [60 U. S.] 82, decided at the last term

of the supreme court, been cited by the advocate for the respondent.

It was contended on the part of the libellant in the case of The Yankee Blade, that the instrument upon which his libel was filed, was in the nature of a charter-party, or had some features of a charter-party; and that the court should, therefore, extend the maritime lien by analogy or inference, for the purpose of giving the libellant his remedy against the ship, and sustaining their jurisdiction. And in his argument, the learned counsel for the libellant endeavored to establish the following proposition: "Agreements for carrying passengers are maritime contracts, pertaining exclusively to the business of commerce and navigation, and consequently, may be enforced, specifically, against the vessel by courts of admiralty, proceeding in rem." This proposition appears to have been deliberately considered, and forms the principal subject of discussion in the opinion of the court, as delivered by Mr. Justice Grier. The learned justice cites and relies upon 2 Boulay Paty (Cours de Droit Commercial), 299, which would seem to be a very direct authority against the existence of a lien in this case. The extract is as follows: "Hors ces deux cas, (viz: default in the delivery of goods, or damage for deterioration,) il n'y a pas de privilege a pretendre de la part du marchand chargeur; car si les dommages et interets n'ont lieu que pour refus de depart du navire, pour depart tardif ou precipite, pour saisie du navire où autrement, il est evident qu' a cet egard la creance est simple et ordinaire sans aucune sorte de privilege." The case of The Yankee Blade [supra] would necessarily have decided this case without further question, if the decision of that case had depended upon the views entertained by the court upon the question thus discussed by Mr. Justice Grier in his opinion; but it was contended by the advocate for the libellants in this case—and it is apparent upon the face of the opinion—that the decision of that question was not, in the judgment of the court, strictly necessary for the determination of the cause. Mr. Justice Grier says, the contract proceeded upon is not a charter-party; that it is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New-York and San Francisco; and that it is not one of those contracts to which the peculiar principles or remedies given by the maritime law have any special application, but it is the fit subject for the jurisdiction of the common law courts. But it appears the question before referred to was, nevertheless, fully argued by counsel, and fully considered by the judge; the court having, in that case, followed the practice most frequently adopted in that tribunal, to discuss and determine the important questions raised and argued by the respective counsel, whether their determination is or is not absolutely essential to the judgment to be pronounced—a practice which has many advantages, and has been generally useful, but which has, at times, been the subject of unfavorable remark.

The fact that the case of The Yankee Blade may have been decided upon the ground last suggested by Mr. Justice Grier, in his opinion, and the fact that the case of The Tribune [Case No. 14,171], The Aberfoyle [Id. 17], and The Pacific [Id. 10,643], were not referred to by Mr. Justice Grier, have induced me to examine, with some care, the earlier authorities cited by Lord Tenterden, and some other authorities bearing upon the question, before deciding this case. It will be recollected that Lord Tenterden, in his text, cites the saying of Cleriac, and also refers to the French ordinance (the celebrated Marine Ordinance of Louis XIV.), and the Commentary of Valin. This saying of Cleriac—"Le bateau est oblige a la marchandise, et la marchandise au bateau"—is found in his commentary upon the 21st Article of the Judgments of Oleron (see Les Us et Coutumes de la Amsterdam, Ed. of 1788, at page 43), and substantially the same language is found in the 18th article of "Reglemens de la Navigation des Rivieres" (Id. p. 297). In the first position, it is not, so far as I can see, connected with any other language applicable to the present case; but in the last it would seem to be limited, to some extent, at least, by the contract. The whole article is as follows: "Le bateau est oblige a la marchandise, et la marchandise du bateau; c'est-a-dire, si le marchand ne paie pas le fret, s'il manaque au terme et câuse du retardement, le patron ou les mariniers sont privilegies de faire saisir les marchandises ou denrees qu'ils ont conduites, et les faire vendre a' concurrence de leur du; comme aussi si le patron ou compagnons n'ont pas fait leur devoir, et qu'a leur faute les marchandises soient empirees, ou deprecies; le marchand prut faire proceder par saisie du bateau, et des apparaux pour son indemnite, le tout par egal privilege." The privilege of a charterer under this article, and the binding of the ship to the performance of the charter-party, would seem to be limited to the cases specified, and to be confined to cases in which the shipper had sustained damages by the fault of the master and crew, in respect to goods actually laden on board. This is, I think, fairly to be inferred, though I concede that it is not so distinctly and directly expressed, as not to admit of doubt. It may be remarked, in passing, that the reference in Abbott is probably to the saying of Cleriac, as first above referred to; and that the attention of the learned author may have rested only upon the epigrammatic saying, which forms his quotation, without having been at all drawn to the same expression and to the context of that saying in the instance last above quoted.

The article of the French ordinance to which Lord Tenterden refers (Liv. 3, tit. 1, art. 11) is in its literal terms an apparent authority for the doctrine which he affirms, and for the position of the advocate for the libellant in this case. It is as follows, article 11: "Le navire, ses agres et apparaux, le fret et les marchandises chargees, seront respectivement affectes aux conventions de la charte-partie." That is to say "the ship, her rigging and tackle, the freight and goods laden shall be respectively bound by the conventions and stipulations of the charter-party." But the learned commentary of Valin upon this article (1 Valin, Rochelle Ed. 1776, p. 629), after referring to the oft-quoted saying of Cleriac before alluded to, and remarking upon the privileges which exist in certain cases, refers the reader, in reference to the damages sustained by the non performance of a charter-party (dommages et interests pretendus par l'affreteur, pour l'inexicution de la charte-partie), to the 16th article, tit. 14, of the first book of his Commentaries (page 362, vol. 1). In commenting upon this article, and particularly that portion of it that relates to the privilege of the merchant-shippers (marchands-chargeurs), he says (page 364): "Cour ce qui est de ces marchands chargeurs, mis au rang des creanciers privilegies, on ne concoit que deux cas ou ils puissent se presenter. L'un est, si les marchandises chargees pour leur compte dans le navire, ne leur ont pas ete remises, l'armateur du navire, ou le capitaine les ayant retenues en tout ou partie; l'autre, si les marchandises leur ayant ete delivrees, elles se sont trouvees avariees par le faut du maitre ou des gens de l'equipage, dont le proprietaire du navire est responsable. Mais l'un et l'autre cas sont egalement difficiles a rencontrer, surtout le premier, un marchand chargeur etant, comme il est naturel, extremement attentif a demander la deliverance de sa marchandise, et a la suivre partout, si le proprietaire et le capitaine refusent ou different de lui en faire la remise. Toujours est-il vrai que, hors ces deux cas, il n'y a pas de privilege a pretendre de la part des marchands chargeurs; car s' il ne s' agit que des dommages et interets pretendus par un affreteur, qui a l'occasson de la saisie reelle du navire ou autrement, aura ete oblige de retirer du navire les marchandises qu'il y avoit chargees, ou qui aura ete empeche d'y faire son chargement; il est evident qu'a cet egard, sa creance est simple et ordinaire sans aucune sorte de privilege; du moins c'est ainsi que je crois qu'on doit limiter la disposition de l'article ii., du titre des charte-parties." This quotation certainly shows that Valin supposed the privilege against the ship for the non-performance of a charter-party, was confined to the two cases mentioned: Of the non-delivery of goods laden on board, and of damage to such goods, by the act of master or crew. And substantially to the same effect, is the significant quotation from Boulay Paty, made by Justice Grier. That the privilege of the merchant charterer against the vessel chartered, was thus limited under the Marine Ordinance of Louis XIV., and in the judgment of Cleriac and Valin, and has not been extended farther by the general maritime law of Europe, may, I think, be safely assumed upon the language of the Code de Commerce, as adopted in September, 1807, and as published in Paris in 1856. This Code (article 191), enumerates the privileged debts for which ships and other vessels are liable, and extends the privilege to some debts which would not, in this country, be deemed privileged. These debts are divided into eleven classes, and they are privileged in the order in which they are classed. The 11th class embraces, and is in fact confined to "the indemnity due to the freighters, for not delivering the goods laden on board, or for any damage which the goods may have sustained through the default of the captain or crew." This clause of the article, standing now as it did in 1807, in this language: "(11) Les dommages interets dus aux affreteurs pour le defaut de deliverance des marchandises qu' ils sont chargees, ou pour remboursement des avaries souffertes par lesdites marchandises par la faute du capitaine ou de l'equipage." This clearly does not include such a demand as that prosecuted by the libellant in this suit, and this fact is conclusive evidence that in France it has not, for the last half-century, been understood that such a demand is secured by a privilege against the ship. The Civil Code of Louisiana contains substantially the same provision as the Code de Commerce, in respect to the privilege of a charterer or freighter; and by that Code the privilege is thus defined and limited: "The amount of damage done to freighters for the failure in delivering goods which they have shipped, or for the reimbursement of damages sustained by the goods through the fault of the captain or crew."

I am not aware that any such privilege as is claimed by the libellant in this case, can be sustained by any reference to the civil law, or maintained upon any of the principles on which the priviligium, of the Roman law, is based; and I think it quite clear that Lord Tenterden is not sustained by the authority of Cleriac and Valin, on which he relied. This weakens the authorities which have been based upon Lord Tenterden's opinion, and I shall act upon the conviction that, if the question presented in this case shall hereafter be presented to the supreme court of the United States, the learned justices of that court would abide, and ought to abide, by the opinion expressed by Mr. Justice Grier in the case of The Yankee Blade, in favor of the respondents: The libel is therefore dismissed with costs, but without prejudice to any proceeding at

law or in personam in admiralty, which may hereafter be instituted to enforce the payment of damages claimed in this suit. See The Freeman v. Buckingham, 18 How. [59 U. S.] 182–188, at which last mentioned page Mr. Justice Curtis, in delivering the opinion of the court, says: "Under the maritime law of the United States, the vessel is bound to the cargo and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

HANNAH, The (CLINTON v.). See Case No. 2,898.

HANNAH, The (FORBES v.). See Case No. 4,925.

HANNAH, The (HUNTER v.). See Case No. 6,905.

HANNAH M. BUELL, The (HENDERSON v.). See Case No. 6,352.

Case No. 6,029a.

The HANNAH M. JOHNSON.

[Blatchf. Pr. Cas. 35.] [1]

District Court, S. D. New York. Aug., 1861.

PRIZE — PLEADING — REASONABLE CAUSE FOR SEIZURE.

1. Mode of pleading in an answer and claim commented on.

2. The prize law regards property which was enemy property when shipped as continuing to be such, although consigned by a bill of lading to other parties, unless clear evidence is given of a change of title.

3. Vessel released as not being enemy property, and restored on payment of costs, there having been reasonable cause for her seizure.

4. Cargo condemned, as enemy property, unless further proof be furnished within ten days as to ownership of cargo.

In admiralty.

BETTS, District Judge. The schooner Hannah M. Johnson was captured on the 31st of May, 1861, twelve miles to the southwest of Cape Lookout, on the high seas, by the United States brig-of-war Perry, under command of Lieutenant E. G. Parrott, and was libelled, together with the cargo on board, for condemnation and forfeiture, as lawful prize. She is charged with giving aid and comfort to the enemies of the United States, and, during her previous voyage and prior thereto, with having carried the flag of the treasonable league called "The Confederate States of America," enemies at war with the United States. An allegation against her, of having violated the blockade of New Orleans, was abandoned by the district attorney, on the trial of the cause. Three answers and claims, nominally, were filed in the cause; one by "Charles H. Wells, on behalf of himself and others," (after this word an illegible scrawl was inserted, supposed to be meant for the word "owners,") "of the schooner H. M. Johnson, the respondent also claiming the" (word very faintly written, supposed to be) "cargo, as carrier thereof." The claimants deny most of the charges in the libel. They do not state the ownership of the vessel, or the place or business of her employment when arrested. An answer was also put in by Charles C. Faber and Henry M. Faber, of the firm of C. C. & H. M. Faber, for their interest in sixty bales of cotton on board the schooner, consigned to them at New York, from New Orleans, alleging that she was an American vessel, and that her sailing from New Orleans without a clearance did not affect the rights of the claimants to the cotton. The claimants do not aver any property or interest to be vested in them in the sixty bales of cotton on board the schooner. An answer was also interposed by Hampton S. Smith and William Patrick, of the city of New York, for their interest in sixty-five bales of cotton on board the vessel. They aver they were in advance to the shippers for the value of the cotton. They do not state who were the shippers, nor what the advance was, or when or how made. All these claimants make general denials to the charges in the libel, and take substantially the grounds of exception and defence to the suit which were made in the preceding cases. The mode of pleading the defences in this case is exceedingly indefinite, and discloses essentially nothing of the particulars which the claimants propose to give in evidence in avoidance of the capture. It does not appear upon the claims who is owner of the vessel, or what was the place of her outfit, or what has been the course of her trade or employment. No test affidavits are appended to the pleadings. These particulars are of material importance, on the general charge of the confiscability of the vessel or cargo, as enemy's property, as also on the charge against her for a violation of blockade, had that charge not been abandoned, because, upon the libellants rests the necessity of substantiating the averments of the libel, so far as to show probable cause for the seizure and prosecution; and they are not without relevancy under the further charge that the vessel had been employed in giving aid and comfort to the enemies of the United States in actual hostilities against the government. The mode of pleading not being specifically objected to by the United States attorney, its irregularity or imperfectness will not demand further notice from the court, as those external facts do not appear to have any important bearing upon the merits of the cause.

It is not easy to ascertain from the proofs

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

when the vessel sailed south under her license, or when or at what port she arrived, or how she was laden, and for whose benefit. She appears to have been employed in the winter and early in the spring of 1861, in short trips, on freight, in carrying lumber and produce, between ports of the states of Florida, Louisiana and Texas; and to have terminated that course of business in May, 1861, and on the 14th of that month to have sailed from New Orleans under a Confederate States clearance, freighted with a miscellaneous cargo, all of which remained on board of her at the time she was taken as prize by the libellants on the high seas. She was built, owned in numerous shares, and registered in the state of New York, one only of her owners residing out of that state, and in the state of Connecticut. The vessel had no interest in the cargo laden on board further than for freight, and the only direct evidence as to the ownership of the cargo is gathered from the loose supposition of the chief mate that it belonged to the shippers, because he knew of no other owners to it. The bills of lading were in all instances drawn to consignees or order or assigns, in no instance designating whether the goods were despatched to the interest of the consignor or consignee; and no letter of advice or explanatory evidence is produced to determine that matter. The shippers and consignors were all at the place of shipment, and leave it wholly undisclosed on the bills of lading that the shipment is not entirely theirs, and for their exclusive benefit. The claimants now ask the intendment to be made, on the claims of Smith & Patrick, that the cotton shipped to their order became, by the address to them, their individual property. Enemy's property in transitu does not change its character by such mode of transmission. The prize law will regard the property as retaining its liability to arrest and condemnation, the same as in the hands of its owner when shipped. Wheat. Mar. Capt. 85; The Marianna, 6 C. Rob. Adm. 24. The bill of lading, until indorsed and given circulation as a negotiable instrument, does not pass absolutely, property shipped to an assignee or consignee; and especially in prize captures, it is regarded as remaining the property of an enemy, when exported during hostilities which continue to the time of capture. The Abo, Spinks, Prize Cas. 46. Ordinarily, the delivery of goods by a shipper to the master of a vessel is a delivery to him as agent of the consignor, and not of the consignee, and will so operate in law, unless explanatory facts on the face of the bill of lading, or otherwise proved, accompany the delivery and evince the contrary. The Frances, 8 Cranch [12 U. S.] 418. And to that effect is the reasoning of the court upon the English cases (Lawrence v. Minturn, 17 How. [58 U. S.] 100, 107), although in Grove v. Brien, 8 How. [49 U. S.] 439, it was held more broadly that a consignment generally (not otherwise explained) vests the goods in the consignee. That doctrine, with the qualification made by the court, no way impugns the rule in respect to prize seizures, and, if it can prevail, and be construed to render the shipment of the cotton at New Orleans an assignment there, in payment of the claimants' debt, that result must be obtained by full and clear evidence that the facts were really so, on which the shipment and the delivery of the cotton to the master of the vessel, at the time of its shipment, was made. The Abo, above cited. The other claimants, Faber & Faber, do not assert any interest in the cargo in themselves; but, as the claims are framed in exceedingly loose and indefinite terms, and the arguments on the hearing seem to regard all the claimants as entitled to a common defence, the court is disposed to consider the points applied to one to embrace all the claims pending.

The other allegations in the libel, upon which the libellants urge the condemnation of the vessel and cargo, are that they were used and employed by her in aid of the enemies of the country. The method of such employment is not specified in the libel, nor does it appear that a substantive offence of the denomination is, under the law of nations, imputable to property, either consisting in vessels or goods. It may be made a confiscable offence by municipal law, but it would then fall under the jurisdiction of local and municipal courts, and not be cognizable by prize courts. The court has not been put in possession, since the adjournment of congress, of the acts passed at its last session; and it is unable to declare that no law now exists in this country subjecting vessels and cargoes belonging to the United States or its citizens to condemnation and forfeiture for the commission of the acts denounced in this libel, nor but that such offences may be placed under the jurisdiction of prize courts. No such law existed at the time of the capture made in this case, and there can be no cause for judicial arrest or adjudication against this vessel and cargo under the public law.

The further charge, that the vessel sailed under, raised, or used, the flag of the enemy during any part of the voyage, is not supported by the proofs. No other evidence is adduced to the fact than the answers to the preparatory interrogatories. Those answers disclose that, in some instance, whilst the vessel lay in enemy's ports, she was compelled by the local authorities to have that flag on board, but that it was always repudiated by the officers of the vessel as belonging to her, and was destroyed as soon as they got the vessel to sea out of those ports; and it is not made to appear that the flag was ever used on the vessel after her officers or crew had knowledge or notice that the government of the United States recognized a state of war to be subsisting and waged against them by the insurrectionists or rebels

in New Orleans. The vessel left the port of New Orleans, on her home voyage, on the 14th of May, 1861. The proof does not show that she committed any act previous to that time in aid of the enemy, with notice that war was levied against the United States and recognized by the government. The acceptance of a clearance under the authority of the Confederate States was an act of personal misfeasance against the revenue laws of the United States, and punishable under these laws, as being tantamount to coming into port without a lawful one; but it is judicially known to the court that these acts were for a considerable period, and until open hostilities were set on foot by the insurgent states, tolerated as necessities imposed upon loyal vessels absent from their ports of destination, until the rebellion progressed to acts of open hostility on the part of the rebels and insurgents; and accordingly those particular acts at such period must be regarded by the court, in a prize suit, as committed previous to the recognition by the government of an existing state of civil war between the insurgent portion of the country and the government.

In my opinion, therefore, it is not proved, on the part of the libellants, that the claimants of the vessel had actual or constructive notice, at the time the cargo in question was laden on board of her, that a state of war between the insurgents and the government existed and was recognized by the government of the United States; and that accordingly the vessel, her tackle, &c., is not liable to seizure and condemnation for the acts alleged against her. The cargo was shipped and laden on board the vessel at New Orleans by residents of that place, after the public secession or rebellion of the state of Louisiana, and after the open avowal of war with the United States made by the Confederate States; and all persons domiciled at that place are legally chargeable with the acts of the government under which they claim allegiance. The property so shipped was enemy's property, and liable to confiscation to the United States as such. The judgment of the court accordingly is that the vessel, her tackle, &c., be restored to the claimants, on payment of costs, there being reasonable cause for her seizure, as she sailed from an enemy port, under an enemy clearance, and without exhibiting, when arrested, full muniments of title as a loyal vessel. And it is further ordered, that a decree of condemnation and forfeiture be rendered against the cargo seized with the vessel, as being enemy property at the time it was laden on board, together with costs, leave, however, being given to the respective claimants thereof to produce further proofs that the cargo when shipped, belonged to neutral or loyal owners. Such further proofs are to be furnished at the costs of the claimants, and are to be given within ten days from the entry of this decree, unless further time be allowed therefor by the court or by stipulation of the libellants.

[NOTE. There was a hearing upon further proofs, and judgment affirmed, in Case No. 6,030. An application for allowance of freight for the carriage of the confiscated cargo was denied in Case No. 6,031.]

Case No. 6,030.

The HANNAH M. JOHNSON.

[Blatchf. Pr. Cas. 97.] [1]

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

PRIZE—ENEMY PROPERTY—TRANSFER TO CREDITORS.

1. Enemy property, shipped by an enemy, from an enemy port, to his creditor, to be applied on a debt, but which, before it came to the creditor's hands, was captured at sea, continues to be enemy property.

2. The transfer to the creditor cannot be carried into effect after the intervention of the legal rights of the captors.

Hearing on further proofs. [The original proceeding upon the libel is given in Case No. 6,029a.]

BETTS, District Judge. The decision in the above cause, on the hearing upon the pleadings and the proofs in preparatorio, concludes, after condemnation of the cargo, with costs, as being enemy property, with the provisions following: "Leave, however, being given to the respective claimants thereof to produce further proofs that the cargo, when shipped, belonged to neutral or loyal owners; such further proofs are to be furnished at the cost of the claimants, and are to be given within ten days from the entry of this decree, unless further time be allowed therefor by the court, or by stipulation of the libellants."

On the 8th of January instant, the counsel submitted further proofs taken upon their mutual attendance before a commissioner of the United States courts, with their respective arguments to the court thereon. This attempt to protect the cargo was, however, limited to the claim of ninety-nine hides in behalf of Leopold Lithauer, to which some further proofs were produced and addressed, and nominally, also, to the claim interposed in behalf of C. C. & H. Faber, of New York, to sixty bales of cotton. That claim was not upheld before the court after the further proofs were introduced, but I understand, from extraneous suggestion, that it was the understanding of counsel, that the court should consider and pass upon the further proofs in this respect also, as part of the matter submitted for the judgment of the court. The hides were shipped by Weiner, in his own name, and continued to be his property to the time of capture. They never came to the hands of Lithauer by actual or

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

symbolical delivery from the New Orleans owner. They were designed, no doubt, in the process of negotiation and arrangement between Weiner and Lithauer, to be remitted by the former, and were expected to be accepted by the latter, in credit upon an open account in their mutual dealings, but had never, in the transition, so changed hands as to become the property of Lithauer, or to operate as an acquittance to their value of the liabilities of Weiner to him. They remained, in point of law, the property of the New Orleans merchant, and must have continued so, without his consent had been procured to indorse the bill of lading to Lithauer, or otherwise transfer the merchandise to him. It was, no doubt, a mental understanding and purpose with Weiner that the goods should go to Lithauer, but that design, if existing, failed of being carried into effect, and, by the rules of prize law, could not be done after the intervention of the legal rights of the captors. Wheat. Capt. Mar. 85, § 16; The Abo, 1 Spinks Pr. Cas. 46. Accordingly, the hides left New Orleans in the ownership of a trader resident there for many years, and after the war between that state and the United States was set on foot, and when seized was enemy property. The master of the vessel had alone intervened and claimed the hides in the character of owner and carrier; but he shows no proof of any right of property in hides in himself. It accordingly follows that the exportation of them from New Orleans was by the shipper for his own interest.

The claimants, Faber & Co., in the testimony given on the further proofs, prove that, in June last, they received the sixty bales of cotton shipped in the Hannah M. Johnson, as consignees and cotton-brokers. No bill of lading accompanied the shipment. The master's manifest, attested at New Orleans the 14th of May last, and his freight list of the same date, represent the cotton as shipped at New Orleans by F. M. Fish. It was remitted, through the agency of Jacob Barker, for Mr. Fish, who was at the time a resident also of New Orleans. The order to deliver the goods to Barker was made on the drayman's receipts of the cotton on board the vessel before she sailed from New Orleans, May 14, and Fish's letter addressed to Barker in New Orleans, May 22, shows that Fish still continued to act as owner of the goods, and directed their consignment in New York to Faber & Co. Mr. Barker consequently, on the 23d of July, by letter of that date to New York to Faber & Co., recognizes Fish's ownership of the cotton, and directs them to deliver it, or the avails of it, to Hendrickson, of Rhode Island. Mr. Barker never made any advances to Fish upon the assignment of the cotton to him, and Fish continued to act as the sole owner of it until the time it, or its avails, went to Hendrickson, which was not until July last. Mr. Fish still continues a resident of New Orleans. The further proofs introduced by these parties have no way varied the case as it stood upon the original evidence, and the decision before pronounced must now be made final in respect to those portions of the cargo also. Judgment accordingly.

[An application for freight money for the confiscated cargo was denied in Case No. 6,031.]

Case No. 6,031.

The HANNAH M. JOHNSON.

[Blatchf. Pr. Cas. 160.] [1]

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

FREIGHT—PROPERTY OF ENEMY—CONFISCATED CARGO.

The vessel having been restored, as belonging to loyal owners, and part of her cargo having been condemned as enemy property, captured on a voyage from New Orleans to New York during the war, the master of the vessel applied to be paid, out of the proceeds of the condemned cargo, the freight upon it for the voyage: *Held*, that the application must be denied.

In admiralty.

BETTS, District Judge. Portions of the cargo of the above vessel were condemned as prize by the court on the capture of the vessel and cargo. The vessel was acquitted and restored to the claimants, as belonging to loyal owners, and not having been employed by them in any unlawful acts against the government in withdrawing herself from the port of New Orleans and returning to her home port after the declaration of war by the seceded states against the United States. Portions of the cargo shipped on board by traders domiciled in New Orleans and transmitted to New York were condemned and forfeited as being enemy property. The proceeds of that property remain in the registry of the court undistributed; and the petitioner, the master of the vessel, applies in that capacity for payment of freight out of the fund earned on the transportation of such part of the cargo on the voyage from New Orleans to New York.

The petition rests upon the assumption that the acquittal of the vessel from condemnation as lawful prize necessarily admits also the legality of her employment in carrying the cargo, and her title to freight therefor. This is by no means a fact or a legal conclusion. The charges upon which the vessel and her lading were seized and tried were, that they belonged to the rebels, or, if neutral, had evaded the blockade of the port of New Orleans. The judgment of the court disaffirmed these charges, except in relation to that part of the cargo which was condemned as enemy property, and which was brought into this port. The vessel, in the transaction, did not act at all in the character of a

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

neutral. If she had been, in fact, of neutral ownership, she would not have been permitted, under the rules of the prize law, to go into an enemy port and freight herself there pendente lite with enemy property. Such property is subject to capture at sea, though found in a friendly vessel destined to another friendly port. Kent. Comm. 124; Hall. Int. Law, 471; Wheat. Mar. Capt. c. 3, arts. 9, 13. This property would not, therefore, be exempt from capture on board a neutral vessel, had it been innocently freighted by the shipper from one neutral port to another; and only on such condition would the carrier be entitled to recover freight from the captor for the carriage performed in its transportation. The undertaking of the master to transport the property from an enemy country was not, as to him, an innocent act. It was in aid of the commerce and trade of an enemy, and the rules of public law interdict as illegal all such transactions by subjects of a belligerent nation with those of its enemy. Wheat. Int. Law, 357; The Hoop, 1 C. Rob. Adm. 196.

The court restored the vessel on this capture, on the ground that taking her from the port after the commencement of the war and the imposition of the blockade was not a proceeding for the benefit of the enemy, but was a withdrawal of home property by loyal citizens in which matter the enemy had no beneficial interest. The principle in respect to enemy property laden in the vessel, and transported for the benefit of enemy owners, is entirely different. Not only is such property liable to confiscation, but the interference of the master, in aiding its conveyance from an enemy port for the benefit of its owners, is wrongful and illegal, and in violation of the rights of his government in the property, and of his own duties and obligations as a subject during war. This doctrine is declared and enforced most explicitly and inflexibly by the highest authorities in America and Europe. 1 Kent, Comm. 55, 66, 68; Wheat. Mar. Capt. 220; 3 Phillim. Int. Law, § 70; The Sally, 8 Cranch [12 U. S.] 382; The Rapid, Id. 155; Wheat. Int. Law, pt. 4, c. 1, arts. 9, 13; The Hoop, 1 C. Rob. Adm. 196. The petitioner is disqualified by his own act, in dereliction of his duties as an American citizen, in aiding and promoting the trade and commerce of the enemy, flagrante bello, from deriving any advantage against the government through his unlawful acts and agency. His application, therefore, to be allowed freight for the carriage of enemy property on the voyage in question, with knowledge of the character of the property and of the existence of the war, cannot be entertained. The motion must be denied.

[The proceedings upon the libel and further proofs are given in Cases Nos. 6,029a and 6,030.]

The HANNAH M. JOHNSON. See Case No. 6,451.

Case No. 6,032.

In re HANNAHS.

[8 Ben. 475.] [1]

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

OBJECTION TO DISCHARGE—FRAUDULENT TRANSFERS—BOOKS OF ACCOUNT.

1. In February, 1874, H. made a conveyance of property to his father, and, in February, 1874, and in March, 1875, he transferred property to S. & H. He was insolvent or contemplated insolvency, when he made such conveyance and transfers, and he made them with intent to give preferences. A petition in involuntary bankruptcy was filed against him on July 16th, 1875. On his applying for his discharge in the bankruptcy proceedings, specifications of objection were filed under the 5th subdivision and the 9th subdivision of section 5110 of the Revised Statutes, charging such transfers to have been fraudulent, and also a specification of objection that the bankrupt had not kept proper books of account, he not having, from June, 1874, to January, 1875, kept a cash book, journal or ledger: *Held*, that the specifications under the 5th subdivision of section 5110 were not sustained, but that the specifications under the 9th subdivision of that section were sustained.

2. In the absence of a cash book, it was necessary for the bankrupt to show that the entries which would have appeared in it, did appear elsewhere in his books as entries of cash, and that the state of his cash receipts and payments could be ascertained from the books which he did keep; which had not been shown.

3. A discharge must be refused.

Various specifications were filed of objections to the discharge of [John J. Hannahs] the bankrupt herein. Some were as to alleged false swearing by the bankrupt, which were held to be not sustained. As to others the following opinion was rendered.

E. Smith, for bankrupt.

R. A. Pryor and Frederick H. Kellogg, for creditors.

BLATCHFORD, District Judge. The petition in bankruptcy herein was in involuntary bankruptcy. It was filed July 16, 1875. Under section 10 of the act of June 22, 1874 [18 Stat. 180], it is the law as to transactions occurring after August 22, 1874, that, by virtue of section 5128 of the Revised Statutes, if an insolvent person, within two months before the filing of a petition against him in involuntary bankruptcy, with a view to give a preference to a creditor, makes any transfer of any part of his property, the person receiving such transfer having reasonable cause to believe such person is insolvent, and knowing that such transfer is made in fraud of the provisions of the bankruptcy statute, the same shall be void. It is, probably, true that on the question of granting a discharge, the court is only to look to the acts and intent of the bankrupt, and that, under the 5th subdivision of section 5110, a discharge must be withheld if the bankrupt has given any fraudulent preference, contrary to the pro-

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

visions of the bankruptcy statute, or has made any fraudulent transfer of any part of his property, without reference to whether such facts exist in regard to the transferee as to enable the assignee to recover back from him the transferred property. In re Gay [Case No. 5,279]. But, in regard to specifications framed under such 5th subdivision, this court held, in Re Freeman [Id. 5,082], that the "fraudulent" conveyance referred to in such 5th subdivision means only such a conveyance as is so declared to be void. If there be, in the case of In re Louis [Id. 8,527], any thing which seems to conflict with the decision in Re Freeman the latter must prevail. The point was not raised in Re Louis, and that case would seem rather to have been decided on specifications made under subdivision 9 of section 5110. So far, therefore, as the 5th specification in the present case relates to fraudulent transfers, it must be overruled, for all the transfers referred to in it are transfers to creditors, and that to Strang and Holland Brothers of March, 1875, was made more than two months before the 16th of July, 1875, while all the others were made before August 22, 1874, and, therefore, more than four months before July 16, 1875, and are governed by section 5128, as it stood before the act of June 22, 1874, was passed.

But, the 9th specification is founded on the 9th subdivision of section 5110, and avers that "the bankrupt has, in contemplation of becoming bankrupt, made certain pledges, payments, transfers, assignments and conveyances of his property or a part thereof, directly or indirectly, absolutely or conditionally, for the purpose of preferring certain creditors or persons having or not having a claim or claims against him, or who are or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts." Under the decision of this court in Re Goldschmidt [Case No. 5,520], as to the meaning of the words in that sub-division, "in contemplation of becoming bankrupt," I think that this 9th specification is sustained, so far, certainly, as relates to the conveyance by the bankrupt to his father, in February, 1874, and to his transfers to Strang and Holland Brothers, in February, 1874, and March, 1875. He was insolvent or contemplated insolvency when he made such conveyance and such transfers, and he made them with intent to give preferences. He is therefore, according to section 5021, to be deemed to have thereby committed acts of bankruptcy. He contemplated committing the acts of bankruptcy which he so committed, and he, therefore, contemplated becoming bankrupt, and, as before said, he made the conveyance and the transfers with intent to prefer the transferees.

As to the failure of the bankrupt to keep proper books of account, it appears, that, from June, 1874, to January, 1875, the bankrupt kept no cash book, journal or ledger. In the absence of a cash book, it must clearly be shown by the bankrupt that the entries which would there appear, appear elsewhere in his books as entries of cash, and that the state of his cash receipts and payments can be ascertained from the books he did keep. This is not shown. A discharge is refused.

[In Case No. 6,033, the court refused to confirm a composition with creditors on account of two dissents.]

Case No. 6,033.

In re HANNAHS.

[8 Ben. 533.] [1]

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

COMPOSITION PROCEEDINGS AFTER REFUSAL OF DISCHARGE—JURISDICTION.

After the refusal of a discharge in bankruptcy to H. he filed a petition in composition, under which a meeting of creditors was had, at which he proposed a composition of one-half of one per cent., payable in ten days after the recording of the final order of confirmation. The resolution of composition was passed by the requisite number and amount of creditors, but was opposed by two creditors who had successfully opposed his discharge: *Held*, that, without passing on the question whether the court had jurisdiction of composition proceedings begun after the refusal of a discharge, the court was satisfied that the composition was not for the best interests of the two creditors who opposed and defeated the discharge of the bankrupt, and would, therefore, refuse to confirm the resolution.

[Distinguished in Re Odell, Case No. 10,427.]

[In the matter of John J. Hannahs, a bankrupt.]

Eugene Smith, for bankrupt.

F. H. Kellogg and J. Reynolds, for dissenting creditors.

BLATCHFORD, District Judge. The bankrupt having applied for his discharge, his discharge was opposed by two creditors, on specifications of objection filed, and, on the 29th of June, 1876, by an order made by this court, his discharge was refused. See [Case No. 6,032]. He had been adjudged a bankrupt on the 3rd of August, 1875, on the petition of his creditors. The grounds on which a discharge was refused were, that he had, in contemplation of becoming bankrupt, made certain conveyances of property to creditors for the purpose of preferring them, and that he had failed to keep proper books of account. On the 11th of July, 1876, the bankrupt presented a petition to this court, which sets forth, "that no assets have come into the hands of the assignee appointed herein;" that the bankrupt "has no assets or property of any kind or description;" that his "friends have offered to advance a sum of money to enable him to propose a composition to his creditors;" that his "creditors have almost unanimously expressed a desire" that

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

he "should obtain a discharge from his debts and have stated their willingness to accept any composition which should accomplish that result and leave" him "free to go into business anew; that nearly all of said creditors have voluntarily signed a paper agreeing to accept, by way of composition, the payment of fifty cents for every hundred dollars of the principal amount of their claims against" the bankrupt; that he "believes that said composition would be gladly accepted by every one of his thirty creditors, with the exception of two creditors only, who have violently opposed" his "discharge, and shown a hostile determination to prevent" him "from ever again engaging in any business;" that he "has no means of gaining a livelihood and no prospect of ever being able to do so, unless through the relief of composition proceedings;" and that he "therefore proposes a composition to his creditors as aforesaid of fifty cents for every hundred dollars of the debts due to them respectively from" him, "payable in cash immediately upon and after the final confirmation and approval of said composition." The petition contains other proper allegations and prays for a meeting of creditors. A list of creditors annexed to the petition shows that there are 29 creditors wholly unsecured and one creditor fully secured. Among the 29, are the two creditors who opposed the discharge. The usual proceedings took place and the meeting of creditors was held. At the meeting the bankrupt proposed the composition above named, being one-half of one per centum, the same to be paid in money within ten days after the recording of the final order of the court confirming the composition proceedings. The statement of debts presented to the meeting shows 30 debts. Four of the creditors hold security. One of the 4 is fully secured. The securities held by 2 others of the 4 are stated to be of no value whatever, and the securities held by the remaining one of the 4 are stated to be of unknown value, but of much less value than the claim. The statement of assets sets forth that "the bankrupt has no assets or property of any kind or description whatsoever, except the technical right to redeem the securities and assets which, as above set forth, are pledged to his secured creditors. This right to redeem upon payment in full of the debts of said secured creditors is of no value whatever." The composition is confirmed by the signatures of the bankrupt and of 20 of the 29 unsecured creditors. It is opposed by the two creditors who opposed the discharge in bankruptcy. The grounds of opposition are, that the proceedings in bankruptcy are closed, within the meaning of section 4972 of the Revised Statutes, so far as the matter of any discharge of the bankrupt is concerned; and that, since the refusal of a discharge to the bankrupt, there has not been any case of bankruptcy pending, within the meaning of section 17 of the bankruptcy amendment act of June 22, 1874 [18 Stat. 182], and that, therefore, this court has no jurisdiction of this composition proceeding; that the composition is not for the best interest of all concerned; and that it can not proceed without injustice to the creditors who opposed and defeated the application for discharge.

I cannot regard this composition as for the best interest of all concerned. It is not for the best interest of the two creditors who opposed and defeated the discharge of the bankrupt, and it is unjust to them. They were at the trouble and expense of opposing the discharge. They were successful. The order refusing the discharge was acquiesced in by the bankrupt. These two creditors had a right to suppose they had prevented a discharge of the bankrupt from the debts he owed them, and now they are sought to be coerced by friendly creditors, who shared no part of the burden of opposing a discharge, into accepting, in full satisfaction of their debts, the nominal sum of one-half of one per centum on the debts. If this proposal of composition had been made before a discharge was applied for, the case would not have presented the features it now does. As was said by this court in Re Reiman [Case No. 11,673]: "The rights and interests of the dissenting or non-assenting creditors are under the protection of the court, and the affirmative votes of the assenting creditors are of no avail to affect such rights and interests, if the composition be not for the best interest of the other creditors, or be unjust towards them." The object of the assenting creditors is stated by the bankrupt and himself, in his petition, to be, to enable the bankrupt to obtain a discharge from his debts; and this is quite apparent from the nominal amount of the composition offered and from the fact that the bankrupt represents that they would accept even a smaller composition than that offered, by saying that they have stated their willingness to accept any composition which should accomplish that result. In view of the fact that the bankrupt has no assets whatever, and has been refused a discharge on the opposition of the creditors who now oppose the proposed composition, such composition loses all the features of a composition, and becomes merely an attempt by friendly creditors to force upon the opposing creditors a discharge, when it has been held, in a formal proceeding, that the bankrupt is not entitled to a discharge. Under like circumstances in England, in a liquidation by arrangement, the confirmation of a resolution is refused. In Re Russell, 10 Ch. App. 255, 263, it appeared that the assets were so trifling that practically there would be no dividend, and the creditors had resolved on a liquidation by arrangement whereby the debtor was at once to receive his discharge without there being any security that the creditors would ever receive anything. There were dissentient

creditors who opposed the confirming of the resolution. The court remarked, that the creditors, being likely to get little under any circumstances, may have been desirous to discharge the debtor, but that it seems impossible to suppose that the majority of the creditors would come to such a resolution as that bona fide, for what they considered best for the creditors; that it appeared manifest that the majority of the creditors had been actuated by kindly motives towards the debtor; and that a resolution of that kind could not stand against the objection of the dissentient creditors. The court adds: "The act of parliament enables a certain majority of creditors to bind the minority, but it must be a majority who are bona fide voting for what they consider to be for the benefit of the creditors and with a view of making the best arrangement for the creditors; and if it is made plain that the resolutions come to are not made bona fide for the benefit of the creditors, but with the intent to discharge the debtor without any real benefit to the creditors, then, in my opinion, the minority of the creditors are entitled to object to the registration of such resolutions."

I do not pass on the question of jurisdiction raised, as the foregoing considerations suffice to show that the composition ought not to be confirmed.

HANNEGAN (BURROWS v.). See Cases Nos. 2,205 and 2,206.

HANNIBAL (FAUNTLEROY v.). See Cases Nos. 4,691 and 4,692.

HANNIBAL (NORTHWESTERN UNION PACKET CO. v.). See Case No. 10,343.

HANNIBAL, The (UNITED STATES v.). See Case No. 15,298.

HANNIBAL & ST. J. R. CO. (AETNA INS. CO. v.). See Case No. 96.

HANNIBAL & ST. J. R. CO. (BAILEY v.). See Case No. 736.

Case No. 6,034.

The HANOVER.

[Cited in The Atlas, Case No. 633. See Case No. 7,466.]

HANOVER, The (JONES v.). See Case No. 7,466.

HANOVER, The (SAUNDERS v.). See Case No. 12,374.

Case No. 6,035.

HANOVER NAT. BANK v. SMITH et al.

[13 Blatchf. 224.] [1]

Circuit Court, S. D. New York. Jan. 6, 1876.

REMOVAL OF SUIT—WAIVER OF RIGHT.

1. An action at law at issue in a state court was called for trial therein, and might, in the ordinary course, have been tried. The defendant applied for a postponement. This was refused by the court, except upon terms of the defendant's consenting to a reference. This he refused to do, but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause into this court, under section 639, subd. 3, of the Revised Statutes of the United States, on the ground of prejudice or local influence. On a motion by the plaintiff to remand the cause to the state court: *Held*, that the defendant had waived his right to claim a removal of the cause under the section above named.

2. A party to a suit may, in that particular suit, waive his right to remove the suit to the federal court; and he may make such waiver after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver.

[Cited in McLean v. St. Paul & C. Ry. Co., Case No. 8,893.]

[Cited in Wadleigh v. Standard Life & Acc. Ins. Co., 76 Wis. 442, 45 N. W. 109.]

[This was an action at law by the Hanover National Bank against Benjamin E. Smith, impleaded with Clark R. Griggs. Heard on motion to remand cause to state court.]

Tracy, Olmstead & Tracy, for plaintiffs.
Lewis Sanders, for defendant.

JOHNSON, Circuit Judge. In this case, the removal into this court was claimed under section 639, subdivision 3, of the Revised Statutes, and was obtained accordingly. A motion is now made to remand the cause, as improperly removed. Before a trial had actually taken place, the defendant took the steps pointed out by the statute, to effect the removal, upon an affidavit by the defendant, stating that he had reason to believe, and did believe, that, from prejudice or local influence, he would not be able to obtain justice in the state court. The plaintiff was a citizen of New York, and the defendant Smith of Ohio; while the other defendant, who had neither been served with process, nor appeared, was a citizen of Delaware. They were sued upon several liabilities—Griggs as first endorser, and Smith as second endorser, of a promissory note.

The plaintiff urges, that the removal cannot be sustained, because the peititoner had, by consenting to a reference of the cause for trial by a particular person named, selected his own tribunal, and had, by thus consenting, prevented an immediate trial of the cause. This, the plaintiff insists, should preclude the petitioner from claiming a removal of the cause, under the subdivision of the section of the statute referred to. Two questions are thus presented—First, whether the right of removal in a particular case can be waived; and second, whether such a waiver should, in this case, be imputed to the defendant.

Upon the first of these questions we are

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

not without an intimation of the opinion of the supreme court, in Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445. In that case, under a law of Wisconsin, a New York insurance company, as a condition of permission to transact its business of insurance in Wisconsin, had made and filed in the office of the secretary of state of that state, an appointment of an agent or attorney within that state, upon whom process might be there served, and had also filed a written engagement that suits commenced in the state court should not be removed into the courts of the United States, by the act of the corporation. It was held by the court that neither the law of Wisconsin, nor the agreement of the parties, could give validity to a general engagement, made in advance of any controversy, that the party would not avail himself of a resort to the jurisdiction of the courts of the United States. Mr. Justice Hunt says, in giving the opinion: "He cannot bind himself in advance, by an agreement which may be specifically enforced, to forfeit his rights, at all times, and on all occasions, whenever the case may be presented." This statement of the ground of the decision is preceded by other remarks, disclosing the line of distinction between this general and not lawful renunciation, and other particular acts of renunciation which the law will sustain. He says: "In a civil case, the party may submit his particular suit, by his own consent, to an arbitration, or to the decision of a single judge. So, he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects, any citizen may, no doubt, waive the rights to which he may be entitled." The instances given show, that, in the waiver of the right to resort to the courts of the United States, in a particular case, only the private right of the individual is concerned. Its waiver touches no question of public policy. Its effectiveness stands upon the maxim, that any man may renounce a legal right which is conferred for his own advantage. The right in question may, therefore, be waived by any sufficient agreement of the party, as well by direct consent, as by that implied by the non-exercise of the right in the manner prescribed by law. A stipulation after suit commenced in the state court would, I think, be, on the principles mentioned, a complete bar to the exercise of the right of removal; and, on the same ground, any conduct of the party which is equivalent to such a waiver ought to be enforced as such by the court.

In respect to the second question stated, an examination of the facts presented is necessary. The case was called for trial, and might, in the ordinary course, have been tried, when the defendant applied for a postponement. This was refused by the court, except upon terms of the defendant's consenting to a reference. This he, in the first instance, refused to do, but afterwards, and before the trial was actually commenced, he consented to the reference of the cause for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. Under these circumstances, the defendant ought to be considered as estopped from making an application to remove the cause. The case is not, in my judgment, within the meaning of the statute. Its language is general, but the right it gives is the right of the party concerned, and he may waive it. It is to be construed as if the right to waive its benefit were expressed in the statute. The defendant was in time to apply for a removal when his case was called for trial, but his consenting to a reference, under the circumstances shown, ought, in justice, and does, I think, in law, preclude him from a subsequent application to remove the cause. To hold otherwise, would recognize a consent to a reference as an allowable resort to gain the postponement of a cause, and the consequent extension of the time limited for its removal into the circuit court. The motion to remand the cause to the supreme court of the state of New York must be granted.

HANRICK (SEVENTH WARD BANK v.). See Case No. 12,678.

Case No. 6,036.

The HANSA.

[2 Ben. 299.] [1]

District Court, S. D. New York. March, 1868.[2]

COLLISION IN NEW YORK HARBOR—STEAM VESSELS CROSSING—LOOKOUT.

1. Where a steamer was coming into New York harbor from the sea, in the daytime, having on her starboard hand a steam vessel, built for a floating grain elevator, which was crossing her path, and the latter kept her course, but was struck by the steamer, and the steamer claimed that there were vessels at anchor which prevented her from going under the stern of the elevator, the steamer's lookout having seen the latter, but not having reported her for the reason that, as he supposed, the captain and pilot, who were on the bridge, saw her: *Held*, that, as the vessels were crossing, it was the duty of the steamer, having the elevator on the starboard side, to keep out of the way. The failure of the lookout to report the elevator, when he saw her, was negligence.

2. As the steamer did not pretend that she was baffled or misled by any movement on the part of the other vessel, and her only mode of keeping out of the way of the latter was to go under her stern, she must prove that, at no time after she was first near enough to have discovered the latter, could she have ported, and thus avoided the collision.

3. It was not proved that the steamer entered among the crowd of vessels before she ought to have discovered the elevator.

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

[2] [Affirmed in Case No. 6,038.]

In admiralty.

W. J. Haskett, for libellant.
W. Q. Morton, for claimants.

SHIPMAN, District Judge. This is a suit to recover damages for a collision between the steamer Hansa and the elevator Transporter, owned by Stephen K. Lane the libellant. The former is a large sea-going steamer, running between New York and Bremen, and the latter is a small steam vessel, having a tower or elevator on deck, and used about the harbor of New York for the purpose of transferring grain in bulk. The collision occurred between five and six o'clock, in the afternoon of the 13th of March, 1865, in the Hudson river, opposite New York City, and near the New Jersey shore.

The Hansa was just in from sea, and bound to her dock at Hoboken. The Transporter was crossing the river from New York to the coal docks at Jersey City. The Hansa was in charge of a pilot, and had a lookout stationed on her forecastle. This lookout says he first saw the Transporter three or four points on the starboard bow of the Hansa, crossing the river, and that this might have been eight or ten minutes before collision. He states that he did not report her, because he supposed the captain and pilot of the Hansa, who were on the bridge at the time, saw her. He also says that the Hansa blew her whistle to the Transporter, but whether before or after he first saw her, he cannot say. Both he and Harrow, the pilot of the Hansa, say that the Transporter did not change her course till at or about the time of the collision. The captain of the Hansa fixes the distance apart of the vessels, when he first saw the Transporter, at a half a mile, and says that the pilot saw her at the same time. The pilot thinks she might have been three, four, or five lengths of the Hansa off when he first discovered her. The captain of the Hansa says that he feared a collision when he saw the Transporter, and commenced blowing his whistle. Newman, the third officer of the Hansa, says that when he first heard the whistle blow, the Transporter was about a length and a half (of Hansa) on her starboard bow, ahead of her, and coming at right angles. From the whole evidence presented on the part of the Hansa, she must have been moving at a speed of six or seven knots just before the collision. The Transporter was bound from pier 1, on the New York side, to the coal docks at Jersey City, and was moving at not more than half the speed of the Hansa. As the tide was ebb she headed, as she neared the west shore, a little up the river. It was broad daylight, and there can be no doubt that the Hansa could have discovered the Transporter early enough to have taken decisive measures to clear her, unless she was in some way embarrassed in her movements. The vessels were crossing under circumstances which bring them directly within the rule laid down in the fourteenth article of the statute for preventing collisions, which provides that "if two ships, under steam, are crossing each other, so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other." The Hansa had the Transporter on her starboard side, from a point a long distance below where the collision took place, and at which it was clearly her duty to have discovered her, whether she did in fact or not, and to have gone to starboard of her, unless prevented by circumstances over which she had no control. This was her duty, imperatively fixed by statute. The burden of proof is on her to show that she was prevented from conforming to the rule by circumstances beyond her control. The only important excuse which she offers is, that the river was full of vessels at anchor, which rendered her navigation difficult. On this point the evidence is conflicting as to the number and location of the anchored vessels in that section of the river passed over by the Hansa, between the time she actually discovered the Transporter and the moment of collision. The witnesses for the libellants testify that the great bulk of the anchored fleet lay along within three hundred yards of the Jersey shore, while the river to the eastward was comparatively clear. The witnesses for the Hansa, who testify on this point, insist that the anchored vessels extended across the river to Castle Garden. Captain Von Santen says he could not have ported his helm (as he would have had to do to have gone to starboard, and astern of the Transporter), because he should have run foul of other vessels, and that vessels were at anchor clear across the river to Castle Garden. This may be true after he entered the anchored fleet, though I am inclined to the opinion, upon the whole evidence, that the vessels at anchor were much more numerous near the Jersey shore, along the route which the Hansa took, than in the middle of the river and to eastward. But the difficulty in this part of the defence is, that the proof fails to show that the Hansa entered among this dense fleet, before she reached the point where she might and ought to have discovered the Transporter. She is seeking to exonerate herself from the charge of having violated a fixed and well-known rule of navigation. She does not pretend that she was baffled or misled by varying movements of the Transporter. Her witnesses say that the latter held her course. The Hansa was bound, therefore, to keep out of the way of the Transporter, and her only mode of doing so was to have gone to starboard, and astern of her. To effectually excuse her for not doing so, she must show that at no time after she was first near enough to have discovered the Transporter could she have ported, and thus have avoided all chance of collision. As already remarked on this point, the proof is unsatisfactory, and her defence

fails. The lookout on the Hansa failed to do his duty. He did not report the Transporter when he discovered her, on the ground, as he alleges, that he supposed the captain and pilot then saw her. This, of itself, was great negligence on his part. Nothing, under such circumstances, should be left to conjecture. He should have reported the steamer at once, and it is possible that his failure to do so may have prevented the Hansa from changing her course, as she otherwise would, or, at least, might have done.

Let a decree be entered for the libellants, with an order of reference to compute the damages.

[On appeal to the circuit court this decree was in all respects affirmed in an opinion by Woodruff, Circuit Judge. Case No. 6,038.]

Case No. 6,037.

The HANSA.

[5 Ben. 501; 6 Am. Law Rev. 759.] [1]

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

COLLISION AT SEA—STEAMER AND BARQUE—LOOKOUT—LIGHTS—FOG-SIGNALS—SPEED OF STEAMER.

1. The Norwegian barque R. was sunk, on May 31st, 1871, about 2.30 a. m., by a collision with the steamer H., at sea, about 350 miles from New York. The H. was bound to New York, heading west one-quarter north, and going at the rate of 9½ knots an hour. It was foggy at the time, having been so for some time, the fog being thinner and thicker at intervals, and the steam whistle of the steamer was being blown at intervals of about a minute between each three blasts. She kept an attentive lookout, but no sound was heard from the R. before the collision. The light of the R. was seen two or three points on the H.'s starboard bow. Orders to starboard the wheel and to stop and back the engine were at once given, but the H. struck the R. a square blow on her port side, cutting into her 18 feet, and sinking her at once and drowning eight of her crew. The bark was heading south half west, close hauled on the wind, which was about west southwest, and was making between three and four knots an hour. Her lookout was blowing a foghorn at brief intervals. The whistle of the steamer was not heard till just as her lights were seen, and the collision immediately followed. The wheel of the barque was put to port just before the blow; but no change was made in the course of either vessel by the movement of their respective helms: *Held*, that the H. blew her steam whistle properly, and that the R. blew her fog-horn properly, and the fact, that neither signal was heard on the other vessel, was due to the fact that the vessels were approaching nearly at right angles, with the wind blowing the sound away, and to the noise of the wind and sea.

2. The testimony of those on the deck of the R., as to the direction of the wind, was more to be relied on than that of those on the deck of the H.

3. The fog-horn on the R. was a proper fog-horn, and was blown in a proper manner—by blowing, stopping to take breath and listen, and then blowing again.

4. The R. was not in fault in not having an additional lookout stationed forward, besides the man who was blowing the horn.

5. Although the R. was crossing the usual track of ocean steamers, that fact only imposed upon her the duty of exercising proper care and vigilance, and it was not a part of the ocean in which she had no right to be.

6. The fact, that the R. had but one man at her wheel, was no proof of negligence, or of want of seamanship on her part.

7. The lights of the R., which were in the mizzen rigging, were where they are customarily carried on Norwegian vessels, and the H. was not misled in any way by them.

8. It was the duty of the H. to keep out of the way of the R.

9. The burden was on the H. to excuse herself for not having performed that duty.

10. The rate of speed at which the H. was going was not a moderate rate, under the circumstances, and she was solely in fault for the collision.

[Cited in The Aleppo, Case No. 157.]

In admiralty.

Beebe, Donohue & Cooke, for libellant.

W. Q. Morton and W. W. McFarland, for claimants.

BLATCHFORD, District Judge. On the morning of the 31st of May, 1871, but a few minutes before half-past two o'clock, the German screw steamer Hansa, in the Atlantic Ocean, about 350 miles from the port of New York, came into collision with the Norwegian barque Rhea, striking her a square blow on her port side, between her mainmast and mizzenmast, and cutting into her to a distance of some eighteen feet. The barque had all her sails set, except her light sails, and was going three or four knots an hour, heading south half west, the wind being about west south west, and the barque being close hauled. The steamer was on a voyage from Bremen to New York, and the barque on a voyage from Rotterdam to New York. After the collision, which occurred in a fog, the steamer backed out from the barque, and the barque disappeared in the fog, towards the port hand of the steamer, and undoubtedly went down with her cargo. The value of the barque and her cargo are claimed to have been $160,000. The crew of the barque consisted of a master, two mates, a carpenter, a sailmaker, a boatswain, seven able seamen, an ordinary seaman, and a steward—fifteen persons at all. Of these, there were on deck at the time of the collision, the mate (who was the officer of the watch), the boatswain, the ordinary seaman (who was at the wheel), one able seaman (who was on the lookout), and three other able seamen—seven persons in all. Of these, the man on the lookout was lost. The other six and the second mate, who was asleep in a cabin on deck at the time of the collision, were saved, by getting on board of the steamer. The other eight of the fifteen perished with the vessel. The seven who were saved have all of them been examined as witnesses in the case. The per-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Am. Law Rev. 759, contains only a partial report.]

sons on the deck of the steamer at the time of the collision were two lookouts, one on each bow; the second officer, on the bridge, and a boy there with him; the third officer, at the con compass, aft by the wheelhouse, and two quartermasters and two seamen in the wheelhouse—nine in all. She had on board a master, four officers, two boatswains, four quartermasters, thirty seamen—forty-one persons having duties on deck, besides sixty-four others, consisting of engineers, fire-men, coal-passers, cooks, stewards, boys, &c., making one hundred and five in all. All of the nine persons who were on the deck of the steamer at the time of the collision have been examined as witnesses, and also the master, the first officer, and the second engineer.

The libel alleges that, at and before the collision, the barque had a fog-horn blowing and sounding; that the barque kept on her course without variation until the steamer was close on board of her; that then, to ease the blow, if possible, the mate ordered the helm aport, but the collision took place before any change could be made in her course; that the collision was caused without fault on the part of the barque; that she had a proper lookout set, and a fog-horn blowing, and a good man at the wheel; that a full and efficient lookout was kept; and that the fault was in the steamer, in running at too great a rate of speed, in not keeping a good and efficient lookout, in not in time taking steps to avoid the barque, as it was the duty of those on the steamer to do, and in not stopping and backing in time.

The answer avers, that, during the time between midnight and half-past two o'clock, a. m., on the 31st of May, a drifting but not continuous fog was experienced, which had commenced some hours before, and had varied in the extent of its obscuration, from time to time lighting up and changing in character, and presenting thick and clear atmosphere alternately; that, during the prevalence of the fog, the Hansa was kept at a moderate rate of speed, part of the time as low as seven knots an hour, and at no time exceeding nine and a half knots, nine knots per hour being about the rate immediately before and at the time of the collision; that her rate of speed was regulated according to the circumstances; that, in view of the skill and care exercised, and the precautions taken, in navigating her, and of the reciprocal precautions required by law from other vessels, her rate of speed was at all times prudent and safe; that, during the half-hour immediately preceding the collision, blasts of her steam-whistle were sounded at intervals not exceeding at any time one minute and a half, lights of the most effective description were displayed, the most vigilant lookout was maintained, an officer of capacity and long experience was in charge of the deck, a force of four men—two able seamen and two quartermasters—was kept in the wheelhouse, the most effective apparatuses for conveying orders from the officer in charge to the engine-room and the wheel respectively, were provided, thus creating a reciprocal duty on the part of approaching vessels to give notice of their location by proper sounds of their steam-whistles or fog-horns, the distance at which the Hansa's steam-whistle could be heard being at least two miles in much less favorable circumstances, and the distance at which ordinary fog-horns and steam-whistles on other vessels could have been heard by those on the Hansa being not less than two miles; that, under these circumstances, the speed of the Hansa was, in all respects, moderate, judicious, and safe, and did not in any manner contribute to the collision; that, while so proceeding, the steamer heading about west, and no answering blast of whistle or fog-horn, and no hail, having been detected, although attentively listened for, in the intervals between the blasts of the Hansa's steam-whistle, and immediately after another blast of the Hansa's steam-whistle, a dim light, the color of which was not at first distinguishable, but which proved to be the red light of a vessel alleged to have been the barque Rhea, came into view, and was sighted and reported simultaneously by both lookouts on the bows of the Hansa; that the light bore about two points on the starboard bow of the Hansa, and indicated the dangerous proximity of a vessel, apparently under full sail, heading to the southward, across the bow of the Hansa; that, by immediate telegraphic orders from the bridge to the engine and wheel of the Hansa, her engine was at once stopped and backed, and her helm was put hard astarboard, but, before the heading or way of the Hansa could be materially affected thereby, a collision, inevitable to the Hansa, occurred, and the port side of the barque came in contact with the bow of the Hansa; that, as soon as the vicinity of the barque became known, every possible effort, on the part of those navigating the Hansa, was made, to avoid the collision; and that no fault was committed by them, and the collision was not caused by any fault or negligence on the part of those in charge of navigating the Hansa. The answer charges that the collision was occasioned by the negligence and unskilfulness of those in charge of the barque, and deficiencies in her equipment, and omissions of duty and of precautions, as follows: (1) The failure on the part of those navigating the barque to give due notice of her presence and approach, by sounding properly one or more fog-horns, as, had the same been so sounded, they must, necessarily, have been heard on board of the Hansa at a distance much further than was necessary to enable those on board of her to easily avoid any danger of collision at even a much greater rate of speed than she was then going; and, in the absence of such signal or signals on the part of the barque, to indicate

her presence and bearing, all precautions by those navigating the Hansa were, necessarily, unavailing to prevent a collision, and would have been so at whatever rate of speed the Hansa might have been proceeding. (2) The barque, at the time of the collision, was being navigated on a part of the ocean out of the usual course of sailing vessels. (3) Her master, officers and crew were not vigilant but negligent, in the performance of their duties, and were inefficient as to nautical competency, seamanship and number. (4) Before, and at the time of, the collision, no competent or effective lookout was stationed or maintained on the barque. (5) Immediately before, and at the time of, the collision, the wheel of the barque was in the sole charge of an inexperienced and incapable boy, who was ignorant of the Norwegian language, in which language the usual orders for navigating the barque were given. (6) The lights on the barque were dim, defective, and placed on an unusual and improper part of the vessel, and, as so defective and misplaced, tended to mislead as to her true position and bearing. (7) There was a general neglect of discipline and proper precautions on board of the barque, and blasts of the steam-whistle sounded from on board of the Hansa were heard on board of the barque in ample time for her, by answering sounds of fog-horn and otherwise, to have notified those navigating the Hansa of the position of the barque, and enabled them to avoid a collision; and, through culpable negligence and want of seamanlike presence of mind, sagacity and promptitude on the part of those navigating the barque, no answering fog-horn or horns was or were sounded, or other measures resorted to, to notify the Hansa of her position; and the collision was due solely to the seven causes thus stated.

(After collating the evidence of the crew of the Rhea, the court proceeds): From the testimony of these six witnesses, comprising all the men who were on the deck of the barque at the time of the collision, except Larsen, who was lost, it is impossible not to believe that the fog horn was being blown from midnight down to the time of the collision, for the first hour by Jacobsen, for the second hour by Schmidt, and for the time after two o'clock by Larsen; and that there was one man (Jacobsen) on the topgallant forecastle, as a lookout, for the first hour, two (Danielson and Schmidt) for the second hour, and one (Larsen) during the time after two o'clock. Before and at the time the lights of the Hansa came out of the fog, Hansen (the mate) was standing by the mainmast, amidships, on the starboard side, Christophersen was on the starboard side by the main hatch, Evaldt was on the port side, amidships, Danielson and Jacobsen were between the forecastle and the foremast, and Schmidt was at the wheel. These men none of them heard any whistle from the steamer any considerable time before they saw her light come out of the fog. To Hansen, the order of events was masthead light, whistle, green light. Danielson saw no light but the masthead light, and heard no whistle. Christophersen heard the whistle and saw the three lights simultaneously. Evaldt heard the whistle and saw the white and red lights simultaneously. Jacobsen saw the white light and then the colored lights, and heard no whistle. Schmidt saw no light and heard no whistle. The depositions of all of these men were taken within twenty-five days after the collision, and more than two months before the answer was put in.

On board of the Hansa, the second officer, Sander, whose watch it was, and who was on the bridge, saw the light of the Rhea from two to three points on his starboard bow, and that was the first he saw or heard of her. He could not tell the color of the light, but he telegraphed immediately to put the helm hard astarboard and to stop. Then, seeing the sails of the Rhea, he telegraphed to go back at full speed. The light was reported from the bow after Sander saw it and while he was stepping three steps to the telegraph. He puts the time between his seeing the light and the collision at fifteen seconds. No one on the deck of the Hansa heard any sound of any fog-horn or other noise from the Rhea. The steam whistle of the Hansa was being sounded from two o'clock down to the time of the collision, by giving three blasts, with intervals of about a minute between every three blasts. The starboarding of the helm of the Hansa did not change her course substantially at all before the collision.

(The court then collates the evidence given by the Hansa, showing that, on the voyage, she had run about 2,700 miles at the average rate of 11 knots an hour, and that she was, at the time of the collision, running 9½ knots, and proceeds): It being clear, on the evidence, that the fog-horn, though blown on the Rhea, was not heard on the Hansa, and that the whistle, though blown on the Hansa, was not heard on the Rhea, the Hansa, in endeavoring to discharge the duty incumbent upon her of excusing the collision, it being her business to keep out of the way of the Rhea, charges upon the Rhea, as a fault, that the fog horn was not properly blown or blown from a proper point on board of the Rhea, insisting that, otherwise, it would have been heard on board of the Hansa. The fact that, with the location of men on the deck of the Hansa, no fog-horn was heard from the Rhea, is urged by the Hansa as evidence that none was blown, or, that, if blown, it was not blown in a proper manner or from a proper place, while the fact that, with the location of men on the deck of the Rhea, no whistle was heard from the Hansa, is urged by the Hansa, not as evidence that none was blown, or, that, if blown, it was not blown frequently enough, but as evidence that those on the deck of the Rhea were not properly attentive to their duties. A more consistent

conclusion, and one which the court should strive to reach, if fairly deducible from the facts in the case, would be, that, the Rhea blowing her fog horn properly and her men attentive to their duties, and the Hansa blowing her whistle properly and her men attentive to their duties, circumstances existed which prevented the hearing by either of the signal from the other. The wind, according to the testimony from the Rhea, was west southwest and the Rhea heading south half west, she being, therefore, close hauled within five and a half points of the wind, and she was going between three and four knots an hour. She was bound to New York, and beating, and, therefore, sailing as close to the wind as she practically could. The Hansa had no sails set and was going nearly dead against the wind, at a speed of nine and a half knots an hour. Under these circumstances, the testimony of those on the deck of the Rhea, as to the direction of the wind, is much more to be relied on than the testimony of those on the deck of the Hansa. Sander, on the Hansa, says that, at the time of the collision, the Hansa was heading west one-quarter north, with the wind right ahead, a fresh breeze, and a moderate head sea running. If the wind was west one-quarter north, the Rhea would have been sailing seven points and three-quarters off of the wind, while her mariners state that she was close hauled on the starboard tack, and give her distance from the wind, thus close hauled, at five and a half points. I, therefore, accept the wind at five and a half points on the starboard bow of the Rhea, and two and a quarter points on the port bow of the Hansa. It was of such force that the Rhea, close hauled, made a speed of between three and four knots an hour. In addition to this positive velocity of the wind, two and a quarter points on the port bow of the Hansa, the Hansa was going through the air at the rate of nine and a half knots an hour, against this wind, and against a head sea, surrounded by the noise which would arise from the sea, and from the rapid passage by each other of the air and the wind, on the one hand, and of the vessel and her masts, spars, rigging and other appurtenances, on the other hand, and that noise which is always present on a steam vessel, even a screw, when in motion, at the rate of speed of the Hansa, but the presence of which is not marked by the ear accustomed to its presence, and only noted when it ceases. To the Rhea there were the wind and the sea two points and a half forward of her beam on her starboard side, with the noise from sea and wind which would exist. In addition to this, the Rhea was off to starboard of the Hansa. When the Rhea was half a mile from the place of collision, calling her speed three and a half knots an hour, the Hansa was one mile and eighteen hundred and eighty-five feet from the place of collision, or one hundred and twenty-five feet more than a mile and one-third, calling her speed nine and a half knots an hour. When the Rhea was a quarter of a mile from the place of collision, the Hansa was thirty-five hundred and eighty feet from the place of collision, or sixty feet more than two-thirds of a mile. When the Hansa was a mile from the place of collision, the Rhea was nineteen hundred and forty-five feet therefrom, or one hundred and eighty-five feet more than a third of a mile. When the Hansa was a half a mile from the place of collision, the Rhea was nine hundred and seventy-two feet therefrom, or ninety-two feet more than one-sixth of a mile. When the Hansa was a quarter of a mile from the place of collision, the Rhea was four hundred and eighty-six feet therefrom, or forty-six feet more than one-twelfth of a mile. The course of the Hansa was nearly at right angles to the course of the Rhea. It angled only a quarter of a point forward of the beam of the Rhea, on the course of the latter. The Hansa was always farther off from the Rhea than from the place of collision. Under all the circumstances surrounding the case, it is not at all extraordinary that no warning signal was heard by either vessel from the other, although both vessels gave such signals properly and the hands on both were attentive and vigilant in listening for what could be heard.

The excuse set up by the Hansa, in her answer, that the collision was occasioned by the failure on the part of those navigating the bark to give due notice of her presence and approach by sounding properly one or more fog-horns, is disposed of by the foregoing considerations, and by others to be now alluded to. The fog-horn blown on the Rhea appears to have been a proper horn, and to have been blown at a proper place and in a proper manner. No whistle having been heard from the Hansa, there was nothing to call upon those on the Rhea to blow the horn especially in a direction towards the Hansa, if, indeed, it could have been so blown any more than it was. It was blown from the usual station of the lookout on such a vessel—the topgallant forecastle—and in the usual manner—by blowing, stopping to take breath and to listen, and then blowing again. Stopping to listen was necessary, nothing having been heard. Continuous blowing, if to be required at all, can only be required when called for in answer to a warning heard. Listening is as necessary as blowing. A second lookout can hear nothing from another vessel by listening, while the first lookout is blowing close to his ears. A single lookout can listen, if charged (as in this case) with that duty, during the intervals of blowing, as well as a second lookout can do so.

It was urged, on the part of the Hansa, on the strength of the testimony of some of the officers of the Hansa (the officers and men of the Hansa being the only witnesses on the part of the Hansa), that one stationed look-

out on a sailing vessel, in a fog, was not sufficient, if he was charged also with the duty of blowing the fog-horn; that one and the same man could not blow the fog-horn properly, and keep a proper lookout with his eyes, and give proper attention with his ears; and that a lookout stationed on the top-gallant forecastle of a barque like the Rhea, and there blowing the fog-horn, with the wind as it was, and with the sails trimmed to port, could not see to leeward, and could not make his fog-horn heard to leeward, because of the interference of the sails. On these subjects the libellant has called, as witnesses, seven shipmasters, disinterested persons, who have no connection with this controversy. All of them testify that the proper and usual station for a lookout, on a vessel like the Rhea, is on the top-gallant forecastle; and that on such a vessel it is not customary to have more than one man set as a lookout, in a fog. Four of them testify, that it is usual, on such a vessel, for the man who is set as a lookout to blow the fog-horn, if there is a fog. Five of them testify, that the blowing of a fog-horn does not interfere with seeing or hearing properly, during the intervals between the blasts, by reason of any effects produced by the effort of blowing. Four of them testify, that, in an ordinary barque, with such sails set as the Rhea had set, there is no obstruction caused by the sails to prevent a lookout on the top-gallant forecastle seeing on both sides. Three of them testify, that, in a fog, one lookout is better than two, because of the propensity which two have to talk together. The seven witnesses from the Rhea were not examined on these subjects. The libel was filed June 6th, 1871, and their depositions were taken June 20th and 24th, 1871. None of them were examined orally at the trial. The depositions of the witnesses from the Hansa were taken July 20th, 1871. The answer of the Hansa was filed August 29th, 1871. The attention of the witnesses from the Rhea was not called, on cross-examination, to any of the subjects just alluded to. Nor does the answer specifically take the point that the top-gallant forecastle was not the proper place for the lookout, or the point that there should have been two lookout men in the fog, or the point that the fog-horn should have been blown by another person than the lookout, or the point that the sight and the hearing of the blower are interfered with, during the intervals of blowing, as the effects of the previous effort of blowing, or the point that the sails of the Rhea, as trimmed, prevented the lookout on the top-gallant forecastle from seeing to leeward or making his horn heard to leeward. The answer contains, in respect to the Rhea, in the particulars alluded to, nothing but generalities, such as failure to sound a fog-horn properly, negligence in the performance of duties, inefficiency in officers and crew as to nautical competency, seamanship and number, an incompetent and ineffective lookout, and general neglect of discipline and proper precautions. These allegations, such as they are, are not supported by the evidence, and the proofs show that, in respect to a lookout and the blowing of a fog-horn, there was no fault or negligence on the part of the Rhea.

To show that the lookout on the Rhea was not efficient in seeing or hearing, and did not blow his fog-horn properly, the witnesses from the Hansa give their opinions as to how far a light can be seen in a fog, and how far a steam whistle can be heard, and how far a fog-horn can be heard. The master of the Hansa states, that, while the white masthead light of the Hansa could be seen, in clear weather, at least six miles off, the distance at which it could be seen during a fog would be modified according to the density of the fog. Elsewhere, when asked if he can give any idea as to how far such white light could be seen in a thick fog, he says, that, if the fog was not too thick, the light ought to be seen two miles. He also says, that he should think the colored lights of the Hansa could be seen, in an ordinary fog, a mile or a mile and a half, probably. The first officer of the Hansa, who was the officer of the watch from eight o'clock until midnight, when asked how far the lights of the Hansa could be seen in an ordinary, moderate fog, says, that it is very hard to say how far; that, perhaps, in a moderate fog, the white light of the Hansa could be seen a mile off; and that, in such a fog as had prevailed at any time during his watch, he thinks such white light could be seen at least a mile. Sander, the officer of the watch on the Hansa, at the time of the collision, and who was on the bridge, says, that, in his judgment, the white light of the Hansa could be seen about a mile in such a fog as prevailed immediately before and at the time of the collision. Yet he elsewhere says, that the first he saw or heard of the Rhea was seeing her light bearing from two to three points on his starboard bow; that he could not tell the color of such light when he first saw it; that the vessels collided in not over fifteen seconds after he first saw such light; that he could not see the hull of the Rhea, but only her sails; and that, after the collision, the Rhea disappeared from his view at about half the length of the Hansa off—the Hansa being 367 feet long. This evidence, in connection with the fact that the red light of the Rhea was burning properly at the time of the collision (as more particularly mentioned hereafter), and was seen nearly as soon as it could be by the lookouts on the Hansa, and that the white light of the Hansa was not seen by any one of the men on the deck of the Rhea, stationed as before mentioned, until the vessels were almost in contact, is better evidence of how dense the fog was, and of the distance at which a light could be seen in a fog, than the speculations or opinions of witnesses tes-

tifying to relieve themselves from a charge of culpable negligence in the management of their vessel.

So, too, as to the steam-whistle. The master of the Hansa states, that the steam-whistle of the Hansa could, with a moderate breeze, be heard at least three miles to leeward, and at least one mile to windward. Sander says it can be heard about two miles, and he gives an instance of hearing it at a considerable distance, in the Hudson river, on a quiet day, on an occasion when he saw the vessel and the puff of steam also. But, from such evidence, and in the face of the evidence of those on the deck of the Rhea as to their hearing no sound of any whistle until they saw the Hansa's light, it would be going very far for the court to say that, on the ocean, with the wind and the sea as they were, and in the fog, the mariners of the Rhea must have been negligent, because they did not hear the whistle, although it was duly blown.

As to the fog-horn, the master of the Hansa testifies, that an ordinary tin fog-horn, a foot and a half in length, when properly blown, can be heard in clear weather at least two miles; and that, in a fog, you can sometimes hear better and sometimes not so well. Sander says, that such a horn, when well blown, in a calm, at sea, can be heard at from half a mile to a mile off; and that he thinks it could, in a moderate breeze, be heard twice as far to leeward. These opinions, in view of the facts and circumstances, before alluded to, existing to prevent the horn, though properly blown on the Rhea, from being heard by those on board of the Hansa, though vigilant, cannot be held to be a sufficient basis for concluding, either that the horn was not blown or that the lookouts on the Hansa were not vigilant. These considerations dispose of the postulate set up in the answer of the Hansa, that, if a fog-horn had been properly sounded by the Rhea it would necesarily have been heard on board of the Hansa at a distance much further than was necessary to enable those on board of her to easily avoid any danger of collision even at a much greater rate of speed than she was then going, and that, therefore, no fog-horn was properly sounded by the Rhea.

It is also set up, in the answer, that the collision was occasioned by the negligence and unskilfulness of those in charge of the Rhea, in navigating her, at the time of the collision, in a part of the ocean out of the usual course of sailing vessels. This defence, as thus broadly stated, amounts to the proposition, that the Rhea was an obstruction to the navigation of the Hansa, and had no business to be where the Hansa could hit her. Yet the view is moderated, in argument, to the proposition, that the Rhea was where sailing vessels are not usually found by steamers passing between New York and the English Channel, and that, therefore, the Hansa might justifiably go at a greater speed, in a fog, at the place of collision with the Rhea, than the speed which would be justifiable in a locality more frequented by sailing vessels. The master of the Hansa testifies, that he does not believe that the place of collision is exactly in the track of sailing vessels from Europe to New York, but that sailing ships, beating about, must get along as they can; and that he should think it must be unusual to find sailing vessels in that region, because, during three years' service on the Hansa, he had never met a sailing vessel in that locality. Sander testifies, that the Hansa was in the usual course of the steamers of that line from Bremen to New York; and that the scene of the collision was an unusual place for sailing vessels. It is also attempted to be shown, by the cross-examination of the witnesses from the Rhea, that her master had found, by sounding, that he had got upon the Banks, and too far to the north, and that he had headed to the southward across what he knew was the usual track of steamers from Europe to New York. This imposed upon the Rhea the duty of exercising proper care and vigilance, but it is impossible, on the evidence, to hold that it imposed upon her the duty of doing anything which it is shown she failed to do. The only possible view in which the fact of the Rhea's being found in a place where it is unusual to find sailing vessels can be of any importance in this case is in regard to the speed of the Hansa, which subject will be considered hereafter.

It is also set up, in the answer, that, immediately before and at the time of the collision, the wheel of the Rhea was in the sole charge of an inexperienced and incapable boy, who was ignorant of the Norwegian language, in which language the usual orders for navigating the vessel were given. Much stress is laid, in the evidence, on its having been bad seamanship, in the fog, to have but one person at the wheel of the Rhea, and that person the ordinary seaman, Schmidt, and it is sought to be inferred from that that there was a general want of proper seamanship on board of the Rhea. Schmidt was, at the time of the collision, within two months of being twenty years of age, and had been at sea three years. Bellmer, one of the lookouts on the Hansa, was twelve days older than Schmidt, and had been at sea six years. Meyer, the other lookout on the Hansa, was twenty-one years and three months old at the time of the collision, and had been at sea seven years. Schmidt had been for over nine months on a school-ship before serving on a vessel. He had been accustomed to take his regular turn at the wheel at night, alone. Although he did not understand Norwegian, the crew understood English and spoke it to him. The master spoke English. When the mate saw the Hansa's light, he called out to Schmidt to put his helm hard down, singing out, in English, as the evidence would show, "Hard down," and Schmidt put it hard down, and remained firmly at his post of duty until the collision

threw him from the wheel. It is not shown that any order was given to him in connection with the collision which he failed to obey, or that two men at the wheel on the occasion could have done anything which Schmidt did not do. The seven shipmasters before referred to testify that, in moderate weather, even in a fog, it is not customary to have more than one man at the wheel of such a vessel as the Rhea. The court cannot, on the evidence, hold that there were any circumstances of wind, sea, weather or fog, which made it incumbent on the Rhea to have more than one man at her wheel at the time of this collision, or made it improper that Schmidt should be at the wheel. It is not shown that anything more, or anything different, could or ought to have been done with her wheel, if several men had been at it. The evidence as to the usage rebuts any suggestion as to want of seamanship in having but one man at the wheel, while Schmidt is shown to have been competent for the purpose, alone, under the circumstances.

The answer also sets up, that the lights on board of the Rhea were dim and defective, and placed on an unusual and improper part of the vessel, and, as so defective and misplaced, tended to mislead as to her true position and bearing. It is abundantly proved, that the Rhea had her green and red side lights set and properly burning. Those lights were in the mizzen rigging. It is shown, by the testimony of the mate of the Rhea and the testimony of four of the seven shipmasters before mentioned, that it is customary, in Norwegian ships, to carry the side lights in the mizzen rigging. It is in evidence, that the port light of the Rhea was seen by the lookouts and the officer of the deck on the Hansa, and that it was seen burning by some of the crew of the Rhea after they had gone on board of the Hansa. The officer on the bridge of the Hansa says that he cannot say that he would have done anything different from what he did if he had known that the light which he saw was in the mizzen rigging of the Rhea. The answer does not set up that the position of the light misled, but only that it tended to mislead.

The answer also avers, that blasts of the steam-whistle sounded from on board of the Hansa were heard on board of the Rhea in ample time for her to have notified those navigating the Hansa of the position of the Rhea, and enabled them to avoid a collision, and that this was not done. This allegation is not established, but is disproved.

The consideration of this case might well stop here. The Hansa and the Rhea were proceeding in such directions as to involve risk of collision, and it was the duty of the Hansa to keep out of the way of the Rhea, and she failed to do so. The Hansa was approaching the Rhea so as to involve risk of collision, and it was the duty of the Hansa to seasonably slacken her speed, and to seasonably stop and reverse, and she failed to slacken her speed in season, and she failed to stop and reverse in season. The Rhea kept her course. There was no danger to accrue to the Hansa from obeying the rules, and there were no special circumstances existing to render necessary any departure by the Hansa from the rules. The Rhea did not neglect to carry the proper lights or to make the proper signals, or to keep a proper lookout, or to observe any precaution required by the ordinary practice of seamen, or the special circumstances of the case. The burden being on the Hansa, under such circumstances, to excuse herself from fault, and she not having done so, condemnation of her necessarily follows. But I think it is shown affirmatively that there was fault on the part of the Hansa, in failing to observe the requirement to go at a moderate speed in the fog which prevailed.

The actual rate of speed of the Hansa at the time of the collision was nine and one-half knots an hour. That had been her speed for an hour and a half previously. Her average speed up to the previous noon, during the voyage, had been eleven knots an hour, using sails whenever practicable. From the previous noon, without sails, her speed had at no time exceeded ten and one-half knots. The answer avers, that, during the prevalence of a drifting but not continuous fog, which commenced some hours before the midnight previous to the collision, the Hansa was kept at a moderate rate of speed, part of the time as low as seven knots an hour, and at no time exceeding nine and one-half knots, nine knots per hour being about the rate immediately before and at the time of the collision. These statements are not borne out by the evidence from the log-book of the Hansa. On the contrary, of the fourteen logs at the fourteen even hours between the time of the collision and the previous noon, there was no rate of nine knots, there were two logs at nine and one-half, six logs at ten, four logs at ten and one-half, and two logs, namely, at 7 p. m. and at 8 p. m., at seven. The master of the Hansa testifies, that he would consider ten miles a very moderate kind of speed for a vessel like the Hansa, on a night when there was a thick fog at times and lighting up at times, and in the location where this collision occurred. Her speed from the noon before the collision until the collision averaged, taking the log rates, a little under nine and two-thirds miles an hour, without sails, her speed at the time of the collision being nine and one-half. From noon of the 29th to noon of the 30th, with fore-and-aft sails, gaff-topsails and stay-sails set for twenty-two hours, she ran at the average rate of nearly eleven and one-tenth miles an hour. Yet her master testifies that, during a part of the time, on the day preceding the collision, the fog was steadily very heavy; that,

during that time, the rate of speed they made was from about six and one-half to seven miles; that, when the fog was thick at times and lighting up at times, their speed was about nine and one-half miles; and that he regards those rates of speed as prudent rates, under the circumstances. He says, that, during the 29th and 30th, the weather was sometimes very thick and sometimes lighter, mostly cloudy, dark weather, with rain and fog; that, when he went to bed, two hours and three-quarters before the collision, the weather was quite clear; and that he had not been in bed before for more than thirty-six hours. Sander, the second officer of the Hansa, testifies, that, in his judgment, the speed of the Hansa, nine and one-half knots, at the time of the collision, was a moderate and prudent rate of speed for her on such a night, heading as she was, and with the wind, sea and fog such as they were. He says that it began to get thick soon after midnight, and continued getting thicker and lighting up until the time of the collision. The fog was such that the Hansa kept her whistle blowing at the same intervals from before half-past twelve until the collision, and that Sander lost sight of the Rhea, after the collision, when the Rhea was about half the length of the Hansa away from the Hansa, that is, about 185 feet off.

It is urged, on the evidence, that a steamer steers better when going at a quick rate of speed than when going at a slow rate of speed; that a steamer making a given rate of speed, with only sufficient steam for that rate, cannot be stopped in any less distance than when making double that rate, with sufficient steam for such double speed; and that the Hansa could be brought to a full stop, when going at the rate of nine and a half knots an hour, in the condition of things as they were at the time of the collision, in, as her master thinks, less than twice her own length, and in, as Sander thinks, from two to three times her own length, her length being 367 feet.

The evidence shows, that there was no difficulty in managing and steering the Hansa at a much less rate of speed than nine and a half knots, for, after the collision, she moved around in a circle of a half or three-quarters of a mile in diameter, for a considerable time, at a speed of four miles an hour, and sometimes less, sometimes stopping entirely, searching for traces of the Rhea. There is no doubt, that a steamer, or any other vessel, will answer her helm more readily, so as to avoid a given object ahead by actuating the helm, at a less distance off from such object when she is going at a higher speed than when she is going at a lower rate. But this has nothing to do with the control exercised by her steam machinery to stop her headway and give her stern way. That control is more effective at the lower speed. Not that five knot steam will give her stern way, when her speed is five knots only, any sooner than ten knot steam will give her stern way when her speed is ten knots. But, a steamer with boiler capacity for steam for ten knots, and whose usual rate is ten knots, in clear weather, can, from running at ten knots, with ten knot steam, reduce her rate to five knots, in a fog, and so manage her fires, and have in reserve a force of steam, as to be able to apply, in aid of obtaining stern way, in an emergency, a greater power of steam than that used to go ahead at five knots, and thus avoid many a collision at five knots which could not be avoided at ten knots. It is the duty of a steamer to avail herself of her boiler power to be ready to stop and reverse with power and efficiency in a fog, while at the same time she moderates her speed so as to enable such power to be exercised with efficiency, and with greater efficiency than if she did not moderate her speed. That is the meaning of the rule that a steamer shall, in a fog, go at a moderate speed. It is that she may avail herself of the power which belongs to a steamer to go directly astern in spite of wind and waves, and thus avoid collisions which no vessel but a steamer can avoid. Hence it is the steamer that is to keep out of the way of the sailing vessel, and she is to do it by moderating her speed in a fog.

Independently of the question of avoiding entirely another vessel, a collision at a less rate of speed may be very much less disastrous. There may be time to give a slanting blow. In the present case, a considerably less rate of speed in the Hansa would probably not have cut the Rhea nearly in two, or, the light of the Rhea being seen at the same distance it was, the Hansa's helm might, at the less speed, have sheered her so as to give the Rhea a glancing, and, perhaps, not a necessarily fatal, blow.

In regard to the distance in which the Hansa could be brought to a stop, when going at the rate of nine and a half knots an hour, the evidence given is purely a matter of speculation and opinion. It is not stated to be the result of experiment or even observation. It is not given by an engineer. It is given solely by the master of the Hansa and the officer of her deck, the persons responsible for this collision, and for the loss of property and of life attendant upon it. But, even if it should be assumed to be possibly true, it amounts to nothing. In the first place, plunging on through the fog, as the Hansa was, with a fresh breeze nearly ahead, and a head sea, at the rate of nine and a half knots an hour, with the attending circumstances before referred to, which made it impossible to hear her steam-whistle on the Rhea, and impossible to hear the foghorn of the Rhea on the Hansa, a capacity to be brought to a full stop in a distance so great even as that suggested was of no service. There should have been a capacity to be brought to a full stop in a less distance.

There would have been such capacity if the speed had been less than nine and a half knots, with the proper reserve of steam power ready to be instantly commanded, to reverse with the utmost efficiency. It is a self-evident proposition, that if, with a reserve force of steam ready to be used, but not in use, and the throttle-valve only partly open, a speed be maintained less than that which would result from having the throttle-valve wide open, the vessel can, by reversing, with the throttle-valve opened wide, be brought to a full stop in a less distance from the lesser speed than from the greater speed. No proposition to the contrary of this is sought to be maintained by any evidence. Instead of that, this question, and this alone, is put, not to any engineer, but to Sander, the officer of the deck on the Hansa: "Assuming that a steamer is making five knots an hour, with sufficient steam for only that rate of speed, can she be stopped in a greater or less distance than a steamer going ten knots, with steam enough for going at that rate of speed?" He answers: "It will take the same time to stop her." The premises being irrelevant, the conclusion is equally so.

It is the more incumbent on these large steamers, of great speed, weight and momentum, to go at a moderate speed in a fog, in order to be ready to reverse with more power than that used in their onward movement, because of the almost certainly fatal consequences to anything which they hit with a direct blow, as in this case, where the Hansa cut into the Rhea to a distance of eighteen feet. The probability of serious injury to such a steamer in a collision with a sailing vessel is so comparatively small, that the steamer, feeling safe herself, takes precautions in a fog substantially only in reference to other steamers. The probability of serious injury to a sailing vessel in a collision with such a steamer is so comparatively great, that the steamer should take extraordinary precautions in a fog, especially in moderating her speed, and making that moderate speed efficient by being ready to reverse with a greater power than that used in her onward movement.

The propositions maintained on the part of the Hansa, as to speed, are, that, if her speed did not exceed such a rate as would admit of her being stopped after being warned that another vessel was in her way, she was going at a prudent and allowable rate; that this test depends on the distance within which she could be stopped, and the distance at which she was entitled to expect warning that another vessel was in her way; that, if she could be stopped within the distance at which such warning was to be expected, her speed was not unreasonable; that such distance is to be taken at the usual reach of the customary warning; and that any other rule will destroy rapidity of communication by steam across the ocean, and interfere with the rapid transit of merchandise and of the mails, which has become a necessity. It is sufficient to say that no such rule of speed has ever been established or recognized by any admiralty court. It would put all sailing vessels, even though complying with all the rules of navigation, wholly at the mercy of these large and powerful steamers, with no chance of redress. If the steamers will persist in going at these rapid rates in fogs, they must take the risk upon themselves and bear the consequences, and not throw the risk upon those whose lives and property they destroy. I had occasion in the case of The Chancellor [Case No. 2,589] to express what I regard to be the settled views of courts of admiralty on this subject, and it is well, in view of the continued and persistent recklessness of steamers, to repeat those views. One of the witnesses for the claimant in that case was the master of a steamer plying regularly between New York and Liverpool. He said, that, while crossing the Banks in a fog, it was not his custom to diminish his rate of speed at all; that he generally went ten or eleven knots an hour, through a fog, on the Banks; and that from three hundred to four hundred yards was the furthest distance at which a fog-horn or a bell could be heard. On this testimony I made these observations: "This practice, if it be one, of not diminishing speed in a fog on the Banks, is directly, so far as steamers are concerned, in the face of the 16th article of the sailing rules, which provides that every steamship shall, when in a fog, go at a moderate speed. * * * Two prominent ideas were advanced by the witnesses for the claimant in this case, as justifying undiminished speed in a fog on the Banks. One was, that the danger to any vessel in a fog is greater the longer she remains in the fog. The other was, that the faster a vessel is going, the more quickly will she mind her helm, and thus the better will she be able, on a signal of danger, to avoid colliding with another vessel in a fog. Neither of these ideas has any sanction in the law, and any vessel which acts upon them takes upon herself the consequences of recklessness. The first idea disregards wholly the rights and the safety of other vessels. The other idea presupposes that a signal of danger proceeding from a vessel unseen in a fog, to another vessel, will necessarily be heard so seasonably, and acted upon so intelligently, by the latter, as to secure, by a proper movement of her helm, the avoidance of a collision."

A review of the principal cases on the subject of speed in a fog will show, not only that no such rule as that contended for on the part of the Hansa has ever been laid down or sanctioned by courts of admiralty, but that the rule which is applied has not been relaxed in view of the increase of intercourse by steamers, and of the enlargement of the size and power of steamers.

In The Rose, 2 W. Rob. Adm. 1, 3, in 1843,

Dr. Lushington said: "It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered." He reiterates this view in the cases of The Virgil, 2 W. Rob. Adm. 201, 205; The Iron Duke (1845) 2 W. Rob. Adm. 377, 385; and the Juliet Erskine (1849) 6 Notes Cas. 633, 635. The same view was taken in the case of The Londonderry, 4 Notes Cas. Supp. 31, 45, and by the supreme court of the United States in Newton v. Stebbins (1850) 10 How. [51 U. S.] 586, 606; McCready v. Goldsmith (1855) 18 How. [59 U. S.] 89, 91; and Rogers v. The St. Charles (1856) 19 How. [60 U. S.] 109, 112. It was enforced in The Northern Indiana (1853) [Case No. 10,320]; The Batavier (1854) 9 Moore, P. C. 287, 297, 40 Eng. Law & Eq. 19, 25; and Amoskeag Manuf'g Co. v. The John Adams (1860) [Case No. 338].

In The Great Eastern, in the privy council, in 1864 (11 Law T. [N. S.] 5, 8, and Holt's Rule of the Road, 167, 180), it is said: "Their lordships do not mean to lay down any rule beyond that expressed in the regulations themselves, as to the occasion when a steam vessel is bound to moderate her speed, or as to the rate which, in the circumstances described in the evidence, she ought not to exceed; but their lordships are of opinion, that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." This was the principle adopted by this court in the case of The D. S. Gregory (1868) [Case No. 4,099], where the D. S. Gregory, a steamer, came into collision with a vessel at anchor, and where it was said, that the fact that the steamer, while under way in a fog, collided with the vessel at anchor, which used all proper precautions to give notice of her position, was sufficient evidence that the speed of the steamer was not moderate, there being no special circumstances existing in the case to justify her in maintaining the rate of speed she did; that, in such a fog, her speed ought to have been as much less than it was as would have been sufficient to enable her to avoid the vessel at anchor; that she ought not to have gone so fast as not to have been able, by slowing, stopping and backing, to avoid a collision; and that, if the fog was so thick, that, at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion was irresistible, that her speed was not that moderate speed in a fog which was required by the well-settled rules of navigation. The same principle was again applied by this court in the case of The Louisiana (1868) [Case No. 8,537], and in The Bristol (Dec., 1870) [Id. 1,890].

In the case of Dolner v. The Monticello [Case No. 3,971], in the circuit court for the Massachusetts district, before Clifford and Shepley, JJ., where a steamer, running not less than eight miles an hour, in a fog, collided with a sailing vessel, in the ocean, thirty to forty miles from Cape Lookout, the court say: "The only rule to be extracted from the statute, and a comparison of the decided cases, is, that the duty of going at a moderate rate of speed in a fog requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully and effectually to do the other things required of her in the same clause of the statute, namely, to slacken her speed or, if necessary, to stop and reverse."

In the case of The Blackstone [Case No. 1,473], in the district court for the Massachusetts district, in November, 1870, where a steamer ran down a sailing vessel, in a fog, in the Vineyard Sound, Judge Lowell held, that the steamer, in running at her usual speed, took the risk of meeting any other vessel properly navigating, and further said: "I do not place much reliance upon the evidence, though not contradicted, that a slower speed would have made no difference. It was well suggested, at the argument, that it might at least have enabled the lookout to hear the fog-horn sooner, because the noise at the steamer's bow would have been less; and it is by no means clear that it would not have enabled the steamer to avoid the libellant's vessel after she was seen. Even an expert must speak very cautiously to such a question, which involves a very close calculation of what a steamer can do in a given time, because no one is in the habit of timing them exactly, and a difference of a few seconds changes the whole aspect of the question. The statute undoubtedly assumes that a slow speed conduces to safety, and there is nothing in this case that should take it out of such a general rule, unless it be that the fog was unusually dense, or the steamer particularly difficult to manage, in either of which cases the necessity for caution was all the greater. I should be glad to see the experiment tried by a steamer, of moderating her speed in a fog, but I have hitherto found that they do not consider it to be important. If it is not, they should procure a change of the law."

A very instructive case on this subject is that of The Pennsylvania, in the privy council, in June, 1870 (23 Law T. [N. S.] 55). The Pennsylvania, a screw steamer, running in a line from Liverpool to New York, collided, in a fog, in the day time, with a barque, about two hundred miles to the eastward of Sandy Hook, while on a voyage to New York. There was a fresh breeze from the south southwest, and a heavy swell, the speed of the steamer was about seven knots per hour, her steam whistle was being sounded at proper intervals, she was steering west by south, and she was keeping a careful lookout. The barque was heading to the southward

and eastward, and making about a knot an hour, her helm being lashed alee. The barque was seen by the steamer about a length of the steamer off on her starboard bow, the helm of the steamer was put hard aport, and her engines were stopped and reversed. She struck the barque with her stem. The barque had been sounding a bell (instead of a fog-horn), which bell was heard on board of the steamer at about the same time the barque came into view. The court of admiralty held that the barque, being under way, ought to have sounded a fog-horn, and not a bell, but that the use of the bell instead of the fog-horn did not occasion or contribute to the collision; that there was no fault in the barque; and that the collision was caused wholly by the wrongful porting of the steamer and by her improper rate of speed. The privy council affirmed the decision, holding that, if the collision was inevitable when the vessels first came in sight, it was the fault of the steamer for going at an improper rate of speed; that the collision was not occasioned by the absence of blowing the fog-horn of the barque; that if, on the evidence, the fog-horn would have been heard further than the bell, it would not have been heard at a sufficient distance to have enabled the steamer to avoid getting into that position; that, in a thick fog, in the Atlantic Ocean, in the direct line to New York, about two hundred miles to the east of Sandy Hook, seven knots an hour is too great a speed for a steamer to proceed at; that, as against the view that a less speed than that would paralyze mercantile transactions and interfere with business and trade, in the carriage of passengers and goods, the lives of passengers and the safety of goods must be protected in the first place; and that, even if these fogs should last longer than they are said to do, still the steamers must abate their speed, and, if they do not, they must take all the consequences of a collision. See, also, on this point, Rogers v. The St. Charles, 19 How. [60 U. S.] 108, 112.

The case of The Westphalia [Case No. 17,460], in 1871, in the district court for the Eastern district of New York, holds the same views. The steamer, in a thick fog, the breeze being very light and the sea calm, collided, in a thick fog, in the day time, in the English Channel, with a brig. The steamer was whistling every fifteen seconds, and had slowed her speed to from eight to ten knots an hour, and her lookout and other precautions were proper. The brig came in sight from 150 to 160 feet distant, no sound from her having been previously heard. The engine of the steamer was at once stopped and reversed, and her helm was hove hard aport, but the vessels were in contact before she could be stopped or her course materially changed. The brig was sunk. The brig had blown a fog-horn after hearing the steamer's whistle, but had not blown it before. The court held that the steamer was not in fault for porting, but was in fault for running at a speed of nine or ten knots an hour, in a dense fog; that a speed of seven knots could not be justified; that, although the steamer would answer her helm more quickly when going at eight or ten knots than at six, she could not stop so quickly; that, in such a dense fog, she was bound to be going as slow as it was possible for her to go consistent with steerage way, in order to enable her to stop in proper time; that she was in fault for not doing so; that the brig was in fault in not sounding her fog-horn before she heard the steamer's whistle; and that the damages ought to be apportioned.

In the case of the Magna Charta, in November, 1871, before the privy council (25 Law T. [N. S.] 512), which was a collision between two steamers, in a fog, in the day time, in the Baltic Sea, both steamers having been sounding their whistles, one of them going at the rate of one and a half knots an hour, and the other at the rate of from four to five knots an hour, the vessels having become visible to each other at seventy yards distance, the latter having cut into the former to the distance of eleven feet, and the fog being so thick that a vessel could not be seen more than a ship's length off, both the court of admiralty and the privy council held that the speed of from four to five knots was too great.

The result of all the authorities is, that, while the justifiable rate of speed will depend upon the circumstances of the case, there is no such criterion as that the steamer may go at a rate such as will enable her to stop within an assumed distance at which she may, under favorable circumstances, expect to hear a fog-horn or a steam whistle, if blown. The present case illustrates the folly of such a test. Neither vessel heard the signal of the other. Yet, on the evidence, each gave the proper signal. The barque could do nothing but what she did. The steamer could easily have been going at less speed.

I forbear to remark on the lookout kept on the Hansa, in view of the speed she was going at. The officer on the bridge saw the light of the Rhea before it was reported by the men on the lookout on the bow. If the Hansa's speed had been less, and the light of the Rhea had then been reported as soon as a vigilant lookout on her bow could see it, and her helm had then been starboarded, and her engines had at the same time been reversed, it might well have been that the collision would have been avoided, or at least have been less disastrous. But I put the decision as to affirmative fault in the Hansa on the ground solely of the Hansa's speed not having been, under the circumstances, that moderate speed, in a fog, required of her by the rules of navigation. There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages.

Case No. 6,038.

The HANSA.

[7 Blatchf. 288.] [1]

Circuit Court, S. D. New York. June 11, 1870.[2]

COLLISION—STEAMSHIPS—CROSSING UNDER RISK OF COLLISION.

1. The rule, that, where two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her starboard side, shall keep out of the way of the other, enforced and applied.

[Cited in Clare v. Providence & S. S. Co., 20 Fed. 536; Meyers Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 828.]

2. Embarrassment by proximity to vessels at anchor is not an excuse for not observing such rule, where there is no justification for being in such proximity.

3. The not slackening of speed by the vessel bound to observe such rule, condemned; and the keeping of her course by the other vessel, approved.

[Cited in The City of Panama, Case No. 2,764; The State of Alabama, 17 Fed. 853; The Lepanto, 21 Fed. 669.]

[See The Albemarle, Case No. 135.]

In admiralty.

William Jay Haskett, for libellants.
Washington Q. Morton, for claimants.

WOODRUFF, Circuit Judge. The counsel for the claimants has argued this case with very great ability and skill. The rules of maritime law, which he urges with great zeal, are, for the most part, unquestionable. My examination of the testimony has brought me, however, to the same conclusion upon the facts which is stated with great clearness and force in the opinion of the district judge before whom the cause was tried below. [Case No. 6,036.] No additional testimony was taken in this court, and I do not think I should state the grounds of decision more satisfactorily if I were to discuss the evidence in detail.

It is not questioned that the Hansa was navigated in entire disregard of the rule which, when two ships under steam are crossing, so as to involve risk of collision, requires that the ship which has the other on her starboard side shall keep out of the way of the other. The master of the Hansa, from the moment he saw the Transporter off his starboard bow, was apprehensive of collision, and yet did absolutely nothing with a view to avoid it until the collision was inevitable, but continued to advance with undiminished speed, from six to nine miles an hour, according to the varying estimates of the claimants' own witnesses, he, as is justly to be inferred from his own testimony, relying upon an expectation, or at least trusting to a hope, that the Transporter would change her course.

The effort is ingeniously and zealously made to excuse the non-observance of the rule by the Hansa, by denying its applicability to her when she was greatly embarrassed by the vicinity of numerous vessels at anchor, which it was necessary that she should avoid. That embarrassment is entitled to consideration, and, if the Hansa had done what she could under the circumstances, would have great weight, notwithstanding the doubt created by the conflict of testimony, as to whether near the place of collision there were any vessels which were a hindrance to her appropriate effort to avoid the Transporter by passing to the eastward of her. But no sufficient excuse can be found for her advancing among those vessels lying at anchor, if they were even as numerous as her master states, and attempting to pass the bow of the Transporter at a speed which her own pilot estimates at nine miles an hour, or at the speed of six or seven miles an hour, as her other witnesses judge, when she had the Transporter in full view, according to her master's own statement, for half a mile.

The excuse for not moving more slowly, and by that means more carefully, which her master states, is, that it was necessary that she should have the speed she maintained in order to have steerage way. But the pilot testifies that she was manageable at a speed of three miles an hour, and, in an ebb tide running three miles an hour in the opposite direction, it would be very extraordinary if the statement of the pilot were not correct. It gave her practically a motion relatively to the water of six miles an hour, and there must be some very extraordinary reason if she could not have been safely steered with less than that. I am compelled to reject the excuse and to say, that if, instead of hoping that the Transporter would change her course, the Hansa had slackened speed, she might safely have picked her way among the vessels at anchor and passed safely to the eastward of the Transporter, and that it was her duty to do so. In short, the proof fails to satisfy me that there was any sufficient embarrassment to justify her in disregarding the rule. Doubtless, it was more convenient for her to take her usual course up and along the west side of the river. That was the most direct route to her berth at Hoboken, but such convenience must yield to rules devised for general observance and to secure safety to others.

The suggestion is plausible, that the Transporter was easily managed, and readily turned to starboard or port, and that, in circumstances of danger, instant and active effort should have been made by her. The rule is very well, but here, if I am right in my previous conclusion, the master of the Transporter saw and could see no reason on his part for not observing the rule which, while it required the Hansa to avoid the Transporter, required the Transporter to keep her course. When the peril became imminent, she appears to have done all that was possible to avert the consequences.

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

[2] [Affirming Case No. 6,036.]

I am constrained to regard the fault as wholly on the part of the Hansa. The decree must, therefore, be affirmed.

HANSBROUGH (UPTON v.). See Case No. 16,801.

Case No. 6,039.

In re HANSEN.

[2 N. B. R. 211 (Quarto, 75).] [1]

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

BANKRUPTCY—DISCHARGE—SPECIFICATIONS OF FRAUD.

Vague and general specifications reciting fraud, &c., will not be allowed in opposition to discharge.

John T. Wilson, Alexander Simpson and James W. Emery, trading under the firm name of John T. Wilson & Company, of 73 Fulton street in the city and county of New York and state of New York, creditors, having proved their debt against the estate of said Hans J. Hansen a bankrupt, and having received notice of his petition for a discharge from his debts, do hereby oppose the granting of said discharge, and for the grounds of such opposition do file the following specification: First. That said bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule and inventory in relation to a material fact concerning his estate, in swearing that said schedule contains a true statement of the property owned by him, and that he has no property not mentioned in said schedule; the fact being that said bankrupt has real estate not mentioned in said schedule, which is owned in trust for him and liable for his debts, and to be sold for the benefit of his creditors. Second. That he has concealed a part of his estate, namely, said real estate. Third. He has been guilty of fraud in delivery of his property to his assignee. Fourth. That he has made fraudulent preferences.

BLATCHFORD, District Judge. The specifications filed in opposition to a discharge are too vague and general to be triable. A discharge is granted.

HANSEN v. The LOUISIANA. See Case No. 8,537.

HANSEN (MAJOR v.). See Case No. 8,982.

Case No. 6,040.

HANSON v. COX.

[Hayw. & H. 167.] [2]

Circuit Court, District of Columbia. Feb. 19, 1844.

ACTION AGAINST AN ADMINISTRATRIX.

1. An administrator, by omitting to return an inventory, is not chargeable with the whole amount of a creditor's claim, and the burden of proof is upon the creditor to show the amount of assets which came into the administrator's hands, even when the administrator has neglected to account.

2. It is the duty of an executor, upon the death of the testator, to take possession of the personal property of the deceased, but not to dispose of it. He may sue for it, provided he takes out letters of administration before trial.

3. If an executor be also a devisee or residuary legatee, and enter generally into possession of the property, he does it as an executor, not as a devisee.

4. Any time before an executor distributes or disposes of the property of a testator, and continues to hold the property as such, even after the expiration of twelve months, is early enough for a creditor to commence an action to recover a debt due from the testator.

5. Where an administrator refuses to account after a creditor has shown in an action against him that he has sufficient in his hands to satisfy the creditor's claim, the administrator cannot be allowed to discharge himself by showing payments without showing his receipts.

This action was brought [by Andrew Hanson] against the defendant [Mary Ann Cox] as administratrix of William Cox, deceased, for the board, maintenance and clothing of a female child, the slave of the said William Cox, in the sum of $500.

Brent & Brent, for plaintiff.

Jos. H. Bradley, for defendant.

The jury brought in a verdict for $300. Judgment for assets ascertained to be due was $300 and costs, without interest; and the cause was referred to W. Redin, the auditor to ascertain and report whether there are sufficient assets to satisfy the judgment. The defendant, through her counsel moved for a new trial. THE COURT overruled the motion.

The following is the report of the auditor:

The subscriber reports that William Cox, by his will dated the 31st of July, 1839, devised and bequeathed to his wife, Mary Ann Cox, and her heirs, all his real, personal and mixed property, in trust, to be applied, in the first place in payment of his funeral expenses and just debts, and then to be held for the benefit of herself for life, and after her death for his children. He appointed his said wife, executrix, and directed that she should not be required to give security as such. On the 13th of August, 1839, Mrs. Cox obtained letters testamentary, and entered into the usual administration bond duly to administer. The above suit was brought against her on 3d of August, 1841, as administratrix, and judgment obtained for $300, on the 28th of August, 1843. Mrs. Cox has not returned any inventory to the orphans' court of the property which came to her hands, nor settled any account there. Citations have been several times issued by the court requiring her to do so. She has not shown to the auditor the amount of assets; but has declined to exhibit the state of her accounts, and to admit that anything came to her hands.

[1] [Reprinted by permission.]

[2] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Under these circumstances the plaintiff insisted that from her neglect of duty in the orphans' court, and her refusal to account now before the auditor, she must be presumed to have assets sufficient to discharge the plaintiff's claim; and that the burthen of proof was not upon him, but upon her, to show what assets came to her hands. The amount of such assets, and of the claims against the estate is information within her own knowledge. If insufficient to pay the debts in full, she could have protected herself by returning an inventory, and settling an account. In an action on her administration bond, for not distributing the assets at the time fixed by our testamentary act, would not the court, on her refusal or neglect to account before the jury, have instructed them to presume assets sufficient? On whom is the burden of proof as to assets in an action against an executor de son tort? Need the plaintiff show anything more than an intermeddling with the estate by such a defendant? The defendant might have pleaded in this action plene administravit, and put in issue the proportion of assets to which the plaintiff was entitled, as well as the existence of his debt. Upon the issue of plene administravit on whom is the affirmative, and on whom would have been the burthen of proof as to assets? By omitting to put that fact in issue before the jury, the question as to assets is referred to the court; and must not the court make the same presumptions against the defendant as to assets, that they would have instructed the jury to make?

The auditor is not aware of any decisions, nor of any established practice of this court where an administrator refuses to account. He would have thought, that, in such a case, it ought to be presumed against him that he had assets sufficient to satisfy the plaintiff's debt in full. But the court of appeals of Maryland has decided that, by omitting to return an inventory, an administrator does not become chargeable with the whole amount of a creditor's debt (Leeke's Adm'r v. Beanes, 2 Har. & J. 373); and that the burden of proof, in an action against an administrator on his administration bond, is upon the plaintiff to show the amount of assets which came to the administrator's hands (Morgan v. Slade, Id. 38; Wilson's Ex'rs v. Slade, Id. 281; Norfolk v. Gantt, Id. 435). Yielding to these authorities, the auditor declined, therefore, to report, as the plaintiff insisted he ought, that, from the defendant's neglect to account and to show what came to her hands, she must be held to have assets sufficient to discharge the plaintiff's debt. The plaintiff then undertook to show assets; and submitted the affidavit of John Gould, which proves that personal property of at least the value of twenty-five hundred dollars of said William Cox was taken possession of and collected by the defendant. It was then objected, on behalf of the defendant, that such property did not come to her hands as administratrix; that whatever personal property she took, was taken by her as devisee and trustee under the will of said Cox, upon the trusts of the will, before she had any notice of this claim; that she was sued in this action as administratrix, whereas, in truth, she was executrix; and that the plaintiff's remedy, if any he had, was in chancery, and not in a court of law.

The defendant sets up the will, and claims to have acquired and to hold the property of the testator, not under the authority of her letters testamentary, but of the will. Taking this to be so; of that will she is residuary devisee or legatee, and also executrix. In which of these characters did she take? It is the duty of an executor immediately upon the death of the testator to take possession of all the personal property. He has authority through the will, and without letters testamentary, to collect and preserve, but not to dispose of it. He may sue for it, before letters granted, and recover at the common law; and so, under our act, provided he obtain letters before the trial. Act Md. 1798, c. 101, subc. 3, § 8; Laws D. C. p. 43. His right and title commence the instant the testator dies; and the property remains in his hands, as executor, until the debts are paid, or until delivered up to those entitled. A legatee can take nothing except by the assent of the executor, or on the order of the orphans' court. Act Md. 1798, c. 101, subc. 10, §§ 7, 8; Laws D. C. p. 59. If a legatee obtains possession of the property bequeathed, and it be necessary that the executor should have it for the satisfaction of debts, he may maintain an action against the legatee, and recover it back. The rule is so where the executor and legatee are different persons. If they be the same person—if the executor be also the devisee or residuary legatee—and he enter generally into the possession of the property he is in as executor, and not as devisee or legatee. 11 Vin. Abr. tit "Executor" (M b) §§ 5, 7. Possession of personal property acquired in one character, continues to be held in that character, until the possession be changed. The defendant in this case unites in her own person both characters of executrix and devisee. It must be shown that she took possession of the property as legatee, or the presumption is that she is in as executrix. Is there any act which shows an intention on her part to take as legatee, and not as executrix? Did she not enter generally on the death of the testator? And not only so; but if the character in which she took is to be determined by her own act, must not the obtaining of letters testamentary giving bond, and taking the oath duly to administer, be deemed evidence of an election on her part to take as executrix? If she made such election, or if by entering generally, she is to be deemed in as an executrix, what act has she since done to change the character of her original possession? No formal act of assent by her as executrix to the

residuary bequest is shown at any time. At the expiration of twelve months, the period for the exhibition of claims, there had been no sale, was no distribution, nor any settlement, and transfer of any balance, after paying the debts of the testator, to herself as devisee, or any other act manifesting an intention to change the character in which she had acquired the possession of the property. It does not appear that any notice of this claim was given the defendant within the twelve months, nor earlier than the commencement of the action. But, if at that time the character of her original possession remained unchanged, and she continued to hold the property as executrix, undistributed and undisposed of, the notice of this claim, by the commencement of the suit, was in time. The auditor thinks the defendant must be considered, at the time of commencement of this action, as holding the property in the character in which she originally acquired it, namely, as executrix, or administratrix with the will annexed. Then, as to the objection that she is sued as administratrix, and not as executrix. Ought not that, if a defense, to have been pleaded in the action? Has she not, by appearing as administratrix, confessed that she is such? And would not this judgment against her as administratrix be a bar to an action for the same debt, by the same plaintiff, against her as executrix? It is thought so.

These views having been communicated to the parties, the defendant, without waiving, but insisting upon her right to rely before the court upon the several objections above stated, claimed the right to show the claims that existed against her husband at the time of his death, and the payments she had since made. Claims to the amount of $3,212.22, including the plaintiff's, have been exhibited. These are particularly stated in a list thereof appended to this report. If the defendant comes in to settle, ought she not to exhibit both sides of the account, and not one side, the creditor side, merely? She has refused to show the debtor side, the amount of the assets which came to her hands, and has put the plaintiff to prove what he can. The sum made out by him may be greatly less than the amount really received. Ought she to enter into this speculation, and be silent, if the amount proved be less, and show the true amount if it be more? The auditor thinks that, to entitle herself to take credit for the payments she may have made out of the assets, she ought to show, what it is in her power to do, the precise amount of those assets, and to state and settle the entire account. Yielding to the Maryland decisions, as establishing that it cannot be presumed from the defendant's refusal to account that she has assets sufficient, the auditor thinks that the plaintiff having shown assets, the defendant ought not to be allowed to discharge herself by showing payments without also showing her receipts. And therefore he reports, upon the testimony of John Gould, that the defendant has assets sufficient to discharge the plaintiff's debt in full; and that final judgment should be entered for $300, with interest from the 28th of August, 1843, and $24.62, the costs of suit, and $27, the cost of this audit.

If, however, the auditor is in error as to this, and the defendant can come in and discharge herself from the sum proved by the plaintiff, without showing the amount received by herself, then the account will stand as follows:

He charges her upon Gould's testimony with		$2,500.00
And he allows in full:		
The fees of the register of wills	$ 7.00	
Kirby's bill for funeral expenses	51.00	
Adm'x's commission at 10 per cent	250.00	
Plaintiff's costs of suit....	24.62	
The defendant's costs of suit	8.50	
Costs of this audit.....	27.00	
		368.12
Balance for distribution.....		$2,131.88

The debts against the estate presented by the defendant, as stated, amount to $3,212.22. The dividend is 66.4 per cent., and the proportion due the plaintiff, the sum of $199.20, for which final judgment should be entered, with interest from the 28th of August, 1843, and $24.62, costs of suit, and $27, costs of the audit. In the amount of debts above stated, is one of $1,000, due to Col. Crowell. This, it appears from the defendant's statement, has never been claimed, but she admits it; and the dividend has been ascertained upon its allowance. If something more than the defendant's mere admission of it as a valid claim against the estate be necessary, and it should have been rejected, the dividend would then have been 96.3 per cent., and the plaintiff's proportion $288.90, for which final judgment should be entered, with interest and costs as aforesaid. W. REDIN.

HANSON (FORREST v.). See Cases Nos. 4,942 and 4,943.

Case No. 6,041.

HANSON v. FOWLE et al.

[1 Sawy. 497.] [1]

District Court, D. Oregon. March 1, 1871.

IMPRISONMENT FOR DEBT IN ADMIRALTY SUITS—CLAIM FOR DAMAGES FOR INJURY TO PERSON NOT A CLAIM FOR DEBT—AT COMMON LAW.

1. The act of March 2, 1867 (14 Stat. 543), adopting the state law concerning "modifications, conditions and restrictions upon imprisonment for debt," does not apply to process in admiralty suits.

2. The act of August 23, 1842 (5 Stat. 517), gave the supreme court full authority to regu-

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

late the process and forms of proceedings in suits of admiralty, and it will not be presumed that congress intended to change the rule prescribed by that court upon the subject of imprisonment on process in admiralty and adopt the state law, unless it is explicitly so provided.

3. An action to recover damages for an injury to the person with force, is not an action to recover a debt, and the claim for such damages is not a claim for a debt, within the meaning of that term as used in the act of 1867 (Adm. Rule 48, or subdivision 19 of article 1 of the state constitution)—at least until it is changed or merged in a judgment for a sum certain.

4. At common law, a capias lay, both before and after judgment in actions for injuries committed with force, but not otherwise, until the statute of Marlbridge (52 Hen. III. c. 23, and Westm. 2, 13 Edw. I. c. 11, etc.)

This suit was commenced January 30, 1871. The libel charges that in August, 1870, while on a voyage from Newport, Wales, to this port, in the American brig Madawasca, the defendant [A. F.] Turner being then second mate on said brig, in the presence and with the consent of the defendant [Frank] Fowle, who was then master of the same, did, without cause, beat the libellant [Christian Hanson], a seaman on said brig, with a capstan bar and otherwise, and thereby fractured his left arm, and otherwise injured said libellant, to his damage, $2,000. Upon reading and filing the libel, an order was made at chambers, allowing a warrant of arrest to issue against the defendants, in pursuance of the S. C. admiralty rules 2, 7, and 48. Upon this process the defendants were arrested. Fowle gave bail, but Turner was committed to jail for want thereof. Separate motions or exceptions were afterward made or taken by each defendant to vacate the order allowing the warrant, or to set aside the proceeding and process as irregular. On February 11, these motions were argued and submitted together.

Theodore Burmister, for libellant.
J. W. Whalley, for defendant Turner.
Orland Humason, for defendant Fowle.

DEADY, District Judge. Section 106 of the Code prohibits arrest in an action at law, except in certain cases therein specified. Subdivision 1 of said section authorizes an arrest of a defendant in an action for damages "for any injury to the person." Section 107 of the Code prescribes the mode or conditions of obtaining a writ of arrest in the cases specified in section 106. Code Or. 164, 165. Substantially these conditions are, that the facts authorizing the arrest shall appear by affidavit, and that the party asking the writ shall file an undertaking, with sureties, to the effect that they will pay defendant all damages which he may sustain by reason of the arrest.

Rules 2 and 7 of the S. C. admiralty rules, adopted at the term of December, 1844, authorize an arrest in all suits in personam; but rule 48, adopted at the term of December, 1850, "abolishes imprisonment for debt" on admiralty process in all cases where it is abolished upon similar or analogous process by the laws of the state where the court is held. It seems that this rule is not deemed to adopt the conditions and restrictions imposed upon the right to arrest a defendant by the state law. It simply adopts the law of the state prescribing the instances or cases in which an arrest is allowed, leaving the national courts to pursue their own mode of proceeding in the premises. 2 Conk. Adm. 135, 136. Upon this understanding of the law and the rules applicable to the subject, the order allowing the warrant of arrest in this suit was made, and the warrant issued without the libellant first filing the undertaking to the defendants.

It is now contended by counsel for the motion, that the act of March 2, 1867 (14 Stat. 543), entitled, "An act supplementary to the several acts of congress abolishing imprisonment for debt," applies to process in admiralty proceeding, and that therefore this warrant was improperly issued, because the libellant had not first performed the conditions imposed by section 107 of the Code upon plaintiff's right to have a defendant arrested in a similar case. If the premises are correct, the conclusion follows.

The act of 1867 provides: "That whenever, upon mesne process or execution issuing out of any of the courts of the United States, any defendant therein is arrested or imprisoned, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he was so arrested or imprisoned on like process of the state courts in the same district. And the same oath may be taken, and the same length of notice thereof shall be required, as is provided by such state laws; and all modifications, conditions, and restrictions upon imprisonment for debt, now existing by the laws of any state, shall be applicable to process issuing out of the courts of the United States therein, and the same course of proceedings shall be adopted as now are or may be in the courts of such states. But all such proceedings shall be had before some one of the commissioners appointed by the United States circuit court to take bail and affidavits."

The acts to which this purports to be supplementary are those of February 28, 1839, and January 4, 1841 (5 Stat. 321, 410); and taken together, they, in effect, abolish imprisonment for debt on process issuing out of any court of the United States, in all cases whatever where, by the laws of the state in which the said court shall be held, imprisonment for debt has been or shall hereafter be abolished; and also provided, that where, at the date of the first named act, imprisonment for debt was allowed upon conditions and restrictions, it should be allowed in like manner in the United States courts.

The provision in regard to conditions and

restrictions upon the allowance of an arrest not being prospective, do not adopt the laws of any state on that branch of the subject, passed since February 28, 1839. It was also held, that these acts did not apply to debtors of the United States (U. S. v. Hewes [Case No. 15,359]); nor to process in personam issuing out of the admiralty courts (Gardner v. Isaacson [Id. 5,230]; Gaines v. Travis [Id. 5,180]).

Taken literally and construed without reference to any consideration beyond that appearing upon the face of the statute, there is no reason to suppose that congress did not intend the acts of 1839 and 1841 to apply to process in suits in admiralty, and with equal reason, the same may be said of the act of 1867. Yet Mr. Justice Betts, in 1848 and 1849, in the cases above cited (Gardner v. Isaacson and Gaines v. Travis), deliberately held the contrary, and I am satisfied to follow his conclusion, until congress shall otherwise explicitly provide.

From the foundation of this government, in all legislation concerning the process and proceedings in the national courts, congress has never confounded the three different and distinct branches or heads of jurisdiction, known as "Common Law," "Equity" and "Admiralty." The process acts of 1789, 1792, 1793 (1 Stat. 93, 275, 335), and 1828 (4 Stat. 278), all uniformly provide that the forms of writs, execution and other process, and the forms and modes of proceeding in suits of admiralty jurisdiction shall be according to the rules and usages which belong to courts of admiralty as contradistinguished from those of common law. These acts, except the first one (which was only temporary), also provide that these forms and modes of proceeding are subject to such alterations and additions as the courts of admiralty might deem expedient, "or to such regulations as the supreme court of the United States shall think proper from time to time by rule, to prescribe to any circuit or district court concerning the same."

By the act of August 23, 1842 (5 Stat. 517), the supreme court was empowered to regulate the whole subject of process and proceeding in courts of admiralty. This was an extension, probably, of the power already conferred upon that court by the above cited acts of 1792, 1793 and 1828. In pursuance of this authority the supreme court made rules 2, 7 and 48, regulating imprisonment on admiralty process, under which the arrest in this case was made.

Under this state of statutes, rules and decisions, all of which, it must be presumed, were well known to congress at that time, I do not think it reasonable to conclude that it was the intention of the act of 1867 to modify the act of 1842—change the rules of the supreme court, and so far, withdraw the subject from its authority. If so, it seems to me, that process in admiralty would have been explicitly mentioned; particularly when it was so well known that similar language in the former statutes on the subject of imprisonment for debt had been construed by the courts not to include courts of admiralty. On the other hand, substantial reasons can be assigned for the passage of the act of 1867, without including that of the regulation of imprisonment upon admiralty process.

The first half of the act has no application to the question before the court in any view of the subject. It only regulates—by adopting the law of the state upon the subject—the discharge of persons already imprisoned for any cause, on process issuing out of the national courts. For instance, by the law of this state a person imprisoned on execution —after judgment—ten days, may be finally discharged from such imprisonment if he makes it appear that he has no property liable to execution. Code Or. 759. The effect of this provision, at least, is to enable a person imprisoned on execution in a common law action in this court, to obtain a final discharge therefrom, upon the same terms and conditions that he could in a similar action in a state court; and this was not so held or understood before. Catherwood v. Gapete [Case No. 2,513]; In re Freeman [Id. 5,083]; and cases there cited. The latter clause of the act obviates or provides for a difficulty which had frequently arisen in the administration of the state laws regulating "executions and other final process" adopted by section 3 of the process act of 1828 (see In re Freeman, cited above), by providing that the proceedings to obtain a discharge shall be had before a commissioner of the circuit court, rather than the state officer as provided by the state law.

The middle clause which adopts the state law concerning "modifications, conditions and restrictions upon imprisonment for debt," was called for or suggested, at least as to the "conditions and restrictions," by the well known fact, that the acts of 1839 and 1841, to which it is supposed this is supplementary, had in this respect been construed to be not prospective. Since the date of the first of these acts, serious changes have been made on the subject in the states then in the Union, while as to the states since admitted, they did not apply at all. If the phrase "modifications upon imprisonment" is construed to be something more than cumulative upon the terms "conditions and restrictions" immediately following, and to have a distinct and independent operation in regard to the subject—"imprisonment for debt"—then it was probably inserted in the act to meet and obviate the construction given to the acts of 1839 and 1841, in Catherwood v. Gapete and in Re Freeman, supra, where it was held that these acts did not adopt a law of the state which, instead of abolishing imprisonment for debt, only modified it and allowed it in certain cases.

In addition to these considerations in support of the conclusion that the act of 1867

was not intended to apply to process in admiralty, weight should be given to the manifest impropriety of subjecting imprisonment on such a process to all the variant and varying conditions and restrictions which may be imposed from time to time upon imprisonment for debt in common law actions, which mainly arise between citizens of the same state, by the legislatures of the several states. By the constitution, admiralty courts cannot exist in the states. Their laws imposing conditions and restrictions upon imprisonment for debt are not framed with a view to the exigencies of the class of persons who constitute the suitors in such courts, or the nature of the controversies over which they have jurisdiction. If a sailor arriving in a strange port must in all cases give security in the amount claimed, before he could arrest an officer of the ship in a suit for a wanton and serious injury to the person, it would generally operate as a denial of justice to this class of persons. Under such circumstances the defendant, "if sued without arrest, would find a substantial defense in a fair wind and open sea." Ben. Adm. 232.

True, if no restrictions are imposed upon the right to arrest a defendant, serious injury may be done to an innocent party by an irresponsible or transient libellant. But a court of admiralty is best calculated to judge, under what circumstances and to what extent to impose restrictions upon the issuance of a warrant of arrest. Probably, as a rule, security should be first given for any damage which the defendant may sustain if the arrest should prove wrongful; but when it appears that the libellant is unable to give such or any security, and prays an arrest of the defendant for some prescribed cause of arrest, the warrant might issue subject to the right of the defendant to give bail, or demand and have an immediate inquiry before a commissioner, to ascertain whether or not there is probable cause of suit and arrest. If upon the examination of the case the commissioner should conclude that there was probable cause, he should endorse that fact upon the warrant, which should thereafter be deemed equivalent to security, or otherwise he should order the defendant discharged.

Again admiralty jurisdiction is given by the constitution exclusively to the United States, and the supreme court is the ultimate judge of the limits of this jurisdiction. Courts of admiralty are in some sense international and inter-state courts, and for these reasons as well as others, the regulation of their process and proceedings seems so appropriately to belong to the supreme court, and is so foreign to the genius and spirit of the local laws of the states, that it is not to be inferred without very good reason, if not explicit declaration, that congress after confiding this authority to that tribunal by the act of 1842, intended to take it away by the act of 1867 in the mere matter of "modifications, conditions and restrictions upon imprisonment for debt," and give it to the states, in proceedings which for the most part arise not between citizens of the state, but between non-residents, strangers and aliens. The St. Lawrence, 1 Black. [66 U. S.] 528.

Nor is it admitted that this warrant of arrest issued without the facts necessary to authorize an arrest first appearing by affidavit as required by section 107 of the Oregon Code. The libel being verified and the cause of suit and arrest being identical, the facts authorizing the issuance of the warrant did appear from the written oath of the libellant—his affidavit. In U. S. v. Walsh [Case No. 16,635], this court held that when the cause of arrest was sufficiently set forth in the complaint, a separate affidavit as to these facts is not necessary to authorize an arrest.

Counsel for defendant Turner seeks to distinguish this case from that, because in the re-enactment of section 107 in 1865, so as to allow the writ to be issued by the clerk without a judge's order, the wording of the section was so changed in this respect, that instead of simply requiring the facts to appear by affidavit when the writ is allowed, without reference to the time of its filing as before, it read that the affidavit for the arrest should be "filed after the commencement of the action," and therefore after the filing of the complaint, and therefore it must be something different and in addition to the complaint. This is an extremely fine point, and rests wholly upon the letter of the statute, without giving any consideration to the reason or purpose of it. A provisional arrest is not allowed before the commencement of an action nor after judgment therein. These are the limits within which the proceedings, including the filing of the affidavit, for a provisional arrest must be taken; and for all practical purposes an affidavit filed with the complaint—at the same time—and upon which the writ is afterward allowed is within the statute. No importance is given by the section to its being filed any perceptible time after the complaint. The time between the commencement of the action and the judgment is given for the convenience of the plaintiff, and to enable him to procure the arrest at any time before judgment, if cause should arise in the progress of the action. So far, the purpose is to prohibit or prevent the allowance of the writ before the commencement of the action, and nothing more. This being so, a verified complaint may very properly be considered both a complaint and an affidavit, and if the facts contained in it justify an arrest, it is sufficient for that purpose.

Counsel for defendants also argued that an arrest for an injury to the person was not allowed by the law of this state, and therefore this arrest was not even within the authority of admiralty rule 48. Of course, counsel admits that subdivision 1 of section 106

above cited, provides for an arrest of the defendant in an action for damages for an injury to the person, but he contends that this provision of the section is in conflict with subdivision 19 of article 1 of the constitution of the state, which declares: "There shall be no imprisonment for debt, except in cases of fraud and absconding creditors." In U. S. v. Walsh, supra, it was held that this clause of the constitution should be construed as if it read: "There shall be no imprisonment for debt, arising upon contract express or implied, except," etc. In support of this conclusion, the court said: "General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produce them, and the end sought to be obtained. A person, who wilfully injures another in person, property or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury, a debt; but he is in fact a wrong-doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he has promised. For instance, a person who wrongfully beats his neighbor, kills his ox or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor."

And this accords with the course of the common law, which did not give process against the body either before or after judgment only in actions for wrongs accomplished with force; it being a rule that in actions vi et armis a capias lay, and when a capias lay in process a capias ad satisfaciendum lay after judgment. Afterwards a capias was given in actions of account by the statute of Marlbridge (52 Hen. III. c. 23, and Westminster 2, 12 Edw. I. c. 11); in debt and detinue by statute 25 Edw. III. c. 17; in case by statute 19 Hen. VII. c. 9; and in annuity and covenant by the statute of 23 Hen. VIII. c. 14, 3 Bl. Comm. 281; 1 Attys'. Prac. K. B. 280.

To conclude, the motion must be denied, because: I. That portion of the act of 1867 which adopts the state law concerning the "modifications, conditions and restrictions upon imprisonment for debt," does not apply to process in suits in admiralty. II. The suit of the libellant is not to recover a debt within the meaning of that term as used in the admiralty rule 48 of the act of 1867, or the constitution of the state, at least until it shall ripen into a decree for a sum of money certain, but to recover damages for an injury to the person with force, for which the defendant might be arrested under admiralty rules 2 and 7, whether the state law allowed an arrest in such cases or not.

[Upon hearing the proofs the court gave judgment for the libellant in Case No. 6,042.]

Case No. 6,042.

HANSON v. FOWLE et al.

[1 Sawy. 539.] [1]

District Court, D. Oregon. April 3, 1871.

SEAMEN — ASSAULT AND BATTERY OF OFFICER — WHEN MASTER LIABLE FOR — SATISFACTION, PROOF OF—RECEIPT FOR CLAIMS EX CONTRACTU AND CLAIMS EX DELICTO—MEASURE OF DAMAGES.

1. A master of a vessel is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, when the same is done by his connivance, consent or authority.

2. The consent and authority of the master will be presumed when it appears that he knew of the trespass or had reason to know it, and did not interfere to prevent it.

3. A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages.

[Cited in The Oriflamme, Case No. 10,572.]

4. A receipt for all "demands and dues" against a vessel, her master and officers, is not upon its face a receipt for assault and battery.

5. The word "demand" on a receipt ordinarily relates only to claims arising ex contractu, and not to those arising ex delicto.

6. Rules for assessment of damages in cases of beating and wounding a seaman.

In admiralty.

Theodore Burmeister and H. Y. Thompson, for libellant.

J. W. Whalley, for defendant Turner.

Orlando Humason, for defendant Fowle.

DEADY, District Judge. Christian Hanson, lately a seaman and second mate on the American brig Madawaska, brings this suit against the respondents, the master and mate of said brig, to recover damages for an alleged beating and wounding by the latter, with the consent of the former, about August 8, 1870, during a voyage from Newport, Wales, to Portland, Oregon.

The libellant and the respondents have been examined as witnesses, also two of the seamen, and the cook and the cabin boy. The arm of the libellant, which it is alleged was fractured by the beating, was exhibited in court, and the testimony of physicians heard as to the nature of the injury and its probable cause and consequences.

The testimony is too voluminous to be detailed here. It appears that when the brig was in the South Atlantic, the libellant was at the wheel during the morning watch, steering by the wind, the same being light and varying about five points on either side. Near six o'clock the ship was thrown into stays, but no harm was done by it except the stranding of the main sheet, which was not discovered, however, until after the beating in question. When the ship was thrown into

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

stays, the master came on deck, and abused Hanson on account of it. Hanson replied that he couldn't help it. The mate immediately with the rest of the watch, braced the yards on the other tack, and then went forward with one man to haul down the foretack. Just at this time—near six o'clock—the libellant's watch at the wheel being about out, the master ordered O'Neal to take the wheel, and the libellant to go forward and help the mate about the foretack. As soon as the libellant got forward near the capstan, words passed between the mate and him about the ship being thrown into stays—the mate abusing the libellant, and finding fault with him about it, and the latter answering, "Mr. Turner, I couldn't help it." Very soon the mate commenced beating the libellant, and knocked him down near or on the combing of the fore hatch and then kicked—booted him—aft to the companion way.

The libellant testifies that the mate struck him six times with a capstan bar. That the first three blows he received on his arm in attempting to ward them off from his head and body, and that then he was knocked down and struck on the lower part of the back three other blows with the bar. That then the mate ordered him aft, and as he went stooping along from the effect of the blows, on his two feet and one hand, the mate kicked him in the back and sides until he reached the companion-way where the master was standing.

The mate denies having struck the libellant with the bar, but admits striking him with his fist and knocking him down, and that he kicked him with his bare foot, and also struck him with his fist as he passed him as they were both going aft. The mate also testifies that the libellant was impudent to him and pushed him against the anchor, and that he was provoked to beat him on that account. No one saw the men during the affray at the capstan, but the libellant was heard to scream and say, "I couldn't help it." There is no doubt but that his arm was broken on that occasion, and the weight of testimony tends to support the story of the libellant. This being so, the beating was unprovoked and unjustifiable. It does not, however, necessarily follow that the mate intended to break libellant's arm, but he beat him unlawfully and, I think, unmercifully, and he must be held responsible for the consequences of his conduct and actions.

The master denies knowing anything about the matter, or that he had any knowledge that the libellant was injured while on the vessel. I think the testimony strongly preponderates in favor of the conclusion that the master was cognizant of the beating, and did not interfere to prevent it but on the contrary, suffered and approved it. Notwithstanding the attempt to prove the contrary, I am satisfied that the master was on deck, probably on the poop, at the time. True, on account of the ship's house, he might not have seen the parties at the time libellant was knocked down and had his arm broken, but he must have heard enough of the affray then to have called his attention to it. At least, as the libellant came aft crying with pain, and the mate booting him, he must have seen them. Besides, it is admitted that the master came on deck immediately after the libellant and mate came aft, and that he saw the former crying from the effects of the beating, and that he made no inquiry into the matter nor noticed it otherwise than to put him to work splicing a thimble in the main sheet, and when he complained that his arm hurt him so he could not work, to tell him "to shut up."

There can be no doubt that the libellant carried his arm in a sling for several weeks, probably as many as six, during which time, although he stood his watch, he did not take his turn at the wheel on account of the fracture of his arm.

The voyage did not terminate for near five months afterwards, and yet no inquiry was ever made into the matter by the master, and the broken arm was allowed to go uncared for and to heal as best it might.

This subsequent utter indifference and neglect on the part of the master tends to convince me that he was aware of the beating when it occurred and approved it. Indeed it is not improbable that he sent the libellant forward to where the mate was when he did, for the purpose of giving the latter an opportunity of punishing the former for letting the ship come into stays. The testimony of one witness is that he was walking the poop cursing and swearing about the matter, at the time the battery was being committed. According to the libellant's testimony, as soon as the master came on deck he railed out at him, calling him a "Dutch hound of h—ll." So the testimony of others of the crew is to the effect that he was in the habit of telling the mate "to make the men move, and if they didn't, to mash their heads," and that on one occasion he beat one of the men himself over the back with a broom-stick, for no particular cause as appears.

The law upon the liability of the master for the trespasses of his officers is laid down by Mr. Justice Story in Thomas v. Lane [Case No. 13,902] as follows: "The master has the supreme authority on board of his ship; and has, moreover, a sort of parental responsibility and duty devolved upon him, for the due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere, and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent to and encourage it; for no officer in his presence has any right to inflict punishment without his assent or direction,

unless upon an emergency, which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notions of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers, for the good, not of the officers alone, but of the crew also, and, indeed, for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady confidence, he is to take care that the crew is not made the victims of the insolence, the passions, or the caprice of the officers under him. If he will stand by and see the seamen cruelly, brutally and unjustifiably beaten without interference, he ought not to complain that the law forces upon him the conclusion that he approves what is done, and means to encourage it by his license and authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground that he who knowingly allows oppression shares the crime. Such, in my opinion, is the dictate of the law on the subject; and it is wholesome as an admonition and a preventive against the undue resentment and oppression of officers, which so often end in the open mutiny and rebellion of the injured crew."

Upon this branch of the case I think the libellant is entitled to recover against the master as well as the mate. To my mind, it is absurd to suppose that within the limited area of this vessel, carrying a crew of only six men, that the mate could in open daylight and without any substantial cause, severely beat one of the men, fracture his arm, and boot him from fore to aft, without the master being aware of it at the time or soon after. If for any reason he did not see the transaction at the moment of its occurrence, and it had not been allowed to take place by his connivance, consent or authority, he would most naturally inquire into the circumstances as soon as the matter came to his knowledge and take some steps to rebuke or punish the offending officer, and to bind up and heal the wounds of the injured seaman. Not having done this, the inference is reasonable that he approved of the mate's conduct at the time.

An attempt is made in the pleadings and proof by both respondents to set up a receipt given by the libellant to the master one or two days after the arrival of the vessel at this port, in bar of this suit. It is in these words. "Received from F. Fowle, the sum $93.96, being the amount in full of all demands and dues against brig Madawaska, her officers, captain and owners. (Signed) Christian Hanson. Portland, January 17, 1871."

There is no direct testimony to show that the sum mentioned in this receipt was paid the libellant for his wages only, but the fact is manifest from all the circumstances as well as from the testimony of the master himself. He testifies that within a day or two after his arrival at this port, he sent for the men to pay them off, and that the libellant was the first man in the cabin. "I (the master) asked him (Hanson) if he had made up his account? He said he had not. I told him I had, and read it to him, and asked him if it was right. He said it is. Then I gave him the money, and he signed the receipt." On cross-examination, he testified further: "I did not suppose there would be any claim for damages. I did not think of anything of the kind at the time."

The general rule is that the word "demand" in a receipt relates only to claims arising out of contract, and does not include those arising out of tort, such as this. The word "damages" nor any equivalent of it, does not occur in the receipt, and the master did not think of any such a thing when he took it. Upon these facts alone it would not be held to be a release or acquittance of this claim. But this is not all. This voyage lasted seven months and twelve days. The only place that the vessel touched on the way was the Falkland Isles, where she remained a few days to ship three men in place of three of the crew lost overboard. It is highly probable that the whole wages for the voyage were due the libellant when he signed this receipt. Dividing the sum received by the time of his voyage, gives as a result, a little over $13 per month. It is not probable that the wages were less than this sum. Considering these facts, the nature of the subject, and the relation of the parties, it is apparent that the receipt was neither given by the libellant, or received by the master with any reference to this claim for damages.

But if this receipt contained the word "damages," or "all claims for damages," the law would not allow the respondents to take advantage of it to defeat this suit, unless it also satisfactorily appeared that after a fair and distinct understanding of the matter, the libellant compromised or settled the claim for, or on account of some substantial satisfaction, compensation or benefit made to, or to enure to him.

The law very properly looks with distrust and suspicion upon a release or receipt obtained from a seaman at or before the payment of his wages, for injuries inflicted upon him during the voyage. While the wages are unpaid, the master and men deal upon such an unequal footing, that no attention will be paid to such release when there is any ground for suspecting that it was unduly or unfairly obtained.

In Whitney v. Eagar [Case No. 17,584] the court held that no attention should be paid to a release of the officers of a ship from all claims and damages, given by a seaman to procure the payment of his wages. In Thomas v. Lane, cited above, there was a receipt signed by the seaman on the back of the shipping articles, in full of all demands for assault and battery and imprisonment. In

passing upon it, the court said: "To such a receipt, given upon the mere payment of wages, and without any distinct compromise, satisfaction, or compensation for trespasses, it can hardly be supposed that any court would listen as a bar to a suit of this nature. It must, under such circumstances, be treated as a paper obtained by fraud, surprise, or under advantage taken of the party's situation."

The damages claimed in the libel are $2,000. In estimating the damages to be allowed libellant, regard must be had to the condition in life and circumstances of the parties. Whitney v. Eagar, supra. The respondents are the master and mate of a sailing vessel, and have nothing so far as appears, beyond their earnings. The libellant is a seaman and a sailmaker, a native of Denmark, and under thirty years of age. On two discharges given him by a "superintendent of a mercantile marine office" at Hull, England, in 1869 and 1870, he is marked as an able-bodied seaman; "very good" as to character for "ability, capacity and conduct." The evidence shows that the bone of the upper arm was fractured, and that it has knit together, but not quite in place. The arm is yet weak, and unfits the libellant to do an able-bodied seaman's duty, but the physicians think it will be a pretty good arm in the course of a year. No expense or loss of time was incurred by libellant while on the brig, on account of the fracture. Allowing the libellant, if his arm was not injured, to be able to earn $60 a month and find himself, I think it may be safely assumed that during the current year he will not be able, on account of the condition of his arm, to earn more than $30 per month. This will be a loss to him of $360. For the actual breaking of his arm, and the anguish, pain and suffering necessarily resulting from the fracture and the beating, and the subsequent heartless neglect with which libellant was treated by the respondents, it is not so easy to determine what sum should be allowed. In these respects, what are proper damages can only be estimated in a very general way, and much must depend in each case upon the condition in life and circumstances, pecuniary and otherwise, of the parties. After careful consideration, I have concluded to allow the libellant on these accounts, $500. To these amounts something must be added by way of compensating the libellant for the expense which he has incurred in employing counsel, to maintain this suit to vindicate his rights. For this I will add $200, making in the aggregate $1,060 which the libellant is entitled to recover in any lawful money of the United States.

Affirmed on appeal in the circuit court, May 12, 1871, Sawyer, J. [Case unreported.]

[Motions to vacate the order allowing the warrant, and to set aside the proceeding and process as irregular, were made in Case No. 6,041.]

HANSON (ODENHEIMER v.). See Case No. 10,429.

Case No. 6,043.

HANSON v. ROWELL et al.

[1 Spr. 117.] [1]

District Court, D. Massachusetts. Nov., 1845.

WAGES OF SEAMEN — FORFEITURE BY DESERTION.

1. Where there was a collision, in the night time, and a cry that the vessel was sinking, and a seaman jumped from his own vessel to the other vessel for safety, and afterwards endeavored to rejoin his own, without success: *Held*, that he had not incurred a forfeiture of wages.

2. Wages were allowed up to the time of leaving his own vessel.

[Cited in Antone v. Hicks, Case No. 493.]

This was a libel for wages promoted by Hanson, a seaman on board of the ship Sumatra, against the owner [and others].

E. & G. A. Smith, for libellant.

E. Blake, for respondents.

SPRAGUE, District Judge. It is insisted that the libellant has forfeited all wages, by abandoning the ship. It is likened to the case of the mariners leaving a wreck, which becoming derelict, is afterwards saved by other hands. Lewis v. The Elizabeth & Jane [Case No. 8,321].

There is some force in the analogy, but it is not close enough to control the present case. The act of the libellant, in leaving the Sumatra, was not one of deliberation, but a sudden impulse, from the instinct of self preservation. In the night time, at sea, the Sumatra came in sudden collision with a much larger ship; the wind being strong, and the waves high. There was a cry that the ship was sinking, and the libellant and two others jumped aboard the colliding vessel, a Dutch ship, which immediately separated from the Sumatra. These seamen did all in their power to return to their ship. At their request, the captain of the Dutch vessel lay by all night, and went out of his course the next day, in order to put them on board the Sumatra, but she, although to windward, and seeing the Dutch vessel with her colors indicating a desire to speak, did not run down to her, or make any attempt to hold communication with her. It was impracticable for the Dutch vessel to approach the Sumatra. And after lying by another night, and finding it impossible in the morning, to distinguish the Sumatra from other vessels then in sight, she continued her voyage. The libellant having only jumped from his ship to save his life, in a moment of sudden alarm, for which there was sufficient cause, and having used every effort to return, it is not a case of forfeiture of wages.

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

The next question is, up to what time wages shall be allowed?

Upon this question I have had some doubts. If it were satisfactorily proved, that the Sumatra might have run down to the Dutch ship, and taken these men on board, but voluntarily declined, I should not hesitate to give to the libellant all that he asks, viz., wages until his return to the United States. But it is in proof, that the sea was so rough that a small boat would not live, that the Sumatra had lost several dead-eyes, and lanyards, and that one of the masts, at least, was left without the support of shrouds on one side; that she was near the Cape of Good Hope, where tempestuous weather might be expected, and that all hands were required to repair the damages, so as immediately to give security to the masts. Under these circumstances, although it would seem from the conduct of the Dutch ship, that she thought that these men might be put on board the Sumatra, I think that the captain of the latter vessel must be allowed to exercise his own judgment, and that it cannot be safely said, that he voluntarily refused to take practicable measures to aid the seamen in returning to his ship. Where seamen have been discharged aboard, either wrongfully or from necessity, or from sale of the vessel for innavigability, wages have been allowed in some cases, until the end of the voyage, and in others until the return of the seaman, deducting what he may have earned, or allowing his expenses, as the case may be.

In case of capture of a neutral vessel, and a seaman's being taken from her, and the vessel afterwards released and completing her voyage, wages have been allowed for the voyage, if the seamen have been prevented from rejoining the vessel, without fault on their part.

In case of impressment, Judge Peters allowed wages only to the time of the impressment. The distinction between this, and that of taking seamen from a neutral vessel, in case of capture, is not satisfactory. Watson v. The Rose [Case No. 17,288].

In case of death, there has been some diversity of opinion and practice, elsewhere, on the question whether wages should be paid to the end of the voyage, or only to the time of the death. In this district, the settled practice is, to allow wages only to the time of the death.

I shall follow the decisions in cases of death and impressment, rather than those in case of a sale for innavigability, or a seaman being taken from a captured neutral vessel. In the last, the doctrine was not established without a struggle, and against names of high authority.

And where the discharge has been occasioned by innavigability, there was something of obligation on the part of the owners, to furnish a ship sufficient for the voyage, contracted for by the seamen; and policy requires that they should not have the inducement to violate it, which even a release from the payment of wages might in some cases present.

In the present case, although no blame is attached to the libellant for leaving the Sumatra, and he used every effort to return, yet he was separated from her by his own act, which public policy requires should not be encouraged; and if any distinction is to be made between this case, and that of a forcible impressment, it would be against the libellant. Curtis's Merchant Seamen, pp. 278, 279, 291, 293, 299–301, 304, 329, and cases there cited. Wages allowed up to the time of leaving the Sumatra.

Decree for the libellant, $75.17 and costs.

HANWAY (ROBINSON v.). See Case No. 11,953.

HANWAY (UNITED STATES v.). See Case No. 15,299.

HANWAY'S CASE. See Case No. 15,299.

Case No. 6,044.

In re HAPGOOD et al.

[2 Lowell, 200;[1] 7 Am. Law Rev. 664.]

District Court, D. Massachusetts. Jan., 1873.

BANKRUPTCY—PREFERENCE.

A payment by an insolvent debtor, of a percentage on claims of a part of his creditors which does not lessen the percentage which his other creditors will receive, is not a preference.

The petition by the Manchester Shoe & Leather Company of New Hampshire against the two defendants, doing business at Boston under the firm name of Hapgood & Co., alleged a debt due from said firm to the petitioners of about $1,000; and that said defendants, being insolvent, did, on the twenty-seventh day of December, 1872, and on the fifteenth day of January, 1873, make certain payments to two of their creditors by way of preference. The defendants filed a general denial of the acts of bankruptcy, and demanded a jury trial, which was afterwards waived, and the case was heard by the court. It appeared in evidence that the defendants met with very severe losses by the great fire of Nov. 9, 1872, and immediately afterwards took an account of their assets and liabilities, by which it appeared that they could pay about seventy-five per cent of the full amount of their debts; and, by the advice of some of their creditors, they made an offer of fifty per cent, which was accepted by nearly all the creditors, who thereupon signed a paper in which was recited the loss by fire, and the desire of the signers to assist the firm to start in business again, and by which they agreed to receive notes on an average time of three months, for fifty per cent of their respective

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

demands, in full discharge of the same. The settlement was completed; and, by the early part of January, the payments had been made, a large proportion of them in money, and to a few small creditors a round sum, which would exceed fifty per cent. There remained outstanding, according to the evidence, only the debt due to the petitioners, and one other of about $700 or $800, out of a total debt on the 10th of November of about $83,000. After the settlement was completed, the defendants had in their hands net assets above all their debts to the value of about $27,000. The petitioners, through their agent in Boston, had at one time agreed to take eighty per cent of their account in full settlement; but some dispute afterwards arose concerning the mode of liquidation, and the bargain was never carried out. They filed their petition March 20, 1873. The defendants had gone on in business during all the period after the fire; and the evidence tended to show that, after discharging their old debts, they had been and continued to be solvent. All their present debts, excepting the two above mentioned and some of the composition notes, had been contracted since the fire in the ordinary course of their business.

C. I. Reed & J. R. Bullard, for petitioners.
N. B. Bryant, for defendants.

LOWELL, District Judge. I have decided that when one creditor stands by and sees a settlement made with the others, under such circumstances that his assent to the compromise is to be presumed, he is estopped to rely on that compromise as an act of bankruptcy. In re Massachusetts Brick Co. [Case No. 9,259]. I shall probably adhere to that doctrine until a higher court has held it to be erroneous. But as this case was not argued nor placed upon the ground of the agreement concerning the eighty per cent, and the evidence upon that point may not have been fully developed, I must consider the important question, whether the payments made by the defendants in settlement with the great body of their creditors render them liable to be made bankrupts under the act. It was argued with great force and ability, that, after a trader is insolvent, there is nothing he can lawfully do by way of disposing of his property and settling with his creditors, excepting through the aid and intervention of the bankrupt court. Adding the qualification, hinted at above, that the acts complained of are done without the express or implied assent of all his creditors, the proposition is a sound one in a broad sense. That such a person cannot lawfully convey his property to trustees, even with the best intentions and the most careful provision for equality among his creditors, that he cannot do this or suffer it to be done, even with the sanction or by the decree of a state court few lawyers will be found at this time to deny. All such arrangements, however innocent in intent, and however probably advantageous to the creditors, are made subject to the objection of any one of them, unless, as in a late instance, congress should make a special exception by a new statute. This is because the bankrupt law [of 1867 (14 Stat. 517)], is and must be conclusively presumed to be the best and only authoritative rule, and to provide the exclusive method and machinery for the settlement of the affairs of insolvent persons.

But this case does not bring up any transfer of property excepting payments of money, nor any thing to withdraw assets from creditors; no appointment of a private assignee chosen by the debtors to present to creditors the alternative of their management or a lawsuit. It was simply a payment, to every creditor who would accept it, of less than his whole debt. I cannot agree that this is necessarily a preference. It has been often ruled, and lately by the highest tribunal, that a payment by an insolvent to a creditor, both parties knowing the insolvency, is to be presumed to be intended as a preference. Toof v. Martin, 13 Wall. [80 U. S.] 40. The presumption is not usually said to be a conclusive one; but, if it were, the payment referred to in all these cases is a payment in full, or of a larger proportion than others will have. The definition of a preference is, a payment to one creditor which will give him an advantage over the others, or which may possibly do so. It is impossible to define it without that idea being included. Now, supposing it could be shown, beyond any doubt, that a creditor, being anxious for his money, perhaps himself in great stress, took from a debtor, in full settlement, very much less than it was certain the others would get, who is injured? Is the assignee to be permitted to say, I will recover back this five per cent to add to the ten per cent I am paying to those who made no settlement? The case that I have supposed is the case at bar. It is proved, without the slightest attempt at contradiction, that the great body of the creditors, knowing that the defendants could pay much more, agreed to take one-half of their first demands. Their purpose was to leave the defendants solvent. In my opinion, they have succeeded. Indeed, it is not denied that the defendants are actually solvent; but the argument is pressed that they are technically bankrupt, because within six months past, they, being actually insolvent, made certain payments, and that nothing can purge this stain but the lapse of time. The argument is undoubtedly a strong one. If it is sound, any one of the new creditors of this firm, having a debt to the amount of $250 or more, can put them into bankruptcy; because there is in our statute no provision that only those creditors can take advantage of an act of bankruptcy who were such when it was committed. The argument is strong; because it would not, in most cases, be possible for the court or a jury

to ascertain with any certainty that a payment by an insolvent would not or might not be a preference, and it would not do to enter into any nice calculations on the subject. But when the very case does arise, in which there is no doubt, and no calculation needed to prove that the creditors who have been paid intended to take, and in fact did take, less than they would have received in bankruptcy, and that, when they were paid, the debtors were left undoubtedly and abundantly solvent, then it would be an inversion of the law to hold that the creditor who alone has gained by this course of proceeding, who is, on the day he files his petition, able to force a full payment at law, may resort to the court of bankruptcy as a speedier and more stringent mode of obtaining such payment. It must often happen, incidentally, that the bankrupt act can be worked by a shrewd creditor to his own particular advantage, by bringing a petition when the others wish to compromise the debts, or by opposing a discharge on account of some technical fraud, and by those means forcing a payment. This cannot always be avoided; but it must be guarded against, as far as the weakness of the parties concerned will permit. If they choose to submit to exactions, it is not possible for the courts to prevent it. I do not mean to cast any imputations on the petitioners in this case. If they did not choose to give up part of their debt, they were under no obligation to do so, unless they once agreed to terms, as to which I am not fully informed. What I mean is this: In the present aspect of the case, it is really prosecuted to obtain payment in full of the petitioners' debt, which they are fully entitled to receive; but this is not the court to give it them. To test the question of preference, I asked the counsel of the petitioners if he should feel himself obliged to refuse payment in full. I did not, however, require a categorical answer to that inquiry. In my opinion, there would not be the slightest impropriety in his taking payment; and, if not, it is because the defendants are solvent, and, if they are, they were so as soon as they had made such an arrangement with their creditors that their assets were clearly and fully above the remaining liabilities, and they could go on and pay all their remaining debts as they accrued.

I do not intend to encourage any compromises but such as are full, fair, and equal. If any of the creditors who took fifty per cent were given to understand that no one should have more, or were deceived in the exhibit of assets, they might well complain. But there is no evidence of this; and the natural inference is, that any one would know there was danger that some few creditors, by refusing to come in, would be able to make better terms than the rest. In the absence of any complaint of that sort, I do not feel bound to listen to one from the party benefited.

If I should decide this case for the petitioners, I should be obliged to say that an insolvent person cannot receive a present of $25,000; for that is precisely what happened to the defendants. I am not prepared to go that length in support of a general formula. The proposition with which I began, that insolvents must, in general, invoke the intervention of the bankrupt courts, must be further modified to express the idea, that what they do in the way of payments they do at their own risk and that of the creditors who are paid, in case it should turn out that any one is or can be injured; but if there is no possible harm done, there is no act of bankruptcy.

I do not rest my decision on the ground that the particular payments mentioned in the petition were not acts of bankruptcy, while some earlier payments may have been so. In my judgment, no such act has been committed at any time. No payments were made until all the creditors were understood to have assented, though a few, like the petitioners, were to have more than fifty per cent. The agreement was to take notes; and, if notes had been given, it is perfectly evident that the effect would have been to diminish the debts one half, and leave the assets as they were, making a gift, as I have said, of about $25,000 to the firm. The agreement being completed, the firm were solvent, for the same reason; and, finding themselves able to pay the dividend in money, they made it in that way to those that wished it. Each payment was the discount of a note they had a right to insist on giving, and was a substituted payment. Not one was made until the solvency of the firm was established beyond a peradventure, by the signature or assent of all, or nearly all, the creditors to the agreement.

At the argument I expressed a doubt whether solvency could be proved, excepting by the convincing argument of a tender in court of the full amount of the petitioning creditors' debt; but as this is not a court for the collection of debts, I do not think, when the evidence is so clear, I ought to hesitate to pronounce that the solvency is proved. Indeed, if the firm had become insolvent again by a new misfortune, my decision in this case would be the same. I do not say there might not be cases in which the debts might be required to be paid before a decree of dismissal should be entered. Nor am I sure that a somewhat larger discretion over the matter of costs might not be safely and wisely intrusted to the courts.

Petition dismissed, with costs.

HAPGOOD, In re. See Case No. 6,549.

HAPGOOD (GOLDSMITH v.). See Case No. 5,522.

HAPGOOD (SAYLES v.). See Case No. 12,420.

HAPPY RETURN, The (SWIFT v.). See Case No. 13,697.

Case No. 6,045.

In re HARBAUGH et al.

[15 N. B. R. 246; 15 Alb. Law J. 194; 23 Int. Rev. Rec. 50; 24 Pittsb. Leg. J. 100.] [1]

District Court, W. D. Pennsylvania. Feb. 3, 1877.

BANKRUPTCY—GENERAL PARTNERS.

1. A creditor cannot compel partners, willing or unwilling, to petition for the adjudication of other persons, who are alleged to be their fellow-partners.

2. Nor can any man lawfully be called upon to show cause why he shall not go himself or put anybody else into voluntary bankruptcy.

In bankruptcy.

KETCHUM, District Judge. The petition of the Citizens' National Bank of Pittsburg, and rule to show cause why the bankrupts shall not amend their petition by including George W. Cass and the Cambria Iron Company, as general partners in their late firm, etc. On August 1, 1874, Springer Harbaugh, David Matthias, and Samuel T. Owens filed their petition in this court praying that they might be adjudicated bankrupt. They stated themselves as co-partners, carrying on business in the city of Pittsburg; that the members of said co-partnership were unable to pay all their debts in full; that they were willing to surrender all their estates and effects for the benefit of their creditors, and desired to obtain the benefit of the bankrupt act [of 1867 (14 Stat. 517)]. They also filed with the petition schedules of the debts and of the effects of the partnership; also schedules of their individual debts and effects, and verified the petition and schedules by their oaths, and on the same day they were adjudicated bankrupts. On September 4, 1874, at the first meeting of creditors, assignees were chosen, and on September 8, 1874, the effects of the bankrupts were conveyed to them. From time to time various orders were made and executed for the sale and other disposition of large amounts of valuable property. April 26, 1876, the petition of the Citizens' Bank of Pittsburg was filed. This petition alleged that George W. Cass and the Cambria Iron Company were general partners of the said Harbaugh, Matthias & Owens, and as such should be joined with them in bankruptcy, and prayed the court inter alia, to order and direct the said Springer Harbaugh, David Matthias, and Samuel T. Owens to amend their petition by including the said George W. Cass and the Cambria Iron Company as general partners of said firm of Harbaugh, Matthias & Owens; and the said Cass and the Cambria Iron Company to file their individual schedules in bankruptcy, on or before a day certain, or in default thereof, that the assignees of such bankrupt firm shall file formal schedules in their respective names, unless on or before a day certain they show cause to the contrary. And on the same day a rule to show cause accordingly was granted upon the said bankrupts, and upon the said George W. Cass and the Cambria Iron Company, returnable May 26, 1876. On May 26, 1876, counsel appeared d. b. e. for George W. Cass and the Cambria Iron Company, and moved the court to dismiss the said petition and rule to show cause. The motion was argued at length on December 27, 1876. The proceedings in bankruptcy of Harbaugh, Matthias & Owens was purely and simply a voluntary proceeding under section 5014 of the revised act as amended by section 15 of the act of June 22, 1874 [18 Stat. 182]. They swear in their petition that they, as co-partners, were transacting business, and had carried on business, and that the members of said co-partnership owed debts and were unable to pay them, and were willing to surrender all their estate and effects, etc., as required by the act. It is clear that they meant to swear, and meant to be understood as swearing that the co-partnership was composed of them alone. They did not swear that they were some or a part of the co-partners, but that they were co-partners carrying on business, and the members of said co-partnership owing debts, were willing to surrender their estate, etc. If there were other partners who ought to have been joined, how were they to be joined in a voluntary proceeding? There are but two ways: either by their own act, or by the petitioning partners including them, and asking the court to include them in the adjudication. There is no other way. Inability to pay alone is the ground of voluntary bankruptcy alone. No creditor can either compel a debtor to go into voluntary bankruptcy, or compel a partner to petition for the adjudication of his fellows. Nor can any man lawfully be called upon to show cause why he shall not go himself or put anybody else into voluntary bankruptcy.

The rule in this case is a rule to show cause why certain partners already adjudicated bankrupt in a voluntary proceeding shall not open their petition and expand their oath, so as to include other persons as partners. Like any rule to show cause, it is compulsory. If cause be shown, the showing is compulsory. If no sufficient cause be shown, the rule must be made absolute, and that is a decree that they shall do whatever under the exigencies of the rule they have failed to show they should not do. And in this case it would be no less than that they should willingly or unwillingly include the other parties in their petition. The petition and oath being voluntary, and by law embodying and affirming a fixed and prescribed series of facts, this decree, of course, like any other, would be nugatory unless enforced by the court.

[1] [Reprinted from 15 N. B. R. 246, by permission. 15 Alb. Law J. 194, contains only a partial report.]

It is not a thing that may be treated as having been done, because it ought to have been done. This oath with its sanction and penalties, human and divine, cannot be presumed. It would indeed be a strange miscellany on the record of a court that it is decreed that certain persons shall, under penalty, voluntarily swear that certain persons were co-partners in a certain firm, and to all the facts that would make bankrupts. It is an attempt by a creditor to compel a partner to do with alleged co-partners what the creditor cannot do himself. No creditor can compel voluntary bankruptcy. The power of one or more partners to put the others into bankruptcy on the ground of the inability of the firm to pay their debts, or, in other words, into voluntary bankruptcy, arises out of the relation of the partners to each other. From the mutual principalship and agency of each to all the others springs the power, for certain purposes, and within certain limits, of controlling each other; the same power that enables one or any number less than all to make contracts and perform all acts within the scope of the partnership business, and, under certain conditions of pecuniary embarrassment or insolvency, to sell out the concern, or assign the effects for the benefit of creditors. The exercise of this power over each other in bankruptcy is held to be voluntary, and though it is actually compulsory as to the other partners, it is not involuntary in the sense of the bankrupt act, because the act of one is held to be the act of all, and if one partner, on account of the insolvency of the concern, petitions to put the firm into bankruptcy, whether the others assent or not, if they are unable to pay their debts, then the petition of one is held to be the petition of all, and they are all decreed voluntary bankrupts.

This petition and rule to show cause do not contemplate the voluntary acts of anybody, but to compel partners, willing or unwilling, to put other persons alleged to be partners into bankruptcy, and that too without even alleging the only ground upon wnich these partners could accomplish it. The petitioners do not even allege that if Cass and the Cambria Iron Company were joined, the firm then would be unable to pay its debts, and yet they desire to make the bankrupt partners swear, inter alia, to this. It is an attempt under the guise of voluntary bankruptcy to accomplish involuntary bankruptcy without the legal ground for either. If these bankrupts left out others who were partners, they committed a fraud upon the creditors. There was a remedy for that, and but one remedy. At any time up to the first meeting of creditors, and perhaps at any time until the effects of the firm had become so fixed that the estate could not be put into status quo, the court, on showing of the facts, would have annulled the adjudication, when all that were liable could have been proceeded against at law, or forced into bankruptcy if subject to it. But the petitioners have been far from this; while they allege that they gave the credit of their debts to the firm on the understanding and belief that the parties sought to be included were partners, they have from the day of the adjudication done nothing to annul the proceedings. But on April 26, 1876, alleging the proceedings to be irregular, they come and ask to cure them by a proceeding still more irregular. It cannot be granted. The petition and all proceedings under it are dismissed at the cost of the petitioners.

[A bill of review of these proceedings was dismissed by the circuit court in Case No. 2,732.]

HARBAUGH (VEATCH v.). See Case No. 16,905.

HARBAUGH (WILSON v.). See Case No. 17,807.

Case No. 6,045a.

HARBECK et al. v. The FRANCIS A. PALMER.

[22 Betts, D. C. MS. 193.]

District Court, S. D. New York. July Term, 1856.

MARITIME LIEN—MATERIALS FURNISHED—VENDOR.

[One who contracts to build a vessel with his own materials, the same to be paid for in installments at various periods of the building, is in the position of a vendor, and has no lien which can be enforced in admiralty, either under the maritime law or under the New York statute (Act March 29, 1855) giving a lien for work or materials "furnished" for the building of a vessel.]

[See note at end of case.]

[This was a libel in rem by John H. Harbeck and others against the ship Francis A. Palmer to enforce an alleged lien. Russel H. Post and others appeared as claimants.]

BETTS, District Judge. There is no important disagreement between the parties in relation to the facts connected with this case. The exception taken by the claimants to the jurisdiction of the court presents the only question now necessary to be considered. Indeed it may be fairly intended that no substantial defence exists to the essential merits of the case, nor but that the libellants are entitled, under the assignment to them by Perim, to a large balance yet payable by the claimants. They oppose this form of remedy by the defence that the libellants have no right of action in rem in the admiralty for the recovery of the money due them. It is admitted by both parties that the libellants have the same but no other or higher privilege in respect to this demand

than would have been possessed by their assignor, Perim, had he continued to hold the rights acquired under his agreement with the complainants, in his own name and unassigned.

The ship is an American vessel. The first position for consideration then is, whether the state statute making provision for the collection of demands against ships or vessels (2 Rev. St. 405, § 1), or the act in amendment thereof passed March 29, 1855 (78th Sess. Laws, 174), secures Perim a lien on this ship, for the price of building her, under his contract. The provision of the two acts united, present this enactment as the existing law on the subject. "Whenever a debt amounting to $50 or upwards shall be contracted by the master, owner or his agent, builder or consignee of any ship or vessel within this state on account of any work done or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel, such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, &c." It appears to me that the contract between Perim and the claimants does not constitute a relationship which brings them within the purview of the state statute. That plainly contemplates that the person setting up a lien against a vessel shall have furnished materials or rendered services for her to the benefit of her owner, she being the property at the time of some other person than the mechanic or merchant man. The act takes effect only "whenever a debt shall be contracted." Accordingly the status of creditor and debtor is indispensable to the vitality of the statutory privilege. It does not arise out of the fact solely that the property or labor of one person is in and part of a vessel owned by another, but rests upon the consideration that the betterment of the ship was obtained by means of a direct or implied credit given her owner on her responsibility.

The pleadings in this cause and the contract and specifications thereto attached, with the admissions of counsel on both sides, present the parties in the following relation: Perim was a ship builder, and on the 1st of February, 1854, contracted with the claimants to build the ship in question and furnish the materials, &c. She was built in his yard in this port, was launched on the 21st day of August, 1854, and delivered the same day along side a dock on the East river into the actual possession of the claimants, although not then in an entirely finished state. The contract was that the ship should be delivered along side the dock afloat on or about the first day of August, 1854, finished complete (with certain specified exceptions); and it was further stipulated that Perim had sold, transferred, assigned and delivered over to the claimants, the keel of said ship, and all her timbers, beams, planks, bolts and every other part, parcel and material of said ship so soon as the same shall be put up and constructed as a part of said ship. In consideration whereof the claimant agreed to pay Perim $60,000. The contract was accompanied with a detail of specification and directions respecting dimensions, materials, workmanship, &c., and the modes of payment, which was to be made in eleven successive instalments, the first one of $5000, when the keel was laid, and so on as the building progressed, in seven subsequent instalments of $5000 each, two of $1000 each and the last one of $8000 when finished and delivered as per contract. Perim failed in business about the first of August. The ship was launched on the 21st. Perim was bound to keep the ship insured against fire whilst she was building, and to assign the policies to the claimants.

Giving the contract set up its natural operation, it may well be taken to be one of purchase and sale prospective and executory in part, but executed and complete as each part was constructed. The claimants were to acquire a ship not then in existence. Perim was to create and construct it progressively by his own labor and with materials supplied by him and a transfer by contract in full property may result from the terms of the agreement. So soon as a specified portion of the vessel was constructed by Perim, that part might by force of the stipulation become the property of the claimants and so on from step to step as its building advanced, until the ship was launched and delivered complete. In that sense of the contract the claimants did not become owners of any part until the work was done and the materials furnished for or towards the building of such part, because it was that work and those particular materials, after they had been supplied by the builder, which constituted the subject of their purchase and property. It is not alleged or proved that Perim furnished labor or materials to any part of the ship under that acceptation after it had become the property of the claimants. The transaction between the parties in that view of it was not, in my judgment, one contemplated and described in the statute as entitled to the privilege of lien. Perim was vendor of his own labor and materials, not in the way of reparation or betterment of a ship in the ownership of the claimants, but for the purpose of constructing and bringing into existence a ship of which the claimants were thereby to become owners. Taking the language of the contract to be so definite as to amount to a positive sale, and to render the ship in its various parts when each was constructed the property of the claimants, I am of opinion the lien claimed cannot be maintained, because the credit intended to be secured by the statute was not given, and could not in the nature of things come into existence.

The act protects a debt contracted by the owner, master or agent of a ship, for work or materials furnished for or towards the building such ship, and does not cover a bargain to buy a ship to be built thereafter by a ship builder with his own materials. The courts in this state, if not controlled by the unequivocal stipulations of the parties, would hold this contract a prospective and executory one, and that the claimants did not become owners of the ship until she was completed and delivered according to the conditions of the contract. Andrews v. Durant, 1 Kern. [11 N. Y.] 35. Furthermore, as a general principle, admiralty courts enforce municipal liens in respect to domestic vessels to the same extent only that the maritime law gives the lien on foreign vessels. Smith v. The Eastern Railroad [Case No. 13,039]. I find no authority out of the text of the civil law which accords a lien upon a foreign vessel which can be enforced in admiralty in favor of her builders. This point however, is not intended to be passed upon in the present case.

Independent of the considerations already suggested, I am of opinion that the contract rested upon a personal credit given by Perim to the claimants, and displaces all implication of a lien on the ship for her price. Raymond v. Tyson, 17 How. [58 U. S.] 53. The periods and manner of payments and the terms of the agreement and the situation of the parties denote a bargain of sale in this instance on no conditions differing from that of a sale of a ship already in service. If the ownership of the ship did not rest in the claimants pari passu as her construction proceeded from one stage of instalments to another, then she became their property only by virtue of a general purchase of her when finished, and the law does not impute to a vendor any lien for the purchase money of a ship after her free delivery to the purchaser. In either construction of the contract it appears to me the claim of the libellants rests upon that of a vendor of the ship, and not on that of a mechanic or material man furnishing necessaries to a ship already in being. In my opinion the libel cannot be supported.

[NOTE. In Case No. 203 there was a libel filed in the circuit court against the same vessel to recover for plumbing and coppersmithing. The libel was dismissed for want of jurisdiction.]

HARBECK (MINER v.). See Case No. 9,629.

HARBECK, The ELVIRA. See Case No. 4,424.

HARBERT (NATIONAL HAY RAKE CO. v.). See Case No. 10,044.

HARBIN (HARDY v.). See Cases Nos. 6,059 and 6,060.

HARBISON (UNITED STATES v.). See Case No. 15,300.

Case No. 6,046.

HARD v. STONE et al.

[5 Cranch, C. C. 503.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

ATTACHMENT—CITIZENSHIP—JURISDICTION.

1. It is not necessary, in order to obtain an attachment under the Act Md. 1795, c. 56, that the instrument of writing produced to the magistrate, granting the warrant for the attachment as the instrument by which the debtor is indebted, should, upon its face, show a complete cause of action; nor is it necessary that the affidavit should state the plaintiff to be a citizen of the United States; it is sufficient if the magistrate, granting the warrant, states that the plaintiff is a citizen of one of the states.

2. It is not sufficient ground for quashing the attachment, that the copy of the short note sent with the writ, has, by mistake of the clerk, the word "cash," instead of the word "each."

3. The circuit court of the District of Columbia has jurisdiction of an attachment issued by warrant of a justice of the peace.

[This was an action at law by Thomas Hard against James W. Stone and John H. Suttle.] Attachment under Act Md. 1795, c. 56.

R. J. Brent moved to quash the attachment, because:

1. The instrument of writing produced to the magistrate who granted the warrant for the attachment, as the instrument by which the defendants were indebted, and which was a covenant under seal to pay for the hire of certain slaves, in a certain event, did not show, upon its face, that the defendants were indebted as stated in the plaintiff's affidavit. The cause of action would not be complete without additional evidence.

2. That the copy of the short note of the cause of action, sent out with the attachment, to be set up at the court-house door, has, by mistake of the clerk, the word "cash," instead of the word "each."

3. That the plaintiff's affidavit does not state that he was a citizen of the United States. It is only stated by the justice who issued the warrant for the attachment.

4. That this court has no jurisdiction of an attachment issued by the warrant of a justice of the peace; because, by the act of congress of the 3d of May, 1802 (2 Stat. 193), this court only has power "to proceed in all common-law and chancery causes, which now are or hereafter shall be instituted before it, in which either of the parties reside out of the said territory, in the same way that non-residents are proceeded against in the general court, or in the supreme court of chancery in the state of Maryland," and that the general court of Maryland had no jurisdiction of attachments issued by warrants from justices of the peace. Those justices could only issue their warrants to the clerks of the county

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

courts, not to the clerk of the general court. Smith v. Greenleaf, 4 Har. & McH. 162, 291.

Mr. Bradley, contra.

The act does not require the plaintiff to swear that he is a citizen of the United States; it is sufficient if he is so in fact. It is not necessary that the instrument of writing upon which the action is founded should, of itself, show upon its face a complete cause of action. The plaintiff's affidavit is positive as to the amount due, and what is necessary, in addition to the instrument of writing, may be supplied by parol evidence. The mistake of the clerk in copying the short note may be, at any time, corrected. Independent of the act of congress of the 3d of May, 1802 (2 Stat. 193), the law of Maryland, 1795 (chapter 56), had been declared by the act of the 27th of February, 1801 (2 Stat. 103), to be and remain in force in this part of the district; and by that act this court has jurisdiction of all cases in law or equity arising under the adopted laws of Maryland. Under the laws thus adopted, the plaintiff had a right to an attachment. It was a case in law, of which this court has jurisdiction under the act of 27th February, 1801, and has in fact exercised the jurisdiction from the first existence of the court to the present time.

THE COURT overruled all the objections, and refused to quash the attachment, (nem. con.)

HARDEN, In re. See Case No. 6,048.

Case No. 6,047.

HARDEN v. GORDON et al.

[2 Mason, 541.] [1]

Circuit Court, D. Maine. Oct. Term, 1823.

SEAMEN—SICKNESS—EXPENSES.

1. The expenses of curing a sick seaman in the course of the voyage is a charge on the ship by the maritime law; and in this charge are included not only medicines and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore.

[Cited in Lamson v. Westcott, Case No. 8,035. Followed in Reed v. Canfield, Id. 11,641. Cited in The George, Id. 5,329; Reed v. Hussey, Id. 11,646; Freeman v. Baker, Id. 5,084; The Forest, Id. 4,936; The Atlantic, Id. 620; Callon v. Williams, Id. 2,324; Brown v. The D. S. Cage, Id. 2,002; Brown v. The Bradish Johnson, Id. 1,992; Peterson v. The Chandos, 4 Fed. 651; Longstreet v. The R. R. Springer, Id. 672; The A. Heaton, 43 Fed. 596.

[Cited in Duncan v. Reed, 39 Me. 417; Croucher v. Oakman, 3 Allen, 189; Holt v. Cummings, 102 Pa. St. 217; Scarff v. Metcalf, 107 N. Y. 216, 13 N. E. 796.]

2. The act of congress for the regulation of seamen, &c. has not changed the maritime law, except so far as respects medicines and medical advice, when there is a proper medicine chest and medical directions on board the vessel. The charges of nursing and lodging are not affected by the act.

[Cited in Plummer v. Webb, Case No. 11,233; Holmes v. Hutchinson, Id. 6,639; McCarty v. The City of New Bedford, 4 Fed. 830.]

3. The court of admiralty has jurisdiction to enforce the payment of these expenses by a libel, for they are in the nature of additional wages during sickness.

[Cited in Packard v. The Louisa, Case No. 10,652.]

4. A stipulation, that the seamen shall pay for medical advice and medicines, without any condition that there shall be a suitable medicine chest, &c. is void, as contrary to the policy of the act of congress.

[Cited in The Sarah Jane, Case No. 12,348; Brown v. Lull, Id. 2,018.]

5. And it seems, that no stipulation contrary to the maritime law to the injury of seamen will be allowed to stand, unless an adequate additional compensation be given to them.

[Cited in The Sarah Jane, Case No. 12,348; The Betsy & Rhoda, Id. 1,366; Joy v. Allen, Id. 7,552; The San Marcos, 27 Fed. 568; The International, 30 Fed. 377.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 20, 31 N. E. 969.]

6. A receipt in full of all demands is open to inquiry and explanation. A settled account for wages, &c. is not conclusive; but it may be surcharged and falsified.

[Cited in The Cypress, Case No. 3,530; Johnson v. U. S., Id. 7,419; U. S. v. Williams, Id. 16,724; Mitchell v. Pratt, Id. 9,668; Piehl v. Balchen, Id. 11,137; Lamb v. Briard, Id. 8,010; Savin v. The Juno, Id. 12,390.]

[Cited in Briggs v. Call, 5 Metc. (Mass.) 507; Pendexter v. Carleton, 16 N. H. 490; Perry v. Harrington, 2 Metc. (Mass.) 368.]

7. The onus probandi in respect to the sufficiency of the medicine chest lies on the owner.

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

This was a suit for subtraction of wages, brought jointly against [Joshua Gordon and another] the master and the owner of the brig Enterprize, for wages earned by the plaintiff [William Harden] as mate on a voyage described in the shipping articles to be from the port of Portland to Guadaloupe and a market, and back to a port of discharge, and to Portland. The libel also included a claim for the expenses occasioned by the sickness of the plaintiff in a foreign port in the course of the voyage; and upon the allegation subsequently given in by the respective parties, the controversy was substantially narrowed down to the consideration of the validity of this claim.

Charles S. Davies, for libellant.

Mr. Longfellow, for defendants.

STORY, Circuit Justice. Several questions have been presented at the argument for the deliberation of the court. In the first place, whether the claim be within the cognizance of a court of admiralty; so that, if it be well founded in fact, this court, sitting in admiralty, is rightfully entitled to enforce it. In the next place, supposing the court to pos-

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

sess jurisdiction, whether by the general principles of maritime law, such a claim constitutes a rightful charge upon the ship, which the master and owner are compellable to defray. And lastly, if the maritime law creates such a charge, whether it has not been abolished by our own navigation laws, or in the present case displaced by the express stipulations and acts of the parties. I need scarcely say, that the masterly discussion at the bar has brought before the court all the principles and authorities, foreign as well as domestic, which bear on these interesting topics; and if the labour of arriving at a satisfactory result has not been materially diminished, it has been aided by whatever could adorn, or illustrate the matters in controversy.

Upon the first point, I do not profess to feel any real doubt. Supposing, that by the principles of law the seamen are entitled, in case of sickness, to be healed at the expense of the ship, I am of opinion, that the claim for such expense may be enforced in the court of admiralty. It constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen. The admiralty has a rightful jurisdiction over the subject of compensation of seamen for maritime services, in whatever manner or form that compensation is to be paid, if it can be reduced to money. This jurisdiction does not arise from the mere toleration or connivance of the courts of common law, as is sometimes represented; and, if true, would be a stain and disgrace to these courts, as well as to the admiralty; but it is founded in its ancient and well established jurisprudence. There never was a period, when it was not an essential attribute claimed and exercised by that venerable tribunal; and instead of troubling ourselves to find out the origin of this jurisdiction, it would be more useful to inquire, how, except by subtleties and fictions, the courts of common law became possessed of that ample jurisdiction, which they now exercise over maritime contracts, with so much honour to themselves, and with such solid advantages to the country. It is not, because the compensation is called wages in the shipping articles, that the admiralty enforces the obligation of payment. It is because the services are maritime; and whatever constitutes the compensation and is reducible to money, or admits of equitable adjustment in pecunia numerata is decreed ex aequo et bono, as the just remuneration of those services. It is upon this ground, that the compensation of fishermen comes within the reach of the admiralty jurisdiction, although they claim specific shares in the cargo; for their share of the proceeds of the voyage are considered as in the nature of wages. See The Frederick, 5 C. Rob. Adm. 8. And congress, acting upon this just view of the subject, have accordingly given to this class of mariners the full benefit of the summary process of the admiralty. Act Cong. Feb. 16, 1792, c. 6, §§ 4, 5, [1 Stat. 231]; Act June 19, 1813, c. 2, §§ 1, 2, [3 Stat. 2]. I am aware, that Lord Stowell has declined to take cognizance of suits for shares in whaling voyages (The Sydney Cove, 2 Dods. 11); but there is not the slightest reason to suppose, that that learned judge has so acted, except in deference to the imposing force of the prohibitions of the courts of common law. What those prohibitions are, we have all learned from the reports; and one can scarcely read the case of Howe v. Nappier (4 Burrows, 1944; and see, also, Buggin v. Bennett, Id. 2035), where the doctrine was very ably discussed at the bar, without feeling a secret persuasion, that Lord Mansfield followed the current of prior authority, rather than the dictates of his own superior judgment. Unless my previous impressions mislead me, a lurking doubt pervades the whole structure of his opinion. The distinction between a special agreement and the ordinary agreement, as a foundation for jurisdiction in cases of seamen's wages, has always appeared to me (I hope it may be spoken without irreverence) to be little more than solemn trifling and evasion. After the most thorough examination of all the common law authorities on the subject of admiralty jurisdiction, I feel myself constrained to say, that they stand upon no consistent or rational principle; and that jealousy, more than solid knowledge, seems to have urged to a disregard of the very learned and satisfactory expositions of the civilians. But this is not the place for a full discussion of this subject. It is sufficient to guard against the inference, that Lord Stowell has shown any approbation of the common law doctrines on this subject. His own decisions in other cases demonstrate, that he has never supposed the admiralty jurisdiction over mariners' contracts to be confined to the entertainment of suits, in which the claim is for mere wages, earned as such upon the ordinary terms of hire under the customary shipping articles. He may, for aught I know, feel his judicial conscience bound up by the controlling mandates of the superior courts of law, so as to exercise the admiralty jurisdiction only in vinculis; but I cannot persuade myself, that a mind so thoroughly imbued with the true spirit of maritime jurisprudence would, in the exercise of its own judgment, hesitate to support the consistent doctrines of his enlightened predecessors. Indeed in the very case of The Sydney Cove, 2 Dods. 11, he decreed wages for the outward voyage, although the wages accrued under a very special agreement, and the subsequent whaling voyage was incorporated into its terms, and was originally in the contemplation of the parties as a contingent enterprise. But whatever may be his opinion, until I am better informed by the highest tribunal, which I am bound to obey, I shall continue to seek for the true exposition of admiralty jurisdic-

tion in the instructive labours of admiralty judges.

In the case of The Isabella, 2 C. Rob. Adm. 241, there was a claim by the chief mate for the value of the privilege of a slave, as well as for wages, on an African voyage. It was rejected, not, because it was not within the jurisdiction of the court, but because it was not proved to be a part of the shipping articles, and rested in parol, and was thought to be inconsistent with the statutable regulations of this trade, which required the whole agreement to be in writing. This carries a pretty strong implication, that the court felt no difficulty in reaching the claim, if it had stood in the text of the contract. In The Madonna D'Idra, 1 Dods. 37, where a claim was made on behalf of Greek sailors for subsistence after their discharge from the ship, as well as for antecedent wages, the court did not hesitate to decree it. "It is," said the learned judge on that occasion, "wages paid in another form, it is part of the compensation for their labour; and according to the law of the country, to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages." In what respect does subsistence in case of a discharge differ from additional subsistence in case of sickness? To use the language of the court, it is but "wages in another form," additional wages to meet additional expenses, and constituting, if the maritime law and usage uphold the claim, a part of the contract. In the same case an allusion was made to some cases of American seamen, then recently before the court, where the three months' additional wages allowed by the act of congress of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], to seamen discharged in foreign ports were sought to be enforced. The court refused the application, upon the ground, that it was a recent municipal regulation not incorporated into the contract. But the court then declared and again recognised the principle, that if the claim had not grown out of a recent legislative act, but was due by the universal usage and custom of the country, or if the regulation had been embodied in the contract, so as to compose a part of it, it would have entertained the suit. In either case we see, that it must have been a claim ultra the ordinary earned wages, founded on a special agreement, or a general usage incorporating itself into the contract. And this in a case, where the court is most reluctant to entertain jurisdiction, I mean, in controversies respecting foreign seamen on voyages in foreign ships. Under a like regulation in a British statute, the court would not have felt any doubt. Indeed in all cases, where wages are decreed by way of compensation, although not earned, as in cases of an illegal discharge, of capture and recapture, of collusive impressment, &c. the court abandons the strict notions of the common law, and deals in all the equities, which by usage or principle belong to the contract, as a maritime contract. See The Beaver, 3 C. Rob. Adm. 92; The Jack Park, 4 C. Rob. Adm. 308; The Exeter, 2 C. Rob. Adm. 261. The acknowledged jurisdiction exercised by the admiralty in cases, where wages are paid by the run, might be disputed upon the narrow rule of the common law; for it supercedes the general marine regulations, and is a special contract, different in obligations and rights, from those which belong to the common contract. See Cutter v. Powell, 6 Term R. 320; The Pearl, 5 C. Rob. Adm. 224. But I do not mean to dwell further on this point. My opinion is that if the plaintiff is entitled to be cured at the expense of the ship, it is a claim in the nature of additional wages during the period of sickness, and is just as proper for a suit of this sort, as a claim for additional pay, while in port, or for subsistence in port, where that has been unjustly withheld. It stands upon the same analogy, as the compensation allowed by our laws in cases of short allowance of provisions and water, where it is expressly provided, that the amount shall be recoverable in the same manner as wages. Act July 20, 1790, c. 29, § 9 [1 Stat. 135]. It is a part of the maritime hire and reward, constituting an essential term in the contract, and no more objectionable in point of jurisdiction than a claim for any other allowance in the ordinary course of trade, or any specific stipulation for an increase of compensation in extraordinary exigencies. The question of jurisdiction may then be dismissed.

The next inquiry is, whether the maritime law does provide, that the expenses of sick seamen shall be borne by the ship. In the elaborate argument at the bar a great variety of authorities drawn from foreign writers and foreign ordinances has been adduced in support of the affirmative. I have examined them at large, and they fully sustain the positions, for which they were cited. In the adminicular researches, (not inconsiderable) to which my duty has led me, I have not been able to detect a single instance, in which the maritime laws of any foreign country throw upon seamen disabled or taken sick in the service of the ship, without their own fault, the expenses of their cure.[2] On the contrary, the positive ordinances of the principal maritime nations expressly make these expenses a charge upon the ship. This is certainly the law of France, Denmark, Sweden, the Hanse Towns, Prussia, Holland and probably of the Italian states. Code de Commerce, b. 2, tit. 5, arts. 262, 263; Ord. de la Marine, lib. 3, tit. 4, art. 11; 1 Valin, 721; 1 Emer. c. 12, § 41, art. 15, p. 633; Cleirac, Judgmens d'Ol-

[2] I am not satisfied, that Spain forms an exception. Her marine ordinances have not been within my reach. And the language cited by Cleirac from the Laberinto del Commercio, contains a denial only of wages during sickness. Cleirac Us et Cout.; Commentaire sur Hanseat. Ord. art. 45, p. 104.

eron, arts. 6, 7, p. 16; Old Hanseat. Ord. arts. 39, 45; New Hanseat. Ord. tit. 14, art 2, and Kuricke Jus Marit. Hanseat. pp. 678, 821; Targa. Pond. c. 17, § 16; Id. c. 85, § 7; Jac. Sea Laws, bk. 3, c. 2, p. 144 (Frick's Translation); Pothier, Louage de Matelots, n. 189, (Cushing's Translation, p. 114); Ord. Rotterdam, 1721, arts. 224, 246; 2 Magens, 115, 118. The same principle is recognised in the ancient laws of Wisbuy (Laws of Wisbuy, art. 19), and in those of Oleron, which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence.[3] The Consolato del Mare does not speak particularly on this point; but from the provisions of this venerable collection of maritime usages in cases nearly allied, there is every reason to infer, that a similar rule then prevailed in the Mediterranean. Consolato del Mare, cc. 124, 125; Boucher, Consulat de la Mer, cc. 127, 128. Molloy evidently adopts it as a general doctrine of maritime law (Molloy, b. 2, c. 3, § 5, p. 243); and two elementary writers of most distinguished reputation have quoted it from the old ordinances without the slightest intimation, that it was not perfectly consonant with the received law and usage of England. Abb. Shipp. p. 2, c. 4, § 14; 2 Brown, Adm. 182–184. There is perhaps upon this subject a greater extent and uniformity of maritime authority, than can probably be found in support of most of those principles of commercial law, which have been so successfully engrafted into our jurisprudence within the last century. Against such an accumulation of evidence of the sense of the commercial world I profess myself wholly unable to devise a satisfactory answer, even if I felt any secret doubts as to the propriety of entertaining the doctrine. But it appears to me so consonant with humanity, with sound policy, and with national interests, that it commends itself to my mind quite as much by its intrinsic equity, as by the sanction of its general authority. Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates. On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw. It would therefore be matter of regret to find incorporated into the common law a doctrine at variance with that, which seems so generally to have received the approbation of continental Europe. No evidence of such a variance is produced; and I am not bold enough to desert the steady light of maritime jurisprudence for the more doubtful guide of general reasoning.

We are next led to the consideration of the question, whether this charge created by the maritime law has been repealed by our navigation acts. This is a point of no little embarrassment and difficulty, and has perplexed the minds of some of our most intelligent admiralty judges. The act of congress for the government and regulation of seamen in the merchants' service provides, that American vessels of a certain burthen and crew, bound on foreign voyages, "shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary once at least in every year, and supplied with fresh medicine in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided and kept fit for use, the master or com-

[3] Laws of Oleron, arts. 6, 7; 1 Bl. Comm. 419; 4 Bl. Comm. 423; Walton v. The Neptune [Case No. 17,135]. Judge Peters has very correctly expounded the meaning of the words, "deducting charges," &c. in the 7th of the Laws of Oleron, in this case. They mean extra charges, for more delicate diet than usual.

mander of such ship or vessel shall provide for and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place, where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner." Act July 20, 1790, c. 29, § 8 [supra]. By a subsequent act this provision is extended to vessels of a smaller burthen and crew engaged in the West India trade. Act March 2, 1805, c. 88 [2 Story's Laws, 971; 2 Stat. 330, c. 28]. The argument of the counsel of the respondent is, that these acts create a virtual repeal of the general charge in all cases, in which the medicine chest is duly furnished.

It is observable, in the first place, that the clause is merely in the affirmative, and contains no words abolishing the charge generally, or repealing it in the special cases within the purview of the acts. The most, that can be urged, is, that it carries a strong implication against the allowance of the charge, when the medicine chest is properly supplied. In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or pro tanto of former laws; otherwise the statute is supposed to be merely declarative or cumulative. The acts under consideration do indeed make a new provision; for independently of them, there does not seem to exist any obligation on the part of the owner to provide a medicine chest for the use of the ship during the voyage; and it is obvious, that unless medicines are so provided, seamen taken sick at sea will be without any means of obtaining suitable remedies. In this view the provision is auxiliary to that of the maritime law; and is a substantial benefit to seamen by enlarging the means of recovery. In any other view it is a serious diminution of their antecedent rights, giving them medicine, but charging them medical advice, and thus abridging their most important permanent interests. It cannot readily be believed, that congress, which has on so many occasions manifested a solicitude to guard the interests and secure the safety of this invaluable, though improvident, class of men, can have intended to increase their burthens, narrow their privileges, or expose them to the danger of still harder sufferings. If indeed, to avoid such a conclusion, one were driven to the indulgence of conjecture, it might not be too rash to suppose, that the legislature was doubtful, or not aware of the doctrine of the maritime law; and had provided, however inadequately, for the relief of seamen by a measure of precaution, which might mitigate the evils of sudden calamity. There is also some peculiarity in the penning of the clause, which deserves notice. In default of the medicine chest the master is to provide and pay for all advice, medicine and attendance of physicians; and it is not said, that the charge shall be ultimately borne by the owners; nor is there any intimation, that the master is in any way to be reimbursed. For aught, that the statute has declared, the charge is to be personally borne by the master, in the nature of a penalty for an omission of his duty; and if the owner is to be reached, it is, because the statute obligation is to be construed equitably beyond the parties, whom it designates. And if it is to receive an equitable construction for the relief of the master, there is no reason, why it should receive a construction broader than its terms to the injury of the seamen. Assuming then, that medicines and medical advice are not a charge on the ship, where a proper medicine chest is on board, it does not follow, that other charges of sickness are entitled to the same exemption. That would be carrying the doctrine of constructive repeals far beyond what courts of justice have hitherto thought it reasonable to assert.

In the next place, the clause itself applies in terms only to the expenses of advice, medicine, and attendance of physicians. It considers the medicine chest and medical directions, (very erroneously, as experience has shewn,) to be equivalent to the regular administration of medical advice. They may be, as has been already hinted, of great utility at sea; but when the aid of a physician, as well as medicines suited to the particular case, may be obtained in port, it is almost trifling with life to entrust the management of diseases to the unskilfulness or rashness of a ship's crew. Such however as the provision is, it manifestly contemplates, that the sick seaman is on board, or in a situation to command the use of the medicine chest and directions. It cannot therefore be intended to apply to cases, where the seaman is removed on shore, and is deprived of these benefits. To him the nonexistence of the medicine chest, and the incapacity to obtain the use of it, are precisely equivalent. Whenever, therefore, the sick seaman is removed ashore for the convenience of the ship, whether with his own consent or without it, if he does not draw his medicines from the chest, he is entitled to an allowance equal to his expenditure for medicines. There is, however, another more important point of view, in which the clause deserves consideration. A sick seaman, while on board, is entitled to receive suitable sustenance and attendance from the ship and crew. during his illness. And the marine ordinances already referred to, which are evidence of the general maritime law, authorise a similar allowance, when he is put ashore. The seventh article of the laws of Oleron is express on this point. It declares, "if it happens, that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore." This was a very humane provision, and easy

in practice, in the short coasting voyages of small vessels, which hugged the shores at the period, when these laws were promulgated; but not always convenient or necessary in our longer voyages with our spacious ships. It adds, "and also to spare him one of the ship's boys, or hire a woman to attend him, and likewise to afford him such diet, as is usual in the ship." The 19th article of the laws of Wisbuy directs in like manner, "that if a seaman falls ill of any disease, and it is convenient to put him ashore, he shall be fed, as he was aboard, and have somebody to look after him there."[4] The 45th article of the Hanseatic ordinance is to the same effect. "If any mariner falls sick of any disease, he shall be put ashore and maintained in like manner, as if he was on shipboard, and be attended by another mariner."[5] The French ordinance in its summary way only declares, that the seaman shall be cured at the expense of the ship, (panse au depens du navire,) which of course includes every sort of expenditure. Admitting therefore, that the acts of congress exempt the ship from the charge for medicine and medical advice and attendance, there is nothing, that in the remotest degree affects the charge for board, lodging, and nursing, while the sick seaman is on shore. This accordingly remains a charge upon the ship, and is to be borne by the owner, upon the principles of maritime law. This is not a novel construction of the acts, for the first time promulgated; although that would not form any solid objection to it, if it stood commended by just rules of interpretation. The doctrine has been asserted for a long time by some of those tribunals in our country, whose familiarity with proceedings of this nature entitle them to very great respect. See Walton v. The Neptune [Case No. 17,135]; Swift v. The Happy Return [Id. 13,697]. I am not aware, that it has been judicially doubted. My own judgment follows it with an unhesitating assent.

The remaining question is, whether the particular circumstances of the case before the court furnish an exception to the application of the general doctrine. It is said, that the shipping articles contain an express stipulation on this subject. The clause alluded to appears from the record before the court to be an addition inserted in writing, at the very close of the printed instrument, after the usual in testimonium clause. It is in these words: "We further agree and bind ourselves to pay for all medicines and medical aid, further than the medicine chest affords." Now, there is not the slightest evidence of the time, manner or circumstances, under which this clause was inserted. It is a stipulation ultra the common shipping paper, and from the place, which it occupies in a printed instrument, and the importance of its contents, there is some reason to call for an explanation of it. It is well known, that the shipping paper is always in the possession of the master or owner; and considering the class of persons, whom it respects, and whose rights it controls, it is not too much to expect, that a very material variance from the common articles should be proved by the most satisfactory evidence to have been fully explained to the seamen before it should bind them. Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. Hence every deviation from the terms of the common shipping paper, (which stands upon the general doctrines of maritime law,) is rigidly inspected; and if additional burthens or sacrifices are imposed upon the seamen without adequate remuneration, the court feels itself authorised to interfere and moderate or annul the stipulation. And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen. Such, as I understand it, is the general doctrine of admiralty jurisprudence on this subject; and I am very slow to doubt either the wisdom or policy, which has breathed so humane a principle into the system.

In the case of The Juliana, recently de-

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[4] "Gardè et servi par un valet," is the expression in Cleirac, page 84.

[5] The common English translation of these ordinances is quoted, not for its exactness, but because it sufficiently conveys the sense. The ordinances are to be found in English, in Peters' Admiralty Reports, and in French in Cleirac. Us et Coutumes de la Mer.

cided in the high court of admiralty,[6] Lord Stowell, with his accustomed ability went into a large discussion of this subject; and he set aside an express stipulation, by which the wages of the seamen, earned in the intermediate periods, were made to depend upon the ultimate successful termination of a long and divided voyage. To the praise so justly pronounced at the bar upon this admired and eloquent judgment, I take leave to add my cordial assent. It is uttered in such a liberal spirit, in such a tone of graceful moderation, and in such a philosophical and rational equity, that it can scarcely fail of universal approbation. The question was not however, as the learned judge supposed, "untouched by any court." A like judgment had been pronounced in America many years ago; and it fell to my lot in my early professional life to have taken a report of a case (which has since found its way into print) in which this doctrine was fully discussed and recognised in a court of common law. In our admiralty courts it received an explicit support at a very early period. See Abbott, Shipp. (Story's Ed. 1810) p. 487, note. There is no pretence, that any extraordinary compensation has been allowed in the present case. The wages are at the ordinary rate, and all the ordinary risks of loss, fastened upon the seamen during the voyage by the maritime law, attach to their earnings here. The duty of the court, under such circumstances is plain; it is to set aside the stipulation as grossly inequitable. But it is said, that this is the case of a mate, which is distinguishable from that of a common mariner, because his rank, character, and intelligence, place him above the pupilage, which the law chooses to impute to the ordinary laborers of the sea. There is certainly a plausible ground for a distinction between the higher officers of the ship and the common mariners in many voyages, and it deserves grave consideration; but whether it would be safe to apply it to all short voyages in small vessels, or even to West India voyages in general, is more than I am prepared to answer. There are cases, in which the officer is so low in rank, or from the nature of the voyage so slightly in advance of the common seamen, that the distinction would perhaps partake more of refinement than justice. It would take from the rule a saving grace in cases, which might call most loudly for its enforcement. But it is unnecessary nicely to scan this proposition, because here the mate, in answer to the allegation of the owner, denies on oath any knowledge of the existence of such a clause in the shipping paper. It has been said, that a clause of similar import was some years ago introduced into the articles, and is now in common use in the port of Portland; and from that circumstance the court ought to presume a knowledge on the part of the mate of this stipulation. Now, it might be a sufficient answer, that in this case there is no evidence of the former habits and voyages of the mate. For aught, that appears, this may have been his first and only voyage from Portland. The presumption could only arise, when the habit of constant employment in the port under similar articles must be supposed to force knowledge home to the most inattentive officer. But in point of fact, the printed stipulation in the ship's articles at Portland is not exactly similar to that, now under consideration. In the printed form handed to the court, the clause stands thus, "Deducting therefrom all such expenditures as the masters or owners of said vessel, cargo or freight shall have incurred in any port, for medicine, surgical and medical aid, nursing, and all and every expenditure whatever, by reason of sickness, wounds, or other disease, for or on account of such seaman or mariner, beyond what may be furnished from the medicine chest, on board of said vessel, the same chest being provided according to law." In some respects this clause is more extensive than that before the court, for it includes nursing and all other expenditures; in other respects it is more limited, for it annexes a condition, that the medicine chest is duly provided, whereas the other clause is absolute in its terms, and independent on any such contingency. So that there is no pretence to infer a knowledge of the one clause from that of the other. Looking then to the other circumstances of the case, the peculiar structure of the clause, its position in the instrument, and the absolute denial on oath by the libellant, it does not seem too much to hold, that it was never in his contemplation a part of the shipping articles. He was ignorant of its existence, and never assented to its obligatory force.

But there remains an insurmountable objection to the clause in the articles before the court, that has not yet been alluded to. I mean its utter hostility to the act of congress. It is an attempt to procure through the medium of contract a dispensation from obedience to the express command of the legislature. In the eye of this clause, it is wholly immaterial, whether the medicine chest be properly furnished or not, or indeed whether there be any on board. It annexes no condition, and assumes no responsibility on this head. And if by a stipulation of this sort the legislative policy can be evaded, it is easy to foresee that the scheme will soon become universal in its adoption and complete in its operation. A public grievance so mischievous cannot for a moment be permitted. The law will work its way through every contrivance of this nature. And I have no hesitation in pronouncing, that the clause is illegal from its direct contravention of the policy of the act of congress. Even

[6] Decided March 19, 1822, and reported in the London New Times, March 20, 1822, and New-York Evening Post, May 13, 1822.

if this interpretation of the clause admitted of controversy, and we should incorporate into it an implied proviso, that the medicine chest should be regularly supplied, it would not aid the present case. For, upon the direct and satisfactory evidence of highly intelligent physicians, the medicine chest of the Enterprize was utterly inadequate for the voyage. In the course of the investigation of this suit, it has come to the knowledge of the court, that there is a most criminal neglect and indifference on this subject, that cannot but excite the most painful surprise and mortification. When we find, that some merchants in this neighborhood, instead of directing a medicine chest to be furnished and replenished with an adequate stock of all the necessary medicines, drive a hard bargain for a supply of the most ordinary kinds, and of those least adapted to the voyage, at a very trifling fixed price; and when even such medicines are insufficient in quantity, it cannot but create a feeling little short of indignation, that there should exist among a moral people, such an insensibility to human suffering, and such a carelessness of human life. This information, which for the first time has been brought to the notice of the court, is most unwelcome, and calls upon it, as an imperious duty, to pronounce the most pointed reprobation of the practice. If owners will persist in this practice, they shall not, so far as this court is concerned, derive any benefit from such a violation of duty. Whenever they seek to exonerate themselves from the charges of sickness imposed upon them by the maritime law, the burthen of proof of the sufficiency of the medicine chest in all respects rests upon them. And the court will require the fact to be established by the testimony of disinterested persons, and not exclusively to depend upon parties, who have trafficked for the supply at a low fixed rate, and may feel a deep interest in point of reputation and custom to gloss over the infirmities of the transaction. In this way the obvious policy of the act of congress will be enforced, and the mischiefs of a gross departure from it may be in some measure redressed.

In every view, which the court has been able to take of the point now under consideration, the respondents have failed to establish, that they were not originally liable for the charges of sickness claimed by the libellant. But it is insisted, in the last place, that the claim, whatever might have been its original validity, has been completely adjusted and settled by the parties. And a receipt, given by the libellant, is relied upon as satisfactory proof of the fact. In respect to instruments of this nature, however general and comprehensive their terms may be, there is no pretence to say, that they have a binding and conclusive effect. The most, that can be attributed to them, is, that they afford prima facie evidence of all, that they purport to declare, and that they are to stand, until overthrown by counter proof from the other party. They do not arrogate the high prerogatives, which the common law has attributed to releases under seal; and even these may be set aside in equity, when surprise, fraud, mistake, or undue influence have intervened to the material injury of the party. It need hardly be said, that courts of admiralty in the administration of their duties, seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in general equity, than in the inflexible strictness of the common law. They have not the rashness to impute blame to the latter, for they are not insensible of its excellence. But they understand, that the common law does not affect to apply remedies to all cases of injustice; and leaves to other courts the full right to pursue a more enlarged equity, whenever their constitution enables them to favour and support it. When a receipt is given in full of all demands, it is not to be taken in the admiralty as conclusive. It is open to explanation, and upon satisfactory evidence may be restrained in its operation. But the natural presumption is in its favour, and that presumption will prevail, until it is displaced by direct proof or strong circumstances. Indeed in cases of doubtful or conflicting claims, where a compromise takes place, and receipts are given, as final discharges between the parties, upon deliberate consideration and in good faith, there is the greatest reason to uphold these instruments, for they tend to general repose and security. But when there has been no such compromise; when there has been an entire mistake of right, or an unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice in refusing the injured party an equitable relief. These observations apply to general receipts. But when, as in the present case, the receipt is merely annexed to the foot of an account, and admits the payment of the balance only, it is to be viewed merely as a stated account, and confined in its operation to the items, which are specified. It cannot by any ingenuity be made to reach other claims, which it neither recognises nor repudiates. Now a stated account is liable to be impeached; and in a fit case the party is admitted to surcharge and falsify it. If errors and mistakes are apparent on the face of it, or the party comes with a strong case, recenti facto, courts dealing in equities are in the constant habit of affording relief. And, what presses with more force on the present occasion, there are situations of peculiar influence and confidence between the parties, in which the opening of settled accounts is very reluctantly refused, and very easily permitted. But it is not necessary to examine this matter very minutely, because, in the case before the court, there is no settlement of any claim, except that of

wages and an inconsiderable item for medicines. The other items are not even mentioned in the account; and it is signed with an express exception of errors. It therefore concludes nothing, and is now open to correction as to the item of medicines, for which, upon the principles already stated, the libellant is not liable. As a receipt, or as a stated account, it presents no bar whatsoever to the controverted claims; and if a final settlement of these claims is to be established upon evidence aliunde, that evidence has not as yet been produced. On the other hand, such a settlement is utterly denied by the oath of the libellant, and that oath is supported by the exception of errors on the settled account. This point of defence may then be dismissed without farther comment, as sustained neither de facto, nor de jure.

The material points presented at the bar having been considered, the remaining duty of the court is to pronounce its own judgment; and it is, that the decree of the district court be reversed, and that the sum of fifty-two dollars and sixty-two cents, together with the costs of suit be awarded to the libellant. In justice to the district judge it is proper to remark, that the case stands before this court very differently in point of evidence from that, which was presented to him. Decree accordingly.

HARDICK (LASH v.). See Case No. 8,097.

Case No. 6,048.

In re HARDIN.

[1 Hask. 163; 1 N. B. R. 395 (Quarto, 97); 1 Amer. Law T. Rep. Bankr. 48, 119; 15 Pittsb. Leg. J. 343.] [1]

District Court, D. Maine. March 16, 1868.

BANKRUPTCY—PROOF OF DEBT—STATUTE OF LIMITATIONS—REVIVAL.

1. A debt, barred by the statute of limitations in the state where the bankrupt resides, is not provable in bankruptcy against his estate by a creditor resident in another state, even though not barred by the statutes of that state.

[Cited in Re Cornwall, Case No. 3,250; Re Noesen, Id. 10,288; Nicholas v. Murray, Id. 10,223.]

2. Nor is such debt revived by the entering of it on the schedule of the bankrupt's liabilities.

[In bankruptcy. In the matter of Herman P. Hardin.] Two questions were certified by Mr. Register Thatcher to the court for decision: (1) Are debts due citizens of Massachusetts and Rhode Island, who have always resided in those states, provable against the estate of the bankrupt, who has always resided in Maine, when such debts are barred by the statute of limitations of that state? (2) Are such debts, when so barred, revived by the bankrupt's entering them upon his schedule of liabilities annexed to his petition in bankruptcy?

FOX, District Judge. The first question has been carefully examined by Blatchford, J., in Re Ray [Case No. 11,589], and that learned judge in an elaborate opinion, decides that such demands are provable, notwithstanding they would otherwise be barred by the statute of limitations in an action at law. Judge Lowell, upon the same question, in a very able opinion in Re Kingsley [Id. 7,819], holds that such claims are not provable against the estate of the bankrupt.

I have carefully examined the opinions, and I concur in that of Judge Lowell. I do not feel it incumbent on me to do much more than refer to his opinion for the reasons which lead me to this conclusion. It seems to me beyond all question, that if these claims were allowed by the register and district judge, and an appeal should be taken under the 24th section of the bankrupt act [of 1867 (14 Stat. 528)] that on trial before the circuit court the claimant must fail. This section expressly declares that in such an appeal, the creditor shall set forth his claim in a statement "substantially as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial and determination of the cause, as in an action at law, commenced and prosecuted in the usual manner in the courts of the United States."

Could not an assignee plead the statute of limitations in such a cause? This language expressly authorizes it. It says the assignee shall plead in like manner, and like proceedings shall be had in the pleadings and trial as in an action at law in the courts of the United States. These courts, in Maine, in an action against a resident of Maine, must be governed by the laws of Maine regulating the limitation of actions, if they are properly pleaded, and can administer none other. The lex fori must control. Bank of U. S. v. Donnally, 8 Pet. [33 U. S.] 372.

Judge Blatchford admits that no debt can be considered "due and payable," which is barred by the statute of limitations; and that a debt so barred cannot be proved. If an action was pending before him in the circuit court in New York on such a demand, and the assignee should plead the statute of limitations of New York, it certainly seems to me that the judge would be bound to recognize the validity and effect of the plea. There is not a word in the whole bankrupt act which authorizes him to reject it, or restrain it from its full and ordinary effect; on the contrary, the 24th sec. above quoted, as I apprehend, in terms requires the court to proceed in the pleadings, trial and determination of the cause, as in an action at law.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission. 1 Amer. Law T. Rep. Bankr. 48, 119, contains only a partial report.]

The provisions of the 22d section, requiring the court to reject all claims not duly proved, or when the proof shows the claim to be grounded in fraud, illegality, or mistake, in my opinion tend to corroborate this construction, and sustain the view that only legal claims, such as could be sustained against the bankrupt in an action at law, are provable.

Would the claim of the creditors in the present case offer a basis for involuntary proceedings? The language of the 39th section authorizes a party guilty of certain acts to be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least $250. Will it be claimed that debts to the amount of $250, upon which no recovery could be had in the circuit court by reason of their being barred by the statute of limitations, would be such an indebtment as could sustain an involuntary petition in bankruptcy? No provision can be found in the statute, which debars the debtor in such a case from saying, "I do not owe the claim, the debt is not a legal one, and cannot be sustained against me"; and yet, the language describing the indebtment is, "debts provable under the act." Would not a debtor, owing demands, which could be legally enforced against him, and also outlawed demands, have a right to pay or secure all of the former, and would such conduct be an act of bankruptcy, subjecting him to the provisions of the involuntary clause in behalf of the creditors of these outlawed debts? [Would such a preference be set aside, and the transfer adjudged invalid, and the holders of these old debts allowed to share and divide among themselves, all the property so conveyed in preference, or in payment of legal and valid claims, to the entire exclusion of the holders of these demands, and would such a preference and payment, of every dollar which could be recovered against him, deprive him of his discharge, if he should be driven into bankruptcy by the holders of the claims barred by the statute? Such consequences would seem to result, if the language of the 39th section, "debts provable against him," would include demands barred by the statute, and if the holders of such demands are to be recognized as creditors entitled to avail themselves of the benefit of this section.] [2]

The language of the statute, to authorize such a construction, and subject a party to bankruptcy on claims to which he had before the act a complete defence at law, should be so positive and certain, as to admit of but one construction, and I can find nothing therein which authorizes me to so interpret it. It is admitted that such has been the law in England ever since the decision of Ld. Elden in Ex parte Dewdney, 15 Ves. 479, and no good reason I think exists for a different construction of our bankrupt act. The only argument presented against this view is, that if this is the true construction, the bankrupt will not be discharged from his old demands, as only provable debts are discharged. I have no doubt that these are provable debts, and that they will be discharged by the certificate if granted. They are of a provable character, but are no longer "due and payable," because the law of the forum designated by congress for the adjudication presumes their payment, and a demand that is paid no longer exists as a legal, provable cause of action. The reasoning of Judge Lowell on this point is entirely satisfactory to me, and therefore, is to my mind a complete answer to the objection, that the debtor would not be released from these claims by his discharge. Proof disallowed.

[The entry of these claims by the bankrupt on his schedule of liabilities cannot be considered as a waiver of the statute, or a new promise to take them out of the statute. A naked acknowledgment of a debt is, of course, not a new promise, but is only evidence from which the court or jury may infer a new promise on the part of the debtor, and to authorize such an inference, to use the language of Mr. Justice Story in Bell v. Morrison, 1 Pet. [26 U. S.] 351, "if there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, we think they ought not to go to the jury as evidence of a new promise to revive the cause of action." An intention to pay his liabilities is certainly the farthest thing possible to be inferred from a debtor's filing a petition in bankruptcy to be discharged therefrom. On the contrary, he thereby says he cannot pay and does not intend to pay, or to have them remain as outstanding demands against him; instead of paying, he means and intends forever to be discharged therefrom.

[I understand that Judge LOWELL and Judge BLATCHFORD both agree in this result, and are of opinion that the demands are not taken out of the statute by being thus entered by the bankrupt in his schedules of liabilities. The demands of these creditors are not provable against the estate of the bankrupt, and it will be so certified to the register.] [3]

HARDIN (TRUMAN v.). See Case No. 14,205.

[2] [From 1 N. B. R. 395 (Quarto, 97).]

[3] [From 1 N. B. R. 395 (Quarto, 97).]

Case No. 6,049.

HARDING v. ALTEMUS.

[1 Wkly. Notes Cas. 12.]

Circuit Court, E. D. Pennsylvania. Oct. 5, 1874.

TAXATION OF COSTS — EXPENSE OF PRINTING AND TRANSLATING TESTIMONY.

[Where the bill is dismissed, defendant is not entitled to add to his bill of costs the expense of printing the testimony in his behalf, or of translating depositions taken in France under letters rogatory.]

Complainant's bill having been dismissed, the defendant added to his bill of costs the expenses of printing the testimony in his behalf, and of translating certain depositions which had been taken in France under letters rogatory, and were in the French language. Upon taxation of costs before the clerk of the court, these items were disallowed by him. Defendant filed exception to this ruling.

Mr. Sheppard, for exceptions.

Mr. Harding, contra.

McKENNAN, Circuit Judge, overruled the exceptions.

HARDING (CALDWELL v.). See Cases Nos. 2,301 and 2,302.

Case No. 6,050.

HARDING v. CROSBY.

[17 Blatchf. 348.] [1]

Circuit Court, S. D. New York. Dec. 10, 1879.

BANKRUPTCY — SUIT BY ASSIGNEE TO SET ASIDE PREVIOUS ASSIGNMENT—NECESSARY PARTIES.

1. An assignee in bankruptcy brought a suit in equity against the voluntary assignee of the bankrupt, to set aside a conveyance made by the bankrupt, within three months before the filing of the petition in bankruptcy, to the defendant, in trust for the benefit of all the creditors of the assignor, without any preferences: *Held*, that, as the direct effect of the conveyance, if upheld, would be to keep the property away from the operation of the bankruptcy law and from distribution by the courts and officers of the United States, and to give it and its administration to a trustee selected by the debtor, the plaintiff was entitled, under section 5,129 of the Revised Statutes, as amended by the act of June 22, 1874 (18 Stat. 390), to the relief asked.

2. The bankrupt is not a necessary party to such suit.

[This was a bill in equity by William A. Harding against Charles P. Crosby.]

William B. Hornblower, for plaintiff.

Charles P. Crosby, for defendant.

WHEELER, District Judge. This cause has been heard on bill, answer, replication, proofs and argument. The bill is brought by the orator, as assignee in bankruptcy, to set aside a conveyance by the bankrupts of all their property to the defendant, in trust for the benefit of all their creditors, without any preferences, made within three months of the filing of the petition. The answer admits the conveyance but denies that it was made with a view to prevent their property from coming to their assignee in bankruptcy, or to prevent it from being distributed under the bankruptcy laws of the United States, or to hinder their operation. The answer is traversed. The principal question, is, whether such a conveyance is within the provisions of section 5129 of the Revised Statutes of the United States, as amended by the act of June 22d, 1874, (18 Stat. 390). That section does not require that the assignment be fraudulent, to be avoided. If it did this conveyance was out of the usual and ordinary course of business of the bankrupts, which would be prima facie evidence of fraud, according to the provisions of section 5130. It is only necessary that it be made with a view to prevent the property from being distributed under the bankruptcy laws. The insolvency and contemplation of it being admitted, the direct effect of the conveyance, if upheld, would be to keep the property away from the operation of those laws, and from distribution by the courts and officers of the United States, and to give it and its administration to a trustee selected by the debtors. They must be deemed to have intended these direct consequences of their act, and to have committed the act in view of the consequences. These considerations bring this case within the statute. Although, when the bankrupt law of 1867 [14 Stat. 517] first came to be construed, there were some decisions by eminent judges to the contrary of this, they have not been followed, and the current of the decisons has almost, if not quite, uniformly since then been in accordance with this. It would serve no useful purpose to name these cases here.

There is, also, an objection because the bankrupts are not made parties to this bill. It is argued that they are necessary parties to a bill to enforce an assignment in trust, because there may be an excess, after payment of debts, in the hands of the trustee, belonging to the debtor, and that the same is true here, and that they are or may be interested to have the assignment upheld. Here, however, all the property of the bankrupts subject to the exemptions, is vested in the assignee in bankruptcy, and there could not be any excess, after administration of the trust, belonging to the bankrupts personally. Hence, there is no occasion for joining the bankrupts. Let there be a decree setting aside the conveyance, and for delivery of the property, and for an account, according to the prayer of the bill.

HARDING (HASKINS v.). See Case No. 6,196.

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

HARDING (KELLY v.). See Case No. 7,670.

HARDING (McKINSEY v.). See Case No. 8,866.

HARDING v. The MAVERICK. See Case No. 9,316.

HARDING v. REPLIER. See Case No. 10,401.

HARDING (UNITED STATES v.). See Case No. 15,301.

Case No. 6,050a.

HARDING v. WALKER.

[Hempst. 53.] [1]

Superior Court, Territory of Arkansas. April, 1828.

WAGES—GAMING CONTRACTS.

1. Gaming contracts are contrary to good morals, and void.

2. All wagers are not void; but all gaming contracts are.

[This was an action at law by Albert G. Harding against Alexander S. Walker.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, JJ.

OPINION OF THE COURT. This is an action on the case, brought by the plaintiff to recover of the defendant the sum of one hundred and fifty dollars, won at a game of cards, called "seven up." To the declaration, the defendant demurs, and insists that there is no cause of action set forth. He admits that the game mentioned is not one of those prohibited by statute, but claims that there is not a good consideration at common law set forth.

The demurrer must be sustained on two grounds: First, because the contract is without a good or valuable consideration. It is settled that the law will not raise an assumpsit without a consideration, or support an action on a nudum pactum. See 1 Bibb, 182; 6 Johns. 194; Comyn., 9. Second, because it is a gaming contract, and against good morals. In the case of Bunn v. Ricker, 4 Johns. 432, a distinction is taken between wagers and gaming contracts. Wagers against public policy or good morals are void as gaming contracts. It is clearly to be inferred from the opinion of the court and the cases referred to, that all wagers are not void, but that all gaming contracts are. In the case of Good v. Elliott [3 Term R. 693] Grose, J., says that wagers are not void as gaming contracts. Lord Mansfield, in the case Da Costa v. Jones [Cowp. 729] says, whether it would not have been better policy to have treated all wagers as gaming contracts, and to have held them void, is too late to discuss. Thus all declare that some wagers are to be supported, but deny the validity of all gaming contracts. This is a gaming contract, and therefore void. Demurrer sustained, and judgment for the defendant.

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

Case No. 6,051.

HARDING et al. v. WHEATON et al.

[2 Mason, 378.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1821.[2]

BILL IN EQUITY TO SET ASIDE DEED—UNDUE INFLUENCE.

1. A court of equity has jurisdiction to entertain a suit upon the application of heirs at law to set aside a deed of land obtained from their ancestor by undue influences, he being so weak in mind and body as to be open to such influence, although he be not absolutely insane. And the like doctrine prevails, where one of the heirs at law has, with the consent of the others, taken such a deed upon an arrangement, that the same shall be considered as a trust for the maintenance of the father, and after his death for the benefit of all his heirs.

[Cited in Fishburne v. Ferguson's Heirs (Va.) 4 S. E. 581; Ashmead v. Reynolds, 134 Ind. 143, 33 N. E. 763; Moore v. Moore, 56 Cal. 94; Fishburne v. Ferguson's Heirs, 84 Va. 110, 4 S. E. 575.]

[See note at end of case.]

2. Under circumstances, such a conveyance may be allowed to stand security for actual advances and charges, and set aside as to all other purposes, on account of imposition.

[Cited in Nailor v. Nailor, 5 D. C. 93.]

[See note at end of case.]

This was a bill in equity brought by [Stephen Harding and another] two of the heirs at law of Comfort Wheaton, deceased, which charged, that on the 9th of May, 1805, Comfort Wheaton was seized of certain real estate in Providence; that he was then infirm and weak, both in body and mind, being very old, viz. seventy-five years of age, and having been severely affected by a stroke of the palsy, which destroyed the soundness of his understanding; that he was conducting himself in such a manner, that his children and friends were seriously apprehensive, that he would waste his estate, and contemplated placing his person and estate, according to the laws of Rhode Island, under guardianship; that with a view to avoid this necessity, it was agreed between Asa Handy, one of the defendants, (a son in law of Comfort Wheaton,) and the other defendant Caleb Wheaton, (the eldest son of the said Comfort,) with a view to the appropriation of the estate for the maintenance of their father during his life, and the preservation of the residue after his decease for the benefit of all the heirs, that Handy should procure a conveyance of all their father's property to himself for these purposes, and should execute an instrument declaring these purposes for the benefit and security of the heirs; that accordingly Handy procured a conveyance of the real estate to be made to him in fee, by formal conveyances duly executed by Comfort Wheaton on the 9th of May, 1805, for the nominal consideration of $2,178, and also took possession of the personal estate; and that Handy had ever since occupied and

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

[2] [Affirmed in part and reversed in part in 11 Wheat. (24 U. S.) 103.]

held the said real and personal estate, and received the whole rents and proceeds, but had never during the life of said Comfort Wheaton, nor since his decease, executed any such acknowledgement of trust, but always refused so to do, and now claims the same estate to his own use; that Comfort died on the 19th of December, 1810, leaving the plaintiffs and the defendant Caleb Wheaton, and Correct Handy, and Mary Handy, (daughters of the defendant, Asa Handy, and Mary his wife, before that time deceased) and —— Wheaton, and —— Wheaton, sons of Daniel Wheaton, deceased, his heirs at law; that after his death the defendant Caleb, with the assent of the other heirs, procured administration to be taken upon his father's estate, by Thomas Burgess, Esq., with a view to defeat the deeds of the real estate so made to Handy; that Comfort Wheaton's estate was afterwards declared insolvent; and that the real estate conveyed to Handy was afterwards sold as the estate of Comfort Wheaton under an order of court, according to the law of Rhode Island, at public auction, and the defendant Caleb Wheaton became the purchaser of the same at the sale expressly for the benefit of all the heirs (he being the principal creditor to the estate); that the monies received by Handy from the personal estate, and the rents and profits of the real estate so conveyed to him, greatly exceeded all the sums expended by him in support of the in testate. The bill then prays relief in the premises, and that the defendants may truly account respecting the same; and that a decree may be rendered exonerating the same estate from the deeds to the defendant Handy, after satisfying his claims, if any, and ordering one fifth part of the real estate to be set off to the plaintiff Nancy, and one fifth part to the plaintiff Sterling, and for other relief. The answer of the defendant Caleb Wheaton admitted all the substantial facts charged in the bill, and stated his claims against his father's estate to be $620.15, and the consideration in the deed of the administrator to him to be $500. The answer of the defendant Handy admitted the execution of the deeds to him by Comfort Wheaton, and alleged them to have been made bona fide, and for a valuable consideration; that the real consideration on his part was an undertaking (besides other main objects) to provide a suitable maintenance for the grantor during his life, and payment of his debts, &c.; all which was secured to be done by two bonds executed by the defendant Handy to the grantor, and deposited with a trustee; it further stated, that Handy had strictly performed the conditions of these bonds, and explicitly asserted, that the grantor was of sound mind and capacity to make the conveyances, and as explicitly denied the trusts and pretences for the conveyances set forth in the bill. Issue being taken upon this answer, the cause came on to be heard upon the whole evidence and proofs in the cause.

Searle and Burgess, for plaintiffs.
Robbins and Tillinghast, for defendants.

STORY, Circuit Justice. This cause has been argued with great care and ability, and it would have been satisfactory to the court, if equal attention had been bestowed on the preliminary proceedings. The bill contains unnecessary amplifications and minute details, apparently inserted to give a complexion to the cause, but in no respect essential to a complete exposition of the case propounded by the plaintiffs for relief; and it wants that brevity, accuracy, and neatness of statement, which are so commendable in all chancery pleadings. The answer is still more faulty, dealing in matter impertinent to the charges in the bill, and besides being argumentative, it assumes the character of a cross bill, and proposes grave interrogatories, instead of confining itself to its own proper office of a plain direct reply to the charges made by the bill. The depositions are worded with impertinent and leading questions and irrelevant facts, which tend to obscure the merits, and draw the attention of the parties from the real points in controversy, to matters utterly unimportant to the decision of the cause. The wisdom of the rule, requiring all depositions in chancery to be taken under commission upon interrogatories previously settled and arranged, is most completely established by the inconveniences, which have grown up under our own lax and inartificial system. It is time we were arrived at a more systematic and regular practice. The great mass of testimony in this case, extending, as I believe, to more than eighty depositions, would be reduced in bulk to one half by the mere suppression of improper matter; and the residue after this deduction would be more direct, satisfactory, and pointed, if written interrogatories had been addressed to the witnesses, (free from the objection of being leading questions) such as the learned counsel in this cause would have undoubtedly advised, if they had been consulted in the preparation of them. It is with reluctance, that I make these remarks; but they are called from me by a sense of duty. And if faults, so obviously easy of correction, shall continue to embarrass our proceedings, it will be necessary in future to adopt a more rigid course, and to refer the proceedings to a master to be corrected at the cost of the parties.

The first point, to which the attention of the court has been drawn, and which is preliminary in its nature to all other inquiry, is, whether the court has jurisdiction of this cause, sitting as a court of equity. It is said, and truly, that by the laws of the United States (Act Sept. 24, 1789, c. 20, § 16 [1 Stat. 82]) no suit in equity can be sustained "in any case, where plain, adequate, and complete remedy may be had at law." But this clause is merely affirmative of the general doctrine maintained in courts of equity, and has never been construed in any degree to

abridge the original equity jurisdiction. It appears to me most clear, as well upon principle as authority, that the case charged upon the face of this bill is one to which the jurisdiction of equity attaches, and that an adequate and complete remedy cannot be administered at law. Frauds and trusts are emphatically within the jurisdiction of courts of equity, and these lie at the very foundations, on which this bill rests. This is not a case like that supposed in the reasoning in Russell v. Clarke (7 Cranch [11 U. S.] 89), cited at the bar, where the remedy is ordinarily at law, and the only ground for equitable interference is the discovery sought to establish the fraud. In such a case if the discovery fails, the plaintiff shall not be permitted to sustain his suit in equity, and thus change the regular forum to which the decision of the case properly belongs. But here, independently of any discovery, the case, if made out in proof, justifies equitable relief. The deeds to Handy may be set aside, or held good sub modo, an account of rents and profits may be ordered, and the property may be apportioned among the heirs according to their respective rights. Besides, even supposing Handy's deeds to be void, as the legal title to the real estates is now in the other defendant Caleb Wheaton, it is most manifest, that if the heirs are entitled to any relief against him, it can only be administered in a court, where that deed may be made subservient to the real equities of the whole case, as between all the parties; and no person will for a moment contend, that such relief could be obtained in a court of law.

Then again it is urged, that here a trust is set up resting in parol, and that it is inconsistent with the rules of law, and the statute of frauds, to establish any trust, which is not a resulting trust, by parol evidence. And to add to the force of this objection, it is stated, that the trust here attempted to be enforced is not between the grantor and grantee, but upon a collateral agreement with a stranger, to which the grantor was not privy, and having no just or adequate consideration or proof to support it.

It does not appear to me necessary in this case to decide, whether the statute of frauds of Rhode Island (Rhode Island State Laws, p. 473) can apply to cases of this nature, or whether the English statute of frauds has been introduced into practice in Rhode Island, so as to have become, under the express declaration of the legislature, a part of the law of the land (Id. p. 78, § 5). Nor do I think it necessary to consider, in what cases parol evidence may be admitted to establish trusts upon the principles of the common law, or the construction of the statute of frauds (see Davis v. Symonds, 1 Cox, 402; Hutchins v. Lee, 1 Atk. 447), because this cause does not essentially depend upon any such grave and important discussions. And for the same reason I pass over the point, how far this court would enforce a collateral agreement or trust, like that charged in the bill, made with a stranger to the estate without consideration, and resting in parol, though the case of Bartlett v. Pickersgill (1 Eden, 515, 4 East, 577n., and 1 Cox, 15; and see Botsford v. Burr, 2 Johns. Ch. 405) is very significant on this subject. My reason for passing over all these topics is, that assuming the agreement stated in the bill to be incapable as an agreement of being supported in law, or as not proved in fact, still if the other circumstances alleged are true, it is impossible, that the conveyances to Handy can be supported as absolute conveyances. The most, that under such circumstances he can be permitted to claim, is, that they should stand security for the advances made, and charges incurred by him for the grantor during his life time; and therefore, in this view of the case, there arises by operation of law, a resulting trust for the heirs of the grantor to the same extent, and of the same nature, as that set up in the agreement.

The material consideration, therefore, is, whether Comfort Wheaton was at the time of the execution of the deeds to Handy of sound capacity and discretion to execute such conveyances; and if so, whether under all the circumstances they ought justly to be held as absolute, or as mere security for the advances and charges of Handy. The evidence as to the degree of capacity and sanity of Comfort Wheaton is certainly contradictory to an unusual degree; and it is matter of no inconsiderable embarrassment to the court to ascertain, what was his real situation. It is, however, manifest, that after he was afflicted with a stroke of the palsy, his understanding was much impaired, his habits of life were greatly changed, and his ability to pursue business was materially diminished. He became intemperate, and addicted to vices, which formed a striking contrast to the regularity of his former life. He was squandering his estate with a negligence, that alarmed his children and friends. It is also proved by evidence entirely conclusive on this point, that his children, and among others Handy himself, expressed a desire, and actually assisted in the institution of proceedings to place him under guardianship. If we add to these facts the declarations of Handy himself, as to the incompetency of the party, and his extreme old age and infirmity, it does not seem too much to assert, that the weakness of his intellect was such, that if there was not an absolute incapacity, there was a state so nearly approaching to it, that a court of equity would betray its duty, if it should give a validity to his acts, disposing of his whole estate, equal to that of a person in full health and vigor of mind. The acts of a person in such a debilitated state are to be watched with extreme jealousy; and if these are not entirely void, they are at least to be restrained to such effects, as a rational mind would be supposed fairly to contemplate. If I were, indeed, to give full credit to the tes-

timony of the plaintiffs, and it is so highly respectable and cogent, that one is greatly staggered in attempting to diminish its force, a clear case of incapacity would be made out, so as to justify a declaration by the court, that the deeds were utterly void. But even admitting every mitigation, which the testimony on the other side can reasonably demand, consistently with the circumstances already mentioned, it is difficult to resist the conclusion, that the party was too imbecile to be supposed capable of making a reasonable disposition of all his estate. In this view of the case, it appears to me, that the alleged agreement between Handy and Caleb Wheaton, supposing the former intended to act with good faith and honesty, (which I am bound to presume) becomes not only a natural, but a very probable transaction. I do not mean to say, that as an agreement it could have a legal effect and obligation, but it may be considered as a family arrangement, with a view to the suitable maintenance of the father during his life, and the preservation of the property he should leave, for the benefit of his heirs. Laying aside the answer of Caleb Wheaton, (which, as the answer of a co-defendant, is not evidence against Handy) it appears to me, that the other evidence in the case is sufficient, notwithstanding Hardy's denial, to establish the fact, that such an agreement or understanding actually took place, and that the deeds were executed in pursuance of that arrangement. I use this fact, however, here, only for the purpose of corroborating the observations already made, as to the capacity of Comfort Wheaton; for, if such an arrangement was made, it demonstrates in the most forcible manner the opinion of all parties as to his incapacity, at least in a judicious manner, to dispose of his property. I am free, however, to declare, that the same conclusion is satisfactorily established in the case, independently of this particular fact.

But the court is pressed with the doctrine laid down in Osmond v. Fitzroy, (3 P. Wms. 129, 131), that where a weak man gives a bond, if there be no fraud or breach of trust in obtaining it, equity will not set aside the bond, only for the mere weakness of the obligor, if he be compos mentis; neither will the court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity. And it is hence inferred, that unless the court can come to the conclusion, that the party in this case was non compos mentis, or that there has been fraud or breach of trust, no relief can be afforded against the deeds in controversy. Whatever force there may be in the doctrine in Osmond v. Fitzroy in general,—and it seems not to have met the approbation of Lord Thurlow (Griffin v. Deveuille, 3 P. Wms. 130, note 1 by Mr. Cox; 3 Wood. Lect. Append. 18; 1 Madd. Ch. Pr. 223, 224),—it cannot be denied, that there may be a degree of weakness short of legal incapacity, which would leave the party so entirely open to influence and imposition, to the persuasions of friends, and the undue operation of slight motives, that it would be unjust to hold his conveyances entitled to the same sanction, as those of a person in the possession of a vigorous understanding. Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract in the ordinary course of things reasonably made with such a person might be admitted to stand, yet if it should appear to be of such a nature, as that such a person could not be capable of measuring its extent or importance, its reasonableness, or its value, fully and fairly, it cannot be, that the law is so much at variance with common sense, as to uphold it. Now, it appears to me, that Comfort Wheaton was, in the contemplation of his friends and family, and especially of Handy, in this predicament. Handy possessed his confidence, and was nearly connected with him, and assuming he might be capable in law of executing a deed, it is impossible to shut our eyes against the fact, that he was in a great measure at the mercy of those, who were immediately about him, and disposed to influence him.

Consider, for a moment, the circumstances of the case. He was more than seventy-five, and as the plaintiffs now assert, seventy-nine years of age. He had notoriously failed from palsy and other infirmities in his understanding, and his bodily health was greatly enfeebled. Under such circumstances, and having several children, he executes conveyances of all his real estate to Handy for the consideration stated in those deeds of $2,178. At the same time he conveys to Handy's wife, as a gift, a portion of his personal estate, and the residue he surrenders to Handy, to be at his sole disposition. Now, in point of fact, no such consideration as $2,178 was paid to the party; so that upon the very face of the conveyances the truth of the transaction is not disclosed. The deeds are at war with the defence now set up. That defence is not, that a money consideration was paid; but, that bonds were given to secure to the party the performance of certain other conditions enumerated in these instruments. For what good purpose could this suppression of the truth of the case upon the face of the deeds be adopted? We are told, that these deed are solemn instruments, and ought not to be incumbered by parol trusts, or contradicted by evidence aliunde. And yet the very ground of Handy's defence rests on parol evidence, contradicting the considerations in the deeds. They, therefore, stand impeached upon his own shewing, and whatever validity may in other respects belong to them, they cannot be admitted to import absolute verity. If we advert to the conditions of the bonds, we shall be abundantly satisfied, that they disclose the weakness of

a mind in dotage. There is a trivial enumeration of unimportant things, indicating the drivelling wishes of an exhausted intellect. The substance of the condition is the payment of a few debts, and the maintenance of the party during his life. Now, we are not to look to the event, in order to ascertain, whether this was a bargain carrying on its face an adequate consideration. It is true, that the party lived five years after the execution of these instruments; but the chance of life at the time was very far short of this period. Here, then, the party disinherits his children, takes personal securities for his maintenance for a brief period, in lieu of a valuable real property, and leaves even these securities in the hands of a trustee. And there is not the slightest evidence, that the existence of these securities was ever made known to any of the family during his life-time by any person whatsoever. I do not impute to Mr. Handy any original meditated fraud in this transaction; but, if I were compelled to consider it in any other light, than as an amicable arrangement, and that what was done was merely designed to save the estate, and yet satisfy the scruples of the aged and discontented man, I should be driven to set aside these conveyances, as obtained by undue influence exerted over weakness, caprice, and dotage. I must, therefore, even for Handy's benefit, look to the transaction, not as he now represents it, under a new posture of things, as an absolute sale; but, in order to give him a lien for his advances, as a trust to preserve the property, and, in short, as a substitution for the rights of a legal guardian.

Cases are not wanting, in which courts of equity have relieved against bargains made by persons of full age and reason without proof of actual fraud and imposition, upon the ground, either of public policy, or the notion of an unconscionable advantage taken of a person's peculiar circumstances and necessities. Decisions of this sort are very familiar, where parties deal with young heirs respecting their expectancies. In such cases, a court of equity will not suffer the conveyances to stand absolute, but only for such sums as are justly due to the party, who has received them. See cases cited 1 Madd. Ch. Pr. 97, &c.; Chesterfield v. Janssen, 2 Ves. Sr. 157; Davis v. Symonds, 1 Cox, 402, 404; Peacock v. Evans, 16 Ves. 512. Lord Hardwicke in a case much resembling the present, though certainly not so strong or pressing, set aside an assignment of the whole of the party's property, and decreed a re-conveyance. Hutchins v. Lee, 1 Atk. 447. A like decree was made under analogous circumstances in Clarkson v. Hanway. 2 P. Wms. 203. See, also, Bates v. Graves, 2 Ves. Jr. 287. These authorities might justify the court in pronouncing a decree, declaring the deeds utterly void, if it should be satisfied, that there was any imposition practised upon the weakness of the grantor. I feel disposed, however, to adopt a more mitigated course, as well upon the ground, that it is consistent with the relief sought by the bill, as, that it agrees with the real complexion of the case. I shall, therefore, follow the rule in How. v. Weldon, 2 Ves. Sr. 516. See, also, Taylour v. Rochfort, Id. 281, and Belt's Supp. to Vesey, 345, 396; Blackburn v. Gregson, 1 Browne, Ch. 420, where deeds obtained under acts of imposition were held security for advances really made, and no farther. Of course, an account must be taken, and the case must be referred to a master for this purpose. The defendant Caleb Wheaton, who is the legal owner of the real estate under the administration sale is in effect a plaintiff; as he sets up no claim, except for an allowance of the debts due him from his father's estate, it is farther to be referred to the master to ascertain and report to the court the amount, if any, due to him. I shall also direct the master to ascertain and report the value of the real estate, with the view of giving Handy, upon the coming in of the report, an election to take the estate at that value, paying the heirs now before the court their shares, after deducting any sum found due to him by the master. If he shall not elect so to do, I shall then decree him to convey to the parties before the court their shares of the real estate upon the payment to him of the proportion of the sum so found due to him. However, I only intimate this as my present opinion, wishing to reserve all farther direction, until the coming in of the master's report.

No question has been made at the bar as to the right of the parties before the court to a decree, without joining the other heirs, or showing, that the other heirs were beyond the jurisdiction of the court, or could not properly be made parties. Whether such joinder be in general necessary; or, whether under the particular laws of Rhode Island, which enable one coparcener to sue at law for his portion of the real estate without joining his coparceners, a suit may not well be maintained by one coparcener by analogy in equity, are questions, on which I give no opinion. I am satisfied, that under the particular circumstances of this case the defendant Caleb Wheaton, as legal owner under the administration sale, sufficiently represents all the parties, who can claim any benefit in this case; and he (as in effect a plaintiff) submits to any decree, that the court can make in favor of the plaintiffs.

Several questions were made in the course of the argument, which I have passed over in silence, because they were not necessary, in my judgment, to the decision of the merits.

Decree: This cause was set down for a hearing, by consent of parties, at the last term of this court, upon the bill, answer,

pleadings, and evidence in the case, and was argued by counsel; on consideration whereof, it is ordered, adjudged, and decreed by the court, that the deeds of conveyance, dated the ninth day of May, 1805, and executed by Comfort Wheaton to Asa Handy, in the pleadings mentioned, ought not to be permitted to stand as absolute and bona fide conveyances to the said Asa Handy, the same having been obtained from the said Comfort by the said Asa, by imposition upon him, he being at the time of the execution thereof, in a state of great mental and bodily weakness, as well from the visitation of Providence, as from his extreme old age. And it is further ordered, decreed, and declared by the court, that under all the circumstances of the case the same deeds of conveyances ought to be permitted to stand as security for any advances made, and charges incurred, and allowances due, to the said Asa Handy, by reason of the premises stated in the pleadings, but no farther; and as to all other purposes, the same are to be held and decreed to be utterly void; and the same is hereby ordered and decreed accordingly. And it is further ordered and decreed by the court, that it be referred to a master for this purpose, to take an account of all debts, claims, and dues, between the said Asa Handy and the said Comfort Wheaton, during his life-time; and in taking such account, the said master is to charge the said Asa with all the personal estate received by him from the said Comfort, including that conveyed by deed of gift to his wife, as in the pleadings mentioned, and also with all the rents and profits of said real estates; and the said Asa is to be allowed credit for all advances made, and charges incurred, and allowances due, for labour and services to and for the said Comfort during his life-time; and also credit for all repairs and improvements made by the said Asa, in and about the same real estates. And the said master is also to take in like manner an account of all the rents and profits of the same real estates since the death of the said Comfort, and is in like manner to be allowed credit for all repairs and improvements on the same estates during the same period. And the said master is to give notice of his meetings for the purpose of taking into consideration the premises to all the parties in interest. And all farther orders and directions are reserved until the coming in of the master's report.[3]

[NOTE. Cross appeals were then taken to the supreme court, where the decree was affirmed in part and reversed in part in an opinion by Mr. Chief Justice Marshall, who held that the circuit court was correct in taking jurisdiction of the suit, but was in error in directing a sale of the premises, as all the heirs who were shown to be interested were not made parties, and it was not shown that they could not have been made parties. The trustee had a right, however, to retain such money as was actually advanced for the debts of his father-in-law, and for improvements to the estate whereby the rents were enhanced. 11 Wheat. (24 U. S.) 103.]

[3] The decree, as here given, varies somewhat from the original minutes, having been altered upon suggestions of the counsel after the delivery of the opinion of the court.

Case No. 6,052.

HARDING et al. v. WHITNEY.

[4 Cliff. 96;[1] 11 Int. Rev. Rec. 103.]

Circuit Court, D. Massachusetts. May Term, 1869.

CUSTOMS DUTIES—AD VALOREM DUTY—RULE FOR ASCERTAINING VALUE—MEANING OF "MARKET VALUE"—APPRAISEMENT.

1. By section 16 of the act of August 30, 1842 [5 Stat. 563], the actual market value or wholesale price of merchandise imported into the United States and subject to an ad valorem duty, or where the duty imposed was regulated by, or based upon, the value of the square yard, or of any specific quantity of the same, was required to be ascertained, as it was in the principal markets of the country from which the same was imported, and at the time the merchandise was purchased, and that there should be added thereto, as the true value upon which the duties should be assessed, all costs and charges except insurance, but including a charge for commissions.

[See Bailey v. Goodrich, Case No. 735.]

2. The same provision was incorporated into the act of March 3, 1851 [9 Stat. 629], except that the actual market value or wholesale price of the merchandise, under the latter act, was to be ascertained at the period and place of exportation.

3. Under the act of March 3, 1851, where the liability of the merchandise to import duty depends upon the value of a given quantity or parcel of the same, there is no necessity for a preliminary appraisement in order to ascertain whether it is subject to duty at all, or entitled to free entry, before it is appraised as required by law to ascertain its dutiable value.

4. Where wool was baled up before it was purchased, the words "market value" in the act of August 30, 1842, include the cost of covering as well as the goods.

5. On entry of imported merchandise actually purchased, or procured otherwise than by purchase, the owner, consignee, or agent may make such addition in the entry to the cost or value given in the invoice, as may, in his opinion, raise the same to the true market value of such imports in the principal markets of the country, where the importation is made, and may add thereto all costs and charges which would form a part of the true value at the port where the same was entered. No duties can, however, be assessed upon an amount less than the invoice or entered value.

6. Where the price paid for the merchandise included the box, package, or covering, the appraisers ascertain the actual market value, or wholesale price, of the merchandise, in the condition as purchased at the time, in the principal markets of the country from which the same was imported. Charges for baling or covering in such cases are not to be added, because they are included in the purchase as a part of the merchandise.

[Cited in Saxonville Mills v. Russell, Case No. 12,413.]

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[This was an action at law by Charles L. Harding and others against James S. Whitney.]

M. E. Ingalls, for plaintiff.

W. A. Field, Asst. U. S. Atty., for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Assumpsit against the defendant, as collector, to recover back import duties alleged to have been illegally exacted and paid under written protest. By the agreed statement upon which the case was submitted, it appeared that the plaintiffs, on June 29, 1860, imported from Melbourne, Australia, via Liverpool, England, to this port, fifteen bales of unmanufactured wool, containing in all seven thousand and four pounds. Wool, unmanufactured, when imported from foreign countries, was by the act of congress of July 13, 1846, subject to a duty of 30 per cent ad valorem, but the rate of the duty was reduced by the act of March 3, 1857, to 24 per cent ad valorem, and section 3 of the same act, which was in force at the date of the importation in this case, provides "that sheep's wool, unmanufactured, of the value of twenty cents per pound, or less, at the port of exportation," shall be exempt from duty, and be entitled to free entry. 9 Stat. 42, 46; 11 Stat. 192, 194. Actual market value, or wholesale price of merchandise imported into the United States, in all cases where it is subject to an ad valorem rate of duty, or where the duty imposed shall by law be regulated by, or be directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of the same, was required by section 16 of the act of August 30, 1842, to be appraised, estimated, and ascertained, as it was in the principal markets of the country from which the same was imported, and at the time when the merchandise was purchased, and the provison was, that to such value or price should be added, as the true value upon which the duties should be assessed, all the costs and charges, except insurance, and including in every case a charge for commission at the usual rates. 5 Stat. 563; Cobb v. Hamlin [Case No. 2,922].

The same provision was incorporated into the appraisement act of March 3, 1851, except that the requirement in that act is, that the actual market value or wholesale price of the merchandise shall be appraised, estimated, and ascertained at the period and place of exportation, which was the provision when the merchandise in this case was purchased and imported. 9 Stat. 629. None of these regulations are controverted by the plaintiffs, but they contend that in all cases where the liability of merchandise to an import duty depends upon the value of a given quantity, or parcel, of the same, there must be a preliminary appraisement of the same, in order to ascertain whether it is subject to duty at all, or entitled to free entry before it is appraised, as required by law, to ascertain its dutiable value. Costs and charges, they admit, must be added in the second appraisement, as the true value of the merchandise at the port at which the same may be entered, upon which the duties shall be assessed; but they deny that any such addition should be made in the preliminary appraisal to ascertain whether the merchandise should be entitled to free entry, or be held to be subject to duty. But the views of the plaintiffs, as applied to this case, cannot be sustained for two reasons, either of which is entirely conclusive that the action of the collector was correct.

Because the wool was "baled up" before it was purchased in the foreign market, and was purchased and sold in the bale, leaving no doubt that the price paid included the covering, as well as the wool which it contained. In such a case, the words actual "market value" used in section 16 of the act of August 30, 1842, include the cost of the covering, as well as the goods, as the whole are sold together, without any additional charge for the covering. Such costs and charges enter into and form a constituent part of the market value and wholesale price of the goods at the place of exportation. Grinnell v. Lawrence [Case No. 5,831]; Cobb v. Hamlin [supra].

Because the appraisers did not add anything to the value of the merchandise as expressed in the invoice, and because the duties were not assessed upon any greater sum or higher value than that made in the entry made by the consignee and owner. Deducting the usual cost of the baling, the wool in this case cost less than 20 cents per pound, but the parties agree that it was actually in bales, and that the cost as purchased, including the baling, was more than that sum. Entry was made on October 21, 1860, and the value of the merchandise, as expressed in the entry and invoice, rendered the same subject to the duty as assessed by the collector. Pursuant to the usual course of proceedings as required by law, the collector sent the merchandise to the public store, and the report of the appraisers shows that they found that the actual market value or wholesale price of the same, at the time of purchase, and place of exportation, was correctly expressed in the invoice and entry. No appeal was taken from their decision, except to the secretary of the treasury, and he affirmed their report, and directed the collector to assess the duties at 24 cents, as provided by law in cases where the actual market value or wholesale price of unmanufactured wool exceeds 20 cents per pound.

Evidence to show that the merchandise might have been purchased in bulk at a price less than 20 cents per pound is immaterial, as the conceded fact is that it was actually

purchased in bale, and at a price greater than the minimum sum required to subject it to duty. Imported merchandise subject to an ad valorem duty, cannot be admitted to entry except in a very limited class of cases not necessary to be noticed in this case, unless the true invoice of the same be presented to the collector at the time of entry; and in all cases where the merchandise was actually purchased, and the entry is made by the owner, he must make oath that the entry contains a just and true account of the merchandise as imported, and that the invoice as presented to the collector contains a just and faithful account of the actual cost of the importation, and of all charges thereon. [Act March 1, 1823], 3 Stat. 729, 731. Experience shows that over valuation, either in the invoice or entry, seldom occurs, and that it is safe to leave the correction of such errors to the treasury department. On entry of imported merchandise, actually purchased, or procured otherwise than by purchase, it is lawful for the owner, consignee, or agent, as the case may be, to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the true market value of such imports in the principal markets of the country where the importation shall have been made, and to add thereto all costs and charges which, under existing laws, would form a part of the true value at the port where the same may be entered, but the provision is express, that under no circumstances shall the duties be assessed upon an amount less than the invoice or entered value. 9 Stat. 43; 11 Stat. 199; Gilmore v. Goodrich [Case No. 5,447], per Lowell, J.

Reappraisement is allowed at the instance of the government, in the case of fraud, or of newly discovered evidence, showing gross error in the first appraisement, or in case of appeal by the importer, at the instance of either party, but it is a great mistake to suppose that the merchandise must be twice appraised in cases where the importation is entitled to free entry, if below a certain value, or that the proceedings or making the appraisement, in such cases, differ from, in any respect, the ordinary course of proceedings in ascertaining the value of imported merchandise as the basis for the assessment of import duties.

Appraisers may add to the invoice or entered value of the merchandise, but they cannot reduce the value as given in the invoice or entry; and their finding, even in cases where they add to the invoice or entered value, unless appealed from, is conclusive. Tappan v. U. S. [Case No. 13,749]; Bartlett v. Kane, 16 How. [57 U. S.] 263; Belcher v. Linn, 24 How. [65 U. S.] 508. Where the price paid for the merchandise included the box, package, or covering, the appraisers have nothing to do but ascertain the actual market value or wholesale price of the merchandise in the condition as purchased at the time in the principal markets of the country from which the same was imported. Charges for the bailing or covering, in such cases, are not to be added, because they are included in the purchase as a part of the merchandise.

Case No. 6,053.

In re HARDISON.

[5 Law Rep. 255.]

Circuit Court, E. D. Virginia. June 8, 1842.

BANKRUPTCY — PETITION — FAILURE TO INCLUDE ALL DEBTS — DEBT INCURRED IN FIDUCIARY CHARACTER—WHETHER DECREE CAN BE MADE.

1. A petitioner in bankruptcy cannot be decreed a bankrupt when, in his petition and schedule, he does not include all his creditors and the debts due to them.

2. Nor can he be so decreed whilst he owes a debt as executor or administrator of a decedent's estate, or any debts that have been created in consequence of a defalcation as a public officer, or as guardian, or trustee, or whilst acting in any other fiduciary character, although he may owe other debts not of such a character. But see the decisions in Re Lord [Case No. 8,501]; Re Brown [Id. 1,979]; Re Tebbetts [Id. 13,817].

In this case the following questions were adjourned from the Norfolk district court, to this court: 1. Can the court decree the petitioner [John Hardison] a bankrupt, under the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed the 19th of August, 1841 [5 Stat. 440], when in his petition and schedule he does not include all his creditors, and the debts due to them? 2. Can the petitioner be so declared a bankrupt, whilst he owes a debt as administrator of a decedent's estate which is unpaid, although he may owe other debts not of a fiduciary character?

Before DANIEL, Circuit Justice, and MASON, District Judge.

DANIEL, Circuit Justice. In considering these questions, it is much to be regretted that no illustrations of them can be derived from the decisions of the courts in England, the statutes in that country containing no provision similar to that in the first section of the act of congress, in relation to voluntary bankrupts. Upon the first perusal of this section of the act of congress, (under which the above questions arise,) a strong impression of its import and requirements was created, and such impression has been strengthened by reflection, and by comparison with the opinions of others, so far as these last have been obtainable. The first section, after adverting to the character in which the debts of the petitioner shall or shall not have been contracted, proceeds further to prescribe the subject-matter, the very detail and specification to be contained in the petition. It shall set forth, first, to the best of his knowledge and belief, a list of the cred-

itors; second, their respective places of residence; third, the amount due to each; fourth, an accurate inventory of the property, rights and credits of the debtor of every name, kind and description, and the location and situation of each and every parcel thereof. It is upon such a petition containing these enumerated requisites, that the petitioner may be decreed a bankrupt; such plain and positive requirements, it seems difficult to misapprehend, or to dispense with; and if any one amongst the conditions, all equally plain, can be dispensed with, the whole might with the same authority or propriety be disregarded. The statute designs a full disclosure of creditors; and of property to be rateably distributed amongst them; a suppression then as to the one or the other, is not only a violation of the letter, but a fraud upon the main purposes of the law.

The language of this section, in reference to the persons who may petition, though not as perspicuous as the ends of legislation would render desirable, is nevertheless deemed susceptible of a rational and definite interpretation. The clause commences with a description of the persons to whom the privilege of voluntary bankruptcy may be extended. 'T is the person; the position in which he stands, and the acts which he shall perform, with which the section is dealing. It is he that is the subject of the section throughout; it is he on whom it is to operate, and on whom conditions are imposed. The language is, "all persons whatsoever, residing in any state, district or territory of the United States, owing debts," which shall not have been created in consequence of a defalcation as a "public officer, or as executor, administrator, guardian or trustee, or whilst acting in any other fiduciary capacity," upon a petition containing the enumerated requisites, may be decreed bankrupts. The privilege sought, is personal; the conditions on which it can alone be obtained, must exist in reference to him in his person, and be fulfilled by him. He must be a resident of the United States, or of some territory thereof. He must be owing debts which shall not have been created in consequence of delinquency as a public officer, or in any other fiduciary character, &c. The correlatives of these things, or the facts which would disqualify the applicant for obtaining the relief proposed by the law, would seem to be, first, that he was not a resident of any state, district or territory of the United States; and, secondly, that he was indebted in consequence of delinquency as a public officer, or as executor, administrator, or in some fiduciary character. The first disqualification resulting from the inability of the statute to operate beyond the territorial limits of the country; the second being imposed in the nature of a penalty upon transactions partaking of the character of fraud, or breach of trust. This clause has, however, been interpreted by some, not as denying the right of voluntary bankruptcy to debtors on their individual accounts, because they were debtors also in a fiduciary character; but, as meaning, that where debts existed in a fiduciary character alone, such debts came not within the purview of the statute, and, that in cases where there were debts, both in a fiduciary, and in an individual character, the privilege of voluntary bankruptcy is permitted as to the latter, whilst with respect to the former, the situation of debtor and creditor remains unchanged. Under this construction of the statute, a material difficulty arises. If the statute embrace no debt arising by defalcation, or of a fiduciary nature, these remaining in statu quo, it would seem that they are not provable under the statute, and their owners must look to other sources or responsibilities for satisfaction. By the third section of the statute, "all the property and rights of property, of every name and nature, whether real, personal, or mixed, of every bankrupt, (except wearing apparel and some articles of furniture,) shall by mere operation of law, ipso facto, from the time of the decree of bankruptcy, be deemed to be divested out of such bankrupt, and be vested in the assignee. Nothing, it is presumed, can be provable under the statute, which the statute does not embrace, but excepts out of its operation. By this view of the matter, debts arising from defalcation, or created in a fiduciary character, are placed in an infinitely worse situation than any others, instead of being favored and protected as they should be. In fact, they are by this interpretation placed wholly out of the pale of the law, and rendered hopeless and desperate. For not being subjects of bankruptcy, and excepted out of the provision of the statute, and the decree of bankruptcy, they are not provable under the statute, and cannot be satisfied pro rata with provable claims. All the bankrupt's property is divested by the statute to the latter claims, and the former are left to the personal responsibility of the bankrupt, after he shall have been stripped in favor of a portion of his creditors of all that could justify the remotest hope of payment. Can it have been the intention of the legislature to authorize such mischief? to create such an anomaly as a bankrupt law, whose fundamental principle is said to be perfect equality of claim, independently of all inclination as acts of the parties, yet operating in practice the most manifest inequality? It would seem, that the obligations of society would be better maintained by giving to the law an interpretation which will withhold from fraud and breach of trust, privileges which are declared to be designed for honest misfortune only. This interpretation, too, seems less forced and more in accordance with the natural meaning of the terms of the statute. The absence of the exception here commented upon from the clause relative to involuntary bankrupts, is not thought to operate against the construction, which we deem

should be put upon the first clause. It rather strengthens that construction; for why should this exception, so important in its effects, have been introduced as to the one class of debtors, and not as to the other, unless intended to make a discrimination between them? The involuntary bankrupt is not seeking a privilege for himself; he is affected by the determinations and acts of his creditors, proceeding upon their own calculations of advantage, independently of his wishes; and the law might very well extend to these creditors the right to declare and establish a bankruptcy, for their own benefit, freed from exceptions which it might be equitable to impose on a debtor himself. Moreover, in the instances of involuntary bankruptcy, there being no exceptions as to debts or creditors, every creditor, whether made so in consequence of a defalcation, or of a fiduciary transaction on the part of the bankrupt, would be permitted to prove his demand, and thereby would an equal distribution be extended to all.

Upon consideration of the two questions aforesaid, submitted under the first section of the act of congress, it is the opinion of this court, first, That the petitioner cannot be decreed a bankrupt, when in his petition and schedule he does not include all his creditors and the debts due to them. Secondly, that he cannot be so decreed whilst he owes a debt as executor, or administrator of a decedent's estate, or embracing the entire category in the statute which has been created in consequence of a defalcation as a public officer, or as guardian or trustee, or whilst acting in any other fiduciary character, which is unpaid, although he may owe other debts, not of a fiduciary character.

All which is hereby directed to be certified to the United States court for the Eastern district of Virginia, at Norfolk.

Case No. 6,054.

HARDON v. NEWTON et al.

[14 Blatchf. 376.] [1]

Circuit Court, D. Connecticut. Jan. 14, 1878.

BILL IN EQUITY—DISSOLUTION OF CORPORATION—PRAYER FOR RELIEF—PLEA.

1. H., the owner of shares in the capital stock of a Connecticut corporation, filed a bill in equity against the president and the directors and the corporation, alleging acts of mismanagement and breach of trust on the part of the president and directors, and that the directors had sanctioned all such acts, and that a request to them to take proceedings for the relief of the stockholders, would be useless. The bill prayed for the dissolution of the corporation, and for the distribution of its assets among its creditors and stockholders, and for such further relief as the case might require. The defendants put in a plea, that, by the statutes of Connecticut, a court of equity could dissolve a corporation only under certain specified circumstances, which did not exist in this case: *Held*, that the plea was good.

[Cited in Langdon v. Fogg, 18 Fed. 9.]

2. On the facts set forth, the court could prevent the continuance of the breach of trust, and could compel the officers to account for such as they had committed, but, to obtain such relief, it should be specifically prayed for; and the plaintiff was given leave, on motion, to amend his bill in respect to the prayer for relief.

[Bill by Chester F. Hardon against Isaac E. Newton and others, praying for the dissolution of a corporation known as the American Suspender Company, and for other relief.]

George H. Starr, for plaintiff.

John W. Webster and Stephen W. Kellogg, for defendants.

SHIPMAN, District Judge. This is a bill in equity, which alleges that the plaintiff is a citizen of the state of New York, and is the owner of sixty-five shares of the capital stock of the American Suspender Company, a joint stock corporation organized under the statutes of the state of Connecticut, and established in Waterbury, in said state, of which corporation Isaac E. Newton is the president, and the other defendants are the directors. All the individual defendants are citizens of Connecticut. The defendant corporation manufactures elastic suspenders and webs. The bill further alleges, in substance, as follows: The defendants Newton, Merriman and Pritchard own the majority of the stock of said corporation. Newton has been its president for the past twelve years, and has practically controlled all its affairs, except the immediate supervision of the sales at the New York agency. The other directors, except said Merriman, have had no real part in the direction of the company, but have concurred in and sanctioned the acts which are complained of. Newton is incompetent for the position of president and manager of the company, and has managed its business in such manner as to cause losses, and has continued in important positions (1) one Dayton, who was known to Newton to be dishonest, and to be dishonestly using and disposing of the property of the company, and (2) one Judson, who was known to have been a dishonest man. Newton secured the election of said Merriman to be secretary and treasurer, although Newton had reason to believe, and had said that he believed, that Merriman was untrustworthy, and was using the company's funds for his own benefit. Newton has neglected to make certain lines and grades of goods which would have been, and which he knew would have been, profitable to the company. He has not allowed the books of the company to be audited, with the fraudulent design of concealing the true condition of its affairs from the stockholders. No dividend has been paid since the year 1866, when it was paid with borrowed money. Sundry specified statements of the pecuniary condition of the com-

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

pany, which were presented to the stockholders, were untrue, and were known to be untrue by those of the defendants who were directors at the time when the respective statements were made, and in their statements the assets were largely overvalued. By means of their wrongful acts the corporation has been losing money, its debts have increased, and it is in danger of insolvency. The directors sanction all the wrongful acts, and a request to them to take proceedings for the relief of the stockholders would be useless. The bill prays for a discovery, and for the dissolution of the corporation, and the appointment of a receiver to distribute the assets among the creditors and stockholders, and for such further relief as the case may require.

The defendants have pleaded to the relief which is prayed for. The plea avers, that, by the statutes of the state of Connecticut, the courts of equity of the state are empowered to dissolve a corporation, and to wind up its affairs, (1) on the application of any shareholder of any corporation, if said court shall find that said corporation has voted to wind up its affairs, or has abandoned the business for which it was organized, and has thereafter neglected, within a reasonable time, or in a proper manner, to wind up its affairs and distribute its assets among its stockholders; (2) upon the petition of one-third of the stockholders of any joint stock company; and that, under no other circumstances is a court of equity of the state empowered by its statutes to dissolve a corporation. The plea further avers, that said suspender company has never voted to wind up its affairs, or to abandon its business, and that the plaintiff is not the owner of one-third of the capital stock of the corporation, and is not one-third of its stockholders.

The plea having been set down for argument and having been argued, the question of its sufficiency is now before the court. The special relief which is prayed for is the dissolution of the defendant corporation, and the appointment of a receiver to divide its assets among creditors and stockholders, which division would be a practical dissolution. A court of chancery, by virtue of its general equity powers, in the absence of statutory provisions, is not authorized to dissolve a corporation, or to distribute the assets of a corporation, which is pursuing its ordinary business, among its shareholders, so as to effect a practical and actual dissolution. "A court of equity may hold trustees of a corporation accountable for breach of trust, but cannot divest it of its corporate character and capacity," unless under the circumstances and in the cases in which the court is specially empowered by statute. Ang. & A. Corp. § 777; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 84; Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371; Slee v. Bloom, 5 Johns. Ch. 366, 380; Gaylord v. Fort Wayne, etc., R. Co. [Case No. 5,284]; Attorney General v. Reynolds, 1 Eq. Cas. Abr. 131. The statutes of Connecticut have authorized the courts of equity of this state to dissolve corporations and wind up their affairs, only in the two cases which have been mentioned. The circumstances which give a court of equity in this state power to dissolve a corporation have not arisen in the case of the defendant company.

But, a court of equity of general jurisdiction has jurisdiction, at the instance of stockholders, to prevent a corporation and its officers from a wilful misapplication of the funds of the corporation, to the injury of the shares or the dividends of the stockholders, and from waste and misconduct which amounts to a breach of trust on the part of the managers, and from such acts as tend to the destruction of the franchises of the corporation, and to compel the officers to account for such waste or misconduct amounting to a breach of trust. Dodge v. Woolsey, 18 How. [59 U. S.] 331; Bacon v. Robertson, Id. 480; Robinson v. Smith, 3 Paige, 222; Heath v. Erie Ry. Co. [Case No. 6,306]; Pond v. Vermont Val. R. Co. [Id. 11,265]. And, if it affirmatively appears that the directors have refused to prosecute in the name of the corporation, or if the controlling directors of the corporation are themselves the wrong-doers, and must be made defendants, the suit may be instituted by a stockholder. Robinson v. Smith, Pond v. Vermont Val. R. Co., Heath v. Erie Ry. Co., cited supra. In the last named case this branch of the subject was exhaustively examined.

It is insisted by the plaintiff that the plea should not be allowed, inasmuch as appropriate relief may be granted under the general prayer, if the allegations of the bill are sustained. "A plea to a bill in equity may be good in part, and not so in the whole; and the court will allow it as to so much of the bill as is properly applicable, unless it contain the vice of duplicity." Kirkpatrick v. White [Case No. 7,850]. If the plea is allowed, the bill may be amended in respect to the prayers for relief, under equity rule 35. And, when the specific relief which is sought is not within the power of the court to grant, and the defect has been pointed out by plea, it is just that the plaintiff should so amend his bill as to apprise the defendants of the hitherto undisclosed relief which he seeks to obtain. The defendants have successfully shown that the specific relief cannot be obtained, and the general prayer only remains. They are entitled to know the result which the plaintiff wishes now to accomplish. Langd. Eq. Pl. § 61. The amended prayers should be consistent with the case which is made by the bill. The plea is allowed, with costs, with liberty to the plaintiff, upon motion, to amend his bill in respect to the prayers for relief.

Case No. 6,055.

HARDS et al. v. CONNECTICUT MUT. LIFE INS. CO. et al.

[8 Biss. 234; 6 Reporter, 420; 2 Chi. Law J. 18; 26 Pittsb. Leg. J. 32.] [1]

Circuit Court, N. D. Illinois. June, 1878.

MORTGAGE—FORECLOSURE—TIME FOR REDEMPTION—FOREIGN INSURANCE COMPANY—INVESTMENT—PUBLIC POLICY — MECHANIC'S LIEN—LIS PENDENS.

1. After a decree of this court foreclosing a mortgage, an objection that it does not give the time allowed for redemption by the Illinois statutes cannot be urged by creditors of the mortgagor except in connection with an offer to redeem.

2. Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state.

3. After bill of foreclosure filed by mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the mortgagee, to create an incumbrance upon the property which can in anywise affect the rights of the mortgagee, as they may be declared by final decree.

In equity. On bill and demurrer. In June, 1872, defendant filed a bill in this court to foreclose a mortgage for $20,000, executed by Sprague, in 1867, upon certain real estate in Chicago. March 17, 1874, a decree was entered giving the relief asked, ordering a sale and giving the mortgagor six months' time within which to pay the mortgage debt. The mortgagor failing to comply, the property was sold in November, 1874, Greene becoming the purchaser in the interest of the company. In January, 1875, a deed was made to the purchaser. The present bill was filed in January, 1875, praying a reversal of the foreclosure decree. It appears that in September, 1873, Sprague, the mortgagor, contracted with complainants to do certain plastering and carpenter work on the mortgaged premises. [William G.] Hards, in December, 1873, filed his petition in a state court for a mechanic's lien, and in November, 1874, amended his petition, making Greene and the insurance company defendants. In May, 1874, the other complainants filed a petition for a mechanic's lien in the same court against the same parties. The company and Greene pleaded the decree of this court in bar, and as against Hards they specially pleaded the limitation of six months prescribed by the mechanic's lien statute of this state. The bill here filed alleges that the insurance company were aware of the work, etc., being done, but had failed to make complainants parties to the foreclosure suit, and that the latter were ignorant of the pendency of that suit, and that the insurance company was forbidden by the laws of Illinois from taking the mortgage of 1867. The defendants demurred.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 32, contains only a partial report.]

Herbert, Quick & Miller, for complainants.
Isham & Lincoln, for defendants.

HARLAN, Circuit Justice (orally, after stating the facts). Counsel for complainants insist that the decree in the foreclosure suit was erroneous, in that it did not give the time for redemption allowed by the statutes of Illinois. Brine v. Hartford Fire Ins. Co., 96 U. S. 627. Touching this objection, it is sufficient to say that the creditors of the mortgagor cannot urge that objection except in connection with an offer to redeem the property by paying the mortgage debt. No such offer is here made. Complainants' counsel also insist that the mortgage of 1867 was void upon the ground that a foreign insurance company could not at that date, consistently with the settled public policy of Illinois, take a mortgage upon real estate in this state. Waiving any consideration of the question as to complainants' right at this late day to urge such an objection, the mortgagor himself making no such point, it is clear that the mortgage was not void upon any such ground. After a thorough examination of all the authorities cited, the court is satisfied that neither at the time of the mortgage nor at any time since, has it been against the public policy of this state for insurance companies, created by the laws of other states, to invest their assets in mortgages upon real estate in Illinois. The cases of Carrol v. City of East St. Louis, 67 Ill. 568, Starkweather v. American Bible Soc., 72 Ill. 50, and United States Trust Co. v. Lee, 73 Ill. 142, cited by complainants' counsel in support of his objection, do not embrace a case like this. Nothing is to be found in either of those cases which justifies the statement that the supreme court of Illinois has decided that insurance companies incorporated by the laws of other states may not take mortgages on real estate in Illinois if authorized by their own charter so to do. On the contrary, by a statute passed in 1869, domestic life insurance companies are required to invest a portion of their capital in certain specified securities, among which are mortgages of real estate. The same statute forbids any foreign life insurance company from transacting business in this state until it has also an equivalent capital invested in like manner. This statute, it is true, was passed after the mortgage in question was taken, but the reasonable presumption is that it would not have been passed had there been any such public policy as that assumed by complainants' counsel.

By the mechanic's lien law of the state, the lien of the mechanic must be asserted by petition within six months from the time his claim matures as against the incumbrancer. Hards did not file his petition within that time as against the insurance company, and, therefore, his claim, in any event, is by the express terms of the statute, barred. Dunphy v. Riddle, 86 Ill. 22. But there is, also,

a fatal objection to both claims upon another ground. It arises out of the doctrine of lis pendens. Upon default by the mortgagor, the mortgagee had a right to foreclose. This court, having acquired jurisdiction of the parties and the subject matter in the foreclosure suit, it was not within the power of the mortgagor pending that suit, by contract with a mechanic, and without the consent of the mortgagee, to create an incumbrance upon the property which could in anywise affect the rights of the mortgagee as they might be declared by final decree. This was substantially held by the supreme court of Illinois in Davis v. Connecticut Mut. Life Ins. Co., 84 Ill. 508.

In that case the mortgagor, after the decree of sale, but before sale, made a contract with a mechanic. It was held that such a contract did not create an incumbrance upon the property as against the mortgagee, whose rights were settled and fixed by the final decree. The contract here was prior to the decree, but the reason, upon which the doctrine of lis pendens rests, applies to all such contracts made by the mortgagor, after the institution of a suit to foreclose. If the mechanics, by force of the statutes, acquired a prior lien, notwithstanding the pendency of the foreclosure suit, then, according to established rules, they were not affected by the final decree. If, however, they did not acquire a prior lien, but only one subordinate to that of the mortgage, then clearly they could not disturb the decree rendered here, nor have it set aside or modified, except by offering to redeem by paying the mortgage debt.

In reference to the doctrine of estoppel, there is no room for its application in this case. The mere knowledge of the insurance company and its agents that the complainants were doing work and furnishing materials upon the mortgaged premises, could not, in the absence of any assurance on the part of the company that their claim would be recognized notwithstanding the foreclosure proceedings, estop the company from insisting upon its rights under the foreclosure decree. The mechanics were bound to take notice of the suits pending in this court, and could not by any subsequent combination with the mortgagor defeat the full operation of the decree which this court rendered.

Demurrer sustained.

HARDY, Ex parte. See Case No. 1,420.

Case No. 6,056.

The HARDY.

[1 Dill. 460.] [1]

Circuit Court, D. Minnesota. 1870.

ADMIRALTY JURISDICTION—MARITIME CONTRACTS.

A contract by which a steamboat navigating the public inland waters of the United States engages, in consideration of freights to be earned, to carry certain goods, and collect from consignee the freight money, charges, advances, and insurance, together with the price of the goods, and after deducting the freight money to pay the balance to the consignor, is a maritime contract, within the jurisdiction of the district court, in admiralty, and is a contract within the scope of the master's authority, and binding on the owners of the vessel in favor of a shipper who had no knowledge that the boat was already chartered for the use of others.

[Cited in Zollinger v. The Emma, Case No. 18,218; The St. Joseph, Id. 12,230; The New Hampshire, 21 Fed. 925; The Josephine Spangler, 11 Fed. 441; Krohn v. The Julia, 37 Fed. 370.]

[Cited in Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 137.]

This was a libel in rem, in the district court, against the steamboat Hardy.

Harvey Officer, for libellant.

Smith & Gilman, for claimants.

NELSON, District Judge. 1. That a contract by which a steamboat navigating the public inland waters of the United States, engages, in consideration of freights to be earned, to carry for the libellant certain goods, and collect from the consignee the freight money and all charges, advances, and insurance on the goods, together with the price thereof, and after deducting the freight money, to pay to the libellant the balance, is not unusual in its character, and is essentially a contract for a maritime service, of which the district court has jurisdiction in admiralty, in a proceeding in rem against the boat.

2. That such a contract is within the scope of the master's employment, and is binding upon the owners and the vessel, in favor of a shipper who has no knowledge that the boat was at the time chartered by parties to be run for their own use and benefit.

See Monteith v. Kirkpatrick [Case No. 9,721]. Criteria of admiralty jurisdiction as to torts and contracts: Ins. Co. v. Dunham, 11 Wall. [78 U. S.] 1; The Mollie Dozier, 24 Iowa, 192; The Moses Taylor, 4 Wall. [71 U. S.] 411; The Ad Hine, Id. 555.

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

Case No. 6,057.

HARDY et al. v. BININGER et al.

[The case reported under above title in 4 N. B. R. 262 (Quarto, 77), is the same as Case No. 1,420.]

Case No. 6,058.

HARDY et al. v. CLARK et al.

[The district court decision, reported in 3 N. B. R. 385 (Quarto, 99); 3 Am. Law T. Rep. Bankr. 11; 17 Pittsb. Leg. J. 61; 2 Chi. Leg. News, 121, and 1 Am. Law T. Rep. Bankr. 151, —is included in the report of the circuit court. Case No. 1,420.]

HARDY (COOPER v.). See Case No. 3,196.

Case No. 6,059.

HARDY et al. v. HARBIN et al.

[1 Sawy. 194.] [1]

Circuit Court, D. California. June 21, 1870.[2]

PATENT FOR MEXICAN GRANTS—PURCHASERS FROM PATENTEE.

Where a bill was filed by the alleged heirs of a deceased Mexican grantee of a ranch against certain persons who had purchased from a party to whom the land had been confirmed and patented, to compel a transfer of the estate purchased, and a delivery of the patent and other muniments of title to the complainants, and it appeared that the patentee derived title under a sale made by order of the probate court which under the decisions of the supreme court was without jurisdiction to order the sale, and it further appeared that the defendants were bona fide purchasers for full value, from the patentee and had no actual notice of any defects in the deraignment of his title from the original grantee: *Held*, that the recitals in the patent that the claim was founded on a Mexican grant; that it had been confirmed by the board and the district court; and that the patent did not affect the rights of third persons, did not affect the defendants with constructive notice of the transcript and records of the board and of the district and of the proceedings in the probate court and the administrator's sale which those records described, and further that their omission to take notice of those proceedings and that the administrator's deed was a nullity was not an act of crassa negligentia or "an omission to take a reasonable and well established precaution which should be treated as equivalent thereto."

[Cited in Parkhurst v. Hosford, 21 Fed. 835.]

[See note at end of case.]

[This was a bill in equity by Alexander Hardy, Thomas Botham, and Ellen Hardy Botham against James M. Harbin, George Taylor, J. C. Parrish, and others. See Case No. 6,060.]

W. W Chipman and B. S. Brooks, for complainants.

J. B. Harmon, for defendants.

HOFFMAN, District Judge. The complainants in this case are the children of one John Hardy, a native of Canada, who, it is alleged, left that country in 1832, and after various wanderings arrived in California, where, having become a Mexican citizen, and assumed the name of Thomas M. Hardy, he obtained from Governor Micheltorena a grant of the premises in controversy. This grant is dated October 23d, 1843.

In October, 1848, Hardy died, leaving no heirs or relatives residing in this state. One Stephen Cooper, to whose house Hardy's body had been carried from the rancho at which he had died, and who had buried him, thereupon applied to C. P. Wilkins, then acting as prefect, to be appointed as administrator of Hardy's estate. Letters of administration were accordingly issued to him on the twenty-seventh day of March, 1850.

On the twelfth March, 1851, Wilkins, whose office had previously been abolished, transferred the papers and documents in the case to the then recently organized probate court. Soon afterward, the probate court, on the petition of the administrator, made an order for the sale of the real property of the deceased, and it was accordingly sold for the sum of $6,000. The sale was confirmed by the probate court, and in July, 1851, a conveyance was executed by the administrator to the purchaser.

In 1852, the claim of the purchasers and parties deriving title from them, was presented to the board of commissioners for confirmation. In July, 1855, the claim was confirmed by the board, and in March, 1857, by the district court on appeal. This decree having been made final by consent of the attorney-general of the United States, a patent was issued to the claimants in July, 1858. The defendants claim title under the patent by conveyances subsequent to its date, with the exception of two or three who obtained their deeds after the final confirmation, but before the patent issued.

The complainants insist, that the prefect of the district of Sonoma had no jurisdiction over the estate of Hardy, or authority to appoint an administrator thereof; that all acts under color of such appointment are null and void, and that the probate court of Solano county acquired no jurisdiction by the transfer to it, by the prefect, of the papers in the case.

They also insist, that even if the probate court acquired any jurisdiction over the estate, it never acquired jurisdiction to order a sale of the real property of the decedent, by reason of various defects and omissions in the petition and proceedings for the sale, which the bill sets forth; and also, that the sale was vitiated by fraudulent practices on the part of the administrator and purchaser, which the bill details at length; that the whole proceeding was the result of a fraudulent conspiracy against the rights of the absent heirs of Hardy; and that the defendants had notice of these frauds before they acquired their respective interests.

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

[2] [Affirmed in 154 U. S. 598, 14 Sup. Ct. 1172.]

The bill further alleges, that the complainants never received any intelligence of their father after he left the Mississippi river, in 1833 or 1834, except by a letter written from Monterey in 1847 or 1848, and until within the last three years had no information as to his residence or movements, or of the acquisition by him of the property, or of the various proceedings relating to the same, set forth in the bill.

They ask, therefore, that the defendants may be charged as the trustees of the title of the real estate, to the extent of the several interests held by them, for the benefit of the complainants, and that they may be decreed to transfer the same to them, and deliver up the patent and all other muniments of title connected with the property.

The defendants, at an earlier stage of the cause, interposed a demurrer to the bill, which, after argument, was overruled by the presiding judge of this court, on the ground that the patent, which was presumed to contain the usual recitals, was a constructive notice to all who purchased under it, of the fact, that the patentees deraigned title through a sale by an administrator, and that they were thus put on inquiry, and charged with notice of the invalidity of that sale, and the nullity of the proceedings which led to it. [Case No. 6,060.]

The demurrer having been overruled, an answer was put in, which, in substance, denies that John Hardy, of Canada, was the same person as Thomas M. Hardy, of California; denies the alleged frauds; denies all knowledge or notice on the part of the defendants of such frauds, if they were committed, and all knowledge or notice of the invalidity of the proceedings in the probate court. On the issues so made, a vast number of depositions have been taken; elaborate arguments were heard, and the cause now comes up for final determination.

The evidence in support of the charges of fraud is unsatisfactory and inconclusive; no attempt whatever was made to sustain by proofs the greater part of the allegations of the bill, which state the facts and circumstances constituting the imputed fraud. So far as appears, the judge acted under the belief that the probate court possessed jurisdiction to order the sale, and that the proceedings were regular and fairly conducted. The order confirming the sale recites that "the confirmation was objected to, and that the court thereupon proceeded to examine and hear all proofs introduced relative to said sale; and that it appeared to the court by proof made in open court that notice of the sale had been given, by publication in a newspaper, and posting up notices as prescribed in the statute; that the sale was legally made in pursuance of the order of the court, and that it was in every respect fairly conducted; and that a greater sum than the amount specified in said report as having been bid cannot be obtained. It is therefore adjudged that the objections to the confirmation of said report be overruled, and that the same be confirmed," etc.

The only evidence against the truth of these recitals, is the testimony of a few persons who assert that they attended at the place of sale designated in the notices, and finding no one, returned; but that the sale in fact took place at a spot some twelve miles distant, and that had they been present they would have been prepared to bid a larger amount than was obtained. Some evidence is also offered to show that a party who attended the sale was in some way induced not to bid.

But these circumstances, even if true, are wholly insufficient to sustain the charges in the bill, of a fraudulent and corrupt conspiracy between the probate judge, the administrator and the purchasers at the sale. The notices of sale are not produced, nor is there a particle of evidence to show that either the judge or the administrator had any interest in or derived any benefit from the purchase.

Without dwelling longer on the evidence, it is sufficient to say that the complainants have failed to establish this part of their case. But even if the fact were otherwise, it is clear that they have not succeeded in bringing home to the defendants actual notice of the alleged frauds. The latter were aware that the land had been granted to Hardy, and that it had been sold at an administrator's sale—but of the invalidity of that sale by reason of frauds perpetrated by the judge, the administrator and the purchasers, or by reason of the want of jurisdiction in the court, none of them seems to have been advised.

The circumstances of the case compel the complainants to admit a superior title in the defendants as holders of the legal estate under the patent, and to avoid it by an allegation of fraud and notice of their equities. The burden is therefore on them to aver and prove the fraud and the notice (Center v. Bank, 22 Ala. 743), and the defendants will have the advantage of requiring that their account of the matter should be received as true, unless conclusively disproved. 1 Litt. [Ky.] 42; 7 J. J. Marsh. 301; 3 Gill & J. 425; cited in 2 Hare & W. Lead. Cas. p. 126.

It will not be pretended that the mere knowledge that the land had been originally granted to Hardy, and that the patentees deraigned title through an administrator, could have any effect to charge the defendants with notice of any fraudulent proceedings in effecting the sale. They could at most be affected with notice of what the record of the probate court disclosed—or of the absence of jurisdiction in the court over the estate sold. Whether they were charged with notice even to this extent will be hereafter considered. But of frauds in fact the record disclosed nothing—on the contrary, the judgment of the court declared that the

sale had been duly advertised, fairly conducted, and was for an adequate price.

In the very elaborate arguments of the counsel for the complainants, but slight allusion was made to the evidence in support of the charges of fraud and actual notice. That part of the case seemed to be virtually abandoned. I dismiss it, therefore, from further examination, and proceed to consider the important and novel questions with respect to constructive notice, presented in the case.

It is not denied that the supreme court of this state has decided that the statute for the settlement of the estates of deceased persons has no application to the estates of parties who died previously to the organization of the state government. Grimes v. Norris, 6 Cal. 621; Tevis v. Pitcher, 10 Cal. 466; Downer v. Smith, 24 Cal. 114.

The proceedings, therefore, in the probate court of Solano county were a nullity, and the deed of the administrator conveyed no title whatever to the purchasers at the sale. On the other hand, it appears that the defendants are the holders of the legal estate, under the patent of the United States; that they purchased from parties who were and had long been in the actual, notorious, undisputed and exclusive possession of the land; that they paid full value for their respective purchases; and that they had no knowledge of any alleged frauds on the part of those from whom they derived title, or of the invalidity of the proceedings in which that title originated. They are thus innocent, bona fide purchasers for value, and without notice except so far as, under the circumstances of the case, they are charged with constructive notice.

The question thus presented is of great importance. Its determination may affect the rights of all persons who may have purchased from the patentees of confirmed land claims in this state. It is also, I believe, novel; for it arises, not as heretofore between the patentees and the representatives of the original grantee, but between those representatives and purchasers from the patentees, after the confirmation of their claim, and the issuance to them of a patent conveying the legal title previously outstanding in the United States.

In the opinion rendered by Mr. Justice Field, when overruling the demurrer in this case, it is assumed that the patent was in the usual form, "with a recital of the existence of the grant, the conveyance of the grantee's interest by the administrator, the confirmation of the claim under the grant, the survey upon the confirmation, and the approval of the survey," etc. The patent was not at that time submitted to the inspection of the court. In fact, it contains no recitals with respect to the grant or the title of the patentees, except that they presented a claim for the rancho of Rio de Jesus Maria, founded on a Mexican grant, made by Gov. Micheltorena on the twenty-third day of October, 1843; that this claim was confirmed by the board of land commissioners and by the district court; that the judgment, on appeal of the district court, was made final by stipulation. A survey was made, duly approved and certified to by the commissioners of the general land office. The patent does not even refer to the original grantee, still less to any of the conveyances by which the patentees deraigned title. For aught that appears on the face of the patent, the patentees might have been the original grantees of the land.

It is contended, however, that the patent refers to and recites a Mexican grant; to proceedings upon this grant before the board and the United States district court, that it mentions the name of the rancho, the date of the grant, and by whom granted; and that it contains an express stipulation, in accordance with the statute, that the interests of third persons shall not be affected thereby; that the purchasers from the patentees were thus directed to the source of title of the latter, and were bound to take notice of the records of the board of land commissioners, and especially of the transcript and records of the district court; and that these, if consulted, would have disclosed the fact that the patentees claimed title under an administrator's deed which was a nullity.

The general doctrine is well settled, that the purchaser of a legal title will be liable to all equities of which he had actual or constructive notice at the time of the purchase; for by taking the legal estate, after notice of a prior right, he becomes a mala fide purchaser. LeNeve v. LeNeve, 3 Atk. 647–649.

But a purchaser bona fide, without notice of any defect in his title at the time of the purchase made, may (as is said by Lord Nottingham, in Bassett v. Nosworthy, Cas. t. Finch, 102) "lawfully buy in a statute, or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him. And precedents of this nature are very ancient and numerous, where a court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another."

In Jones v. Powles, 3 Mylne & K. 581, a person who had advanced money upon a mortgage of an estate which the mortgagor claimed under a will, which turned out to be forged, got a conveyance of the legal estate which was outstanding in a mortgagee whose debt had been satisfied. Upon a bill filed by the heiress-at-law, it was held that the mortgagee being a purchaser without notice of the plaintiff's title could protect himself by the legal title. And Sir John Leach, M. R., says: "Upon full consideration of all the authorities which have been referred to, and the dicta of judges, and text-writers,

and the principles on which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice was impeached by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected with reasonable diligence."

What will amount to this "reasonable diligence," and when the purchaser will be affected by constructive notice, will depend on the circumstances of each case. "It is scarcely possible," says Vice-Chancellor Wigram, "to declare, a priori, what shall be deemed constructive notice, because unquestionably that which will not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that cases in which constructive notice has been established resolve themselves into two classes, first: * * * and secondly: where the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. * * * The proposition of law upon which the second class of cases proceeds is, not that the party had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the res gestae would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will be considered, as in fact he is, a bona fide purchaser without notice." 1 Hare, 55, cited; 2 White & T. Lead. Cas. Eq. (Hare & W. notes). The same principles are recognized by the supreme court of the United States in the last decision on this subject.

In Wilson v. Wall [6 Wall. (73 U. S.) 83] the court says: "On this point, we need only refer to Sugd. Vend. (page 622), where he says: 'In Ware v. Lord Egmont [4 De Gex, M. & G. 458] the Lord Chancellor Cranworth expressed his entire concurrence in what on many occasions of late years had fallen from judges of great eminence on the subject of constructive notice, namely: that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is, not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.'" [U. S. v. The Watchful] 6 Wall. [73 U. S.] 91.

The doctrine of constructive notice has unquestionably been carried, in some of the cases, further than the principles above laid down would warrant. They would probably at the present day be otherwise decided. In general, it may be said, that whatever is sufficient to put a person upon inquiry, is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it.

Thus, the direct statement to a purchaser, of an adverse claim, by the party holding it, or by any one acting in his behalf, will take effect as actual notice. But it must be sufficiently definite to put the purchaser on his guard, and enable him to ascertain whether it is authentic. 4 Cushm. 312; Flagg v. Mann [Case No. 4,847]. But mere reports and allegations, incapable of being traced to any definite source, vague and general assertions, resting on mere hearsay, and made by strangers, may be wholly disregarded. 25 Me. 484.

It has even been said that the notice will not be binding unless it proceeds from a person interested in the property, and in the course of a treaty for its purchase. 2 Sugd. Vend. 451, 452; Barnhart v. Greenshields, 28 Eng. Law & Eq. 77. So, also, where the purchaser knows that the legal estate is in a third person, he is bound to take notice of what the trust is. Freem. Ch. 171. Or, if he knows that the title deeds are in another man's possession, and he omits all inquiries as to the deeds, he will be held to have notice of any claim of the party holding them. 9 Hare, 458; 11 Jur. 527; 2 White & T. Lead. Cas. Eq. p. 139. So, too, if the purchaser knows the estate to be in the occupation of another than the vendor, he is bound by the equities which the party in possession may have in the land. Taylor v. Stibbert, 2 Ves. Jr. 439; Jones v. Smith, 1 Hare, 60. So, too, "where the purchaser cannot make out title but by deed which leads him to another fact, he shall be presumed cognizant thereof, for it is crassa negligentia that he sought not after it." Moore v. Bennett, 2 Ch. Cas. 246.

It is also said to be well established, that "a purchaser will have constructive notice of anything which appears in any part of the deeds or instruments which prove and constitute the title purchased, and is of such a nature, that if brought directly to his knowledge, would amount to actual notice." and the rule is said to be the same with re-

gard to grants made by the public as to those made by individuals, and a party claiming title originating in a patent from the state, will be held to have notice of everything that appears on the face of the patent. 2 White & T. Lead. Cas. Eq. p. 169; citing Brush v. Ware, 15 Pet. [40 U. S.] 93.

In that case, the contest was between the real owner of a land warrant and a purchaser of the warrant under a fraudulent executor's sale, who had subsequently obtained a patent. The court held that, in purchasing the warrant, he had merely acquired an equity, and that the recital on the face of the warrant of the assignment by the executor put him on inquiry to inspect the will, and ascertain the validity of the assignment, and that the issuance of the patent by the ministerial officers of the government did not better his position.

What would have been the rights of a purchaser for value without actual notice from the patentee in possession, was not considered. From the foregoing it may be gathered "that although to deprive a purchaser of protection as a bona fide purchaser without notice, he must be proved to have acted fraudulently, or to have been guilty of gross or culpable negligence, yet that the failure to take certain well established and reasonable precautions—such as a thorough examination of title papers, a search of the records, an inquiry into the rights of those in actual possession—will be treated as gross negligence, and will make the purchaser liable for all the consequences of omissions, which are equally injurious whether they proceed from laches or design." 2 White & T. Lead. Cas. Eq. 163.

Such being the general principles applicable to this case, we will proceed to consider the questions presented by it.

1. Did the recitals in the patent that the claim was derived from a Mexican grant; that it had been confirmed by the board and the district court, and that the patent did not affect the rights of third persons, affect the defendants, who purchased for full value from the patentees, in actual and undisputed possession, with notice of the transcript and records of the board and of the district court, and of the proceedings in the probate court, and the administrator's sale, which those records described?

2. If so, were they bound to take notice of the invalidity of those proceedings, and that the administrator's deed was a nullity, and was their failure to learn that fact an act of crassa negligentia, or "an omission to take a reasonable and well established precaution," which may be treated as equivalent thereto?

The cases of Estrada v. Murphy, 19 Cal. 250; Salmon v. Symonds, 30 Cal. 301; and Wilson v. Castro, 31 Cal. 420, are cited in support of the affirmative of the above propositions. But in neither of these cases did the questions here presented arise. Estrada v. Murphy merely holds that where a confirmee, in presenting his claim acts as agent, trustee, guardian, or in any other fiduciary capacity, equity will compel a transfer of the legal estate to the equitable owner, and will control the legal title in the hands of the patentee, so as to protect the just right of others. Salmon v. Symonds decides that patentees who did not own or claim to own but a portion of a rancho for which they presented their claim, but who have obtained a patent for the whole, will be decreed to hold the legal title for the part not owned by them in trust for the owner. In Wilson v. Castro it was held that where the widow of a deceased Mexican grantee, together with her second husband, conveyed the lands granted to a purchaser, who presented his claim and obtained a patent, equity will raise a constructive trust in favor of the heirs of the deceased grantee. But the court is careful to withhold any expression of opinion as to what, under such circumstances, would be the rights of a purchaser from the patentee without actual notice.

It has already been observed that in Brush v. Ware, 15 Pet. [40 U. S.] 111, the contest was between the patentee and the real owners of the warrant under which the patent issued. The rights of the bona fide purchasers from the patentee were not in question. The law on the points under consideration being thus found not to have been settled by authority, must be determined upon principle. If the purchaser from the patentees was bound to look at the record of the proceedings before the board, and the district court, and the deeds it referred to, and was affected with notice of every defect in the deraignment of the title of the patentees, it can only be because no greater effect is attributed to the adjudication of the courts that the patentees had established a valid claim to the land, than would be given to a declaration to that effect by an ordinary vendor.

The adjudication would, in that case, merely amount to a judicial determination that the original Mexican grant was valid, but would have no effect to raise a presumption that the confirmee was entitled to the patent, strong enough to protect a purchaser from him without notice, or to prevent the failure of the latter to investigate the derivative title from being an act of gross and culpable negligence.

Such is not, in my opinion, a just construction of the provisions of the act of 1851 [9 Stat. 632], under which the patent issued. By the eighth section of that act, "each and every person claiming lands by virtue of any right or title derived from the Spanish or Mexican government, was required to present the same," etc. By section 13, "all lands, the claims to which shall not have been presented to the said commissioners within two years after the date of the act, are to be deemed, held and considered as part of the public domain of the United States. A subsequent clause in the same section provides for the

issuance of an injunction by the district judge to restrain the confirmee from suing out a patent, when his title to the lands confirmed is disputed by any other person.

It will be seen from these provisions that the duty of the board, and of the district and supreme courts, on appeal, was not merely to inquire into the validity of the original grant, but into the validity of the claim of the claimant. If the latter failed to establish, prima facie at least, his derivative title, his claim must be rejected.

In practice, the claims were in general presented in the names of the owners, and not of the original grantees, in cases where the latter had conveyed the whole or a portion of the ranchos; and it has occasionally happened that a claim for a part of a rancho has been duly presented and confirmed, while the remainder has become public land by reason of the non-presentation of any claim for it.

It was therefore, the duty of the law agent, the district attorney, and the attorney-general, and of the board and the courts, to look into the mesne conveyances to a certain extent at least; first, in order that the patent might not issue, except to one presumptively entitled to it; and second, because if the claimants' title could be shown to be invalid, and no other claim had been presented, the land would become a part of the public domain.

The provision in the thirteenth section, for an injunction to restrain the confirmee from suing out a patent, seems to recognize that the issuing of a patent might confer some rights, and raise to some extent a presumption in favor of his title. The form of decree sanctioned by the supreme court, in cases where the derivative title of the claimant was doubtful, seems also a recognition of the same fact.

In those cases, the claim was confirmed to the claimants, or whoever might be the lawful successor in interest of the original grantee. To what end insert this saving clause, if the adjudication in favor of the claimant was so mere a nullity, that not even a bona fide purchaser of the legal title, without actual notice, would be relieved of the imputation of gross negligence if he omitted to search into the derivative title, and if he failed to discover flaws in it which had escaped the notice of the law officers of the United States, and even of the supreme court itself? Nor are the observations of the supreme court, in Castro v. Hendricks, 23 How. [64 U. S.] 441, when properly understood, inconsistent with this view.

The court says: "The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court has frequently decided that the government had no interest in the contest between persons claiming ex post facto the grant."

The supreme court could not, of course, have meant that the government had no interest in showing that the derivative title of the claimant was wholly void; for by so doing the rejection of the claim must have followed, and the lands would in many instances have been secured to the public. All that the court meant to declare was, that the United States had no interest in contests inter partes; that their rights were not submitted to the board, and could not be finally adjudicated, for contestants were not permitted to intervene in the proceeding (except by way of injunction, as provided for in the thirteenth section), and the decision of the board was declared by law not to affect the rights of third persons. The true meaning of the court is, doubtless, that attributed to it by Mr. Justice Baldwin, in Estrada v. Murphy, 19 Cal. 274. "It would seem to follow," says the learned judge, "from these and not less decisive intimations, in other cases in the supreme court of the United States, that the mere fact that a particular person obtained a patent from the government, was not conclusive of his exclusive right, but that it might be shown in a proper proceeding that others were interested or had a better right."

In the opinion delivered by Mr. Justice Field, when overruling the demurrer in this case, it is said: "It (the patent) is evidence that the title had passed by grant from the former government, or that such equities had existed under the former government in favor of the alleged grantee as to require or justify the cession of the title, and also, that by conveyances regular on their face, the legal title had apparently passed from the grantee to the claimants; but it is not evidence of any equitable relations of the holders of subsequent conveyances from the grantee to each other, for such relations were not submitted to the tribunals of the United States for adjudication."

From the foregoing it results, that a confirmation and patent establish: 1st. That the original grant was valid, and 2d. That the patentee has been found to be a bona fide claimant under the grant, and that, by a deraignment of title regular on its face and prima facie valid, he has shown himself to be entitled to a conveyance by the United States of the legal title.

The purchaser, therefore, from the patentee, without actual notice, has a right to assume the existence of these facts thus judicially established. He cannot be charged with gross negligence, willful ignorance, or even neglect of a reasonable and well established precaution, if he has acted upon the belief, that in the mesne conveyances adjudged to be regular and apparently translative of title, there would not be found a deed void on its face, because it was the result of a legal proceeding which was an absolute nullity.

In charging every patentee with a constructive trust in favor of the successor in interest of the grantee, who has failed to present his claim, irrespective of any question of notice, good faith, or any fiduciary relation towards the latter, the supreme court of the state has gone as far as either principle or sound policy will permit. The doctrine of constructive notice should not, in my judgment, be extended contrary to the tendency and spirit of the recent decisions to a new class of cases. It is essential to the security and repose of a vast number of fairly acquired titles in this state, that the rights of the purchaser who, without actual notice, has obtained the legal title from the United States under a patent, should be firmly upheld.

It is well settled, that even where a purchaser is put on inquiry, all that can be exacted of him is a diligent effort to ascertain whether the purchase will prejudice the equitable rights of others; when such an attempt has been made, and it appears that further efforts would have been fruitless, the purchaser's duty is discharged. Williamson v. Brown, 15 N. Y. 354; 2 White & T. Lead. Cas. Eq. 154.

In this case, no examination of the record would have in fact apprised the purchaser that the probate court was without jurisdiction over the estate of the deceased. One of the defendants swears that he consulted a lawyer, who advised him that the purchase was safe, and such would very possibly have been the opinion of a large number of the profession.

The decision of the supreme court, that the probate court was without jurisdiction, was not promulgated until several years later. So far, then, as the doctrine of constructive notice rests upon voluntary ignorance or willful blindness, or any moral delinquency whatever, it cannot apply to these defendants: for they had practically and in point of fact no means of ascertaining the fact, with constructive notice of which they are now sought to be charged. If the case of Jones v. Powles, above cited, be law, and if a purchaser of an estate claimed under a forged will, will be protected by the subsequent acquisition of the bare legal title, on the ground, that the falsehood of the asserted fact of title could not have been detected by reasonable diligence, a fortiori must these defendants be protected: for no diligence would have enabled them to discover the defects in the title, unless, in advance of the public and many of the legal profession, and with greater acuteness than was exhibited by the judicial authorities of the United States, they had anticipated a decision of the supreme court of this state upon a novel and perhaps doubtful question of law. Nor could they suspect, that by acquiring the legal title, they were prejudicing the equitable rights of others: for no heirs had appeared to claim the inheritance for more than ten years, and none were known to exist. And besides, their rights as against the United States had long since been lost, by their failure to present their claim: for the act of 1851 makes no exception in favor of absentees, minors, or femmes covert.

The only party that could have been injured by the presentation of the invalid claim was the United States—and they by a solemn adjudication, final and conclusive as between them and the claimants, had adjudged the claim to be valid, and had issued a patent for the land.

Nor in considering the hardships of this and similar cases, and the comparative equities of the complainants and defendants, is it to be forgotten that but for the proceedings now claimed to have been fraudulent and invalid, no claim would have been presented for this vacant inheritance, and it would long since have been disposed of as public land.

The complainants therefor seek to avail themselves of the acts of the patentees who presented the claim, obtained a confirmation, and procured a patent. It is but just that their rights should be postponed to those who, in good faith and relying upon a deed from the government, the paramount source of title, have paid their money, occupied and improved the land, and for many years have established their homes upon it.

No distinction can, I think, be drawn in this case between those who purchased after confirmation and before patent issued, and those who purchased subsequent to the patent. Both hold the legal title, derived from the United States, under the patent—and both have the equitable right to protection. Under this view, it becomes unnecessary to consider the other important questions of fact and of law presented by the case. The bill must be dismissed.

[NOTE. An appeal was then taken to the supreme court by the plaintiffs, and the judgment was affirmed in an opinion by Mr. Justice Hunt, who said that there was not sufficient evidence to hold that John Hardy and Thomas Hardy were the same person. 154 U. S. 598, 14 Sup. Ct. 1172.]

Case No. 6,060.

HARDY et al. v. HARBIN et al.

[4 Sawy. 536.] [1]

Circuit Court, N. D. California. July 29, 1865.

HOLDER OF LEGAL TITLE, WHEN CONVERTED INTO TRUSTEE—MEXICAN PREFECT HAD NO JURISDICTION — CALIFORNIA PROBATE ACT HAD NO RETROSPECTIVE APPLICATION — MEXICAN LAND GRANTS — EFFECT OF CONFIRMATION — PATENT UNDER MEXICAN GRANT—PURCHASERS CHARGEABLE WITH NOTICE OF FACTS DISCLOSED BY DOCUMENTS THROUGH WHICH THE TITLE IS TRACED—LIMITATION — CALIFORNIA STATUTE OF LIMITATIONS — PARTIES DEFENDANT TO SUIT TO CHARGE HOLDERS OF LEGAL TITLE AS TRUSTEES.

1. Wherever property is acquired by fraud, or under such circumstances as to render it in-

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

equitable for the holder of the legal title to retain it, a court of equity will convert him into a trustee of the true owner.

[Cited in Norton v. Meader, Case No. 10,351; Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 341; Lang Syne Min. Co. v. Ross (Nev.) 18 Pac. 362; Butte Hardware Co. v. Schwab (Mont.) 34 Pac. 28; South End Min. Co. v. Tinney (Nev.) 35 Pac. 91.]

2. A prefect under the Mexican government in California had no jurisdiction over the estates of deceased persons, or authority to appoint an administrator.

3. The statute of California for the settlement of the estates of deceased persons has no application to the estates of persons who died previous to the organization of the state government.

4. A confirmation of a Mexican land grant under the act of congress of March 3, 1851 [9 Stat. 631], inured to the benefit of the confirmees, so far as the legal title was concerned. It determined nothing as to the equitable relations between them and third parties.

[Cited in South End Min. Co. v. Tinney (Nev.) 35 Pac. 92.]

5. A patent issued by the United States for land granted by the former government is evidence that the title had passed by the grant from the former government, or that such equities had existed under that government in favor of the alleged grantee as to require or justify the cession of the title, and also that by conveyances regular on their face, the legal title had apparently passed from the grantee to the claimant; but it does not affect any equitable relations of the holders of subsequent conveyances from the grantee to each other, or to third parties.

6. Where a purchaser of land cannot make out his title except through an instrument which leads to a particular fact, he is chargeable with notice of such fact. Accordingly where a patent of the United States, upon confirmation of a Mexican grant, recites a transfer of the grantee's interest to the patentee by an administrator, a purchaser from the patentee is chargeable with notice of the character of the conveyance of the administrator, and the proceedings upon which it was made.

7. Where parties secured to themselves the legal title of a Mexican grant, by the presentation to the board of land commissioners of a worthless document as a transfer of the grantee's interest, whereby a fraud was committed upon the heirs of the grantee: *Held*, that the patentees would in equity be converted into trustees, and that the statute of limitations would not commence running in such case against the rights of the heirs until their discovery of the fraud.

8. The statute of limitations of California applies to both equitable and legal remedies; it is directed to the subject-matter, and not to the form of the action or the tribunal before which it is prosecuted.

[Cited in Norris v. Haggin, 28 Fed. 279.]

9. In a suit in equity to convert the holders of the legal title to land into trustees for the true owners, a previous holder of such legal title who has parted with all his interest in it is not a necessary party.

This was a suit in equity to charge the defendants [James M. Harbin and others] as trustees of certain real property in California, and to compel a transfer of the title. It came before the court on demurrer to the bill.

H. H. Hartley and Joseph P. Hoge, for demurrer.

W. W. Chipman and B. S. Brooks, contra.

FIELD, Circuit Justice. This is a suit on the equity side of the court to charge the defendants as trustees of certain real property, situated in the county of Yolo, and to enforce a transfer of the title to the complainants, Alexander Hardy and Ellen Hardy, the wife of Thomas Botham. Alexander and Ellen claim to be the only surviving children and heirs at law of one, John Hardy, deceased; and the case presented by their bill is briefly this:

Hardy, their father, was a native of Upper Canada, and in 1824 intermarried in that province with one Nancy Wright, a citizen of the United States. Three children were the issue of this marriage—Alexander, Ellen and Nancy. Alexander was born in 1825, in New York, and is a citizen of that state, and is at present a soldier in the army of the United States. Ellen was born in Canada, in 1827, and intermarried in 1847 with the complainant, Thomas Botham. Both she and her husband are subjects of the queen of Great Britain. Nancy was born in New York, in 1829, and died at the age of six years. The wife of Hardy died in 1832, and soon afterward Hardy himself left Canada; and after working one or two years at different places on the Mississippi river, proceeded to Texas, and thence to Mexico, and engaged in the military service of the latter country.

In 1843 he came to California, having in the meantime become a Mexican citizen by naturalization, and assumed the name of Thomas Hardy—by which name, or that of Thomas M. Hardy, he was always known in this country. In October of the same year, he obtained from Micheltorena, then governor of the department of California, a grant of land of the extent of six square leagues, situated in the present county of Yolo. The grant was issued to him in his assumed name of Thomas Hardy. In October, 1848, he died at Benicia, in this state, intestate, possessed of the real property thus granted to him; and also of personal property of the value of several thousand dollars.

In March, 1850, the prefect of the district of Sonoma assumed jurisdiction over the estate of the deceased, and appointed one Stephen Cooper, of Benicia, administrator, and issued letters of administration to him. Under color of these letters, Cooper took possession of the property of the deceased, and proceeded to act as administrator. In 1851, the prefect, his office having been abolished by law, and probate courts having been established in the different counties of the state, transferred the papers and documents relating to the estate of Hardy to the probate court of the county of Solano. Soon afterward, upon the petition of the administrator, the probate court made an order for the sale of the real property; and under it the property was sold for the sum of $6500. The sale was confirmed by the probate court, and in July, 1851, a conveyance was executed by the administrator to the purchasers.

In 1852, the claim of the purchasers and parties deriving title from them, to the land in question, was presented to the board of commissioners, created under the act of congress of March 3, 1851, for confirmation. In July, 1855, the claim was confirmed by the board, and afterward, in March, 1857, on appeal, by the decree of the district court of the United States. This decree was made final by stipulation of the parties; and in July, 1858, a patent of the United States was issued to the claimants. The defendants derive whatever title they possess to the premises under the patent and the conveyance of the administrator.

The complainants insist that the prefect of the district of Sonoma had no jurisdiction over the estate of Hardy, or authority to appoint an administrator thereof, and that the proceedings and appointment, and all acts under color of the appointment, are null and void; and that the probate court of Solano county acquired no jurisdiction by the transfer to it of the papers of the prefect.

The complainants also insist that even if the probate court acquired any jurisdiction over the estate, it never acquired jurisdiction to order a sale of the real property of the decedent by reason of various defects and omissions in the petition and proceedings for the sale, which the bill sets forth; and also that the sale was vitiated by fraudulent practices on the part of the administrator and purchasers, which the bill details at length, and of which it alleges the defendants had notice before they acquired their respective interests.

The complainants never received any intelligence from Hardy after he left the Mississippi river, except by a letter written from Monterey, in the spring of 1847 or 1848, and until within the past three years had no information as to his residence or movements, or of the acquisition of the property, or of the various proceedings relating to the same, which are stated in their bill. They ask, therefore, that the defendants may be charged as trustees of the title of the real property to the extent of the several interests held by them for the benefit of the complainants, Alexander and Ellen, and be decreed to transfer the same to said complainants, and deliver up the patent and all other muniments of title connected with the property.

To the bill of complaint the defendants demur on several grounds, the principal of which are: First, that the bill does not contain any matter of equity upon which the court can base a decree, or grant the complainants any relief. Second, that the claim of the complainants is a stale claim, and barred by the statute of limitations; and third, that there is a defect of parties defendants.

The ground upon which the bill proceeds is, that the defendants have obtained the legal title to property, of which the father of the complainants died possessed, and which the complainants inherited; that the defendants took the legal title, with notice of the invalidity of the means by which it was obtained; and should, therefore, upon obvious principles of justice, be required to give it up to the true owners. The bill is filed for the purpose of having a trust declared and enforced, the complainants relying upon the established doctrine that wherever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of equity will convert him into a trustee of the party actually entitled to its beneficial enjoyment. And the bill presents a clear case for the application of this doctrine. The prefect of Sonoma had no jurisdiction over the estate of the deceased, nor any authority to appoint an administrator. Prefects were executive officers of the government. It was their duty to maintain public order and tranquillity, to publish and enforce the laws, and to exercise a general supervision over the subordinate officers, and the public interests of their districts. They were empowered to impose small fines in the enforcement of their authority, and to hear complaints against inferior officers of the district; but beyond this extent they were not clothed with any judicial functions.

Nor did the probate court of Solano county acquire any jurisdiction over the estate of the deceased after the transfer of the papers from the prefect. The statute of California, for the settlement of the estates of deceased persons has no application to the estates of parties who died previous to the organization of the state government. This was expressly held by the supreme court of California, in Grimes v. Norris, with reference to the probate of a will executed in 1848 (6 Cal. 621); and the ruling in this respect was affirmed by the same court in the subsequent case of Tevis v. Pitcher, 10 Cal. 465. The act which provides for the probate of wills also regulates the manner in which the estates of parties dying intestate shall be closed, and is equally limited in its application to cases arising subsequent to the adoption of the constitution. It was obviously the intention of the legislature to leave all estates of decedents, who died previously, to be settled under the law as it then existed; and such is the ruling in a recent case of the supreme court of the state. Downer v. Smith, 24 Cal. 114. It was, therefore, under color of legal proceedings, every step of which was a nullity, that the conveyance of the alleged administrator was executed. That conveyance enabled the purchasers and parties holding under them to present the grant made to Hardy by the Mexican government to the board of land commissioners, and to obtain a confirmation of the claim asserted by them to the land it embraces, and ultimately the patent of the United States. Thus, by means of an instrument purporting to transfer the interest of which Hardy died possessed, but in fact transferring nothing, they obtained a

standing before the federal tribunals, and have secured to themselves the legal title from the government of the United States. It is the possession of this legal title, as shown by the confirmation and patent, which precludes the complainants, who are the sole surviving heirs of the deceased, from instituting or maintaining ejectment for the premises, and forces them to seek relief from a court of equity. And it is upon the confirmation and patent that the defendants rely to resist the claim of the complainants. Their position is, that the confirmation inured to the benefits of the confirmees, and that the patent is conclusive evidence of the validity of their title—that it is the record of the government upon it, which cannot be questioned, except in direct proceedings instituted in the name of the government or by its authority.

It is undoubtedly true that the confirmation inured to the benefit of the confirmees, so far as the legal title to the premises was concerned. It established the legal title in them, but it determined nothing as to the equitable relations between them and third parties. The object of the government in the passage of the act of March 3, 1851, was to separate the public lands from those which were private property, and to discharge its treaty obligations by protecting private claims. The only question in which the government was concerned, and which demanded its consideration was, what interests in land had the former sovereignty parted with; not what had transpired between private parties subsequent to the action of that sovereignty. And in conformity with this view is the language of the supreme court of the United States in Castro v. Hendricks, 23 How. [64 U. S.] 442. After stating that to accomplish the purposes of the act of March 3, 1851, every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments, was required to present the same to a board of commissioners, the court said: "The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court have repeatedly determined that the government had no interest in the contests between persons claiming ex post facto the grant." And the supreme court of California, whilst declaring that the confirmation inured to the benefit of the confirmee, has in frequent instances qualified the declaration, by stating that equities between the confirmees and third parties remained unaffected. Thus, in Estrada v. Murphy, 19 Cal. 272, the court said: "If the confirmee, in presenting his claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a court of equity, upon a proper proceeding, will compel a transfer of the legal title to the principal, cestui que trust, ward, or other party equitably entitled to the same, or subject it to the proper trusts in the confirmee's hands. It matters not whether the presentation was made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim, a court of equity will control the legal title in his hands so as to protect the just rights of others."

The patent is undoubtedly a record of the government upon the title of the claimant. Before it is issued numerous proceedings are required to be taken before the tribunals and officers of the United States, having for their object the ascertainment of the validity of the grant, preferred under Mexican law and authorities, and the identification of the land to which it is, or should be restricted. As the last act in the series of proceedings, and as a result of those previously taken, it is issued. It is, therefore, record evidence on the part of the government that the previous grant was genuine, and entitled to recognition and confirmation by the law of nations, or the stipulations of the treaty between Mexico and the United States, and is correctly located so as to embrace the premises described. Until vacated and set aside by proceedings instituted in the name, or by authority of the government, it is evidence that the title had passed by the grant from the former government, or that such equities had existed under that government in favor of the alleged grantee, as to require or justify the cession of the title, and also that by conveyances, regular on their face, the legal title had apparently passed from the grantee to the claimant; but it is not evidence of any equitable relations of the holders of subsequent conveyances from the grantee to each other or to third parties, for such relations were not submitted to the tribunals of the United States for adjudication in the settlement of private land claims under Spanish and Mexican grants.

There is nothing in the numerous decisions of the supreme court of this state upon patents of the United States which militates against this view. Those decisions, with one or two exceptions, were rendered in actions of ejectment, and only affirm the conclusiveness of the patents in determining the title of the patentees in such actions, as against attempts to resist their operation by parties holding either under confirmed grants, or by alleged pre-emption and settlement under the laws of the United States. It is true it is said in Stark v. Barrett, 15 Cal. 361, that the patent, in recognizing the validity of the grant, upon the confirmation of which it is issued, necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest; but this is no more than saying that if the grant was valid, a valid title was transferred by properly executed conveyances of the grantee, a proposition which requires no explanation. And the decision in Clark v. Lockwood, 21 Cal. 220, to which counsel refer, only goes to the extent of declaring that in an action of ejectment by

the vendee of the confirmee, it is unnecessary to introduce the intermediate conveyances from the Mexican grantee to the confirmee, the confirmation being an adjudication that the legal title was in him at the date of the presentation of his petition to the land commissioners. The opinion of the court expressly limits the conclusiveness of the adjudication to the legal title in that action, and cites from the case of Estrada v. Murphy [supra] to show that equities against such titles may be enforced by proper proceedings in a court of equity. The action of ejectment deals with legal titles; the patent determines the position of such title, and when the patentee is other than the Mexican grantee, it is evidence that he had made such a prima facie showing before the proper authorities of having a transfer of the grantee's interest, as to justify its having been issued to him. In the opinions filed on rendering the decisions in the state courts cited by counsel, though relating to the legal title, reference is made in several instances to possible equities of third parties, for the purpose of qualifying the general language used as to the conclusive effect of the patents and to direct parties asserting such equities to the proper tribunal for relief.

In Rico v. Spence, 21 Cal. 504, which was a suit in equity to establish and enforce a trust, the court recognized that equities might exist which would control the title of the patentees, by the observations made to show that there were no such equities in that case. "The plaintiffs," said the court, "do not show the possession of any equities which can control the legal title. They present no evidence of the existence of any such relation of trust or confidence between them and the patentee, as imposed upon the latter the duty of acting for their benefit, and of holding the title for their use. There was no fiduciary relation between them. Nor does it appear that there was any mistake committed by the authorities at Washington in issuing the patent to the defendant Spence. The instrument was intended for the party who received it. Nor is it pretended that any fraud was committed by the patentee in the deraignment of his title from the original claimant of the premises. The genuineness and due execution of the intermediate conveyances from Jose Mariano Estrada to him are not questioned. Nor can it be said that he acquired his title with notice of any equitable rights of the plaintiffs which could affect him."

The case of Brush v. Ware, in the supreme court of the United States, 15 Pet. [40 U. S.] 93, is in many respects similar to this. In that case it appeared that one Hockaday was a captain on the Virginia line on the continental establishment, which, under the acts and regulations of congress, entitled him to four thousand acres of land in the Virginia reservation, within the state of Ohio. A certificate of this military right having been obtained from the executive council of Virginia, the executor of Hockaday fraudulently assigned the same, in 1808, to one Ladd. On the certificate and assignment, Ladd obtained four warrants of a thousand acres each, as assignee of the executor. One of these warrants was assigned by Ladd to Hoffman, by whom certain lands were entered. By various transfers, the interest of Hoffman came into the possession of Brush, to whom patents of the United States were issued in 1818. In 1839, the heirs of Hockaday filed a bill to compel the patentee to convey the lands to them, alleging that he was a purchaser with notice of their superior title. The defendant, among other things, set up in his answer that he had no recollection or belief that he had ever seen the warrant, entry or survey, or copies of either, upon which the patents issued; that he was an innocent purchaser for a valuable consideration; that he had no notice of the complainants' claim before the emanation of the patents, or any knowledge of any fraud or what the will of Hockaday contained; that he had been in possession under claim of title since 1808, and had made lasting and valuable improvements, and that the complainants were barred by the statute of limitations. But the court held that Brush was chargeable with notice of the imperfection of the transfer of the executor by the facts which appeared upon the face of his title papers. The incipient step in the acquisition of his title was the entry in the books kept in the office of the surveyor. This entry could only be made upon the production to the surveyor of the warrant, and filing it, or a certified copy, in his office. A survey and plat of the land were then made and returned to the office of the principal surveyor, by whom they were transmitted to the general land-office, accompanied by the original warrant, or a copy of it. The patents were then issued. The original warrant, which was the foundation of the title, stated on its face that it was issued to Ladd as assignee of the executor of Hockaday, and the patents were in terms issued to the patentee as the last of several assignees from the executor. The attention of the patentee was thus directed to the will of Hockaday, in which the authority must have been found, if it existed at all, for the assignment by the executor. That will contained no such authority, and so the patentee would have ascertained had he made the proper inquiries. And the court held that he was bound to look to every document which was essential to the validity of the title. As he neglected to do this, he was not entitled to any greater protection than if he had made the inquiry and ascertained the real facts of the case. "The question," said the court, "is not whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected." The court therefore affirmed the decree directing a conveyance to the heirs.

The case of Reeder v. Barr, 4 Ohio, 458, decided by the supreme court of Ohio, cited in the opinion in Brush v. Ware [supra], is equally in point. There the patent was issued to one "Newell, as assignee of the administrator of Henson Reeder, deceased," and the court held that this disclosure of the rights of the patentee, and of the manner in which they were acquired, was sufficient to charge a subsequent purchaser with notice of the equitable rights of the heirs at law of Reeder. "If, in the investigation of a title," said the court, "a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed. Here Barr, in tracing his title, must have seen from the patent that Newell's right was derived from an administrator, who possessed no title to the land himself, and whose deed could be available only by previous compliance with certain legal formalities. If the assignment of an administrator, per se, conveyed the equitable rights of the intestate, the purchaser might stand in a different situation. As it is, we are of opinion that the recital in the patent is sufficient to put a man of ordinary prudence to an inquiry for the rights of the heirs, and that a subsequent purchaser must, at his peril, ascertain whether those rights have been regularly extinguished. Authorities are cited to show that presumptions of regularity are to be made in favor of public officers. Williams v. East India Co., 3 East, 200; Hartwell v. Root, 19 Johns. 347. And that the existence of a grant is sufficient ground to presume that every prerequisite has been performed. Polk v. Wendell, 9 Cranch. [13 U. S.] 98, 5 Wheat. [18 U. S.] 293; King v. Hawkins, 10 East, 216. If this grant were a simple conveyance to Newell, his assignees might, perhaps, claim the benefit of these rules; but the grant, upon its face, shows that the heirs of Reeder were the owners of the estate, after the death of their ancestor, and it is going too far to say that there is a legal presumption not only that the officers of government have performed their duties, but that the rights of the heirs of Reeder have been divested by a judgment of a court of competent jurisdiction."

The principle upon which these decisions proceed, is the familiar one, that where a purchaser cannot make out his title except through an instrument which leads to a particular fact, he is chargeable with notice of such fact. In the case at bar the principle applies, and is a full answer to those of the defendants who took their title from the patentees. The patent, we must presume, was issued in the ordinary form of such instruments, upon the confirmation of a Mexican grant, with a recital of the existence of the grant; the conveyance of the grantee's interest by the administrator, the confirmation of the claim under the grant, its survey upon the confirmation and the approval of the survey by the proper officers of the government. Such are the usual recitals, and of course, in the present case, they directed the attention of all subsequent purchasers to the examination of the conveyance of the administrator and the proceedings upon which it was made.

The position that the complainants are not entitled to relief, because by the act of March 3, 1851, all lands, the claim to which was not presented within two years thereafter, were to be deemed part of the public domain, hardly merits serious consideration. It cannot be affirmed that if the sale by the administrator had not taken place, friends of the deceased would not have made efforts to ascertain whether there were any heirs to the estate, and have not succeeded in finding them; nor that the property would not have been taken in charge by officers of the state as a vacant inheritance, and the grant presented for adjudication to the proper tribunals of the United States; nor that relief might not have been afforded the heirs when the property was discovered by appropriate legislation. The finder of personal property might, with equal propriety, justify its retention, on the ground that the true owner would never have found it. The claim presented by the claimants, resting upon solid principles of justice and right, must be sustained, upon the showing of the bill, unless barred by the statute of limitations.

The statute of limitations of this state is peculiar. It differs essentially from the English statute, and from the statute of limitations in force in most of the other states of the Union. Those statutes, in terms, apply only to particular legal remedies, and courts of equity are said to be bound by them only in cases of concurrent jurisdiction, and in other cases to act only by analogy to the statutes, and not in obedience to them. But in this state the statute applies both to equitable and to legal remedies. It is directed to the subject-matter, and not to the form of the action or the tribunal before which it is prosecuted. Such is the language of the supreme court, the only authoritative interpreter of the laws of the state. Lord v. Morris, 18 Cal. 486.

The question then is, whether the statute bars the relief prayed, and not whether, as insisted by counsel, the claim on general principles adopted in the administration of equity is a stale claim, although we may add on this latter head that the claim has upon such principles no feature that should bar its enforcement on that ground. The statute provides that certain actions shall be brought within three years after the cause of action shall have accrued, but declares that in an action for relief on the ground of fraud, the cause of action "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." This exception covers the case at bar. The patentees secured to themselves the legal title by the presentation to the board of land commissioners of a worthless document as a transfer of the grantees' interest, and they

prosecuted a claim under this document for years. By these proceedings a fraud was committed upon the heirs of Hardy, and not until its discovery did the statute commence running against their rights. The bill avers such discovery within the years prescribed. And the defendants who took title under the patentees are chargeable with notice of the character of the claim under which the patentees secured the title, and consequently are precluded from protection as innocent purchasers. They are therefore chargeable with constructive fraud in taking title from the patentees, however ignorant in fact of the rights of the heirs, and however honest in their intentions they may have been. "Another class of constructive frauds," says Mr. Justice Story, after enumerating several classes, "consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such case he will not be permitted to protect himself against such claims; but his own title will be postponed, and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, particeps criminis with the fraudulent grantor; and the rule of equity, as well of law, is 'Dolus et fraus nemini patrocinari debent.' And in all such cases of purchases with notice, courts of equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat."

This doctrine has frequent illustration in the adjudged cases, where a purchaser takes his deed with notice of a prior unrecorded deed of the same property against which he invokes the registry acts. A court of equity treats the taking of the second deed under such circumstances, and attempting to hold the property as a fraud against which it will grant relief. "The ground of it," said Lord Hardwicke, in speaking of this doctrine, "plainly is this, that the taking of a legal estate after notice of a prior right, makes a person a mala fide purchaser (and not that he is not a purchaser for a valuable consideration in every other respect); this is a species of fraud, and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. And this exactly agrees with the definition of the civil law of dolus malus. * * * Now if a person does not stop his hand, but gets the legal estate when he knew the right of equity was in another, machinatur ad circumveniendum; and it is a maxim, too, in our law, that 'fraus et dolus nemini patrocinari debent.'" Le Neve v. Le Neve, 3 Atk., 646.

In the case at bar the bill does not stop merely with a statement of the matters showing the nullity of the proceedings before the prefect and probate court for want of jurisdiction, but it charges in these proceedings the most gross and palpable frauds. As indicating the motive with which the purchasers at the administrator's sale were actuated, the fraudulent practices alleged may be considered, even though the tribunal before which they were taken had no jurisdiction over the estate of the deceased. These observations are made with reference to the rights asserted by the complainant Alexander Hardy, for complainant Ellen is within another exception of the statute, by reason of her coverture.

It may be proper to observe in this place, to prevent misconception, that the complainant Ellen has been treated as having taken an interest in the property in controversy, as one of the heirs of the deceased Hardy. It appears that she is a British subject, and it may, perhaps, be contended that the entire estate passed to her brother, an alien not being able to take by inheritance. No point was made on this head on the argument, and we allude to it now only to say that it will be open for consideration on the final hearing.

It only remains to consider the objection that there is a defect of parties defendant. It appears from the bill that Estell was one of the purchasers at the administrator's sale, and one of the subsequent patentees, and the objection is that his heirs or legal representatives are not made parties. The bill also shows that he had parted with all his interest and claim long before his death. No decree could therefore pass against the heirs or representatives, and they are not, therefore, necessary parties. The proceeding is against the holders of the legal title.

The demurrer must be overruled, and the defendants required to answer the bill.

[See Case No. 6,059.]

Case No. 6,061.

HARDY v. REDMAN.

[3 Cranch, C. C. 635.] [1]

Circuit Court, District of Columbia. May Term, 1829.

DEVISE IN TRUST—FEE.

A devise to the executor in trust to apply the rents and income to the support of the widow, with power to sell the estate if the income should not be sufficient, is a devise in fee to the executor; and he is entitled to receive the rents accruing after the death of the wife.

This suit was docketed by consent, to recover the rents which accrued after the death of the testator's wife. The litigation arose upon the following clause of the will of Samuel Beall: "And it is my will that after the payment of my debts and funeral expenses, all my other property, (except heretofore reserved,) real, personal, and mixed,

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

be placed in the hands of my executors hereafter named, the proceeds thereof to be applied to the support of my said wife, Anne Beall, in such manner as they shall think proper; and in case the rents and income of my estate should not be found sufficient for the above purpose, then the said executors are hereby empowered to sell such estate, and vest the proceeds thereof in such stock as they may think proper, for the support of the said Anne Beall; and at the death of my said wife Anne Beall, the whole of the remainder of my estate to devolve on my heirs at law."

The case stated, for the opinion of the court, is that on the 27th of August, 1811, Samuel Beall was seized in fee of a lot of land in Georgetown, and, on that day, by deed, leased it to Alexander Kile, for ninety-nine years, renewable forever, at the yearly rent of $90, and taxes, payable on the last of March, with the usual covenants. That on the 9th of May, 1812, Kile being in possession, assigned his lease to James Redman, who entered, and was possessed till his death, when his administrator entered, and continued in possession to the present time, and paid the rent to the 31st of March, 1827, but nothing since. That the testator, Beall, having made his will on the 6th of January, 1820, died shortly after, without revoking or altering the same. That the plaintiff is the sole surviving executor. That Anne Beall, the widow of the testator, died on the 28th of November, 1827. That the heirs at law of the testator, if any, are aliens, and are unknown to the parties. That the widow, Anne Beall, died indebted to several persons, for board, medical attendance, and other necessaries. It is submitted to the court to say, whether the plaintiff, William Hardy, is entitled to receive the rents due on the said premises, since the 31st of March, 1827, either in whole or in part. Judgment to be entered for the plaintiff, for so much as the court may think him entitled to receive, if entitled to receive any part; but, if no part, judgment to be for the defendant.

Mr. Marbury, for plaintiff, contended:

(1) That the assignee was bound by the covenant to pay the rent.

(2) That it was a devise to the executors in fee.

When a trustee is to receive the rents and profits, he has the legal estate. The power to sell vests the fee in the trustee, and he becomes trustee for those in reversion. It cannot be an estate for the life of the trustee, for the widow might outlive him. It cannot be for her life, because the power is to sell, and invest the proceeds in stocks, to raise a fund for the support of the widow. No interest vested in the trustee; but he has, at least, a life estate, because, having accepted the trust, he was bound to support her, whether the annual rents and profits would or would not be sufficient for that purpose, and, therefore, might be subjected to loss if the estate were only for the life of the widow. Cruise, Dig. tit. "Devise," c. 1, §§ 13, 18, 24, 26; 6 Coke, 16a.

C. Cox, contra.

No greater estate vested in the executors than was necessary to enable them to execute the trust. They were not bound to advance money, or to make contracts. 2 Rob. Wills, 26; 6 Cruise, 315, 316; Co. Litt. 42a; Merson v. Blackmore, 2 Atk. 341; Rob. Wills, 446, 447, in notes; Reading v. Rawsterne, 2 Ld. Raym. 829; Cro. Eliz. 919.

CRANCH, Chief Judge. The defendant's counsel contends, that this is a devise to the executors in trust for the use of Mrs. Beall during her life, with remainder to the heirs of the testator, and that the use is vested by the statute of uses; so that it is, in effect, a devise to her for life, and that the heirs of the testator take the reversion by descent, and do not take a remainder by purchase; or, at most, that the executors only take an estate during the life of the widow, and that the reversion descended to the heirs at law; for the words, "the remainder of my estate to devolve on my heirs at law," give them no other estate than the law would give them; in which case it is settled, that the heir shall take by descent, and not by purchase. That, where the devise is charged with the payment of a gross sum, it carries a fee; but where the sum is to be paid out of the annual rents and profits, it is only an estate for life. And that, where lands are subjected to a temporary right of possession in another, subject thereto, the heir takes by descent. These principles are correct, but they do not apply to this case. This is not a devise in trust directly to the use of the widow, nor to suffer her to take the rents and profits, in which case, perhaps, the statute would execute the use; but it is a devise to the executors, charged with the payment of debts and funeral expenses; and that the proceeds of the estate should be applied to the support of the widow, in such manner as they should think proper, and with power to sell the estate, if the rents and income should not be found sufficient to support the widow and pay the debts.

In the case of Gibson v. Montfort, 1 Ves. Sr. 490, 491, the testator devised his real and personal estate to trustees, and their executors, administrators, and assigns, in trust, to and for several uses, to pay several annuities, sums, and legacies, by and out of the produce of the personal estate; if that should be deficient, then out of the rents, issues, and profits of the real estate. Lord Hardwicke decided that the whole legal estate of inheritance was devised to the trustees, and said: "It has often been decided that, in a devise to trustees, it is not necessary that the word 'heirs' should be inserted, to carry the fee, at law; for if the purposes of the

trust cannot be satisfied without having a fee, courts of law will so construe it, as in Shaw v. Wright, 1 Eq. Cas. Abr. 176, and several other cases. Here are purposes to be answered, which, by possibility, (and that is sufficient,) cannot be answered without the trustee's having a fee, namely, the payment of several annuities, and large pecuniary legacies. If the personal estate is deficient, which will probably be the case, then how is the rest to be raised? Barely by the annual rents and profits. It must be so if it is a chattel interest, for then it cannot be taken out of the estate by anticipation; but that cannot be here, for if these pecuniary legacies be not paid out of the personal, the real estate must be sold to satisfy them. For several of them are to be paid within a year after the testator's death, and cannot, therefore, be paid by annual perception. This, then, is a purpose which it is impossible to serve, unless the trustees have the inheritance, for if they are to sell a fee they must have a fee; nor will the court split the devise." That case seems to be decisive of the present; for here the executors have not merely an implied but an express power given to them, by the will, to sell the real estate, for the payment of the debts and the support of the widow.

We, therefore, are of opinion that the plaintiff, William Hardy, has an estate in fee in the reversion of the lot, in trust for the heirs at law of Samuel Beall, or for such persons as would, but for their alienage, be his heirs at law; and, consequently, that the plaintiff is entitled to receive the whole rents up to the time of the commencement of this suit, or to the last pay-day preceding such commencement. See Cruise, Dig. tit. "Devise," c. 10, §§ 29–32, 36; Id. c. 11, §§ 49–73.

Case No. 6,062.

HARDY et al. v. The RUGGLES.

[2 Hughes, 78.] [1]

District Court, E. D. Virginia. June 28, 1875.

SHIPPING—OLD AND NEW VESSEL—REPAIRS—MARITIME LIEN.

1. A propeller steamboat, enrolled and owned in New York, was burnt, while on a voyage to North Carolina, to the water's edge. The hull, with steam machinery and propelling wheel on board, was towed to Smithfield, Va., and there rebuilt; the old hull being used with engine frame and boilers standing; but the length of the vessel was increased. *Held*, that this was an old vessel rebuilt, and not a new vessel built.

2. Being still the same vessel, it was a foreign and not a domestic vessel in Virginia.

3. The owner being a stranger, his agent a stranger, and the mechanic who rebuilt the vessel being without responsibility, and the credit of the vessel being a necessary means of obtaining materials for rebuilding the vessel, and these having been furnished on the security of the vessel; *held*, that a lien in admiralty attached in favor of material-men.

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

Libel in admiralty. The steam propeller Ruggles, Charles Early master, was owned in New York by N. Barber, and was enrolled in New York. While in the waters of North Carolina in 1874, she was burnt to the water's edge; her hull remaining untouched, and her steam engine and propeller remaining in the hull. While lying in this condition in Elizabeth City, North Carolina, a contract in writing was made between Samuel Seed of the first part, and the owner of the second part, for finishing and completing this propeller, as to the carpenters' and joiners' work. The length of the vessel was to be increased from what it was originally to 116 feet. The old dimensions in other respects were to be preserved with very slight change. The propeller's hull was then towed to Smithfield, Virginia, where Seed has a shipwright's establishment. Seed was a resident of New Jersey, but was conducting this business at Smithfield, Virginia. The contract between him and Barber was signed on the 9th of July, 1874. The contract provided for an agent to be appointed by Barber. Barber was absent from Smithfield most of the time from the date of the contract to October. During all this time the work progressed under the contract; some nineteen hands being employed as a general rule. Seed was a man wholly without property, or other basis of credit, and dependent upon his labor and its results for what credit was given him. During Barber's absence he left Charles Early, former master of the propeller, to look after his interests and supervise the reconstruction of the vessel. Barber was a stranger in Smithfield, and his pecuniary responsibility unknown. So was Early. Most of the timber and lumber for the reconstruction of the propeller was obtained from the lumber mill of Thomas A. Hardy, which was situated a few miles from the ship-yard where the propeller was undergoing reconstruction. Before the lumber was furnished by Harrison & Parker, who had charge of the mill, they inquired as to the source from which they were to receive payment for their lumber. The result of the information obtained by them was that Seed was to be paid for the work, as it progressed, every two or three weeks; they could be present when he was paid and then collect their bills; and, if payment was not made, as their lumber was to go into the propeller, they would have the security of the vessel. The proof is that they charged the lumber to Seed in a rude book not kept by a skilled bookkeeper; but relied upon their recourse on the vessel if payment through Seed should not be forthcoming. The proof is positive that they did not depend upon Seed, or rely on his responsibility alone, but looked ultimately to the vessel as their security. In lengthening the vessel it was made 123 feet 6 inches long, instead of 116. Barber, in evidence, denies that he authorized or knew until October of the increased length. But either he or his

agent was present on the vessel during the whole time of its rebuilding; and it is not credible that the extra length was put upon the vessel except by order of his agent or himself. The job, on the part of Seed, was a lump job, and it is not to be supposed that, working all the time under the eye of Early or Barber, Seed would have put upon himself extra work by adding of his own accord to the contract length of the vessel.

The libel here is for the lumber and timber employed in the extra work. E. J. Seed, the foreman of Samuel Seed, testified that the extra work was ordered by Barber and Early, chiefly by Early. He testifies that Early directed him to order the lumber for the extra work from Parker, Hardy's agent. This extra lumber was sent up from the mill to the ship-yard, along with the lumber ordered by Samuel Seed, and it was marked extra afterwards on the rude day-book kept at the mill, when it could be ascertained which was for the extra work and which for the contract work. When Parker first got an order from E. J. Seed for lumber for the extra work, he took the pains to go to the ship-yard and see Early about it. He thereupon was authorized by Early to send this lumber upon the order of E. J. Seed, as the latter should need it. It is proved that this lumber, except cullings, went into the propeller. It is not proved that any of it has been paid for, except to the amount of the small credit which is entered on the bill filed with the libel.

The second claim in the libel is for a bill of lumber furnished to this propeller by R. J. & W. Neely & Co. on the order of Samuel Seed. Of the 4,000 feet charged for in the bill for this lumber filed with the libel, it is proved that 1,280 feet were used in other structures or ways than on the propeller, and this amount rather exceeds in value the credit of $35 which is entered on the bill. It was strongly asserted in argument by counsel, and stated on hearsay evidence by a witness, that still another part of the lumber charged to the propeller in Neely's bill was used for the flooring of a Baptist church near Smithfield; but the defendant failed to prove by any one connected with the work on that church, or having personal knowledge of the facts, that such use was made of it. The evidence to that effect is wholly upon hearsay.

J. H. Gale, R. F. Graves, and Scarburgh & Duffield, for libellants.

R. S. Thomas and W. H. C. Ellis, for respondents.

HUGHES, District Judge. The foregoing are the principal facts disclosed by the evidence in the case, in which there is very little conflict. Two questions arise upon these facts, viz.: First. Was this the repairing and completing of an old vessel, or the building of a new one? Second. Have the materialmen a lien upon the vessel for the material furnished?

Unless the vessel is the same in the eye of the law with the propeller which was burnt, there is no lien for the materials furnished by Hardy and Neely & Co.; for it has been long ago determined by the United States supreme court that in the United States there is no maritime lien for the materials furnished for the building of a ship before it is launched. We cannot go back of the decisions of the supreme court to inquire whether they really declare and expound the admiralty law as it obtains among civilized nations at large; we must implicitly abide the decisions of that court on that subject. And that court has set this question at rest in the United States by its decisions in the cases of People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, and Roche v. Chapman, 22 How. [63 U. S.] 129. Therefore, the first inquiry in this case is: Was the work put upon the Ruggles such as to make her a new ship? Her hull was left intact. The frame of the steam engine, the boiler, the apparatus connected with the propelling wheel, and the wheel itself remained. There was no change of the model of the vessel except such as was necessary to giving her greater length. All the old timber in the hull that was sound was retained in its former position. There was no breaking up of the vessel. It was, as to the hull, preserved just in the constituent condition in which the fire left it, except as to the work of lengthening. Molloy, following all the old authorities, says, "If a ship be ript up in parts, and repaired in parts, and taken asunder in parts, yet she remains the same vessel and not another; nay, though she hath been so often repaired that there remains not one stick of the original fabric." This is still the general doctrine, and it is very rigidly adhered to by the government of the United States in its laws of registration as to the names of vessels. This being the same vessel as the Ruggles, it is a foreign vessel. The contract for repairing it was made in another state. It was brought from another state into this to be repaired in this. Her owner is not a citizen or resident of this state; nor is her master; nor is the mechanic a permanent resident, who put the work upon her, and in the character of contractor with the owner ordered the lumber which was used under the contract. The same was the case as to the mechanic foreman who, in the character of agent of the owner, ordered the lumber and timber used in the extra work.

2. Under these circumstances, this being a foreign vessel, does the admiralty law give a lien for the material used upon this vessel under the eye of its owner or his agent, for the extra work that has been described? Upon the principles decided in the case of The Grapeshot, 9 Wall. [76 U. S.] 129, this question must be answered in the affirmative: (1) The lumber and timber in question were necessary for the extra repairs, and the repairs were necessary to putting the ship in seaworthy condition. The owner being a

stranger, the agent a stranger, the workman being without money, (2) the credit of the vessel was necessary to be resorted to. (3) The workman who ordered the materials ordered them on the credit of the ship, and the materials were furnished on the credit of the ship. The case of The Eledona [Cases Nos. 4,340 and 4341] differs from the present one in the fact that there was no necessity in that case for a resort to the credit of the vessel. There the mast was furnished to the contractors on their order, not to the master or his crew; and there the price of the mast was actually paid to the contractors by the master, who was supplied with money. Here the materials libelled for were never paid for by owner or master. The master had no money with which to do so. The inference from all the facts is that the owner has none. There has not been from the beginning, and is not now, any source from which payment for the extra materials can come, except the credit of the vessel. This constitutes the very difference between the two cases. There the credit of the vessel was not necessary. Here it was necessary.

I therefore, on the whole case, must decide that the libellants should be paid. Mr. Hardy must recover the whole balance of his bill as claimed. Messrs. Neely & Co. should recover the original amount named, subject to deductions, which bring the amount he may recover to $61. I will so decree.

Case No. 6,063.

In re HARE.

[43 How. Pr. 86.]

District Court, S. D. New York. March 8, 1872.

BANKRUPTCY—TAXATION OF COSTS—MARSHAL'S FEES AND EXPENSES.

[1. Additional allowances should not be made to the marshal, under section 47 of the act of 1867 (14 Stat. 540), unless it is shown that he has performed something beyond his ordinary duties.]

[2. The register's decision disallowing a charge for a watchman, on the ground that no watchman was necessary, reversed by the court, and the item allowed.]

In bankruptcy. In the matter of Utley Hare.

By I. T. WILLIAMS, Register:

I, the undersigned register in charge of the above entitled matter, do hereby certify, that upon the taxation of the marshal's costs therein, I was attended by Chas. H. Wight, Esq., the assignee of said bankrupt, and the said marshal, by his deputy, Oliver Fiske, Esq., who presented for taxation a bill of the items of his said costs and fees, which bill is hereto annexed. That I proceeded to take the testimony of James Turney and Oliver Fiske, which is hereto annexed. That after hearing the respective parties, I taxed and deducted from said bill the following items, to wit:

Copying papers	$ 1 00
Advertising in Commercial Advertiser..	4 50
24 days' custody, from January 29 to February 22d, at $2.50	60 00
Allowance to marshal	25 00
	$90 50

That, as to the said item of $60, and the said item of $25, the marshal excepted to said taxation, and requested that the point be certified to the district judge for decision.

And I further certify, that the reasons for taxing said item of $60 from said bill, are as follows: It appears from the testimony, that the property in question was a quantity of hardware upon the second floor or first loft, of a building, the first floor and the second and third lofts of which were used by other parties for mercantile purposes. That said goods were deemed sufficiently secure at night by locking the door of the room in which they were, the custodian keeping the key. If so secured in the night, it is not suggested that they would not be equally secure under the lock and key in the daytime. The suggestion that business letters that might contain money, drafts or other valuables, are usually directed to the place of business, and might fall into the hands of unreliable persons, in case the marshal's custodian was not there to receive them, is answered by the fact, that if the door of the room were locked the postman would scarcely deliver them to a person outside. Besides, it would be easy to arrange with the postman—for the same man comes to the building every day to deliver letters—to deliver such letters at the marshal's office or elsewhere. But I think, the marshal is bound to deal as economically with property that he seizes under a warrant as if the property were his own, by purchase or otherwise. It cannot, in such case, be pretended, that he would be at the expense of having one man spend his time in watching it for the space of a month or so. He would either lock up the room or box and store the goods. And when it is considered, that the responsibility of the marshal for loss of such goods, is measured by what is called ordinary care, such care as prudent men ordinarily take of their own property, the suggestion of his liability in such a case is absurd. See Browning v. Hanford, 5 Hill, 588; Moore v. Westervelt, 1 Bosw. 357; Jenner v. Joliffe, 6 Johns. 9. It may be suggested that the marshal should be allowed upon this item, a sum equal to what it would have cost to have boxed and stored the goods. In answer to this, it appears that about the 12th of February, the landlord of the premises in which the goods were, obtained possession by summary proceedings, and the marshal was then obliged to, and did, box the goods and store them elsewhere. A bill amounting to $169.33 for thus boxing, removing and storing, is presented to the assignee by McEntree & Co.

I took the testimony of Charles McEntree, a member of said McEntree & Co., and here-

with hand the same to the court, with the bill and vouchers annexed; from which it appears, that McEntree & Co. did this work with the aid of the men of the deputy marshal, and that they paid said deputy $30 for the aid so rendered by his men. If, therefore, the marshal were allowed anything for such expenses, it would be to pay a second time for the same services. Had the marshal in the first instance done this boxing and removing, it would have avoided all pretext of claim for custodianship, and put the estate to no more expense than it has now incurred therefor. The fact that the attorney for the petitioning creditors at the time he handed the warrant to the marshal, expressed the opinion, that it would be necessary to put a man in charge, I don't deem material. He could at best bind but one of the creditors, and I don't think that the marshal can substitute the opinion of the attorney for his own. He must act upon his own official discretion in the execution of the warrant. As to the item, "allowance to the marshal, $25," I don't understand that it is claimed that any extra or unusual services were rendered in the case; none are stated, certainly. If this item is allowed it must be under the provisions of section 47, which is in these words: "For cause shown and upon hearing thereon such further allowance may be made as the court in its discretion may determine." It is clear that something beyond the ordinary duties which a marshal is called upon to discharge in all cases, is here contemplated. I cannot think that the present case is brought within the purview of this provision. As the taxation of the other two items were not excepted to, I need not state why they were rejected.

BLATCHFORD, District Judge. I think it is proper to allow the item of $60, and to disallow the item of $25. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

HARE (STEVENSON v.). See Case No. 13,416.

HARE (UNITED STATES v.). See Cases Nos. 15,302–15,305.

Case No. 6,064.

HARGRAVE v. CREIGHTON.

[1 Woods, 489.] [1]

Circuit Court, S. D. Georgia. April Term, 1873.

CONTRACT FOR PAYMENT OF MONEY—SUIT IN ANOTHER COUNTRY—MEASURE OF DAMAGES.

Where a contract for the payment of money is made in one country, payable in the currency of that country, upon suit brought in another country to recover for breach of the contract, the plaintiff ought to recover such a sum in the currency of the country where the suit is brought, as would be equivalent to the sum to which he would be entitled in the country where the debt is payable, calculated by the real and not the nominal par of exchange.

This case was submitted pro forma to a jury. The only question was upon the amount of the verdict.

Henry R. Jackson, for plaintiff.
R. E. Lester, for defendant.

WOODS, Circuit Judge. This action is founded on several bills of exchange. The following is a copy of one of them: "£166. 13. 4. Manchester, May 2, 1870. Nine months after date, pay to our order one hundred and sixty-six pounds, thirteen shillings and four pence, for value received. Geo. J. Hargrave & Co. To Messrs. Hugh Creighton & Co. 883 Belfast. Payable in London." The other bills are similar, save in amount and time of payment. The bills show that the contracts were made and were to be performed in England. It is admitted that the verdict must go for the plaintiff. The only question controverted is, what ought to be the amount of the verdict? Upon this point plaintiff has introduced the testimony of a witness, who swears that it would require the sum of six thousand and fifty-three dollars and forty-nine cents, to purchase a bill of exchange on London for £1078. 16. 9. This is 26¼ per cent. more than the face value of the bills sued on, and is made up partly in exchange and partly in the premium on gold. The plaintiff claims that he is entitled to this 26¼ per cent., and the defendant denies it.

The question whether, in a case similar to this, the plaintiff would be entitled to exchange, has been decided adversely to the claim in the courts of New York. Thus in Scofield v. Day, 20 Johns. 102, where a promissory note was drawn at Montreal, in the British province of Lower Canada, payable to parties residing in England, it was held, that in a judgment obtained on a note in a court of the state of New York, the plaintiffs were not entitled to any allowance for the current rate of exchange in England at the time of the judgment. So in Martin v. Franklin, 4 Johns. 124, it was held, that when a person in New York purchases goods in England, and is sued here, the creditor can recover the amount at the par of exchange only, and is not entitled to any allowance for the rate of exchange, or for the price of bills on England. The court said, "The debt is to be paid according to the par and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent, and the courts are not to inquire into the disposition of the debt after it reaches the hands of the agent." The same doctrine was held in Adams v. Cordis, 8 Pick. 260, as the proper rule in all cases, except bills of exchange. On the other hand, Mr. Justice Story says (Confl. Laws, §§ 308–310): "When a contract is made in one country and is payable in the

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

currency of that country, and a suit is afterwards brought in another country to recover for the breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the two currencies, or according to the rate of exchange at the particular time existing between them. The proper rule would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not the nominal par of exchange. In all cases, we are to take into consideration the place where the money is, by the original contract, payable; for, wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. Thus, if a note were given in England for £100, payable in England, or, what is the same thing, payable generally, then, in a suit in Massachusetts, the party would be entitled to recover, in addition to the four hundred and forty-four dollars and forty-four cents, the rate of exchange between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. If the exchange were below par, a proportionate reduction should be made, so that the party would have his money replaced in England at exactly the same amount he would be entitled to receive in a suit there." In Cash v. Kennion, 11 Ves. 314, Lord Eldon held that if a man in a foreign country agrees to pay £100 in London upon a given day, he ought to have that sum there on that day, and if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed.

Mr. Justice Washington, in the case of Smith v. Shaw [Case No. 13,107], in a suit brought by an English merchant on account for goods shipped to the defendant's testator, where the money was doubtless to be paid in England, and the question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held that the debt was payable at the then rate of exchange. See, also, Grant v. Healy [Id. 5,696]; Earl of Dungannon v. Hackett, 1 Eq. Cas. Abr. 288; Ekins v. East India Co., 1 P. Wms. 395. It seems to me, not only that the weight of authority, but the weight of reason is with the plaintiff on this question. The defendants agree to pay their debt to the plaintiffs on a day certain, in London. They break their contract, and remove to America, where the plaintiffs are compelled to follow them. Is not the plaintiff entitled to the same fruits of his contract at the hands of a court of justice as if the contract had been kept? And ought the defendants to be allowed, by breaking their contract, to make it any the less valuable to the plaintiff, and ought they to derive benefit from their own wrong in violating their promise by being allowed to pay their debt in a cheaper currency than would have been required had they kept their contract? These questions, it seems to me, should be answered in the negative. The legal tender act cannot affect this question. The point is, what is due from the defendants to the plaintiff on their contract? When that is ascertained, the amount is solvable in currency. Let the verdict be for $6,053.49, the amount claimed by plaintiffs.

HARGRAVE (UNITED STATES v.). See Case No. 15,306.

H. A. RICHMOND, The (FITZGERALD v.). See Case No. 4,839.

HARKER (UNITED STATES v.). See Case No. 15,307.

Case No. 6,065.

HARKEY v. TEXAS & P. RY. CO.

[1 Tex. Law J. 116.]

District Court, W. D. Texas. Dec. 1, 1877.

CARRIERS—INJURIES TO PASSENGER—RAILROAD PLATFORMS—DAMAGES.

[1. A railroad company is bound to the highest degree of care and skill in the construction of its platforms for the safety of passengers in getting on and off its trains. But it is only required to build platforms of sufficient dimensions to accommodate the passengers getting off or on at the particular station; and if the platform is safe, and constructed according to the opinions of persons skilled in such matters, the fact that it might have been made more convenient will not render the company liable for an accident. The laws require safety rather than convenience.]

[2. A passenger injured by the fault of a railroad company is entitled to reasonable actual damages, in determining which the jury may look to the medical and all other expenses resulting from the injury, the time lost by plaintiff, and the value of his services while disabled, and the nature and extent of his injuries.]

At law.

DUVAL, District Judge (charging jury). The plaintiff brought this suit in the district court of Kaufman county, on January 25, 1876, and it was subsequently transferred in accordance with law, and filed in this court on the 31st of October, 1876. Its object is to recover damages for personal injuries alleged to have been received by the plaintiff, while being conveyed as a passenger on the defendant's road between Mineola and the city of Dallas, on or about the 30th day of December, 1875. Plaintiff avers that the injuries of which he complains occurred at a depot on said road called "Terrel," at night, after the train had stopped for supper, and that they resulted from a failure on the part of said defendant to furnish a proper and safe platform for the ingress and egress of passengers at that point to and from the trains, and a want of proper lights to enable passen-

gers to see their way in and out of the same, together with their failure to stop said trains, all of which he charges were acts of negligence on the part of said company. Plaintiff further avers, on the occasion stated, the defendant, by its officers, deceived him by inducing him to believe that the train would stop at the passenger depot to take on passengers, thus causing him to wait at that point, until said train should move up to it, and when the same did so move, it failed to stop, and that plaintiff, seeing this, attempted to get on the same, which was then going at the rate of four or five miles an hour, and in this attempt received the injuries complained of.

The defendant denies all the allegations of the plaintiff, and by special answer avers, that on the occasion referred to, the train stopped at Terrel station about 8 o'clock, p. m., for the space of thirty minutes or more, to enable passengers to get their supper, when the ordinary usual time for this purpose was twenty minutes, and that after the expiration of thirty minutes or more, the train backed off of the main track upon the side track to allow the down train from Dallas to Marshall to pass; that before doing so, the train had remained at the platform where it first stopped more than ten minutes over the usual time, thus giving the passengers more than sufficient time to get supper and resume their seats, before backing out to the side track; that the plaintiff failed to avail himself of this opportunity, and that when the train returned to the main from the side track, it was moving quite rapidly when it reached the platform where the plaintiff was standing, and that while in such rapid motion he attempted to board the same, and thus received his injury. And so the defendant avers that such injury did not result from any negligence or want of care of the company or its officers, but solely and entirely from the negligent and reckless conduct of the plaintiff himself.

This is the case, substantially, as presented by the pleadings of the plaintiff and defendant, and it is for the jury to determine to what extent they are respectively supported by the evidence before them.

The defendant, in this case, is a corporation and public carrier, and I instruct the jury, that as such, it is bound to the highest degree of care and skill in the construction of its road and road-bed, including platforms for the convenience and safety of passengers in getting on and off its trains, also the like care and diligence in the selection of its employés, officers and agents in the management, maintenance and operation of its road and trains, and to employ prudent and skillful agents and officers who are bound to observe and faithfully carry out all laws, customs and instructions imposed upon them by the laws of the state, or by the company itself, for the protection, care and safety of the passengers who may be carried over its road.

If the jury believe from the evidence that on or about the 30th day of December, 1875, it was usual and customary for the west bound passenger train of the defendant, when it reached Terrel at its regular time, as prescribed by its time card, to wait on the main track of the defendant's railway, at or near the passenger platform for the space of twenty minutes, to enable passengers desiring to do so to get their supper, and that passengers (including the plaintiff in this suit) on the west bound train of that day were informed that twenty minutes would be allowed them for supper; and if you believe from the evidence, that on that day, the said west bound passenger train of the defendant did, in fact, remain twenty minutes or more on the main track at or near the passenger platform at said station before backing down to get on the side track, and after so remaining for said time on said main track, did then back down and go on the side track, and after the passage of defendant's east bound train for that day, did then back out and go forward, west on the main track, without stopping, and that the plaintiff having failed to return to and take his seat on the cars before the expiration of the twenty minutes above referred to, did attempt to get on the defendant's west bound passenger train when the same was going at a rate of speed rendering it imprudent and incautious on his part; and if you further believe, from the evidence, that the plaintiff's attempt to get on the cars, under the circumstances, produced, or contributed to produce the injury complained of, —you will find for the defendant.

If the jury believe, from the evidence, that at or about the time of the injury for which the plaintiff sues, it was usual and customary for the defendant's passenger train from the east, bound west, to stop on the main track of defendant's railway a sufficient time for all passengers who desired to do so to get supper, and then, after said passengers had taken supper, it was usual and customary for said train to back down off the main track, so as to allow the passenger train of the defendant from the west, bound east, to pass, and then, after said east train had passed, it was usual and customary for said west bound passenger train to back off the side track, and then go forward on the main track without stopping; and if you further believe, from the evidence, that the defendant's train, bound west, on the 30th day of December, 1875, did conform to what was then usual and customary, as above stated, and did stop on the main track, as above specified, a sufficient length of time for the plaintiff to get his supper; and if you further believe, from the evidence, that the conductor of the defendant's west bound passenger train on that day did not assure the plaintiff that the train would stop a second time on the main track after the east bound passenger train had passed; and if you further believe from the testimony, that the defendant was guilty of

no negligence or omission of duty on this occasion, and that while said west bound train was in motion, at such a rate of speed that an attempt to board it would have been rash and imprudent, and the plaintiff did then attempt to get on board, and in doing so received the injury for which he sues,—then you are instructed that such injury was from his own act, and you will find for the defendant. It is not enough for the plaintiff to show that the defendant was in fault, or was guilty of negligence. This the plaintiff must do to your satisfaction by competent evidence, before he can recover at all. But if you are satisfied, from the evidence before you, even if the defendant was guilty of negligence, that the plaintiff's careless, rash and imprudent conduct produced, or contributed to produce, his injury, then you will find for the defendant.

Under these circumstances you will find for the plaintiff or defendant. If for the plaintiff, you may consider what amount he ought to have, under all the evidence, as reasonable, actual damages, and in determining this, you may look to the amount paid for medical attention, and all other expenses incurred by the injury; to the time lost by plaintiff, and the value of his services while disabled from labor; the nature and extent of the injury received by him, and all the evidence before you on this subject.

The following additional charge was asked by counsel for defendant, which the court permitted to go to the jury:

The defendant was only required to build a platform of dimensions sufficient to accommodate the passengers getting off and on the cars at Terrel station. If the platform was safe, and constructed according to the opinion of persons skilled in such matters, the fact that one might have been constructed making it more convenient for persons to get on and off the cars will not make the company liable. Railroad companies, by law, are required, in building their structures, to look to the safety rather than convenience of passengers.

HARKNESS (MONROE v.). See Case No. 9,715.

Case No. 6,066.

HARLAN et al. v. The NASSAU.

[Blatchf. Pr. Cas. 199.] [1]

District Court, S. D. New York. July 29, 1862.[2]

ADMIRALTY—PRIZE OF WAR—PRIVATE LIENS SUPPLANTED.

1. A motion being made by the libellants in a private suit for the sale of the vessel as perishing, and it appearing that the vessel was under capture as prize of war, the motion was denied.

2. The capture as prize overrides and supplants all private liens.

[See note at end of case.]

In admiralty.

BETTS, District Judge. Mr. Williams, for the libellants, moves the court, on the service of copies of affidavits and notice of motion upon the proctors for the claimants of vessel and cargo, for an order directing her immediate sale, because of the perishing condition of the ship. The United States district attorney intervenes, and informs the court that the vessel and cargo are under capture by the United States as prize of war, and were committed to the custody of the prize commissioners in this port as such, on the 2d day of June last, by a prize-master, who brought the said vessel from sea into this port for that purpose. A certificate of the prize commissioners, under their seal of office, dated June 27, 1862, verifying that fact, is laid before the court, and the district attorney objects to the competency of any private suitors to interfere with or molest such military possession, except through the authority of the prize court.

The property vests primarily in the sovereign, and is held by him in trust, in a state of abeyance as to the right of property, or in a state of legal sequestration, until the right is passed upon by the prize courts of the country of the captor. 1 Kent, Comm. 101, 103. The capture as prize overrides and supplants all claims of private liens. Wheat. Mar. Capt. p. 80, art. 15. And whether the seizure of the property is one of prize or not, is exclusively a question under the cognizance of the prize court in the first instance. Jennings v. Carson, 4 Cranch [8 U. S.] 2. This motion, therefore, cannot be sustained against the legal possession of the vessel as prize of war. Motion denied.

[NOTE. An appeal was then taken to the circuit court by the claimant, where the judgment was affirmed in an opinion by Mr. Justice Nelson, who held that the seizure of the vessel as a prize of war discharged all liens. Case No. 10,028.

[See, also, Cases Nos. 6,067, 10,025–10,027, for other cases bearing on the seizure of this vessel.]

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

[2] [Affirmed in Case No. 10,028.]

Case No. 6,067.

HARLAN et al. v. The NASSAU.

[Blatchf. Pr. Cas. 220.] [1]

District Court, S. D. New York. Sept. 30, 1862.

ADMIRALTY—PRIZE OF WAR—NOT ATTACHABLE IN PRIVATE ACTION.

In this case, after the vessel had been libelled as prize, a libel on the instance side of the court was filed against her to recover a private claim. The court dismissed the latter libel, holding that the case was under the exclusive jurisdiction of the prize court: that the vessel, while under arrest as prize, could not be attached in a private

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

action, and that relief must be sought in the prize court.

[Cited in Re People's Mail Steamship Co., Case No. 10,970.]

In admiralty.

BETTS, District Judge. The libellant sued out a libel on the instance side of the admiralty court, and had this vessel attached thereon on the 17th of June last. After the arrest of the vessel, the libellants, demanding a debt or lien against the vessel as private creditors, moved the court for an interlocutory order of sale, because of its perishing condition. The United States intervened in the suit, alleging that the vessel had been seized by the government as prize of war, and was in their actual custody, under that seizure, at the time of the service of the attachment in this cause. Mr Edwards also appeared for a private claimant of the vessel. Objection was taken by the intervening parties to the right of libellants to prosecute the vessel in admiralty while she is held in actual custody by the United States as prize of war. The motion referred to was heard and denied by the court on the 1st of July last, on the ground that the instance court could not take cognizance of a prize capture, and that the remedy of the libellants, if any they had, must be first sought in the prize court, and under its jurisdiction. On the 22d of September, instant, the case was again brought before the court by the claimant in this action to have the libel dismissed, and by the libellants, in effect, to obtain a reversal of the former decision of the court, and a decree establishing the validity of this suit, notwithstanding the prize action and seizure also pending over this vessel.

The counsel for the libellants has been indulged in an elaborate and prolonged argument in maintenance of various legal propositions advanced by him in support of his action, but it does not seem to me that the court is called upon to consider the validity of the legal positions taken, or their applicability to the case in hand. The points rest upon the assumption that the condition of the hostilities in which the nation is involved is not a war in the sense which renders the property of neutrals employed in hostile acts against the United States, by carrying on trade with the insurgents, or aiding or assisting them in this warfare, or the property of our own citizens seized at sea and intended to be used for their benefit, subject to capture and condemnation by public or municipal law. The court remarked to the counsel, on the opening of this argument, that it seemed quite useless to go into those questions as being open to discussion in this court on its instance side, in the existing posture of the subject; that, in the earliest sessions of the court on cases of prize judisdiction, these matters were all brought up and debated by eminent counsel in a series of suits, and were carefully considered by the court and decided; the cases involving all the questions offered for renewed discussion were in the course of immediate revision and final determination before the circuit court of this district and the supreme court in full bench; and that this court could not after administering the law in that acceptation of it for eighteen months, upon the strength of any argument at bar, reverse its former judgments, but would adhere to them until they were acted upon by the higher courts. The counsel still persisted in his anxiety to deliver the argument prepared by him in the case, and, after a careful perusal of the synopsis of it published in the papers, at the same time recalling, so far as practicable, the impressions made by it at the hearing, the court sees no legal reason to surrender its convictions upon the questions involved in the case.

I therefore hold, that the matter charged in the libel presents a case within the jurisdiction of the prize court; that the libellants in this case have no authority in law to attach, in a private action, a vessel or her cargo which is under arrest as prize, and is within the cognizance of the prize court; and that, if the libellants have any legal or equitable demand against the vessel proceeded against in the prize court, the remedy must be sought in that tribunal.

It is ordered that the libel be dismissed, with costs to be taxed.

[See Cases Nos. 6,066, 10,025–10,028, for other cases bearing on the seizure of this vessel.]

Case No. 6,068.

HARLEY et al. v. FOUR HUNDRED AND SIXTY-SEVEN BARS OF RAILROAD IRON, Etc.

[1 Sawy. 1.] [1]

District Court, D. California. Jan. 6, 1870.

SALVAGE CONTRACT BY MASTER SUSTAINED — ADDITIONAL COMPENSATION REFUSED.

A contract, made by the master with salvors, for the recovery of the cargo of a sunken vessel, sustained.

[This was a libel brought by Charles Harley and others to recover compensation for salvage service.]

McAllisters & Bergin, for libellants.

Samuel M. Wilson, for claimants.

HOFFMAN, District Judge. There can be no question that the vessel and property saved were in a condition to be the subject of salvage service. The vessel had foundered and had sunk with her cargo to the bottom of the bay. The Reward, 1 W. Rob. Adm. 174; The Princess Alice, 3 W. Rob. Adm. 138; The Emulous [Case No. 4,480]; Bearse

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

v. Three Hundred and Forty Pigs of Copper [Id. 1,193]; The Centurion [Id. 2,554]. Nor does the fact that a contract was made, stipulating for the rate of compensation, to be paid in the event of and proportionate to the degree of success, affect the character of a salvage service.

Parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted, and such agreements, if fairly made, and no advantage be taken of ignorance or distress, are readily upheld by the courts. The Independence [Case No. 7,014]; The Emulous [supra]; Bearse v. Three Hundred and Forty Pigs of Copper [supra]; The A. D. Patchin [Case No. 87]; The True Blue, 2 W. Rob. Adm. 176; The Henry, 2 Eng. Law & Eq. 564.

It is claimed by the salvors that their agreement was made under a misrepresentation of the facts, and that the service was more arduous and expensive than they had a right to anticipate. But it does not appear that any willful misrepresentation was made to them as to the position of the vessel. The precise depth of water in which she lay, and especially her position on the bottom in water twenty-five or thirty feet deep, were necessarily matters of conjecture, and the libellants, before entering into their contract, might have visited the wreck, ascertained its position, and estimated the chances and probable expense of the service.

Had she been found in shallower water, or more favorably situated than they supposed, they would hardly have consented to an abatement of the contract price. They cannot now demand an enhancement of it because the contrary has proved to be the case. But, even if the contract could be set aside, the libellants would thereby gain no advantage. Besides the railroad iron libelled in this case, the vessel herself was also saved, and restored to her owners. The saving of vessel and cargo constituted but one transaction—the former being dependent, to a great degree, on the previous success of the latter.

If the contract be set aside, the salvors will be entitled to a just compensation for the whole service to be paid by the owners of the vessel and cargo, in proportion to their respective interests. In that case they could only recover in this action the proportionate share of the total reward due from the cargo which has been libelled. This would certainly not exceed the amount agreed in the contract to be paid.

If, in this case, it had appeared that the master of the vessel had used the powers entrusted to him, to enter into an agreement by which the whole cost of saving both cargo and vessel should be thrown upon the owners of the former, and the vessel restored to her owners substantially without charge, I should not hesitate, notwithstanding that the master has a general authority to enter into contracts of this description, to pronounce the contract void, and not made in the execution of the master's duty to act fairly and impartially for the best interests of all concerned—the owners of the cargo as well as the vessel.

But I do not find any evidence that the amount of salvage agreed to be given was excessive, or beyond what might reasonably have been demanded if the saving of the cargo had been the sole object of the salvors' exertions. The proofs show that in point of fact the salvors' compensation will not cover their expenses, or at best will leave them but a slight and insufficient compensation.

I am not prepared to say, that if their reward were to be estimated upon the aggregate value of cargo and vessel, the share due from the former would be less than the compensation stipulated for in the contract. Had the owners of the cargo, on being apprised of the disaster, revoked the master's authority to contract for its salvage, and notified the proposed salvors that they would themselves undertake its recovery, and would not be bound by any agreements entered into by the master, the case might have been different. But no such steps were taken, and the salvors were permitted to undertake the service, incur large expenses, and encounter the risks of failure, without opposition or objection on the part of the owners of the cargo. I am also inclined to think, that had the latter undertaken the service, it would have been found nearly or quite as expensive as under the contract. But this, as I am not informed what were the means of effecting the service at the disposal of the owners of the cargo, is merely a conjecture.

Under all the circumstances, my opinion is that the libellants are entitled to recover the compensation agreed upon in their contract, and no more. As there seems to be some misunderstanding or confusion as to the precise number of tons of iron saved and delivered to the owners by them, a reference to ascertain that number may be taken, or the advocates of the respective parties may appear before the judge in chambers, and establish the facts.

Case No. 6,069.

HARLEY et al. v. GAWLEY et al.

[2 Sawy. 7.][1]

District Court, D. California. April 17, 1871.

MISCONDUCT FORFEITS RIGHT TO SALVAGE.

Where, by the law of the state [Laws Cal. 1850–53, p. 134], it was provided that any person who shall take away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, * * * and shall not within four days deliver them to the sheriff, etc., shall be guilty of a misdemeanor, etc., etc.; and the libellant having recovered an anchor and chain which had been lost in the Bay of San Francisco, and

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

failed to deliver them to the sheriff, or to libel the same for salvage; but sold the anchor and appropriated its proceeds, and the anchor was subsequently surrendered by the purchaser to the owner, who also recovered the chain from the salvor; and the latter filed his libel in personam to recover a salvage compensation; *held*, that he had by his misconduct forfeited all right to a salvage compensation.

[Cited in U. S. v. Stone, 8 Fed. 251.]

[This was a libel for salvage by Charles Harley and others against William Gawley and others.]

McAllisters & Bergin, for libellants.
Milton Andros, for respondents.

HOFFMAN, District Judge. This was a libel for salvage. It appears that the master of the bark Tidal Wave, having lost his anchor in the bay, employed the libellant to search for and recover it; for which service, if successful, he was to receive $140.

An expedition was accordingly fitted out at considerable expense, and, after some three weeks' search, the anchor and chain were recovered. They were found, however, as the libellant states, a mile and a half from the place where he had been informed they had been lost, and the anchor was so covered with long grass as to make him suppose it had been in the water a much longer time than the five or six weeks which had elapsed since the loss of the Tidal Wave's anchor. The chain was taken to the junk-shop of the libellant, and the anchor was left in an open space at the corner of Market and California streets, where it lay for two months; when it, together with the chain and all the other anchors and chains in the libellant's possession, was sold. Before, however, the purchaser had taken possession of the anchor, it had been removed by the respondent, who claimed it to be his.

The libellant testifies that he did not know to whom the anchor belonged. He subsequently acquiesced in the respondent's claim of property, and restored to him the chain, which had been delivered to the purchaser. He now brings this suit to recover salvage compensation.

This claim is resisted on the ground that the salvors have lost all right to their reward, by converting the property to their own use, and by omitting to proceed against it in court and submit their claims to its adjudication, and by omitting to deliver it to the sheriff, as required by section 25 of the act of the legislature of this state, approved April 10, 1850. That section is as follows: "Every person who shall take away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek; or shall knowingly have in his possession any goods so taken or found, and shall not deliver the same to the sheriff of the county, where the same shall have been found, within four days after the same shall have been taken by him, or have come into his possession, shall forfeit treble the value of the goods so taken or found, and shall be deemed guilty of a misdemeanour punshable by fine and imprisonment, etc.

It is contended on the part of the libellant that this section only applies to "wrecks of the sea" strictly so called, i. e., property cast upon the shore, and not to goods found on the bottom of a bay or river, wholly submerged in the water.

To this point Baker v. Hoag, 3 Seld. [7 N. Y.] 555, is cited. In that case a lien was claimed under the state statute "of wrecks," on certain wool found in a canal boat which had been sunk and abandoned in the Hudson river. It was held that the statute referred exclusively to property known at common law as wrecks, i. e., to such goods as are after a shipwreck cast by the sea upon the land, and left there within some county, for they are not "wrecks" so long as they remain at sea within the jurisdiction of the admiralty. But the plaintiff's lien was sustained as a valid lien for salvage under the maritime law. The California statute is nearly identical with that of New York. The first section renounces any right of property, similar to that possessed in England by the crown, to ships, vessels, boats, goods, wares, and merchandise "cast by the sea upon the land." The subsequent sections speak merely of "wrecked property."

But it is by no means clear that the term "wrecked property" should be taken to refer exclusively to what was known as wrecks at the common law. Anciently, all property cast after shipwreck by the sea upon the land was considered wreck, and adjudged to belong to the king. But, by the statute of Westminster (3 Edw. I. c. 4), the rigor of the common law was relaxed, and it was enacted that, if a man, dog, or other animal escape alive out the ship, it shall not be wreck. But even this absurd and unjust limitation upon the owner's right to recover his property was repudiated by Lord Mansfield, who declared that the whole inquiry was a question of ownership; that the coming ashore alive of a dog or a cat was not better proof of ownership than if they had come ashore dead; and that, if no owner could be discovered, the goods belonged to the king, and not otherwise. Hamilton v. Davis, 5 Burrows, 2732. By the laws of the states of this country, the ancient rights of the crown to waifs, estrays, lost money, goods, wrecks, etc., have been generally renounced. In some of the states, the proceeds, if unreclaimed for a year, are divided between the finder and the poor of the town. In some, the expenses only of the finder are deducted; while in others, as New York and California, the proceeds of shipwrecked goods, after allowing a reasonable salvage are paid into the public treasury.

It seems, therefore, most reasonable to construe the California statute as renouncing, by its first section, any sovereign rights of the

people of the state to property, which, as technically wreck, might have been supposed to belong to them, as against the true owner; but in the subsequent sections, as intending to provide for the custody, preservation, and restitution to the owner, in case he appeared, or the final distribution of its proceeds, if unclaimed, of all property which, in consequence of any marine disaster, might have been lost or abandoned. And this, whether it was a wreck in the technical sense of the term, or was flotsam, jetsam, or ligan; or an anchor abandoned by a vessel in a tempest, with no buoy attached, which at common law would be neither "wreck," "flotsam," or "ligan," and perhaps not "jetsam," though contributed for like jettisoned goods in general average.

But any doubt as to the construction of the statute is dispelled by the 25th section. That section provides, as we have seen, "that every person who shall take away any goods from any stranded vessel" (it may be on a rock or reef unconnected with the shore), "or any goods cast by the sea upon the land, or found in any bay or creek, and shall not deliver them within four days to the sheriff, shall be deemed guilty of a misdemeanor," etc., etc.

The anchors in this case were found in this bay, and if, as the libellant asserts, he did not know to whom they belonged, it was his duty under the statute to deliver them to the sheriff to be disposed of according to law, or at least to proceed against them in this court and submit his claim for salvage to its adjudication. He had no right whatever to dispose of them at private sale without notice to any one, and with the evident intention of appropriating their entire proceeds.

The jurisdiction of this court over the case either as a suit in rem against the goods salved, or in personam against the owner who has received his property, is not disputed. The Hope, 3 C. Rob. Adm. 215; The Trelawney, Id. 216, note. But the court is asked to apply to this case the rigorous, but wholesome rules of the admiralty which deny to salvors, no matter how meritorious, all compensation when guilty of misconduct or bad faith.

The most usual case for the application of this rule is when an embezzlement has occurred; but any misconduct, such as false representations made for the purpose of exaggerating the danger or hardiship of the service, and to enhance the reward—spoliation, smuggling, an obtrusion of unnecessary services, a refusal to accept necessary or needful assistance, will be punished by a total, or partial, forfeiture of compensation. Lewis v. Elizabeth & Jane [Case No. 8,321]; [The Bello Corrunes] 6 Wheat. [19 U. S.] 152; The Boston [Case No. 1,673]. And see cases cited in Fland. Mar. Law, pp. 346, 347, and Jones, Salv. p. 124 et seq.

In the case at bar, I see not how the libellant can be acquitted of flagrant misconduct. He has committed a violation of the law of the state, which exposes him to punishment as for a misdemeanor. He has attempted to appropriate property which he knew not to be his, and it was only when it was accidentally discovered and reclaimed by the owner that he has sought the aid of this court to obtain a compensation.

A due respect for the laws of the state within which this court sits, as well as for the principles of justice and policy on which those and similar laws throughout the United States are founded, forbid the court to look with any indulgence upon so flagrant a violation of their salutary provisions. And if it be true, as suggested at the hearing, that the practice of appropriating in violation of the law, and in entire disregard of the owner's rights, anchors, chains, and other property found derelict in this harbor, is extensively pursued, an additional reason is furnished why persons so engaged should be admonished of their own duties, and taught to respect the rights of others. The libel must be dismissed.

HARLEY (MOORE v.). See Case No. 9,764.
HARLEY (OREN v.). See Case No. 10,567.

Case No. 6,070.

In re HARLOW.

[10 N. B. R. 280.] [1]

District Court, D. Maine. 1874.

BANKRUPTCY—PLEDGE—WAIVER OF LIEN BY SURRENDER.

H., the bankrupt, was indebted to R. for rent of store and otherwise, and in order to secure the debt, gave R. an absolute bill of sale of a silver cornet, which musical instrument he delivered to R., telling him he could hold it as long as he stayed on the premises and until the rent was paid. Subsequently H. borrowed the cornet to use, and agreed to return it after using it, but had the exclusive possession of it several months before he went into bankruptcy. On petition of R. to have his lien upon the cornet enforced, etc., *held*, that he had waived and surrendered whatever right he might otherwise have had under the bill of sale: that the transaction was a pledge and not a mortgage.

By CHARLES HAMLIN, Register:

The petitioner, Ramsdell, has filed his petition before the court, alleging, in substance, that he rented, October 1, 1871, to said bankrupt, the westerly half of his store, No. 3 Kendusheag Bridge, Bangor, to be used as a jeweler's shop, at the annual rent of five hundred dollars, to be paid in monthly installments of forty-one dollars and sixty-seven cents each, as fast as the same should become due; that the bankrupt became his tenant, as aforesaid, and remained such tenant up to the time of his filing his petition in bankruptcy, viz., August 13, 1873. He also alleges, that the rent was not paid according

[1] [Reprinted by permission.]

to the stipulated terms, but that the bankrupt suffered it to run in arrear, until the 1st of June, 1872, when it amounted to one hundred and fifty dollars, or nearly four months rent; and that he then owed the petitioner besides, on account of certain fixtures, fourteen dollars more; and that the bankrupt, June 5, 1872, executed and delivered to the petitioner an absolute bill of sale of a certain silver cornet with gold trimmings, valued at three hundred and fifty dollars, and thereupon delivered the cornet into the hands and possession of the petitioner, to be held as security, as well for whatever thereafter might be due, on account for rent and otherwise, as for what was then due for rent and on account, which bill of sale and cornet was accepted and received and delivered as aforesaid; and that the bankrupt afterwards borrowed the cornet, to use on some special occasion, agreeing to return it immediately after to the petitioner, since which time he has been unable to obtain possession of the same. The prayer of the petition, after reciting the proceedings in bankruptcy, and stating that petitioner's claim against the estate amounts to three hundred and forty-five dollars and seven cents, asks, that his rights under and by virtue of said bill of sale may be adjusted and secured, to the end that his claim against the bankrupt's estate may be satisfied, etc. The assignee having been duly notified of the pendency of this petition, the court thereupon ordered the same to be referred to the register to investigate and report upon the facts and his conclusion as to the rights of the parties in the matter. A hearing has been had of parties. The assignee filed his answer to the petition, and in the answer sets up for his defense: First, that the bill of sale is fraudulent and void against the assignee, because it was made for the express purpose, between the bankrupt and this petitioner, of being a fictitious and colorable sale or transfer of said instrument, and to secure and save the same from attachment, or liability to attachment, as the property of the bankrupt, who was then largely in debt, unable to meet his payments, and threatened with suits and attachments; second, that the petitioner has fully surrendered and effectually waived whatever right or interest he had to the instrument or cornet by or through the bill of sale; and third, that any liability which at any time may have subsisted on the part of the bankrupt to the petitioner by virtue of the bill of sale has been fully discharged and paid in money and goods. Testimony of the petitioner, bankrupt, and other witnesses, was adduced on all of the questions thus raised, and an examination had of their accounts and other documentary evidence, all of which appear in the depositions returned to court.

The case, as disclosed upon the petitioner's showing, is found almost entirely in the first part of his deposition, pp. 1 and 2. There is no controversy between the parties but that the bankrupt became the petitioner's tenant October 1, 1871, at the agreed rent of five hundred dollars per annum, nor of the execution of the bill of sale, which is as follows: "Bangor, June 5, 1872. J. W. Ramsdell bought of A. D. Harlow one gold and silver instrument. $350.00. Received payment, A. D. Harlow."

The petitioner says, in answer to the (2) question, "When and where was the bill of sale given, and for what purpose?" that "It was given at my store, at the date it purports to be given. It was given to secure me on rent of the west half or side of my store while he (the bankrupt) remained in there." And in answer to the question (3) "How the bankrupt happened to secure him in this way, and whether the cornet was delivered, etc.," he testifies: "I spoke to him frequently about rent. He was some three or four hundred dollars behind hand and kept promising to pay me so and so, but failed to do so. I asked him if he would secure me on that instrument? He said he would, and produced the bill of sale. He delivered it up to me and I put it in my safe. He was to pay me five hundred dollars per annum rent. It began on October 1, 1871. Directly after he gave me the bill of sale he asked me if he could borrow the instrument to use on the street. I told him he could if he would return it to me again, as soon as he had got done with it. He used it several times and returned it to me again as soon as he had got done with it. Have not had it in my possession since last May, I think. He has kept it since. He gave me the bill of sale at the time I requested him to give me security on the instrument. Couldn't say that any one else was present." In answer to the (4) question, "Whether the bankrupt owed him on account aside the rent, and what was said about securing that as well as the rent," he says: "He was owing me a small account besides the rent. * * * It was not mentioned at the time he gave me the bill of sale whether it was for security on the other account besides the rent. I presented my bill against him for the rent he owed me, and the security was for what he owed me. He said, I could hold the instrument as long as he stayed there and until the rent was paid." The petitioner has treated his case as one of an equitable mortgage in his argument, and claims that between himself and the assignee there is no necessity of retaining possession of the property mortgaged, nor recording the bill of sale; but the transaction, as stated in his petition and testimony, shows it to be a pledge and not a mortgage. The distinction between a mortgage and a pledge will always be observed both in equity and law. A slight examination of the testimony of the petitioner will show, first, there was no

condition of defeasance (4 Kent, Comm. 138), and, second, there was no fixed time within which the debt was to be paid and the property redeemed thereby (Cortelyou v. Lansing, 2 Caines, Cas. 200). Ramsdell distinctly states, near the close of his answer to the fourth question, that at the time of the execution of the bill of sale the bankrupt said "he could hold the instrument as long as he stayed there and until the rent was paid." There is no evidence to indicate when the rent was to be paid, or when it was necessary for the bankrupt to redeem the property, in order to prevent the petitioner's interest from becoming absolute. Third. There is nothing in the evidence tending to show that the petitioner has more than a special property in the cornet. He held it as security until it should be relieved by the payment of rent, and there is nothing to indicate how long, if the rent was not paid, it would take for the property to become petitioner's absolutely; or that the whole legal title passed, or was intended to pass, to the petitioner, as in the case of a mortgage. In order to make a mortgage out of the transaction, it is incumbent on the petitioner to show that it is more than a pledge, and that the legal title passed to him, and this he has not done. As is said by the court in Jones v. Baldwin, 12 Pick. 319, "there is no evidence to show that the transaction was intended as a mortgage rather than a pledge, and it cannot so operate unless it can be made to appear that it was the intention of the parties that the legal property should pass, liable to be defeated by the performance of the condition." In this case the transaction was held to be a pledge. See, also, Hazard v. Loring, 10 Cush. 267, and Newton v. Fay, 10 Allen, 505. Finally, it appearing that the petitioner having voluntarily surrendered the possession of the pledged property into the hands of the bankrupt months before the proceedings in bankruptcy were instituted, must be held to have waived his lien and takes nothing by this petition. In re Mitchell [Case No. 9,657].

No opinion is given on the other questions raised.

FOX, District Judge. The court having read all the testimony taken before the register, and the arguments of counsel and the report of the register, doth order and decree that the petition of said John W. Ramsdell be dismissed, he having relinquished and surrendered any right he might otherwise have had to the cornet under the bill of sale to him from the bankrupt, bearing date June 5, 1872, but without costs to either party.

HARLOW (CROWELL v.). See Case No. 3,444.

HARLOW (EARLE v.). See Case No. 4,246.

Case No. 6,071.

HARMAN v. HARMAN.

[Baldw. 129.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

DECREE OF DISTRIBUTION — REFUNDING BONDS — POWER OF ATTORNEY TO EXECUTE — SEAL.

1. On a decree of distribution it was ordered by this court that the complainants, residing in France, should give refunding bonds with security, pursuant to the act of 1794 [3 Laws Pa. p. 149], concerning intestate estates.

2. Bonds executed here, in virtue of a power of attorney executed in France before a notary, according to the law of that country, but not under the seal of the complainants, were held not to be such as were required by the law of this state.

[Cited in Cook v. Moffat, 5 How. (46 U. S.) 315.]

3. The seal of a party is necessary to give a paper the effect of a bond in preventing the bar of the act of limitation, and giving it priority as a specialty in paying the debts of a decedent.

By a former decree in this case the court had directed refunding bonds to be given by the complainants, who resided in France. They executed a power of attorney, before a notary in France, according to the forms of the civil law, authorizing their agents here to execute bonds pursuant to the order of the court; but the instrument was not under the seal of the parties. Whereupon, a question arose whether the bonds executed under such authority would be valid under the law of this state of April, 1794, sections 15, 16. This law provides that every person to whom distribution of an intestate's estate shall be decreed shall give bond, with sufficient securities in the orphan's court, to refund to the administrator the amount of any debts which may be afterwards recovered against him.

Mr. Laussatt and Mr. Duponceau contended, that the seal of a stranger may be used by the party; and that one seal is sufficient, though many execute the deed, if they all adopt it (4 Com. Dig. tit. "Fait," A, 2, p. 273); and that the parties in this case had adopted the seal of the notary; but that no seal was necessary, inasmuch as the power of attorney was sufficient by the law of France to authorize the execution of sealed instruments. The bonds so executed were therefore valid by the laws of Pennsylvania, in which the law of nations was in force as part of her jurisprudence ([Respublica v. De Longchamps] 1 Dall. [1 U. S.] 114); that it was a principle of that law, that all contracts depended for their validity on the law of the place where they are executed (Henry, Foreign Laws, 48, c. 48, § 1); as also the form in which they were executed (5 Pard. Droit. Comm. 252, pt. 6, tit. 7, c. 2, § 2); that no seals were used in France; and all contracts and

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[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

instruments executed before notaries in France were considered as if they had been done before the highest judicial authority (1 Perfect. Not. 7); and this being the law of the domicil of the complainants, it applies in all questions relating to personal property in Pennsylvania (Desesbats v. Berquier, 1 Bin. 348).

Mr. Binney, on the other side, contended, that the act of assembly was binding on the court, which requiring a bond with securities, no other instrument could be accepted; there can be no bond without a seal, nor can one bind another by a sealed instrument, unless by an authority under the seal of the principal. Shep. Touch. 57, 58, 217; 6 Term R. 176; 7 Term R. 207; 5 Barn. & C. 355; Holt, N. P. 141. The bond must be so executed that the courts of this state can sustain a suit upon it, as a sealed instrument or specialty, to which a seal is indispensable. Taylor v. Glaser, 2 Serg. & R. 504. In this state the sealing is not a matter of form, as a debt secured by a specialty has a preference, in payment, out of the estate of a decedent, and is not within the act of limitations. The parties have not put their seal to this power of attorney. The only seal affixed to it is that of the notary, without any certificate that it was adopted by the parties as theirs. Foreigners coming here to sue in our courts, must comply with the forms prescribed by the law of the forum, as to the remedy; they have obtained a decree for distribution, because the law of this state gives them a right, not because they are entitled by the laws of France or of nations. They must therefore give such bond and security as is recognised by the law here, or they do not comply with the terms of the decree.

BALDWIN, Circuit Justice. We have no doubt that the power of attorney is executed in the form, and with all the solemnities required by the law of France, where the parties are domiciled; nor that any writing made under its authority would be binding upon them here, as a contract, to the same extent as it would there. The general proposition, that the validity of a contract depends on the law of the country in which it is executed, is undeniable, unless it is to be performed elsewhere; the forms of execution are also governed by the local law of the contract, on which it depends whether a seal is necessary to give it efficacy or not. But when an instrument is executed in one country, with reference to the laws or judicial proceedings of another, it must be executed with the formalities prescribed in that country in which it is to take effect, for the purposes declared by the law. The plaintiffs come into this court to claim the personal property of a decedent, domiciled in this state at the time of his death; he must pursue his remedy by the law of the forum to which he resorts, and comply with all things required to entitle them to distribution, one of which is that he shall give bond and security, in the orphan's court, to the administrator, to refund in certain cases.

This court, in a suit in equity, between a foreigner and a citizen, praying for an order of distribution of the estate of a decedent, is bound by the same law which regulates the proceedings of the orphan's court of the state; it has accordingly ordered, that bonds shall be given pursuant thereto. The only question now before us is, whether the papers presented are the bonds of the plaintiffs, according to the true intent and meaning of the fifteenth section of the act of 1794. We cannot doubt that the intention of the legislature was, that the security of creditors and the administrator, should be by an instrument, which should have all the effect and attributes of a bond or specialty by the laws of the state, binding the principals and sureties alike. If the papers now before us are not bonds, the obligation they create may be barred by the act of limitation, and in case of the death of any of the parties who have executed them, the administrator would come in only as a simple contract creditor, for the sum which he had been compelled to pay to a creditor, who may have sued after the order for distribution. This would be so contrary to the spirit, as well as words of the law, and so unjust to the administrator, that we cannot hesitate on the subject. The law of this state recognises no instrument of writing to be a bond, without the seal of the party who executes it. The case of Taylor v. Glaser was a strong one; there were counterparts of an agreement; one was under seal, the other had none, and was held not to be a specialty. 2 Serg. & R. 504. The seal is not a mere formality of execution, but a matter of substance, which gives to the paper certain legal effects, which cannot be attached to any unsealed paper. The power of attorney not being under seal, therefore, could give no authority to execute a bond in the name of the parties; the cases are full to the point, and the law must be taken to be settled.

Case No. 6,072.

HARMANSON v. BAIN et al.

[1 Hughes, 188;[1] 15 N. B. R. 173.]

District Court, E. D. Virginia. Jan. 3, 1877.

JURISDICTION IN EQUITY—CONSTRUCTIVE FRAUD—TRANSFERS OF PROPERTY TO OBTAIN A PREFERENCE—NEGOTIABLE INSTRUMENTS—CONCLUSIVENESS OF DECREE IN BANKRUPTCY.

1. Equity has jurisdiction of a bill charging fraud, which, except in form and as to the forum is nothing more than an action of indebitatus assumpsit, even though the fraud charged is only the constructive fraud contemplated by section 5128 of the Revised Statutes of the United States. Section 35, Bankruptcy Act [of 1867 (14 Stat. 534)].

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

2. If, however, the allegations of such a bill be disproved, and the real gravamen be found from the evidence to have been transfers of property, charged to have been made in violation of section 5128 in favor of several persons not parties to the bill, in independent transactions, *held*, that the bill described in 1, cannot be treated as brought to set aside the said transfers, first, because it does not pray for such a thing in terms; second, because it has not made all the persons connected with them parties defendant; and third, because even if it had made them all parties, it would have been multifarious. *Held*, therefore, that the bill must be dismissed.

3. Where an incorporated society which had been a bank of discount, deposit, and circulation in Virginia, ceased its business in 1862 in consequence of public invasion, and in 1865, after publishing that it would make settlements as far as practicable by set-off, undertook no other business than the liquidation of its affairs, in which it was much hindered by stay laws in force until 1869, and where before completing its settlements, it was thrown into bankruptcy in June, 1872, *held*, that the question of its insolvency as against persons with whom it effected settlements within four months before the bankruptcy, should not be considered as if the society was a trader, merchant, or bank, but with reference simply to whether its liabilities could meet its assets, that being the basis on which all had dealt with it for seven years.

4. Transfers of property are not void under section 5128, where it is proved affirmatively that the persons who effected them with the debtor had no intention of obtaining a preference, or the debtor of giving it.

5. Where the deposits due from a society which for ten years had ceased business as a bank and ceased to receive deposits, and which for seven years had been in liquidation, have ceased to be deposits of money, and become mere debts, and a commodity bought and sold in the market like public stocks, and are not paid or payable in money and are only available by way of set-off in favor of debtors to the society, *held*, that papers in the form of checks on these deposits are not checks, because not representing money, not payable at sight, and too much limited in negotiability as to the persons having use for them, but are mere evidences of the assignment of choses in action in the form of deposits.

6. Persons who sell such papers in the form of checks are not responsible to the assignee in bankruptcy of the society owing the deposits, for the amounts stated in dollars on the face of the papers called checks.

7. Upon a bill in the district court to impeach a transaction charged to be void under section 5128, that court, sitting in equity, is not concluded by an order of adjudication, which it has made in involuntary bankruptcy, declaring the said transaction to have been an act of bankruptcy; for the reason, that the character of the court, the evidence, the parties to the proceeding, and the technical quality of the act itself, are different in the two proceedings.

In equity. The Portsmouth Saving Fund Society of Portsmouth, Virginia, was a bank of discount, deposit, and circulation, on a capital of $32,000, for a period of some twenty years anterior to 1862. It was compelled to close its doors in that year by the troubles of the country. Its cashier, George M. Bain, Sr., now dead, preserved its assets as best he could, with care and fidelity, during the period and until the close of the Civil War. The first meeting of the directors of the society after that event was held on the 11th of August, 1865; but there does not seem to have been any definite official ascertainment of the condition of the society until July 3d, 1866, when a committee, which had been appointed for the purpose, reported its assets to be at par valuation, less an item of profit and loss, $226,700; and its liabilities, less its capital stock, including all notes of circulation outstanding, $220,532. At the resumption of its business in August, 1865, the assets of the society consisted chiefly of notes which had been discounted before 1862, and which had been lying overdue since that period. Its liabilities consisted chiefly of amounts due to depositors and to the holders of the notes of circulation; the amount of the former being $183,210.40, and the amount of the latter (if none of the notes were lost) being about $36,726.21. A stay law was in force in Virginia, which remained until January, 1869. The statutes of limitation were also in suspension, and there was no chance of making collections by suit. In this condition of things the society did not venture upon a resumption of its regular business; and its directors resolved to open the doors of the bank merely for the liquidation of its affairs. At their first meeting, held August 11th, 1865, they "ordered that the cashier receive the notes of the institution and checks for deposits in payment of any debts due to the institution, and that the cashier give notice that the persons indebted to the institution can pay or renew their notes as formerly." Thus resuming operations only for the purpose of liquidation, the business proceeded on that basis for about seven years, until the 12th of June, 1872. It had but one officer, George M. Bain, Sr., in its place of business, and part of his time was given to other affairs. Its directory met but very seldom after long intervals. No banking business was done. No business but that of liquidation went on during this period of seven years. Except from sales of real estate no cash seems to have been received by the society during this period of liquidation. Except possibly as to cash received from sales of real estate, no notes seem to have been discounted otherwise than in renewal or settlement of old notes representing debts which originated before 1862. No cash was paid to depositors or to holders of notes of circulation. Nor did these two classes of creditors expect payment in cash or demand it at the counter from the cashier of the society. When notes of circulation were presented to the society, I infer that they were credited as deposits. Interest was credited to the depositors regularly each six months during the period of liquidation.

By June 12th, 1872, notwithstanding the hindrances of the stay law, the affairs of the society had been liquidated to the extent of about $200,000. There was still due to the depositors at that date $84,840, and there had been paid and credited of interest to the de-

positors $77,476 since 1865. This large liquidation had been effected almost exclusively by the process of set-off. Persons indebted on notes to the society would purchase from depositors assignments of deposits in the amounts wanted by them. These assignments were made in the form of checks, and were called or miscalled checks. The society being in liquidation and its deposits and notes having become choses in action, and commodities bought and sold in market like public stock, Bain & Bro., bankers and brokers of Portsmouth, as well as others, from time to time, bought largely of the deposits, making their heaviest purchases at par prices, and smaller ones at prices ranging from one hundred cents down to eighty and sixty cents. A few small deposits seem to have been bought by them and others at thirty cents. The holders of the large deposits seem to have had more or less confidence in the solvency of the society, and held their claims at par. The holders of smaller deposits seem to have sold at prices less than par as their needs or convenience induced. These assignments of the deposits in the form of checks were never treated as negotiable paper by being presented to the society for payment, and protested for non-payment. In fact they could only be used by debtors to the society in setting off their debts. Among the deposits bought by Bain & Bro. were those of John Nash, amounting to $11,517; of the Old Dominion Lodge, amounting to $9,000; of W. D. Whidbee, amounting to $1,143; and of Nathaniel Owens, amounting to $2,125,—these particular deposits making a total of $23,785. They were purchased in the early part of 1870. The alleged object of Bain & Bro. in purchasing them was to settle with them by set-off certain notes due to the society, to wit: a note of Bain & Co., a mercantile firm, for $5,000; a note of George M. Bain, Jr., for $4,300; and two notes of R. T. K. Bain for $1,461 and $1,466 respectively. The makers of these notes, with one exception, were members of the banking house of Bain & Bro. The notes, for the settlement of which these deposits were purchased, fell due in August and September following the purchases, and were never renewed. The directors of the society after that time ordered suit on all notes not renewed; but those of the Bains were not sued upon. According to the testimony of two of the firm they were not sued upon because they were considered by the society and their firm as having been settled by the deposits purchased for the purpose. But no actual entries were made taking the subjects of this set-off off the books of the society until June 4th, 1872.

At a meeting of the directors, held on the 4th of June, 1872, the cashier informed them of a suit pending against it on which judgment might be expected, in July proximo. This statement brought the directors face to face with the question whether or not an assignment should be made for the protection of creditors other than the one who was suing for judgment; and a committee was appointed to examine into the affairs of the society, with instructions to report before the 12th instant, to which day the directors adjourned. The alleged object of the committee was to ascertain whether or not the society was solvent. At a meeting of the 12th of June, the majority of this committee reported the condition of the society (estimating each asset and liability at its supposed value or amount) to be as follows: assets, $72,679; liabilities, $105,502. The liabilities included old notes of circulation outstanding to the amount of $20,080, none of which (except for $27.50) have been proved in bankruptcy, and all of which have probably been lost. The committee estimated that not more than $5,000 of these notes would ever come in; and therefore computed the actual value of the assets of the society at $72,679, and the amount of liabilities at $90,500. The result disclosed by their report was that the society was insolvent. Before this report was made, that is to say, at times between the 12th of April and the 12th of June, 1872, Bain & Bro. had assigned deposits held by them in the society to the amount of $15,307, executing their assignments in the form of the "checks" which have already been referred to. Most of these were made to persons who purchased them with a view of making settlements with the society, of debts due on notes; and the principal one of them, for the amount of $14,449, dated on the 4th of June, 1872, was drawn for the purpose, as they allege, of clearing off from the books of the society, first the several notes due by persons of their name which have been mentioned, and also balances due on three notes of one Bilisoly for about $750, and a note of one Campbell for $240; these latter being due from persons wholly irresponsible, and voluntarily paid by Bain & Bro.

The particular assignments by Bain & Bro. of their deposits in the society to the amount of $15,307 to different persons, settled the following matters, which, as will be seen if computed, make up the aggregate of $15,307. This amount of money is the subject of the suit which is now before the court for decision.

A curtail and discount for H. Wilson	$ 18 94
A note of one Westwood	29 27
A curtail and discount for some one not remembered	32 03
A note of one Brownley	10 26
A curtail and discount for H. Wilson	18 79
A note of Bain & Bro. lying over since 1870, principal and interest	5,518 33
A note of George M. Bain, Jr., lying over since 1870, principal and interest	4,562 30
A note of R. T. K. Bain lying over since 1870, principal and interest	1,615 87
A note of R. T. K. Bain, lying over since 1870, principal and interest	1,621 44
A balance due on notes of J. A. Bilisoly, indorsed by J. A. Benson, lying over since 1870, principal and interest	792 90

A note of J. B. Campbell, principal, protest, and interest, lying over since 1870	388 41
A check given to take up sundry cash anterior memoranda held against Bain & Bro. by the cashier of said society	404 51
A check in favor of G. M. Bain, Jr.	5 52
A note of T. M. Grant	196 94
A deposit placed to the credit of Mary J. McRae, which is still there	50 00
A check in favor of one Brownley	20 00
A check in favor of George L. Neville	20 89

The four larger of the notes just mentioned were the same which were referred to in a previous part of this statement, and amounted, principal and interest, to $13,317.94.

On the same 4th of June the directors authorized a note of J. G. Holladay, for the sum of $3,000, to be credited by a check which Mr. Holladay presented for like amount drawn by George L. Neville, one of the depositors of the society. They also authorized one or two smaller transactions with other persons, of a similar character, on the same day. Similar transactions are shown by the books of account to have been had by the society within four months before the bankruptcy, on which no suits have been brought, to the amount of $8,207.59. [The time within which the assignee could bring suits expired in May, 1876.][2] At their meeting on the 12th of June the directors resolved that a deed of assignment should be made, and ordered that one should be executed. At the next, or a subsequent day, a deed had been prepared and executed by the president, but it was never expressly ratified by any order of the directors, or sealed with the seal of the society, the use of this latter for that purpose being refused by the cashier, George M. Bain, Sr., now deceased. On the 17th of June, 1872, James G. Bain, a creditor of the society, filed a petition in this court against it in involuntary bankruptcy, charging as an act of bankruptcy the transaction of the directors with J. G. Holladay, which has been mentioned. On the 25th of September, 1872, this creditor filed an amended petition, charging that the execution of the deed of assignment of the 12th of June was an act of bankruptcy. On the 8th day of November, 1872, after a hearing of the petition and amended petition, the then judge of this court made an order in the usual terms of form 58, Bump (9th Ed.) p. 937, adjudicating the society a bankrupt. From this order there was an appeal to the supervisory jurisdiction of the circuit court. On the 11th of October, 1873, the circuit court affirmed the order of the district court in an order reciting the transaction with J. G. Holladay as an act of bankruptcy. This order was suspended afterwards by that court on a petition for review, and a rehearing granted. But on the 9th of April, 1874, after the rehearing, that court made an order renewing its order of October, 1873. The usual proceedings in bankruptcy were accordingly afterwards had in this court, and L. Harmanson became assignee of the assets of this bankrupt. On the 26th July, 1875, the assignee filed his bill in this court against Bain & Bro., as a firm, for the recovery of $15,307, charged to have been paid to them by the society on their checks drawn within four months before the 17th June, 1872. The bill makes the proceedings and papers in bankruptcy part of the record, and, after sundry formal recitals and allegations, charges that the Portsmouth Saving Fund Society being insolvent and in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, with a view to giving preferences to Bain & Bro., who then had a large claim against the society for deposits, made certain payments, aggregating $15,307, on certain several days, in certain several sums stated, on "checks" of the said Bain & Bro., who were the persons receiving the said payments and to be benefited by them, they having reasonable cause to believe the said society to be then insolvent, and knowing and having reasonable cause to believe that the said payments were made in fraud of the provisions of the bankruptcy act of the United States; and the bill further charges that the said payments are void, and that the plaintiff is entitled to recover of the said Bain & Bro. the said sum of $15,307. The bill makes no other person defendant than Bain & Bro. It prays that they may be required to pay to the plaintiff the said several sums of money, amounting to $15,307. There is no allegation in the bill that the "checks" sued upon were paid to Bain & Bro. in anything else than money. There is in the bill no description or mention of or allusion to the property which passed from the society in settlement of the "checks" of Bain & Bro. The answer denies that the society made to the defendants, or any of them the payments or any of them in the bill mentioned, and denies that the defendants or any of them received or were benefited by any such alleged payments. It admits that the "checks" spoken of were drawn and signed by the defendants, but denies that any payments were made to them on account of the said "checks." There was also a demurrer to the bill, the ground of demurrer being that, on the case stated by the bill, the plaintiff had full and complete remedy at law, and a court of chancery had no jurisdiction.

Scarburgh & Duffield and James E. Heath, for complainant.

W. W. Crump and W. W. Old, for defendants.

HUGHES, District Judge. I am to consider this bill, first, as to its technical character and sufficiency, and second, as to the merits of the case presented by it.

[2] [From 15 N. B. R. 173.]

1. When the argument was heard on the demurrer, neither the court nor the counsel for either party to the cause knew the facts as they have been disclosed by the evidence since taken. The court was wholly ignorant of those facts. The case, considered on the demurrer, was that of checks drawn by a depositor on a bank charged to have been at the time insolvent, which checks the bill alleged to have been paid to the drawers of them, and to have been drawn and paid under circumstances of knowledge and collusion, which, by section 35 (512S) of the bankruptcy statute, made them void and fraudulent. The bill prayed that the drawers of the checks, Bain & Bro., who were charged to have received the benefit of the preferential payments, might be decreed to repay the money received by them on the checks. The bill was, except in form, nothing more nor less than an action of indebitatus assumpsit for money of the society had and received by the defendant, and the only question presented by the demurrer was, whether a bill of the sort would lie, where the only ground on which the equitable jurisdiction could be founded was confessedly the allegation of constructive fraud under the 35th section of the bankruptcy act, no actual fraud being pretended. If it had been a case of first impression, I should have unhesitatingly decided in favor of the demurrer, but the authorities were numerous in asserting that constructive fraud was sufficient per se to support the equitable jurisdiction, and I felt constrained to overrule the demurrer. But the evidence taken upon the issues joined in the bill and answer has most surprisingly changed the aspect of the case.

The bill is founded upon papers which it calls checks, and which it treats as representatives of money. But these papers were not checks except in form. A check is a draft for the payment of money drawn against deposits of money on a bank or a banker doing a banking business, payable at the instant of presentation in money, to any bearer, if made payable to bearer, or to any holder by order, if made payable to order. Its two essential qualities are, being a representative of money, and having mercantile or unlimited negotiability. It would be preposterous to pretend that the checks named in this bill were payable in money, or that there were any deposits of money to meet them. And they were not mercantile paper with unlimited negotiability payable to any holder, because very few could hold them, namely, the few who were debtors to the bank, and in position to avail of them in the way of set-off. Nor were these papers called checks representatives of cash money in any sense. Nor were they drawn against a bank, but only against a corporation, in slow, tedious liquidation, which had ceased to be a bank for ten years. They were but the mere evidences of assignment by their drawers of choses in action in the form of deposits, which deposits were not payable in money. The better opinion now obtaining is, that even a mercantile check on a vital bank, passes the title to its bearer by assignment, before presentation for payment and at the time of delivery; giving him the right to sue the bank for the money covered by the check from the time of his receiving it, though, in passing from hand to hand it might get back, before presentation for payment, to the drawer himself. See Morse, Banks, pp. 465–474, and the numerous cases there cited. Every check, therefore—every draft that is a check in fact as well as form—may now be considered as an assignment before presentation for payment; of course it is after presentation. Certainly it cannot be contended that a paper which is merely in the form of a check, not mercantile, narrowly limited in negotiability, not drawn on a bank or banker, not payable in money, has any other value than as the evidence of an assignment of a chose in action. The checks, therefore, so called by this bill, were but assignments. And I do not suppose that it will be pretended that a person who assigns, without guarantee, a chose in action which has become a commodity in the market, like public stocks, or government bonds, at its market value, the public and all parties to it knowing the condition of the commodity, becomes responsibile to any one for the face value of the chose in action sold. Yet that is the claim on which this bill is based, made of course when the counsel thought these were mercantile checks for money in fact.

The case, therefore, in the light of the evidence before me, presents an aspect wholly different from that which it presented at the hearing of the demurrer, and which the eminent counsel who drew the bill supposed that it wore. The Portsmouth Saving Fund Society, which was assumed by the bill to have been a bank of discount and deposit, doing business as such up to the time of the filing of the petition against it in bankruptcy, turns out to have long before suspended its regular business, and to have been doing nothing else than liquidating its old business for seven years before that event, by the process of set-off. The checks mentioned by the bill as drawn by the defendants, turn out not to have been checks, except in form; and to have never been received, held, or presented for payment as bankable, protestable, negotiable paper; but to have been in legal effect, in fact, and in the minds of the receivers of them, the holders of them, and the society against which they were drawn, nothing more than evidences of the assignment of claims against the society to those who received them, by those who drew them. The payments of money charged in the bill to have been made by the society to the defendants on these miscalled "checks," turn out to be wholly imaginary and theoretical; no cash having actually been paid in

consequence of them; the so-called checks having been used as mere vouchers to serve as the basis for various entries in the books of the society.

The theory and allegations of the bill have thus been wholly contradicted by the evidence. The probata have entirely refuted the allegata, and the suit considered as an action against Bain & Bro., for money of the society had and received by them, has failed and must fall. No money was paid by the society on the checks; none was received from the society by the defendants; nothing at all passed from the society to Bain & Bro., in their own right and for their own benefit, as charged by the bill; and, in their own right as a firm, they had no interest in any transaction of the society in and about the checks after they had passed from the defendants. Bain & Bro. simply held choses in action against the bank. For seven years these deposits had been an article of merchandise in Portsmouth. As such they were sold and assigned by Bain & Bro., by the instrumentality of checks, or orders, or bills of sale, as the usage authorized. And Bain & Bro. had the legal right to sell those choses in action in the market for what could be got, without any reference to the bankruptcy of the society whatever, up to and even after the filing of the petition in bankruptcy. The act of Bain & Bro. in selling their claims for the market price, up to the day of the petition, and in evidencing their sales by drawing checks and delivering them to the purchasers, was in itself legal, and could not of itself subject them to any liability for what the purchasers might do in their own subsequent negotiations with the society. Bain & Bro.'s transactions, as assignors of their own right, title, and interest in the deposits, ended with the drawing and delivery of the checks. In their own right they received nothing from the society. And therefore the bill cannot be sustained, assuming that it made no one defendant but the firm of Bain & Bro. But it so happens that the firm of Bain & Bro. was composed of several members, some of whom were identical with some of the men whose notes were taken up by them. George M. Bain, Jr., one of the members of Bain & Co., the note of which latter firm was taken up, was a partner of Bain & Bro. His individual note was also one of those taken up. R. T. K. Bain, whose two notes were taken up, was a partner. But David A. Bain, deceased member of the firm of Bain & Co., or his representative, was not a partner. And James G. Bain and Thomas A. Bain, no note of either of whom was taken up, were partners. Thus, neither all the Bains whose notes were taken up were partners in Bain & Bro., nor were the notes taken up notes of all members of the firm. Bain & Bro., therefore, the defendants in this bill, are not identical with those Bains who received benefit from the transactions which were made the subject of formal entries in the books of the society on June 4th, 1872; and the allegation of the bill in that particular, also, is disproved. As to parties, therefore, I do not see how the bill can, by construction, be so enlarged in its scope as to be treated as a bill brought under section 35 for the property, or its value, transferred in violation of its provisions on the 4th June, 1872, that property being the notes held by the bank of Bain & Co., George M. Bain, R. T. K. Bain, and others, and delivered on that day by the society to Bain & Bro., as agents or trustees of the several makers. Generally the prayer for general relief in a bill has great aptitudes; but the India-rubber properties of the prayer for general relief in this bill are inadequate to give it such a scope. Nor does the difficulty stop here. The curtails and discounts made for H. Wilson, the Westwood note, the Brownley notes, the Bilisoly notes, and the Campbell note were part of the property transferred in like manner with the notes of the Bains; and these several persons who all received the benefit of the transfers are in no manner parties to the bill; nor is Mrs. Mary J. McRae. And even if they were parties, as they should be, if the bill were drawn to embrace the parties to all the checks, the payment of which is complained of in the bill, it would be hopelessly multifarious. Considered, therefore, with reference to the recovery authorized by section 35, the bill is incurably defective in respect to parties defendant, in failing to bring them before the court. As to subject-matter, the bill does not pray that the transfers of the notes and credits which have been described may be decreed to be void, and does not seek the recovery of this property or its value, either in its language, or its intendment, or in any possible construction that can be given to it. Even, therefore, if all the parties to the transfers of property which, or its value, the bill ought to have sought to recover back, had been brought before the court by the bill, and the bill had not become fatally multifarious thereby, still it would be defective in not praying in terms for the recovery of the property which was transferred; or, failing that, in not in terms alleging its value, and in terms praying the recovery of that value.

I have examined all the cases of suits founded upon the 35th section of the bankruptcy act, which have as yet been reported as decided by the supreme court of the United States; and with only two exceptions, in which there was plainly no necessity for its so being, the proceeding was by bill and brought in equity, because the bills all prayed the court set aside the transfers or payments they complained of as void, and it was necessary to make all the persons connected with the transactions, parties to the proceedings. These cases are: Toof v. Martin, 13 Wall. [80 U. S.] 41; Traders' Bank v. Campbell, 14 Wall. [81 U. S.] 87; Tiffany v.

Lucas, 15 Wall. [82 U. S.] 410; Buchanan v. Smith, 16 Wall. [83 U. S.] 277; Wager v. Hall, Id. 584; Allen v. Massey, 17 Wall. [84 U. S.] 352; Wilson v. City Bank, Id. 473; Bartholow v. Bean, 18 Wall. [85 U. S.] 635; Cook v. Tullis, Id. 332; Tiffany v. Boatman's Sav. Inst., Id. 376; Mays v. Fritton, 20 Wall. [87 U. S.] 414; Bayley v. Glover, 21 Wall. [88 U. S.] 342; Clark v. Islen, Id. 360; Michaels v. Post, Id. 398; Watkins v. Taylor, Id. 378; Burnhisel v. Firman, 22 Wall. [89 U. S.] 170; Amsinck v. Bean, Id. 395; Sawyer v. Turpin, 91 U. S. 114. One of the points decided in Smith v. Mason, 14 Wall. [81 U. S.] 419, is, that as strangers to a bankruptcy proceeding could not properly be affected by the summary process used in a bankruptcy court, and yet are necessary parties where it is sought to set aside transactions under the 35th section, in which they have participated, plenary proceedings must be brought for that purpose in the district or circuit court, or other court of terms. I am bound, therefore, in view of all these considerations, to hold that on the principles of pleading, and the law and evidence of this case, the bill is, in its form and scope, on the issue joined, fatally defective, and must be dismissed.

2. I think it proper, however, though technically unnecessary, to pass also upon the case presented, with reference to its merits. I shall suppose the case to stand upon the transactions represented by the check for $14,499, dated on the 4th of June, 1872, which was used to take up the four notes of several of the Bains, which have been mentioned, to pay off balances on three notes of Bilisoly, and to take up the note of J. B. Campbell. The taking up of these four last-named notes, which were debts of persons wholly irresponsible, and which were worth nothing to the society in strict right, and which were voluntarily paid by some one or more of the Bains, was an unqualified benefit to the society, cannot be complained of, could not have worked a preference as against the creditors of the society, and may as well be dismissed from consideration, and I do dismiss them. The notes of the Bains which they were allowed to take up in the same transaction, and which aggregated in principal and interest $13,317.94, were worth dollar for dollar; and the question on the merits of the case is, whether or not, under the circumstances under which they were taken up, the transaction was void under the provisions of the 35th section of the bankruptcy act (section 5128, Rev. St.).

I am confronted in the consideration of this question by the orders of the bankruptcy courts, adjudicating the Portsmouth Saving Fund Society a bankrupt, the order in bankruptcy of the circuit court having expressly recited the transaction of the society with J. G. Holladay as an act of bankruptcy, and that transaction having been had on the 4th of June, 1872, the same day on which the check of Bain & Bro., for $14,499, was used for taking up the notes which have been described. The bankruptcy courts, however, acted on a more or less technical view of the case, and on a very limited presentation of facts compared with the thorough development of them which now enlightens this court. The parties benefited by the transaction were not before the courts of bankruptcy. The case is now before a court of equity, which considers every transaction in the light of its merits more than its technical features, and which renders its decrees in accordance with the dictates of substantial equity and justice. No actual fraud is pretended. The case is confessedly one of constructive fraud, and is heard in a court that will not subordinate the ends of justice to merely technical considerations. I do not consider myself precluded, therefore, by the orders of the courts of bankruptcy referred to, from considering and deciding this case with respect to its merits and irrespectively of the orders which were made by those courts.

In order that the transfer of the notes of the Bains, which are under consideration, should be void under section 35 of the bankruptcy act (section 5128, Rev. St.), certain facts must coexist. (1) The society must have been insolvent within four months before the petition in bankruptcy was filed on 17th of June, 1872. (2) The transfer must have effected a preference, and have been made for the purpose of so doing. (3) The persons receiving benefit by the preference must have had reasonable cause to believe the insolvency of the society. (4) And also to know that the object of the transfer was to give them a preference. Toof v. Martin, 13 Wall. [80 U. S.] 40; Clark v. Islen, 21 Wall. [88 U. S.] 360; and Mays v. Fritton, 20 Wall. [87 U. S.] 414. I shall examine the case only with reference to the society's knowledge of its insolvency, and to the question whether the transaction of 4th June, 1872, was made for the purpose of securing a preference for the Bains. The other points are conceded.

The term "insolvency" is not always used in the same sense. It is sometimes employed to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. Toof v. Martin, 13 Wall. [80 U. S.] 40. This is the sense in which the term insolvency is used when applied to persons who are not traders, and are not engaged in mercantile, banking, and financial pursuits, carried on principally by the means of negotiable paper. As to persons engaged in pursuits carried on by the use of such instruments, the term insolvency means an inability to pay off or take up that sort of paper in the ordinary course of business. Now, this society of Portsmouth had long ceased to be engaged in the latter sort of business; and for seven years preceding the filing of the petition in bankruptcy against it, had been engaged in the sole business of liquidating its affairs. Whether it was insolvent, therefore,

was simply a question whether its assets could be so managed as to liquidate its debts. All persons had been dealing with it for seven years on that basis; and as against any of those persons it would be grossly unjust to treat the question of the society's insolvency upon any other basis of inquiry. The orders in the courts of bankruptcy against it were based on the belief of those courts that up to June 17th, 1872, it was a bank engaged in the business of banking, whose solvency was to be determined by the inquiry whether it was paying over its counter all obligations to depositors and note-holders as they were presented. The evidence which has now been taken in this cause shows that the courts of bankruptcy were misinformed on that head. The society had not been a bank carrying on the business of banking since 1862. Whether the society was insolvent, therefore, in the sense stated by the supreme court as above, was a question which must be admitted to have been undetermined up to the 12th June, 1872, when the committee, which eight days before had been appointed to look into its affairs, and to report with reference to this very question of doubt, made their report. It is the bankrupt who must know his insolvency. Up to that time it had been a mooted question, even among the officers and directors of the society, whether the corporation would be able to pay itself out of debt.

The committee which was commissioned to thoroughly investigate, inquire into, and report upon the question of insolvency, was appointed on the 4th June, 1872, the date of the transfer of the four notes of the Bains on the check of Bain & Bro., which is now under consideration, and, of course, had not then reported. The society, therefore, did not then know its insolvency; and the next and the vital inquiry is, whether the transaction of June 4th, 1872, was made for the purpose, on the part of the society, of giving a preference to those Bains who owed the notes. It is in evidence that the notes of the Bains had been considered as settled by the large deposits bought for the purpose, which had stood as an offset against them to the credit of Bain & Bro. since as early as the summer of 1870. These deposits had been bought and placed to their credit for the purpose, and the notes had been left with the cashier, who, being the father of its members, possessed the unqualified confidence of the firm, in pursuance of the standing resolution of the board which had been in force since 1865, and which had somewhat the effect of a contract of the society with its customers, "that the cashier should receive the notes of the institution and checks for deposits in payment of any debts due the institution." This resolution was general, had been acted upon by the society, and not only by the Bains, but by nearly all the debtors of the society, and was still in force on June 4th, 1872. Inasmuch, therefore, as the transaction had really been made in 1870, when no intention of giving or procuring a preference could have been entertained, the motive existing at that time was the real motive of the transaction, and gives interpretation to what was done on June 4th, 1872, both as to the society and as to the Bains. It is also proved in evidence that the final entries which were made on the 4th of June, 1872, were made in consequence of the committee having been raised that day, and that they were made for the purpose, on the part of the cashier of the society, of placing the books of the society in a condition, cleared of all closed transactions, to show the real status of its affairs, so that the committee would have to consider only unsettled affairs affecting the question of its solvency or insolvency. Finally, the idea and motive of giving or securing a preference is negatived by the fact that part of the especial transaction under consideration was the voluntary settlement by Bain & Bro. of four debts due from Bilisoly and Campbell, aggregating about $1000, which were worthless to the society, and could never have been collected from the persons owing them, the gratuitous settlement of them showing that a preference was not in the mind or motive of Bain & Bro. or of the society.

The circumstances of the case all go to show the truth of the evidence I have mentioned. Instead of proving an intent to give or obtain a preference, the evidence really proves that no such an intent existed. The transaction simply conferred upon the Bains a privilege that had been conceded to and had been enjoyed by debtors owing obligations to the extent of $200,000 to the society. For the society to have refused to make the transaction would have been to give all of those debtors a preference over the Bains. The allowance of the transaction by the society, so far from giving the Bains a preference, was simply allowing them the same benefit that had been allowed others to ten or twenty times the amount. A recovery in this suit against Bain & Bro., after omitting to bring suits for other transactions of like character which were made within four months of the bankruptcy, to the amount of $8,207, would work a preference in favor of the persons benefited by these last-named transactions, and a discrimination against Bain & Bro., so that a suit brought to set aside a preference would itself, if successful, work a preference against these defendants of the very character which it seeks to condemn.

The evidence in the case proves that the intent and purpose of the transaction of the 4th June, 1872, was not to give or obtain a preference, but was other than that, and fair, honest, and legitimate on the part of the society and the defendants in this cause. The transaction had really been concluded, except in form, two years before, when no design of giving or obtaining a preference, in evasion of the bankruptcy law, could have been entertained, and it was had in pursuance of an

honest contract or understanding which the society had made with its customers, which its venerable cashier had uprightly fulfilled with all who complied with its terms, and which was in full force on 4th June, 1872. A court of equity will not, for the sake of making out a case of constructive fraud, disregard honest intentions, which are proved, and cast about ingeniously to find dishonest ones, which can only be inferred. I disdain such an office in this case and upon the merits decide that the bill must be dismissed.

Case No. 6,073.

HARMANSON v. BAIN.

[1 Hughes, 391.] [1]

District Court, E. D. Virginia. May, 1877.

SUIT AGAINST A BANKRUPT — WHETHER PLEA OF SETOFF IS A SUIT—NEGOTIABLE PAPER—"WITHOUT OFFSET"—AGREEMENT BETWEEN MAKER AND PAYEE.

1. The filing of a plea of setoff, in a suit brought by an assignee against a creditor in bankruptcy, is not the maintaining of a suit at law "against the bankrupt," such as is forbidden by section 5105 of the Revised Statutes of the United States, to a creditor who has proved his claim in bankruptcy.

2. Even if it were, section 5073, relating to setoff, and section 5105 must be construed together; and where the bankruptcy court permits the assignee to bring suit in a common law court against a creditor who has proved his claim, it must be implied that that court ipso facto gave leave to the creditor at the same time to withdraw his proof of claim and to plead his offset in the common law suit. Such a plea of setoff is not a "suit" in contemplation of section 5105.

3. If the creditor who has proved his claim fails, or is not allowed, to plead his offset in such a common law suit, and judgment goes against him for a debt against which he has an offset, the court of bankruptcy, having full power over such a judgment, is bound by section 5073 to offset it with the claim of the creditor at its proper value.

4. The words "without offset" in common use on the face of negotiable paper, do not defeat the operation of section 5073, have no value as between the maker and the payee, and as to them are to be construed to have the same meaning as the words "without offset as against a holder by indorsement."

5. Where it was agreed between the maker of a negotiable note and the payee, that the note should be payable in greenback currency, and other debtors of the payee were in the habit of paying their notes in the payee's depreciated certificates of indebtedness, the rate at which the maker of the note may set off such certificates held by himself against the payee is their market value at the time of the maturity of the promissory note.

Action of assumpsit. The Portsmouth Saving Fund Society ceased business as a bank in 1862, in consequence of public invasion. At the close of the war, in the summer of 1865, it resumed business only for purposes of liquidation, and its directors by resolution authorized its cashier to wind up its affairs as far as possible by setoff. From sales of property the society afterwards derived some funds in greenback currency. With part of these greenback funds it afterwards discounted a promissory note for R. T. K. Bain, the defendant, with the understanding that it should be payable in greenback currency. This note, with its renewals, matured on the 29th of August, 1870, its amount being then $2,434. Bain and the firm of Bain & Bro., of which he was a member, held at that time claims founded upon original deposits in the bank to a greater amount than the firm and each of its members owed the bank, whether on notes or claims susceptible to be set off or otherwise. These deposits were then worth 75 to 80 cents on the dollar. For the reason that he or his firm held such deposits, this note of the defendant stood over unpaid until the 30th of April, 1872. At this latter date, partly for a claim for deposits held since 1870, and partly for a claim as a depositor transferred on that day by Bain & Bro. to the defendant, the defendant was a creditor to the bank to the amount of $2,828.48, and was its debtor for the promissory note of $2,434 already mentioned. A petition in involuntary bankruptcy was filed against the society on the 17th of June, 1872, and on the 28th of June, 1872, the society was adjudicated a bankrupt. In its schedule of debts due to it, it itemized this debt of $2,434 due from R. T. K. Bain. In the course of proceedings, that is to say, in April, 1874, R. T. K. Bain, the defendant, through his attorney in fact (who could not, under section 5078 of the Revised Statutes, legally prove for him as a resident creditor), proved his claim in bankruptcy as depositor for $2,828.48, and made no mention of the notes as an offset in the proof of claim. Although it would seem that the defendant appeared by attorney in some of the meetings of the creditors in bankruptcy, and voted by attorney, yet there is no evidence that he recognized the acts of his attorney in fact. Indeed, the attorney in fact had no written power of attorney, and it is admitted that the defendant neither received nor demanded either of two dividends which have been declared to him as a creditor by the assignee and register in the bankruptcy proceedings. It is supposed that the assets in bankruptcy will pay a dividend of fifty per cent. at least. Without demand by the assignee, and without any refusal on the part of the defendant, to recognize the validity of the note for $2,434 due by him, the assignee, August, 1875, brought this suit against the defendant upon the note which has been mentioned, on the common law side of this court. The defendant pleads his offset of $2,828.48, and the court allows his plea of offset to be filed.

James E. Heath and C. Duffield, for plaintiff.

W. W. Old, for defendant.

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

Counsel for plaintiff rely upon section 5105, Rev. St. U. S., and upon Russell v. Owen [61 Mo. 185], and Brown v. Farmers' Bank of Kentucky, 6 Bush. 198.

Counsel for defendant rely upon section 5073, Rev. St.; Colt v. Brown, 12 Gray, 233; Demmon v. Boylston Bank, 5 Cush. 194; 5 Rob. Prac. 998; New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656; Downer v. Eggleston, 15 Wend. 52; Lechmere v. Hawkins, 2 Esp. 626; Eland v. Karr, 1 East, 375; and Cornforth v. Rivett, 2 Maule & S. 510.

HUGHES, District Judge. The promissory note of the defendant, having been returned by the bankrupt society in its schedules, and not having been disputed by the defendant, and the claim of the defendant intended as an offset to it having been proved in bankruptcy by an attorney in fact (whose action, although illegal, will not be disputed by the defendant unless technical use of it be made against him), all this having been done, the bankruptcy court had full jurisdiction, under the unqualified language of section 4772, to adjudicate the mutual rights of the assignee in bankruptcy and the defendant, upon the rule of setoff established by section 5073. The defendant did not, by any act of his own, render the suit at common law necessary. The bringing of that suit in another forum than the court of bankruptcy was the voluntary act of the plaintiff. The defendant as a creditor was standing upon his right of setoff in the bankruptcy court. By proving his claim there he submitted it to the jurisdiction of that court, and secured it from defeat by the statute of limitations, and he has done no act to put the plaintiff to the necessity of resorting to the common law forum. The plaintiff, by leave expressed or implied from the bankruptcy court, brought this suit on the common law side of the district court; and it must follow, as a corollary, that by the same leave, express or implied, the defendant has been permitted to withdraw his proof of claim in the bankruptcy proceeding and to plead his claim as an offset in this suit. If the court were not so to hold as to its implied leave to either party, the greatest injustice would be done the defendant, in first having permitted, if not invited, him to prove his claim in the bankruptcy court, and then using that fact in bar of a right which the law itself gives him to offset at a proper rate with that claim the debt he owes to the assignee. Section 5105 was never intended to be used for such a purpose. Its object was to confine the creditor to one forum or the other in respect to his claim upon the bankrupt. It must be construed in connection with section 5073 so as to allow him, if the assignee in bankruptcy should resort to any forum other than the bankruptcy court for the assertion of a claim of the estate against him, to use his counter claim there as a setoff. In Catlin v. Foster [Case No. 2,519], so far was this principle carried, that a creditor who had proved his claim in bankruptcy which had been disallowed by the bankruptcy court, and who had failed to appeal under sections 4980 and 4981, was allowed to plead the claim so rejected as a setoff. In fact, the filing of a plea of setoff in a suit brought by an assignee in bankruptcy is not the "maintaining a suit at law against the bankrupt," such as is forbidden to a creditor who has proved his claim by section 5105.

As to the objection of the plaintiff's counsel, that the plea of setoff was not noted as filed by leave of court within two years from the appointment of the assignee in bankruptcy, that seems to have been merely a clerical omission. But even if the plea of setoff had not been filed until this present hearing, the objection could not be allowed to prevail; because, when the bankruptcy court gave leave to the plaintiff to bring this suit, that leave implied a contemporaneous permission to the defendant to avail himself of the same right of setoff in the common law court under section 5073, which he had secured in time in the bankruptcy proceeding. This question, however, is of little practical importance; for, even if in the common law court the defendant were debarred by section 5105 of the right of pleading his setoff, and judgment were to go against him for the amount of his promissory note, still, even in that case, the judgment being in favor of the assignee in bankruptcy, who is under the control of the court of bankruptcy, that court would nevertheless be bound to apply the rule of section 5073, and set this judgment and the defendant's claim off, the one against the other.

Dismissing, therefore, that branch of the case, I come to consider the more important question: What amount should be allowed the defendant in offset against the plaintiff's demand? The extreme demand of the defendant is, to be allowed the full amount of his claim on account of deposits which he held against the society as of April 30th, 1872, viz., $2,828.48. The extreme demand of the plaintiff is, that defendant should be allowed only the amount of the dividend to which the claim of the defendant will be entitled in bankruptcy, say 50 per cent. The plaintiff bases his proposition on two facts, namely, that the defendant agreed that his note should be payable in greenbacks, and second, that the note purports on its face to be payable "without offset." I think from the evidence that the intention of the society and of the defendant was that the note should not be treated as payable in deposits at their par value, as other creditors of the society were allowed to do in paying off their indebtedness. But it could not have been legally intended by either of the two parties, that in the event of a liquidation in court of the affairs of the society the defendant should not have the right to set off, against the note he owed payable in greenbacks, his own claim against the society at its just valuation.

Some of the many authorities to this effect were cited by the defendant. While the defendant, in my judgment, has not the right to a credit against this note of the full amount of his claim against the society, yet I am bound to allow him a proper percentage of that claim. What that percentage should be, I confess I arrive at in a somewhat arbitrary way. It is conceded, that at the maturity of the note in August, 1870, and on the 30th of April, 1872, some ten weeks before the petition in bankruptcy was filed, the market value of the claim of the defendant was 75 to 80 cents in the dollar. This was about the value of the deposits of the society (when sold in large amounts) down to the time when the proceeding in bankruptcy was about to be commenced, which proceeding naturally depressed the market price afterwards. I shall, therefore, on the principle that the defendant, having had no agency in, is in no wise responsible for the consequences of the bankruptcy proceeding, allow his offset at the rate of 70 cents in the dollar, and will give judgment on that basis. As to the words "without offset" used in the body of the negotiable note, they are to be read as if they were "without offset as against a holder by indorsement." Their sole purpose and effect is to give negotiability and credit to the paper. They are not treated by the courts as having any effect between the maker and the original payee of the paper. They have no effect or value in this suit, and cannot be construed to nullify section 5073 of the Revised Statutes.

Case No. 6,074.

HARMANSON v. WILSON et al.

[1 Hughes (1877) 207; 14 Am. Law Reg. (N. S.) 627] [1]

Circuit Court, E. D. Virginia.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS.

The act of assembly of Virginia, allowing an abatement of interest which accrued during the late civil war, does not contravene the clause of the national constitution which forbids the states from passing laws impairing the obligation of contracts, this state having always and continuously reserved the discretion to juries of allowing or disallowing interest, interest not being a subject of common law right, but of legislative permission.

Bill of foreclosure in equity.

This bill is brought to subject certain real estate of the defendant, [Samuel M.] Wilson, to the payment of two notes held against him by the assignee of the Portsmouth Saving Fund Society, now in bankruptcy, secured by deed of trust. One of the two notes is for the sum of $3450, dated February 4th, 1862, which was given in renewal of other notes which commenced before April, 1861. The other note, given in like manner for notes beginning before April, 1861, is for the sum of $2990, and is dated on the 29th November, 1870. The defendant, Wilson, makes no opposition to the prayer of the bill, except that he claims that interest be not charged against him for the period of the late Civil War. The fact that the last note was given in 1870 does not conclude the maker of it from claiming an abatement of war interest, a statute of Virginia (Code 1873, p. 982, c. 139, § 7,) allowing such abatement, even after judgments have been rendered, upon motion in the courts rendering them.

The question of the abatement of interest was argued by James E. Heath, Esq., for the complainants, and by the defendant, Mr. Samuel M. Wilson, and Messrs. Baker and Walke for the abatement. Their respective briefs are here given.

Mr. Heath's brief:

The defendant, Wilson, claims that the interest on the debts sued upon for the period commencing April 17th, 1861, and ending April 10th, 1865, shall be remitted. He relies upon an act of the legislature of Virginia, passed session 1872–73. See Acts 1872–73, p. 344, c. 353; Code Va. 1873, p. 1120, c. 173, § 14. The contracts sued upon are negotiable notes, made by the said Wilson, payable sixty days after date, dated February 4th, 1862, and November 29th, 1870, respectively. As to the debt dated 29th of November, 1870, it is alleged the consideration accrued prior to the 10th day of April, 1865. Interest is demandable and recoverable in all cases where there has been either an express or implied contract therefor. The obligation to pay interest, where it is implied from the nature of the contract, is as strong and binding as where the obligation is contained in the contract, and in both cases interest is a necessary incident to the original debt, and a matter of strict right, which must be allowed by the court. A contract to pay interest will be implied either from general mercantile usage or custom, as in the case of bills of exchange and promissory notes, upon which, in the absence of any other agreement, interest runs from the day of maturity and payment; or from the demand, if they be payable on demand; or from the issuing of the writ, where no demand is made; or it will be implied from the particular course of dealings between the parties, or the special custom of one party, known and acceded to by the other. So also where, by the terms of an agreement or contract, the principal is to be paid at a specific time, an agreement is always implied to make good any loss arising from default of payment at the proper time, by the payment of interest after such default. Page v. Newman, 9 Barn. & C. 378; Foster v. Weston, 6 Bing. 709; Calton v. Bragg, 15 East, 223; 1 Hen. & M. 211; Wood v. Hickock, 2 Wend. 501; Robinson v. Bland, 2 Burrows, 1086, 3 Cow. 436.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 14 Am. Law Reg. (N. S.) 627, contains only a partial report.]

The foregoing authorities establish the doctrine that interest upon contracts silent as to interest is as much a part of the principal, after maturity or day of payment, or from demand, if they be payable on demand; or from the issuing of the writ, where no demand is made; or from the day upon which, according to the contract, the principal is to be paid, if a day be appointed, as contracts which, upon their face, expressly provide for interest; and, in both cases, where implied and where expressed, interest is a matter of strict right, and must be allowed by the court. Interest, then, being the fruit of the principal, it being a part of the contract, expressly or by implication, does the act of April 2d, 1873, upon which the defendant, Wilson, relies, constitute such a defence as should be respected by the courts? It will be observed that the act of the legislature applies to suits for the recovery of money founded upon contracts, express or implied, or on causes of action, or on liabilities, which were entered into or existed, or where the original consideration accrued prior to the 10th day of April, 1865. The constitution of the state (article 5, § 14) provides that the general assembly shall pass no law impairing obligation of contracts, etc.; and the constitution of United States (article 1, § 10) provides that no state shall pass any law impairing the obligation of contracts, any ex post facto law or bill of attainder. This act of 1872–73 is confined, by its very terms, to a class of cases existing prior to its enactment; in other words, it acts retrospectively entirely. It impairs the obligation of the contract by changing the rights of the contracting parties thereto, authorizing the debtor to pay less by $6 on the $100 for four years than he contracts to pay, and obliging the creditor to receive that much less than he contracted to receive.

In Planters' Bank v. Sharp, 6 How. [47 U. S.] 301, 327, Justice Woodbury says: "One of the tests that a contract has been impaired, is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree, or manner, or cause, but of encroachment in any respect on its obligation, dispensing with any part of its force." Again, the supreme court of the United States says: "Any law which enlarges, abridges, or in any manner changes the intentions of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence its conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs the obligation, though it may not do so to the same extent in all supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute and apparently immaterial in their effect, impairs its obligation." Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 327; Green v. Biddle, 8 Wheat. [21 U. S.] 1, 84. It will not be contended that the contracts to which the statute in question applies, are not diminished in value, nor that the intentions of the parties to said contracts are changed, nor that the validity, construction, and discharge of said contracts are materially affected, nor that there is a plain deviation from the terms of the contract by an imposition of conditions not expressed in the contract, nor that a portion of the conditions of said contracts are dispensed with. The meaning of that provision of the constitution of the United States which forbids a state passing any law impairing the obligation of contracts as construed and defined by a series of decisions of the supreme court, extending from 1810 to 1871, is that the laws existing at the time and place of making the contract, and of the place where the contract is to be performed, are as much a part of the contract as if they were incorporated by express words into the contract. That the state may alter at will whatever belongs merely to the remedy; provided, the alteration does not affect the value of the contract, or in any way impair its obligation. But if the value of the contract is lessened by changing the remedy, then the constitution is violated just as much as if the legislation complained of affected directly the contract itself. McCracken v. Hayward, 2 How. [43 U. S.] 608; Green v. Biddle, 8 Wheat. [21 U. S.] 1; Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Fletcher v. Peck, 6 Cranch [10 U. S.] 87; Von Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 553; White v. Hart, 13 Wall. [80 U. S.] 646. The supreme court of this state have, at all times upon similar questions, been controlled by the decisions of the supreme court of the United States in the foregoing cases, and have but recently reaffirmed them in the cases of Taylor v. Stearns, 18 Grat. 244; Bank of Old Dominion v. McVeigh, 20 Grat. 457; and the Homestead Cases, 22 Grat. 266.

The facts in Taylor v. Stearns were these: G. A. W. Taylor conveyed to James M. Taylor and John Enders, by deed dated 19th of September, 1860, a house and lot in the city of Richmond, to secure the payment of $13,299.55, due by ten negotiable notes, bearing even dates with said deed, and payable each at six months after the next preceding. In 1866 the trustees advertised the house and lot for sale, and the grantor thereupon applied to the circuit court of Richmond for an injunction to stop the sale, on the ground that the general assembly, at the session of 1865–66, had passed an act providing that there should not be any sales under deeds of trust for the payment of money (except in certain specified cases, of which this was not one), until 1st day of January, 1868. Acts

1865-66, p. 179. The injunction was granted, and at the hearing was dismissed, upon the ground that the act of assembly relied upon by the grantor was contrary to the provision of the constitution of the United States which forbids the passage of a law by a state impairing the obligation of contracts, and upon an appeal to the court of appeals, the decision of the court below was unanimously affirmed. Rives, J., in delivering the opinion of the court in that case, says: "The constitutional prohibition applies to all contracts, whether verbal or written, express or implied, executory or executed; whether between individuals, corporations, states and individuals, or between separate states." 18 Grat. 275. The law of the general assembly, declared to be unconstitutional by the court of appeals in Taylor v. Stearns, was a law which simply postponed the creditor in the collection of his debt. It did not prohibit the collection of any part of the debt, but declared that a certain class of debts should be collected, after notice by the creditor, in instalments of one, two, and three years. If that act, which postponed the creditor in the collection of his debt, defeated the agreement of parties and impaired the obligation of the contracts to which it applied, we respectfully submit, that the act relied upon by the defence in this suit is much more plainly in violation of the constitution, because the intention of the parties is not only defeated, but a portion of the contract is entirely abrogated and annulled. The agreement, as evidenced by the contracts sought to be enforced in this suit, was that the principal was to be paid on the days specified for the payment in the contracts, and if not paid on the days of payment, then the implication was that the principal sum should bear interest, at the rate of six per centum per annum, till paid. The laws of this state, existing when these contracts were entered into, made them valid contracts; no subsequent acts of the legislature can diminish or enlarge the express contract then made to pay the principal, and the implied contract to pay interest if the principal was not paid when due, without defeating the intention of the contracting parties and impairing the obligation of the contracts. Chicago v. Sheldon, 9 Wall. [76 U. S.] 50, 55; Bank of Old Dominion v. McVeigh, 20 Grat. 466.

The history of the question of interest is a very interesting one. It seems that, by the ancient common law, no interest was allowed for the use of money; and Hume, in his History of England, at chapter 33, says: "In 1546, a law was, for the first time, passed fixing the interest of money at ten per cent. Formerly all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and criminal." Mr. Jefferson (1 Am. St. Papers, 1st Ed., p. 307) says, that "in England all interest was against law until the statute of 37 Hen. VIII." And his confidence in the correctness of this statement is strengthened by the fact that, up to this time, the Roman Catholic religion prevailed in England, and interest was unlawful in all Roman Catholic countries. The statute referred to of Hen. VIII is not an affirmative, but a negative statute; it provides that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds, for one whole year." All statutes passed since, in England and in this country, are of the same character. They are negative, not affirmative; they do not declare in what cases interest shall be taken, much less do they, in any case, require it to be paid. It follows then, necessarily, that interest is a matter of agreement, since all liability must be fixed by law or by agreement, and we have seen that the law does not require interest. If the above position be correct, we must conclude that the allowance of interest by the courts as an incident to the debt, as a fruit of the principal, is founded exclusively upon the agreement of the parties. Calton v. Bragg, supra. This agreement, as we have before said, may be expressed in writing or by words, or it may be implied, and is as binding and as invariably assessed in cases where it arises by implication as where it is in writing or expressed in words.

The agreement, as we have seen, may be implied: (1) From the custom or usage of the business in which the debt is contracted. When such custom is known to the parties, or may reasonably be presumed to have been known, it enters into the original contract, and forms a part of it. (2) When the principal is to be paid at a specific time, the law always implies an agreement to make good the loss arising from a default, by the payment of interest. Per Lord Mansfield, in Robinson v. Bland, 2 Burrows, 1086. It is a maxim universally acknowledged and acted upon, that, where interest does not run with the principal, none accrues until default is made in payment. "All contracts to pay undoubtedly give a right to interest from the time the principal ought to be paid." Lord Thurlow, in 2 Brown, Ch. 3; Calton v. Bragg, before cited. (3) Where an account has been liquidated by both parties, and the debt therefore becomes due and payable, it carries interest on the same ground of a debt payable at a specific time: there is an implied contract to pay. Boddam v. Riley, 2 Brown, Ch. 3; 1 P. Wms. 376; 7 Johns. 213; 3 Wils. 205; 15 Johns. 424. (4) Where an account has been rendered, and the debtor, during a reasonable time for that purpose, makes no objection, it may be presumed that he has acquiesced in its correctness, and it then becomes a liquidated account, and carries interest from the time of such presumption. 2 Ves. Sr. 239.

In the foregoing enumerated class of cases, and others of a kindred nature, interest is considered and treated by the courts as a

necessary incident to the principal, and allowed as a matter of right. But there is another class of cases where interest is not a matter of right, where it is not an incident of the principal, and where properly and necessarily it is left to a jury, in its discretion, to be allowed or not; and when this discretion is fairly exercised, the courts will not interfere with the verdict. It is to this class of cases that our statute (Code Va. 1873, p. 1120, c. 173, § 14, to which the act of 1872–73—relied upon by the defendant, Wilson—is an amendment, and which has been the law of this state since the Code of 1819) is intended to apply, and does apply. The class of cases of which we are now treating, and which, we insist, are included and controlled by our statute, differ widely, and must be distinguished from those cases where interest is allowed by the courts as an incident of the principal, and as a matter of strict right. The confusion and difficulty which seem to exist upon the question of interest grow out of the mingling of these classes. They are entirely independent of each other, and the principles which govern and control them bear no analogy to each other.

Interest is a question in the discretion of the jury, and is allowed by way of damages or punishment, where the debtor has been guilty of fraud or injustice, or some injury has been done; and in such cases the legal rate of interest is assumed as the rule or measure of damages. Thus, in actions of tort, technically so called—as in trover, detinue, or in trespass—interest may be allowed by way of damages, by the jury (14 Johns. 128, 385; 13 Grat. 219, 454, 461; 11 Leigh, 219); in actions ex contractu, as in covenant for breach of covenant; in assumpsit to recover money improperly retained and withheld from the rightful owner, as in the case of an attorney collecting the money of his client and failing to pay it over, or a sheriff collecting money on an execution and misappropriating the money thus collected, and on penal bonds. So in cases where an agent makes advances to his principal, or the principal to his agent, and in cases of fiduciaries receiving money and making no disposition of the same for an unreasonably long time, or innocently misapplying the funds in hand, —in all these cases, and those of a like character, the question of interest is left to the discretion of a jury under the advice of the court, and that discretion, properly exercised, will not be disturbed by the court. Our statute before referred to applies to such cases as we have enumerated, and not to cases where interest is a part of the debt by expression or by implication. The rule by which the two classes of cases are to be distinguished is thus stated in Rensselaer Glass Factory v. Reid, 5 Cow. 616: "Where money has been lent, advanced, or expended by request, and under an agreement to pay at a specific time, or when it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; and so, also, where the money is not to be refunded at a particular time, but a default arises from a demand, or notice, the same principle will apply. But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems it should be referred to a jury to determine whether damages shall be given by an allowance of interest."

The facts of this case show conclusively that it is not one of that class in which a jury could allow interest in its discretion, because: (1) The contracts are payable at a specific time and place. (2) The notes evidencing the indebtedness are negotiable: the maker, at the time of their execution, a citizen of Virginia, residing at Portsmouth; the contract made in Portsmouth, and payable in Portsmouth; and according to the custom and usage of the bank holding these notes, and the custom and usage of such transactions in Virginia (which custom and usage was known, or presumed to be known, to the maker), interest accrued and was payable from the day upon which the notes fell due. (3) Wilson has already made a payment upon each of said notes, to be applied (and which has been applied) to the extinguishment in part of the interest. (4) The deeds of trust executed by Wilson to secure these debts, or his indorsers for these debts, and which under the law enures to the benefit of the holder of the notes, provide for the securing of the principal and interest.

The cases cited by Mr. Wilson in his note have no application to the case at bar. McCall v. Turner, 1 Call, 115, was an action upon a bond for penalty; and all the judges who delivered opinions in that case use the following language: "The act of assembly has altered the common law; and by allowing the penalty to be discharged by the payment of the principal and interest due thereon, necessarily turns the quantum into a question to be determined by circumstances; and it is the province of the jury to decide that question." The plaintiff, McCall, purposely absented himself from the country, and remained absent during the Revolutionary War, and left no authorized agent to act for him. He put it out of the debtor's power to pay the interest. It will be observed, in the first place, that the instrument sued upon, the character of the contract, in McCall v. Turner, is of that class in which, by the act of assembly, interest is left discretionary with the jury; and in the second place, the plaintiff, by his own voluntary act, had placed himself, not only beyond the reach of the defendant or debtor, but was a citizen of the British government, between which and the debtor's government war existed for about eight years, the result of which was the establishment of an independent government for the country of the debtor.

In the case at bar, as we have before shown, the debts sued upon are of that class in which interest is a strict matter of right after maturity; and the holder of these debts, the Portsmouth Saving Fund Society, a body corporate under the laws of Virginia, doing a banking business in the city of Portsmouth, never changing its place of business, much less placing itself beyond the reach of its debtors. If the debtor voluntarily places himself where he cannot communicate with his creditor, and by consequence renders himself unable to pay his interest, surely the law, which would exempt from the payment of interest where the creditor absents himself from the country and places it beyond the power of the debtor to pay, will compel the debtor to pay where the default has happened by the act of the debtor himself. Brewer v. Hastie, 3 Call, 21, was a suit in chancery brought to settle up a long running account between the parties, in which there were mutual credits and debits, and no balance struck (a case eminently proper for the exercise by the court of a discretion in fixing the time from which interest shall run); and when the debtor sought his creditor to pay his debt, he found he had left the country. The court, upon the authority of McCall v. Turner, decided interest should be abated during the war. The creditors, Hastie & Co., were British subjects. Ambler's Ex'rs v. Macon, 4 Call, 605, does not bear upon the question at issue here. The expression used by the court in this case, that "interest, during the war, ought not, in justice and equity, to have been allowed," etc., was not necessary in establishing the principles governing the case under consideration, not acted upon in the decision of the case, and cannot therefore be relied upon as settling or establishing any principle.

The citations from the letter of Mr. Jefferson to Mr. Hammond (1 Am. St. Papers, pp. 307–312) are interesting and improving, but are not law for this court. The views therein presented were in answer to the charge that the government of the United States had not kept the treaty of peace, inasmuch as our courts had refused to allow interest to run on debts due British subjects during the war. Some of the views expressed in this letter upon the subject of interest are sound, and some in conflict with a long series of decisions of the supreme court of the United States since made and hereinbefore referred to. Mr. Jefferson says that "interest is no part of the debt; that an assignment of the debt does not necessarily carry interest upon the debt; and that interest depends altogether on the discretion of the judges and jurors." Page 307. We have seen that in many cases interest is a part of the debt, following the debt, and recoverable as a matter of strict right.

The cases relied upon by the defendant, Wilson, establish that interest accrued during the Revolutionary War upon debts due by the citizens of this country to those of the British government, where the creditor placed it out of the debtor's power to pay interest, ought properly to be abated. Chief Justice Chase, in Shortridge v. Macon [Case No. 12,812], decided in the circuit court of the United States for North Carolina, in 1867, allowed interest during the late war upon a debt due citizens of Pennsylvania by a citizen of North Carolina. He uses the following language: "It is claimed, however, that whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they cannot recover interest for the time during which war prevented all communication between the states in which they respectively reside. We cannot think so. Interest is the lawful fruit of principal. There are, indeed, some authorities to the point, that interest which has accrued during war between independent nations cannot be afterwards recovered, though the debt, with other interest, may be; but that rule, in our judgment, is applicable only to such wars." We are told by the defendant, Wilson, in his answer, that the notes held by the plaintiff, and sought to be enforced in this suit, are renewals of notes executed prior to the 17th day of April, 1861. We are also informed by him that the Confederate forces evacuated Portsmouth about the middle of May, 1862, and that he remained within the Confederate lines from that time until the termination of the war. The record shows, then, at the date of the maturity of said debts, when they were payable, and for some time thereafter, the maker was in Portsmouth, where the holder was doing business, and nothing prevented the payment of the debts.

The supreme court in Ward v. Smith, 7 Wall. [74 U. S.] 447, held as follows: (1) The designation of a bank as a place of payment of a bond, imports a stipulation that its holder will have it at the bank when due, to receive payment, and that the obligor will produce there the funds to pay it. (2) If the obligor is at the bank at the maturity of the bond, with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as cost of suit or interest for delay. (The opposite of the proposition last stated must be true, and the party, under such circumstances, seeking a rebate of the interest, should show, that on the day of maturity, he was ready, and at the place named, to discharge the debt.) The court further held, in Ward v. Smith, supra: If the rule that interest is not recoverable on debts between alien enemies, during war of their respective countries, is applicable to debts between citizens of states in rebellion, and citizens of states adhering to the national government in the late Civil War, it can only apply when the money is to be paid to the belligerent directly; it cannot apply where there is a known agent appointed to receive the money, resident within the same

jurisdiction of the debtor. In the latter case, the debt will draw interest. Mr. Wilson, in his answer, says, that the amount due on the 17th of April, 1861, on the note of indorser, Arthur Emmerson, was $3400, and this amount remained due as principal until the 10th day of April, 1865. On the 17th day of August, 1865, he paid to the Portsmouth Saving Fund Society, the sum of $892.76, and on the 15th of November, 1867, he paid the further sum of $554.24. These payments were made in gross, but credited to the note indorsed by Arthur Emmerson, as shown by statement filed and marked "Exhibit A." He claims a rebatement of the interest on the original debt of $3400, indorsed by Emmerson, from the 17th of April, 1861, to 10th of April, 1865. The position taken by Mr. Wilson with reference to the abatement of interest on this debt is wholly untenable. Statement "A," filed with his answer, shows, and he himself says, that the payments which he made in 1865 and 1867, were applied by the cashier, Mr. Bain, with his consent, to the extinguishment of the interest first, and then of the principal of the debt indorsed by Arthur Emmerson. The interest on this debt ceases to be a question, the rights of the parties relating to the interest have been adjusted—it has been paid. The parties who settled it were competent to settle it; they had a right to settle it; they have settled it; rights have become vested by the settlement; property acquired by the bankrupt, or its creditors in the interest, and the contracts thus made, rights thus acquired, cannot be annulled, violated, divested. These payments cannot be disturbed. If a creditor holds two claims against his debtor, and the debtor makes a payment, and directs to which debt the payment shall be applied, it must be so applied, and the law will not permit any change in the application; so, if the debtor fails to make the application, and the creditor exercises his right to apply the payment in the absence of instruction from the debtor, the application once made is final, irrevocable; or, if both creditor and debtor fail to make the application of the payment, the law makes it, and both parties are bound by the direction of the law. Hill v. Southerland's Ex'r, 1 Wash. [Va.] 133; [Mayor, etc., of Alexander v. Patten] 4 Cranch [8 U. S.] 320; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S. 720]. In the case at bar, the payment was made to the extinguishment of that portion of the debt which the law requires shall be first satisfied, to wit, the interest. It is a much stronger case than could arise under the doctrine of the application of payments for the non-interposition with rights of parties once settled and adjusted.

S. M. Wilson, for defendant.

Interest is no part of a debt, unless made so by special contract to pay interest; and the allowance of interest, both in England and the United States, has, as a general rule, been left discretionary with the courts. This is shown by the whole current of legislation on the subject in Virginia, from the earliest periods in the history of the commonwealth down to the present time. In the year 1730, interest was fixed at six per centum per annum. 4 Hen. St. at Large, p. 294. In the year 1734, it was reduced to five per cent., and this, by successive legislation, was continued the rate until the 1st of May, 1797, when the rate was restored to six per cent. In the Code of 1819 (1 Rev. Code, p. 508) we find it enacted that "in all actions founded on contracts, when judgment shall be rendered in court, if interest be allowed, such interest shall be upon the principal sum due, and shall continue until such principal sum be paid; and on all actions founded on contracts, and tried before a jury, the jury shall ascertain the principal sum due, and fix the period at which interest shall commence, if interest be allowed by them, and judgment shall be rendered as carrying on interest till the judgment shall be satisfied." In the Code of 1849 (page 673) it is enacted that "the jury, in any action founded on contract, may allow interest on the principal sum due, or any part thereof, and fix the period at which such interest shall commence. And in any action for a cause arising hereafter, whether from contract or from tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which said interest shall commence. If a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly." This same section was re-enacted in the Code of 1860 (page 732), and again re-enacted in the Code of 1873 (page 1120), with a proviso "that in all suits for the recovery of money, founded on contracts, express or implied, or on causes of action or liabilities, which were entered into or existed, or where the original consideration accrued prior to the 10th day of April, 1865, it shall be lawful for the court or jury, by whom the suit may be tried, to remit the interest upon the original debt found to be due, or any part thereof, for the period commencing on the 17th day of April, 1861, and ending on the 10th day of April, 1865, or for any portion of said period." These acts are cited to show how fully and continuously the question of interest has been kept in the control of the legislature, and submitted by it to the discretion of the courts, in which it rested at common law, and how clearly and continuously it has recognized interest as no part of a debt, by leaving the allowance of it to the discretion of courts and juries. As to the disallowance or remission of interest during the late war, authorized to be made by the courts or juries by the Code of 1873, as quoted above, the act is but an affirmance of the law as recognized

and declared by the court of appeals, the highest judicial tribunal we have in Virginia, in cases carried before it subsequent to the War of the Revolution. In the case of McCall v. Turner, 1 Call, 115. This was a case in which the jury of the district court of King and Queen county found a verdict for the principal of the debt claimed, and interest thereon from the date of the bond to the 19th day of April, 1775, and from the 19th day of April, 1783, till paid, thus remitting interest during the period of the War of the Revolution. From the judgment of this verdict an appeal was taken, and the judgment was affirmed without dissent from either of the judges of the court of appeals. In this case the creditor, during the war, from some time in the year 1775 to some time in the year 1783, was out of Virginia in parts beyond sea. Each of the judges, in delivering his opinion in the case, recognized the question of interest due as one to be decided by the jury, who, according to the language used by Judge Carrington, should say "when it should commence, how long it should continue, and when it should be suspended or extinguished." President Pendleton, in delivering his opinion in the case, says: "The only question, therefore, is whether interest during the war constitutes a bona fide part of the debt. And I do not hesitate to declare my opinion in the negative, whatever stigma may be attached to that opinion. Our situation at that period, attacked by a powerful nation, to whose government we had been subject, called for the exertion of every power, personal and pecuniary, in defence of life, liberty, and property; and without commerce (which had heretofore been monopolized by that nation) to enable our citizens to pay their debts, takes the case out of every principle on which interest is demandable. The objection applies to all creditors, but a fortiori against those of the nation who unjustly brought us into that situation." This case was decided in the year 1797 by the court of appeals. In the year 1801 the case of Brewer v. Hastie, 3 Call, 21, was decided by the court of appeals in accordance with the decision in the case of McCall v. Turner, war interest for the eight years of the Revolution being disallowed by the court. The claimant of debt and interest in this case was a British subject, and non-resident of the commonwealth. Following these cases comes the case of Ambler's Ex'rs v. Macon, 4 Call, 605. The court of appeals stated, in its decree in this case, that "interest during the war ought not, in justice or equity, to have been allowed on debts due to domestic creditors, no more than to foreign; but since it has not been attended to, either in practice or judicial decisions, until so much business has been otherwise adjusted, it would be unjust at this late era to introduce it in a particular case, unless in one attended with peculiar circumstances." This last-named case was decided in the year 1803, twenty years subsequent to the close of the War of the Revolution.

In the three cases above cited no one of the judges of the court of appeals expressed dissent to the rulings of the court, and the decrees never having been reversed or overruled, stand among the judicial decisions as exponents of the law on the subject embraced by them, and fully sustain the principle that the question of allowing interest during war is at the discretion of the courts and juries. As said above, the act of 1873, giving legislative sanction to the disallowance of interest during the late war, is but an affirmance of the doctrine recognized and declared by the court of appeals, and only shows that the power to disallow interest during the war exists in the courts and juries, and was, no doubt, passed to indicate that the exercise of the power is required for the general good, and called for by right and justice. From the language of the decree in the case of Ambler's Ex'rs v. Macon, 4 Call, 605, it may be inferred that the question of interest running during the war was overlooked, in the majority of cases, immediately succeeding the War of the Revolution; but this can be readily understood if we consider how few persons, comparatively, know the laws, though all are presumed to understand them. That the debts of private individuals then must have been slight, both in number and amount, compared with the mass of liabilities now resting on our people; and that the people then having come through the War of the Revolution with their labor and social organization unchanged, and their property nearly intact, and with lands yielding generous returns to tillage, their power of recuperation must have been such as to leave but little necessity for any relief, save such as the creditor, in most cases, could easily extend to the debtor. The case is different now, when our people having recently passed through a war of almost unparalleled magnitude, during which a very large portion of the state has been laid waste and devastated, from which it is but beginning to recover, have yet the great bulk of their antebellum indebtedness to meet, while their whole system of labor has been swept away, and requires to be organized again, and farming, their main occupation, can barely be relied on for subsistence, and often fails in affording it. The rate of interest is fixed by statute law, and particular cases are defined in which it may be allowed; but the law does not declare or make interest a part of a debt; and while laws are enacted for the construction and enforcement of contracts, they form no part of them (unless possibly of implied contracts), and this, though contracts when made are only valid and binding so far as they are in conformity with law, and, as a general rule, are made and to be construed under the laws and usages existing at the

place and time they are entered into. There are probably, now, no contracts for the payment of money existing in Virginia which have not been made since the allowance of interest on contracts in suits brought on them has been submitted by express law to the discretion of the courts or juries. If I be correct, no party to any contract can complain of the provision of the Code of 1873, quoted above.

As to interest being no part of a debt at common law, I refer to Vin. Abr. tit. "Interest," (c), § 7, and to Chit. Cont. tit. "Interest," and cases cited there; and on this subject, and also as to interest not running during wars, involving general and national calamity, I ask to present the following extracts, made from a communication made by Mr. Jefferson, when secretary of state of the United States, to Mr Hammond, minister plenipotentiary from Great Britain to the United States, under date of the 29th May, 1792, and published in volume 1, American State Papers, and to call attention to those portions of said communication from page 304 to 317, as containing the fullest exposition I have been able to find, both as regards interest forming no part of a debt at common law, and its not running during war, or other national calamity cutting off income, the source properly from which interest is payable. "Section 54, the treaty, is the text of the law in the present case, and its words are, that there shall be no lawful impediment to the recovery of bona fide debts. Nothing is said of interest on those debts; and the sole question is, whether, where a debt is given, interest thereon flows from the general principles of the laws. Interest is not a part of the debt but something added to the debt, by way of damage, for the detention of it. This is the definition of the English lawyers themselves, who say, 'Interest is recovered by way of damages, ratione detentionis debiti.' 2 Salk. 622, 623. Formerly all interest was considered as unlawful in every country in Europe; it is still so in Roman Catholic countries, and in countries little commercial. . . . . In England, also, all interest was against law, till the statute of 37 Hen. VIII. c. 9. The growing spirit of commerce, no longer restrained by the principles of the Roman Church, then first began to tolerate it. The same causes produced the same effect in Holland, and perhaps some other commercial and Catholic countries. But, even in England, the allowance of interest is not given by express law, but rests on the discretion of judges and juries as the arbiters of damages. And we may add, once for all, that there is no instrument or title to debt so formal and sacred as to give a right to interest on it under all possible circumstances. The words of Lord Mansfield (Doug. 753), where he says, 'That the question was, what was to be the rule for assessing the damages, and that in this case, the interest ought to be the measure of the damage, the action being for a debt; but in a case of another sort the rule might be different;' his words (Doug. 376), 'that interest might be payable in cases of delay, if a jury, in their discretion, shall think fit to allow it;' and the doctrine in Giles v. Hart, 2 Salk. 622, that damages or interest are but accessory to the debt, which may be barred by circumstances which do not touch the debt itself,—suffice to prove that interest is not part of the debt, neither comprehended in the thing nor in the term; that words which pass the debt do not give interest necessarily; that the interest depends altogether on the discretion of the judges and juries, who will govern themselves by all existing circumstances, will take the legal interest for the measure of their damages, or more or less, as they think right, will give it from the date of the contract, or from a year after, or deny it altogether, accordingly as the fault or the sufferings of one or the other party shall dictate. Our laws are generally an adoption of yours, and I do not know that any of the states have changed them in this particular. But there is one rule of your and our law, which, while it proves that every title of debt is liable to a disallowance of interest, under special circumstances, is so applicable to our case that I shall cite it as a text, and apply it to the circumstances of our case. It is laid down in Vin. Abr. 'Interest' (c) § 7, and Abr. Eq. 5293, and elsewhere, in these words, 'Where, by a general and national calamity nothing is made out of lands which are assigned for payment of interest, it ought not to run on during the time of such calamity.' This is exactly the case in question. Can a more general national calamity be conceived, than that universal devastation which took place in many of these states during the war? Was it ever more exactly the case anywhere, that nothing was made out of the lands which were to pay the interest?"

In the history of the world, there probably has been no instance among civilized nations of a general or national calamity in which the people have been so deprived of available income while it was pending, or at its close left so little able to meet their engagements, especially the payment of interest which accrued while it lasted, as the people of Virginia have during and since the recent war. During the war they were barely able to secure subsistence for themselves and families, in many cases losing their entire property by the exigencies of the war, and called on by the state authority to contribute their time, means, exertions, and, in many cases, their lives, to the defence of the state. Since the war, through the abolition of slavery, a very large proportion of what constituted their productive property has been swept away; and resuming the cultivation of their lands, which had been ravaged and desolated by the war, without any organized system of labor, and without adequate circulating medium (now needed more than ever), which

they have not the means to purchase, and are prohibited from creating, as they did before the war, their financial condition has been and continues worse than at any other period in our history. If there ever existed cases in which interest accrued during war or national calamity should be disallowed, the cases which it was the object of the statute of 1873, above quoted, to reach, stand pre-eminent among them; and the facts adverted to above, and giving birth to the statute, appeal trumpet-tongued to the courts and juries, to whose discretion the question of allowing interest during the war is submitted, not to allow it.

Messrs. Baker & Walke united in the argument of Mr. Wilson, and cited the following additional authorities: Code Va. p. 1120, § 14; decisions United States courts, declaring state laws unconstitutional: Gilchrist v. Little Rock [Case No. 5,421]; [Jackson v. Lamphire] 3 Pet. [28 U. S.] 280; [Watson v. Mercer] 8 Pet. [33 U. S.] 88; [Green v. Biddle] 8 Wheat. [21 U. S.] 90-92; [Fletcher v. Peck] 6 Cranch [10 U. S.] 128; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 625; and case of Tucker v. Watson, 6 Am. Law Reg. 220, decided by district court of appeals at Petersburg, Judge Joynes.

HUGHES, District Judge. The exhaustive arguments of counsel in this case relieve me of the task of collating the authorities, or presenting any extended reasoning, upon the questions at issue. I think that upon authority, as presented in the Virginia cases of McCall v. Turner, 1 Call, 115; Brewer v. Hastie, 3 Call, 21; Ambler's Ex'rs v. Macon, 4 Call, 605; Tucker v. Watson, 6 Am. Law Reg. 220; and the series of acts of assembly by which this state has expressly and continuously, from the beginning, preserved to her juries a discretionary power over the subject of interest on money,—we may assume the law of this commonwealth, as between citizens thereof, to be, that interest during a period of war may be disallowed by a jury or a court without breach of contract, The legislature of Virginia, by a long series of acts, reaching down, in conjunction with acts of parliament, from the time when, by express statute, the taking of interest on money at such rate as the statute expressly named was declared not to be usury, and was converted from a crime into a statutory privilege,—has reserved to itself the power to say first, through a jury, under what circumstances interest may be taken at all; and next, what percentage of interest shall be allowed. These statutes, and the decisions of her highest courts and ablest judges in the cases I have named, seem to me to settle the law of the subject for this commonwealth. The law may not be precisely the same in other states of the Union, or in England. The weight of authority elsewhere is probably in favor of the exaction of war interest; and the decisions of the supreme court of the United States in cases between other litigants than citizens of Virginia probably incline in the same direction; but a federal court adjudicating between citizens of a state of the Union in cases where the lex loci contractus governs, is bound to follow the law of that state as interpreted by its courts of highest resort; and therefore I feel bound in this case to disregard contrary decisions on this subject which may have been made by the courts of other states, or by the federal courts in adjudicating between citizens of other states, and uphold the Virginia statute (section 14, c. 173, Code 1873).[1] If I were to deny the power of the court or of a jury to disallow war interest in Virginia, I should have not only to nullify an act of assembly which all courts of the state are now administering, but to disregard solemn decisions of its supreme court of appeals, never overruled, and rendered at a time when that court commanded, probably more than at any other, the highest consideration among lawyers and jurists. See Fowler v. Dillon [Case No. 5,000]. The only ground upon which opposition is or can be made to this provision of the Code leaving it in the discretion of court and jury to allow or not interest during the period of the late war is that it impairs the obligation of contracts, and thus violates that clause of the national constitution which prohibits the states from passing laws having such effect.

It is contended, however, in reply, that interest is not in all cases an obligation of contract, in the meaning of the clause of the national constitution referred to. It is true that it is sometimes expressly provided for in the bond, promissory note, or other writing in which parties unite. In such cases, of course, the payment of it is an obligation of contract; and but for the fact that the taking of interest at all is wholly of legislative permission, and that that provision has been in Virginia continually coupled with a legislative reservation to juries of discretion over it, there could be no denial of the fact that the obligation was protected by the provision of the national constitution which has been named.

But in the large majority of cases interest is not payable by express contract. In a multitude of them the obligation to pay it is only implied. Where it is not given by express contract, and the obligation to pay it is not implied by the courts, there is a large class of cases in which it is given as damages for the non-payment of money when due. There are, therefore (using the terms of the civil law,) three modes in which interest may become due: by obligation ex contractu, by obligation quasi ex contractu, and

[1] A decision of Judge Giles, of the United States court, district of Maryland, disallowing war interest, is given elsewhere. [See Jackson Ins. Co. v. Stewart, Case No. 7,152.]

by obligation ex delicto; that is to say, by contract, by implied contract, and by tort. It is with reason contended that the prohibition of the national constitution does not apply to the two latter classes of contract, but only to the first. There is reason for prohibiting the states from impairing express contracts entered into in solemn form; while great mischief and abuse may result from wholly annihilating their power over the multitudinous class of implied contracts, which are inferences of the courts often contravening the intention of parties. The clause of that instrument containing the prohibition is in these words: "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Each of the other phrases in the context is used in its strictly technical sense. "Bill of attainder" has a well-defined judicial meaning, and the courts will not give it a constructive meaning other than or beyond its technical one. So the phrase "ex post facto law" is held to embrace only laws relating to crimes, and will not be allowed by the courts to embrace retrospective laws affecting civil rights. Likewise, it is contended that the phrase "obligation of contracts" should be strictly construed; that is to say, should be treated technically, and should not be interpreted to embrace other contracts than those known in the classification of the civil law as "obligationes ex contractu," or "express contracts." It is a historical fact that the prohibition was inserted in the constitution on the motion of an eminent civil lawyer, educated in Scotland, Mr. Wilson, afterwards justice of the supreme court of the United States. There can be no doubt that the mover of the provision intended it to have only its technical signification; and it is with reason contended that the phrase should be construed strictly, and not be latitudinously extended to apply to obligationes quasi ex contractu (implied contracts), or to obligationes ex delicto, the obligation to pay damages. What possible reason can exist for depriving the states of power over the latter classes of obligations?

Neither of the notes which are the subject of the petition in this case gives interest in terms. It is due upon each of them only by implication. It is due for the forbearance of money. It is due by obligation quasi ex contractu. It may with reason be contended therefore, that this is not one of the class of contracts falling within that prohibition of the national constitution which would render the act of the Virginia assembly void in regard to express contracts. But however this phrase of the national constitution may be interpreted touching the special subject of interest in other states, and in suits between citizens of other states, the question in Virginia stands upon a special basis, to some extent peculiar to this commonwealth. Here the state of the law relating to interest is as follows: By common law, the taking of interest was usury, and a punishable offence. This being the normal condition of the law for a long time, a statute finally was passed in England giving the creditor permission to charge a certain limited percentage of interest, the taking of a greater percentage being still left as a punishable offence; and in Virginia this statutory permission has been continued from time to time down to the present day, always coupled with a legislative provision that the allowance of even the rate of interest permitted to be taken by law should be within the discretion of juries. Therefore this legislative provision has entered into and become a part of every contract of interest, express or implied, which has been made, during its existence upon the statute-book. Being a part of the contract in every case, the clause of the national constitution prohibiting the passage of laws impairing the obligation of contracts does not apply to this law of Virginia. The condition of the law in Virginia, on this subject, is precisely the same as it is on the subject of corporate charters. When the legislature grants a charter, but for a general law on the subject it would have no power to alter or amend the charter until the term for which it had been granted had expired. This is so, because of the decision of the supreme court in the Dartmouth College Case, which declared charters to be contracts, and that laws altering charters had the effect of impairing the obligation of contracts, and therefore contravened the clause of the national constitution forbidding such laws. The consequence has been, that most or all of the states—Virginia among them—have expressly reserved the right to alter or amend every charter that is granted. In Virginia this reservation is not repeated in each act of charter, but is a standing provision in the form of a general law of corporation, so that now, by virtue of that general law, the legislature of the state alters and amends every charter at its pleasure, and these amendatory laws do not contravene the clause of the national constitution under consideration. Precisely the same is the case with reference to the disallowance of interest. From a period long anterior to the adoption of the national constitution, has the general assembly of this state reserved to itself the power of intrusting the allowance of interest to the discretion of juries. This express reservation of power has entered into every contract between her citizens that has been made within a hundred years, and the act of assembly of 1872–73, c. 353, p. 344 (Code 1873, § 14, c. 173, p. 1120), directing the courts and juries to exercise that discretion, does not, in my opinion, in any degree, impair the obligation of contracts within the inhibition of the national constitution.

As to the equities of the case, alluded to by both counsel in the conclusion of their briefs, I think there are, in general, very strong equities against the allowance of war interest. In the great majority of cases in which the

interest for that period is unpaid, the creditors refused to accept it, at the time it fell due, in the currency then in circulation. They preferred to take the chances of receiving gold or its equivalent, after the war should be over, and of the enactment of such legislation as the state has actually resorted to. The permanent and fixed legislative policy of the state had been and was, to reserve to her juries the discretion of allowing or disallowing all interest; and these creditors certainly ought to have contemplated the very probable contingency of the legislature's directing the exercise of this discretion as to interest falling due during the war, when all the resources of the state and her citizens were devoted to the prosecution of their side of the contest. They had knowledge of the legislative policy alluded to, and had notice of the probability that war interest would be disallowed as described. If, with such notice, they chose to refuse interest, as it became due, or to forbear the collection of it, they cannot now complain of the harshness of the law by which it is disallowed. The assignee in bankruptcy has made his claim to war interest in this case by bill in chancery, making the maker of the notes, the trustee in the deeds of trust securing their payment, and the indorsers of the notes on which the interest is claimed, parties defendant. A decree will be given in accordance with the prayer of the bill, except that the defendant, Wilson, will be required to pay the amount which shall be found due upon the notes, without computing interest for the period between the 17th of April, 1861, and the 10th of April, 1865.

Case No. 6,075.

HARMER et al. v. GWYNNE.

[5 McLean, 313.] [1]

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

BILL OF PEACE—WHEN AUTHORIZED—RULES OF EVIDENCE IN EQUITY.

1. The rule, though general, is not universal, that more than one trial at law is required, to authorize a bill of peace. Much depends upon the circumstances of the case.

2. If a trial has been full and satisfactory, and from lapse of time an acquiescence may be presumed, and, if in addition to this, a case in the circuit court has been reviewed and affirmed by the supreme court of the United States, strong ground exists for a bill of peace.

3. Under the 9th section of the practice in chancery act of the state, of 1824 [22 Ohio St. p. 75], a title may be quieted, when it has been established.

4. In such a case the court cannot direct, in a second trial before a court of law, that the same evidence shall be received as was used in the first trial. In directing an issue to a court of law, this may be done. Or, in granting a new trial, such an order may be made as a condition.

5. The rules of evidence, except the answer of the defendant, are the same in chancery as at law.

[Cited in Dishong v. Finkbiner, 46 Fed. 15.]

[This was a bill in equity by William Harmer and others against A. E. Gwynne.]

Mr. Chase, for plaintiffs.
Mr. Walker for defendant.

OPINION OF THE COURT This is a bill to quiet title. In December, 1829, the plaintiffs recovered, by an action of ejectment, in this court, certain lots in the city of Cincinnati on which a judgment was rendered, which judgment was affirmed, on a writ of error, by the supreme court, at January term, 1833. The bill states that the lots claimed were conveyed to the ancestor of the complainants, by John C. Symmes, on the 6th of May, 1791, and that the deed was regularly recorded. That Gen. Harmer, shortly after the deed was executed, took possession of the lots, and remained in possession until his death, in 1814. That when Gen. Wilkinson commanded the garrison at Fort Washington, he had the parade ground enlarged so as to include the lots, by which means their boundaries became obliterated and lost. Judge Symmes did not obtain the patent for his Miami purchase until 1794. The deed to Gen. Harmer being prior to that time, it was supposed that the legal title remained in Symmes, and it was levied on and sold under an execution, as his property, to Ethan Stone. In 1811, Gen. Harmer filed a bill in the supreme court of Ohio, and obtained a decree that the said Stone should release to his heirs all his pretended title. This was in 1820, Gen. Harmer having died in 1814. The heirs of Gen. Harmer, on his death, came into the possession of the premises. The release executed by Stone, under the decree of the court, described the lots as lying south of Front street, they being situated north of it. At the death of Gen. Harmer, his heirs were minors. After they became of age, in 1828, they brought an action of ejectment in this court for the lots and recovered possession of them, which they have ever since maintained.

The bill alleges that the defendant, who claims by descent from his father, who was one of the defendants named in the ejectment writ, has lately commenced an action of ejectment in the superior court of Cincinnati, which was removed by the defendants to this court. The bill further alleges, that the boundaries of said lots, and many other facts proved in the action of ejectment, cannot now be proved, by reason of the death of the witnesses; and they pray that they may be quieted in their title by enjoining the defendant; and that if the court shall be of the opinion that the defendant is entitled to another trial at law, that he may be required to receive the depositions and evidence used in the former case. The defendant demurred, generally, to the bill. The remedy claimed

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

in this case may be resorted to, to suppress oppressive litigation, and prevent irreparable mischief. And an injunction may be granted to quiet the possession of an owner of land against ejectment suits, where the right of the complainant has been satisfactorily established by law. And in some cases it has been held immaterial what number of trials has been had. 2 Story, Eq. Jur. § 859. This jurisdiction was formerly much questioned. Lord Cowper refused an injunction where five verdicts had been rendered for the plaintiff. But the house of lords overruled this decision, and established the jurisdiction. 26 E. C. L. 859.

The power to grant injunctions is confided to the discretion of the court of chancery, to be exercised in all cases, where that court shall deem it necessary, for the furtherance of justice. Trustees of Huntington v. Nicoll, 3 Johns. 586. In that case there was one trial for trespass, and, under the circumstances, it was held that the court ought to quiet the title. It has not been usual to exhibit a bill in chancery for quieting a title between two individual claimants until after several verdicts at law. But it seems not to have been held that any precise number of verdicts at law before a bill of peace can be sustained. The better rule would seem to be, that the title at law has been fully and fairly established by one or more trials. 2 Term R. 601. In Leighton v. Sir Edward Leighton, 1 P. Wms. 672, there were two verdicts for the defendant, and afterwards two for the plaintiff, and the court perpetually enjoined further litigation, quieting the plaintiff in his possession. By a note in that case it is said, that in a cause much litigated, the defendant shall not be concluded by one verdict. That case was affirmed, on an appeal to the house of lords. 2 Brown, Parl. Cas. 21. After the right to real estate has been satisfactorily established at law, equity will quiet the title against further disturbance. It is immaterial what number of trials have been had, whether two or more, so that the right be satisfactorily established. Marsh v. Reed, 10 Ohio, 347. In Weller v. Smeaton, 1 Brown, Ch. 573, the demurrer was allowed, as the right had not been established at law. In that case the lord chancellor said, if after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this court to interfere by way of injunction, but merely where one party claims, and another denies the right, it is impossible to entertain the bill.

On the part of the defendants, it was contended that the general rule on this subject required two or more trials at law, before chancery would restrain the defendant from prosecuting an action at law, to recover the possession of the premises; and the following authorities were read in support of the position assumed: Finch, Prec. 262; 1 Brown. Parl. Cas. 266; 2 Brown. Parl. Cas. 217; 2 Atk. 48; 3 Johns. 586, 590; 1 P. Wms. 672. In the case before us the facts have been tried once only by a jury; but exceptions were taken as to the admission of the facts in evidence before the jury, and the principles of law which belong to the case have been twice considered and decided; first, in the circuit court, and then in the supreme court. This, in such a case, is entitled to consideration. Long continued possession is also a matter not to be disregarded in the case. From lapse of time, a presumed acquiescence in the first decision may be drawn. And in addition to the above consideration, all the points which could be raised, were made and deliberately considered in the circuit court, and also in the supreme court, we are inclined to think might afford ground on which to quiet the title. But there is another ground on which this proceeding may be sustained, and which has not been advocated in the argument. In the 9th section of the practice in chancery act of 1824, of this state, it is provided, "That any person having both the legal title to, and possession of land, may institute a writ against any other person setting up a claim thereto; and if the complainant shall establish his title to such land, the defendant shall be decreed to release his claim thereto, and to pay the complainant his costs; unless the defendant shall, by his answer, disclaim all title to such lands, and offer to give such release to the complainant, in which case the complainant shall pay to the defendant his costs, except for special reasons appearing, the court shall otherwise decree."

In the case of Clark v. Smith, 13 Pet. [38 U. S.] 20, under an act of Kentucky of 1796, which contained the same provisions as are in the Ohio act, the supreme court held it afforded ground of relief. They say, "The state legislatures have no authority to prescribe the forms and modes of proceeding in courts of the United States; but having created a right and at the same time, prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts." Under the above statute it is not perceived why relief may not be given to the complainants, if they shall show themselves entitled to it. It is a new right so far as the form of the action is concerned, which can be enforced only by a court of chancery. And in such a case the supreme court have held relief may be given. In regard to the alternative prayer of the bill, to require the court of law, if the injunction shall not be granted, to receive the evidence in behalf of the complainants that was used on the trial of the former ejectment, I am inclined to doubt the power of the court. Where chancery directs an issue at law, such an order may be made. But can the chancellor in this manner control the judgment of a court of law. In directing or

granting a new trial, this may be done as a condition of granting the motion. But the rule of law, in regard to the admission of evidence, is the same at law as in chancery. It is true the answer of the defendant, responsive to the bill, is evidence which must be contradicted, but in every other respect the rule in both courts is the same. The demurrer is overruled, and leave is given to the defendant to answer the bill.

[For previous stage of this litigation, see Case No. 6,076.]

Case No. 6,076.

HARMER v. MORRIS et al.

[1 McLean, 44.][1]

Circuit Court, D. Ohio. Dec. Term, 1829.[2]

EJECTMENT—ACQUISITION OF LANDS BY GRANTOR AFTER DATE OF DEED—MINORS—MAP AS EVIDENCE—BOOK OF SURVEYS—ACT DONE BY MISTAKE.

1. Symmes executed a deed for the lots in controversy in 1791, and in 1794 obtained a patent for the same and other lands, from the United States. From the date of this patent the first deed operated as a legal conveyance. A suit against the purchaser of this property on a judgment against Symmes in 1803, on the ground that he acquired the legal title, and that Symmes's deed conveyed only an equitable title, was unnecessary. The mother of minor heirs has no power to authorize an agent to act for such heirs, in matters relating to their real estate.

[See note at end of case.]

2. To prove boundary, a map which has governed in the sale of lots, and has been treated for many years by the proprietors and purchasers as the original map, may be received in evidence.

[Cited in City of Elgin v. Beckwith, 119 Ill. 369, 10 N. E. 558.]

[See note at end of case.]

3. The remarks, however, made on the map by the proprietor, are not evidence.

4. A book published by a deponent respecting the date, &c. of certain surveys, may be read in evidence, with a view to qualify his deposition. Acts done through mistake are not binding, whether done by principal or agent.

[Cited in Yates v. Little, Case No. 18,128.]

[See note at end of case.]

[Action by the lessee of Harmer's heirs against George Morris and David Gwynne.]

Mr. Caswell, for plaintiff.

Mr. Ewing, for defendants.

OPINION OF THE COURT. This action of ejectment was brought to recover possession of a lot of ground in the city of Cincinnati. The lessors of the plaintiff claim as heirs of Gen. Josiah Harmer; and they have given in evidence a deed executed by John C. Symmes, in whom the legal title was afterwards vested, for the whole of the land covered by the plat of the city. The deed was dated the 6th May, 1791, and acknowledged the 28th November, 1804, and recorded in the same month. The boundaries specified in the deed are, "on the south on the front of River street, lying directly in front of Fort Washington, being twelve rods wide on the street, including two lots, and extending northerly from the said front street twenty rods, to the south side of the second street from the Ohio, and adjoining the said second street twelve rods from east to west; and on the east bounded by lands of his excellency, Gov. St. Clair." These lots were not within the original plan of the city. Symmes obtained a patent from the United States for the land in 1794. The defendants claim title under Ethan Stone, who purchased it at sheriff's sale in 1803, as the property of Symmes on a judgment obtained against him by Lemmon. The defendants also gave in evidence the record of a chancery suit brought by Harmer against Stone, on the ground that as Symmes had only an equitable title at the time he executed the deed to Harmer, in 1791; an equitable title only was conveyed, and that by the purchase at the sheriff's sale, Stone became vested with the legal title; and the bill prayed that Stone should be decreed to release his title to the premises to the complainant.

This suit was prosecuted and in 1817 a decree was obtained by the heirs of Harmer, (their ancestor having deceased) for the title of Stone. But he did not execute a release in pursuance of the decree until some four or five years after the decree, when at the instance of George W. Jones, an agent of the widow and heirs, a part of whom were minors, Stone went to the ground in company with the counsel for the heirs and a surveyor, and the lots were set off as Stone directed. The surveyor handed Jones a plat of the survey, and a release in pursuance of it was executed by Stone. Mr. Jones states that he had no written authority to act as agent, and that one of the heirs, and perhaps the only one of full age, gave him no authority, verbal or written. He acted merely at the request of the widow. The witness supposed the deed of release was executed for the same lots as contained in the deed from Symmes to Harmer. The plaintiffs then proved that in 1824, an execution against Ethan Stone was levied on a part of the ground included in Stone's deed of release, but which, it is contended was not within the boundaries of the lots conveyed to Harmer by Symmes, and which was sold as Stone's property by the sheriff, in February, 1825, to one Kirby, who conveyed the same to Jones. Afterwards Stone, on being informed that this purchase was made to quiet the title of the heirs of Harmer, executed a release to Kirby. It is proved that the heirs have had possession of the premises for a great number of years, and that they caused to be erected thereon, one or more valuable buildings.

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

[2] [Affirmed in 7 Pet. (32 U. S.) 554.]

Much evidence has been introduced in relation to the boundaries of these lots. With other witnesses, Thos. Henderson has been sworn, who states that he has heard several of the old residents of Cincinnati, now dead, speak of Harmer's lots; and among others, he recollected the names of Joel Williams and David Zeigler, the latter being the agent of Harmer, and they censured Stone for attempting to take away Harmer's property. The plaintiffs then read from a work by Doct. Drake, called "A Picture of Cincinnati," the date of the surveying of the lots lying east of Fort Washington. This evidence is admitted and also the statement of Henderson, though they are objected to by defendant's counsel. The deposition of Doct. Drake has been read in evidence in relation to the same matter, as contained in his book, and it is considered that the statement in his book may be read to correct, or in some degree qualify the statements in his deposition. The book was written when the facts were fresh in the recollection of the witness, and they were probably stated with greater accuracy than he could be expected to state them after the lapse of many years. The book is therefore not admitted as an ancient record of facts or events, but merely as the statement may have some bearing on the deposition of the author recently taken and read in evidence. The remarks of Williams and Zeigler, as related by the witness Henderson, go to establish no fact which can have a bearing in the case, and the jury will so consider them. Gest, the surveyor, was examined, as a witness, and other witnesses. The defendants then offered a map contained in Drake's book, corresponding with the plan given in evidence by the plaintiffs, except no numbers were given to the four first lots. Another plat was then given in evidence by the plaintiffs which was numbered 3. And the witness Henderson stated that that map was shown to him in 1809, by John C. Symmes, in the presence of Daniel Symmes. That he saw the map again in 1811, when the lots were numbered, which appeared to have been done by Daniel Symmes. That he then copied the plat on a larger scale, at the request of a number of the citizens of Cincinnati, and had it placed upon the records of the county. That on this plat were designated the lots, alleys and streets, of the upper part of the city, and that sales of lots were made with reference to it, and that it was treated and considered as the original plat of the city for that part which lies east of the garrison. This plat was objected to by the defendants, but the court overruled the objection, and admitted the map as evidence, with the exception of remarks made upon it in the handwriting of John C. Symmes. The plaintiffs then prayed the court to instruct the jury "that inasmuch as they claim title to the premises in dispute under the deed from Symmes to Harmer, and not under the deed of release made by Stone, they cannot be divested of their title to the lots which that deed conveyed by the possession of the premises for the period of five or six years, which they supposed to be a part of the original lots, though embraced in the deed of release, but not in the decree." This instruction was given to the jury. A deed having been given by Symmes to Harmer, for these lots in 1791 when the patent was issued to Symmes for the same land in 1794, the deed of 1791 took immediate effect and vested Harmer with the legal title. Stone therefore by his purchase of these lots on execution in 1803, as the property of Symmes, acquired no right to them either legal or equitable, and no necessity is perceived for the prosecution of the chancery suit against Stone for a release of the legal title. This suit, however, and the proceedings under it, can in no sense impair the title of the plaintiffs. At most, these proceedings were unnecessary, and would seem to have no other bearing in the case than to show the boundaries of the lots. A mistake in the release of Stone cannot, under the circumstances, in any form prejudice the rights of the heirs. They gave no assent to the release, in a form which could bind them to take other land than that contained in the deed of Symmes.

The defendants then prayed the court to instruct the jury "if they believe upon the whole evidence, that Mrs. Harmer, the next friend of the minors, in prosecuting the bill in chancery and obtaining the decree given in evidence authorized George W. Jones to obtain the deed of release under the decree, and take possession of the lands, and that George W. Jones under this authority, as agent for the complainant, obtained the decree, and in conjunction with the attorney for the complainants, who obtained the decree, assented to the location of the ground, and that the agent accepted the deed and took possession of the land according to the boundaries described in the deed, the lessors of the plaintiff are concluded by his acts and they cannot recover." This instruction the court refuse to give. Jones was not the regularly constituted agent of the plaintiffs. He acted at the request of Mrs. Harmer, and, as above remarked, he was authorized to do no act which could bind the lessors of the plaintiffs, all of whom were minors with one exception. But, if Jones had been authorized to act as agent, the acceptance of the deed of release under the mistaken impression that it described the lots truly as conveyed by Symmes, would not bind his principals. The defendants further ask the court to instruct the jury that "if upon the whole evidence the jury believe that Mrs. Harmer, the next friend of the minors, in prosecuting the bill in chancery, and obtaining the decree given in evidence, authorized Jones to obtain the deed of release under the decree and take possession of the lots, that Jones, under this authority, in conjunction

with the attorney assented to the location of the ground, accepted a deed and took possession accordingly, and continued his agency after the lessors of the plaintiff arrived at full age, and the defendants purchased before the lessors of the plaintiff disavowed the acts of their agent, and before the defendants had any knowledge of their intention to do so, and no such notice was given by Jones, although public sale of the adjacent lots was made, the lessor of the plaintiffs cannot recover." This instruction is refused for the reasons above given. Mrs. Harmer had no power to appoint Jones an agent to act for the heirs; her powers, as natural guardian were, at most, very limited, and did not extend to the management of the estate of her minor children. The fourth and fifth instructions asked are also refused. It is unnecessary to repeat these instructions, as they are both answered by the want of power in Jones, as an agent, to bind the lessors of the plaintiff; and the fact that Stone acquired no title either legal or equitable to these lots, by his purchase of them, or a part of them, at the sheriff's sale; consequently his release to Kirby, as well as his release to the lessors of the plaintiff, compose no part of the title relied on by the complainants. Stone having acquired no title, could release none by the conveyances executed. Under these instructions the jury found the defendants guilty, and a judgment was rendered for the lessors of the plaintiff, on the verdict.

[NOTE. The defendants then sued out a writ of error, and the supreme court affirmed the judgment in an opinion by Mr. Justice Story, who said that the deed of 1791 passed a legal title to Harmer, which became consummated when his grantor obtained a patent from the United States in 1794. The mother could not, as next friend, authorize any release to be taken during the minority of her children which would bind them. As Dr. Drake had already been used by the defendants as a witness, it was proper to put his book in evidence to explain, qualify, or control his testimony. The plat was evidence, as it had been used by the original proprietor of the whole city, and was recognized by the corporate authorities in making their surveys. It was the best proof obtainable, although not conclusive. 7 Pet. (32 U. S.) 554. See, also, Case No. 6,075.]

HARMISON (UNITED STATES v.). See Case No. 15,308.

Case No. 6,077.

In re HARMON.

[See Case No. 6,078.]

Case No. 6,078.

In re HARMON.

[10 Chi. Leg. News, 22; 6 Am. Law Rec. 196.]

Circuit Court, N. D. Ohio. 1877.

On exceptions to petition in involuntary bankruptcy [in the matter of Gilbert Harmon].

Before WELKER, District Judge.

Held, 1. That it is not necessary in the petition to allege that the debts of the petitioners are unsecured debts, when it is alleged that they are provable debts.

2. That the depositions in support of the petition in reference to the debts of the petitioners, must show that they were unsecured debts, as well as otherwise definitely describe them.

Exceptions overruled as to the petition, sustained as to proof of debts, and leave given to petitioners to amend the proof of debts.

HARMON (DICKEY v.). See Case No. 3,894.

Case No. 6,079.

HARMON et al. v. JAMESSON.

[1 Cranch, C. C. 288.] [1]

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

BANKRUPTCY—ATTACHING CREDITOR.

Under the bankrupt law, an attaching creditor was entitled to only a ratable part of his debt, with the other creditors; and that part was to be ascertained by the assignees, under the direction of commissioners.

In bankruptcy.

CRANCH, Chief Judge. Sacket, Doolittle, Allison, and others, creditors of Harmon & Davis, attached the money of the bankrupts, before their bankruptcy, in the hands of Jamesson. During the pendency of these attachments, Harmon & Davis became bankrupts, and a commission issued, upon which they have been discharged, and a dividend of 10 per cent. has been made. The defendant, Jamesson, by his answer, admitted $867 of the effects of Harmon & Davis to be in his hands, ready to be paid as the court should order. This money has been brought into court, and the question is, whether it shall be decreed to be paid over to the assignees of Harmon & Davis, to be distributed according to the bankrupt law, or whether this court will decree to each of the attaching creditors, "a ratable part of his debt, with the other creditors of the bankrupt," who have proved their debts under the commission, and received their dividend of 10 per cent. This question depends upon the construction of the 31st section of the bankrupt law of 1800 (2 Stat. 30), which is in these words: "That in the distribution of the bankrupt's effects, there shall be paid to every one of the creditors, a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such

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

bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupt,) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment for more than a ratable part of his debt, with the other creditors of the bankrupt."

By this section, then, a creditor "having an attachment," "shall not," "in the distribution of the bankrupt's effects," "be relieved" "upon such attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt." But this, it is said, implies that he shall be relieved upon such attachment for a ratable part, and therefore this court cannot decree the whole to be paid over to the assignees. But he is only to be relieved for his ratable part, in the distribution of the bankrupt's effects. What then is a distribution of the bankrupt's effects? By going back to the 29th section, we shall find an answer. It is a distribution among such of the bankrupt's creditors as have duly proved their debts under the commission, and is to be made by the commissioners and assignees. By the 30th section, a second, or any subsequent dividend, is to be made "by like order of the commissioners," "amongst such of the bankrupt's creditors as shall have made due proof of their debts." The word "distribution," has a technical meaning, prescribed by the statute. The court understands the 31st section to mean, that in the distribution of the bankrupt's effects by the assignees under the order of the commissioners, an attaching creditor, who has duly proved his debt under the commission, shall not be relieved upon the attachment for more than a ratable part of his debt. If this negative proposition implies an affirmative, the affirmative proposition must be correspondent to the negative. This affirmative proposition can only be, that in the distribution of the effects by the assignees under the order of the commissioners, the attaching creditor, who has duly proved his debt under the commission, shall be relieved upon his attachment for a ratable part of his debt. This construction seems to arise so obviously, upon an attentive reading of the act of congress, that the court cannot deem it necessary to go into a detail of the arguments which support it. It may, however, be observed, that, by the act, the commissioners are constituted the sole tribunal competent to receive proof of debts against the bankrupt's estate. They are also the only competent tribunal to make the order for a dividend, and to ascertain its amount. There can be no distribution, but by their order. A debt, proved before this court, is not a debt duly proved under the commission; and a distribution made by this court, is not a distribution within the meaning of the act.

The general object of the bankrupt law, was to distribute the effects of the bankrupt, equally among his creditors, and to prevent priorities and preferences. Hence it avoids all assignments and transfers of property made on the eve, or in contemplation of bankruptcy. This wise provision of the law, might, however, be completely defeated, by permitting attaching creditors to gain a priority. Hence it provides, that no such creditor shall be relieved on such attachment, for more than a ratable part of his debt, with the other creditors. Of what use, then, could it be to say, that the attachment should be a lien for such ratable part, when the creditor would be equally entitled to his ratable part without such a lien? The law could not presume that the commissioners or the assignees (the very persons intrusted and commanded by the law to distribute the effects) would not do their duty, and faithfully execute the command of the law. The opinion of THE COURT, therefore, is, that this court cannot decree any part of the money to the attaching creditors, but that the whole must be paid over to the assignees, to be distributed according to law.

Case No. 6,080.

The HARMONIA.

[See Case No. 6,005.]

Case No. 6,081.

The HARMONY.

[1 Gall. 123.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

UNLOADING GOODS WITHOUT A PERMIT—FORFEITURE OF VESSEL—PRACTICE.

1. Under the 50th section of the act of March 2, 1799, c. 128 (4 U. S. Laws [by Folwell] 279; [1 Stat. 665, c. 22]), if foreign goods exceeding $400 in value are unladen without a permit, &c. the vessel is forfeited from which they are unladen, although they were not actually brought in such vessel from a foreign port; but had been trans-shipped into her on the homeward voyage.

[Cited in U. S. v. The Virgin, Case No. 16,625; The Industry, Id. 7,028; Jackson v. U. S., Id. 7,149; U. S. v. 129 Packages, Id. 15,941; The Active, Id. 33; The Sarah Bernice, Id. 12,343; The Saratoga, 9 Fed. 328; U. S. v. Curtis, 16 Fed. 186.]

2. Amendment by inserting a new substantive offence disallowed; the statute of limitations having run against it.

See Dunl. Adm. Prac. c. 18. See Cross v. U. S. [Case No. 3,434]; The Edward, 1 Wheat. [14 U. S.] 261; U. S. v. Four Part Pieces of Woolen Cloth [Case No. 15,150.]

[Cited in Anonymous, Case No. 444; Tyson v. Belmont, Id. 14,315a; Tiernan v. Woodruff, Id. 14,027; Newell v. Norton, 3 Wall. (70 U. S.) 266; The Favorite, Case No. 4,696. Applied in U. S. v. 123 Casks of Distilled Spirits, Id. 15,943. Cited in Reed v. Crowley, Id. 11,644; The Maggie Jones, Id. 8,947; U. S. v. Mosely, 8 Fed. 690; The Corozal, 19 Fed. 655; The George Taulane, 22 Fed. 800; Dieckerhoff v. Robertson, 29 Fed. 782.]

[1] [Reported by John Gallison, Esq.]

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a libel by the United States against the schooner Harmony, Paoli Hewes, claimant, for unloading goods without a permit.]

G. Blake, for the United States.
S. Dexter, for claimant.

STORY, Circuit Justice. The libel is founded on the 50th section of the collection act of 2d March, 1799, c. 128 (4 U. S. Laws [by Folwell] 279; [1 Stat. 665, c. 22]), for unloading goods without a permit at Boston. The attorney for the United States moves for leave to amend, and to insert a new count, founded on the 28th section of the same act, for receiving on board, from another vessel, certain foreign goods and merchandize in the Bay of Passamaquoddy. It is stated, that this latter transaction has now, for the first time, come to the knowledge of the district attorney; that it took place more than three years ago, and of course the forfeiture would be barred by the statute of limitations; and that the transaction had no immediate connexion with the offence, for which the original seizure was made at Boston.

The amendment has been opposed on several grounds:

1. That it would be introductive of a new cause of action, which is not allowable. On examination, I do not find that this has, even at common law, been considered as of itself a sufficient objection. 2 Tidd, Pr. 643, 644; 2 Strange, 890; 1 Wils. 149. Though it appears, that amendments in such cases have been granted only under particular circumstances. Sackett v. Thompson, 2 Johns. 206; Harris v. Wadsworth, 3 Johns. 257. In revenue informations, such amendments were formerly denied (Edgell v. Decker, Bunb. 252); but latterly they seem to have been generally allowed, as the attorney general might obtain the same effect by a new information (Attorney General v. Henderson, 3 Anstr. 714). In admiralty and maritime causes, to which class the present belongs, such amendments are within the scope of the general rule, that you may allege new allegations in the appellate court. Cler. Prax. tit. 54.

2. It has been further objected, that such amendments ought not to be allowed, because the statute of limitations has actually run against the forfeiture; and it would be in effect reviving a new right of action, which in an original information would be barred. That the statute of limitations would run against a cause of action then before the court, has been held a good reason for allowing an amendment, as to such cause of action. 2 Tidd, Prac. 643, 644; 1 Wils. 144; Sayer, 235; Cross v. Kaye, 6 Term R. 543; Maddock v. Hammet, 7 Term R. 55. But in such cases, the court will not admit an amendment, if it be to introduce a new substantive cause of action, or new charge against the defendant. Id.; Petre v. Craft, 4 East, 433. Now I think this rule a perfectly reasonable one, and I shall adhere to it in this case. The amendment must be disallowed, because the cause of action would be gone on an original information; and it is clearly a new substantive charge. I will only add, that a third objection made, that it might affect the rights of the sureties on the bond given for the property, has not been considered of weight in any cases at common law. Where the property is delivered on bond, it is too much to contend, that the rights of the court over it can be increased or diminished by that circumstance. Every person, so bailing the property, is considered as holding it subject to all legal dispositions by the court. Rex v. Holland, 4 Term R. 457. A fortiori the objection would, with great difficulty, find support in a court exercising admiralty jurisdiction. Motion denied.

On a hearing of the cause on the merits, STORY, Circuit Justice, delivered the following opinion:

The schooner Harmony has been libelled for landing foreign goods and merchandize, exceeding $400 in value, in the port of Boston without a permit, and in the night-time, contrary to the 50th section of the revenue act of 2d March, 1799, c. 128 (4 U. S. Laws, 360) [1 Stat. 665, c. 22]. It is admitted, that the facts prima facie support this allegation, and the defence relied on is, that these goods and merchandize were not brought in said schooner from a foreign port or place, but were taken out of a British vessel in Passamaquoddy Bay, within the limits of the United States, and there immediately put on board of the Harmony; and it is contended, that the 50th section of the act referred to, applies only to vessels which have actually brought the goods and merchandize from a foreign port or place, and not to goods and merchandize, which have been shipped within our waters. It is admitted, that the transshipment in Passamaquoddy Bay, if sufficiently proved, was a violation of the 27th and 28th sections of the same act, and an inference is thence drawn, that the 50th section ought not to be applied to the case. There can be no doubt, that the vessel was forfeited under the 28th section; but as there is no count in the libel founded thereon, the forfeiture cannot be decreed for that cause. The words of the 50th section are, "that no goods, wares or merchandize, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States, but in open day, &c., nor at any time, without a permit," on penalty of forfeiture; and if they are so unladen, and the value exceed $400, the act declares, that the vessel shall be subject to the like forfeiture. The argument is, that the vessel so declared to be forfeited, is the vessel, which shall bring the goods from

a foreign port or place, and none other; and that these words are a description or designation of the vessel forfeited, and not of the goods.

Perhaps, in strict grammatical construction, this is the more natural import of the clause; but without any violation of propriety, the language may also be applied to the goods. It would in this view read in effect thus, "No goods, wares, or merchandize, brought from any foreign port or place, in (that is, on board of) any ship or vessel shall be unladen or delivered, &c., without a permit." If it be urged, that this is an unauthorised transposition of the words, and gives them a construction the reverse of their literal signification, I might answer in the words of Lord Coke, "Qui haeret in litera, haeret in cortice." But it is not necessary to resort to this maxim. In the construction of all statutes, it is a general rule, that the court are to expound them according to the intention of the framers. This intention is to be gathered, not merely from an examination of a single section, but from comparing together different sections of the same statute. When it is once ascertained that the legislature have created an offence, the extent, to which it reaches, is to be sought in the exposition of the mischiefs which it seeks to remedy, and cases within the same mischief and the same intent have been frequently construed within the prohibitions, although not exactly within the letter. 2 Rolle, 318; Plowd. 350, 363; 3 Atk. 203; Com. Dig. "Parliament," R, 10, 13, 15, 19. From the operation of this rule, penal statutes do not seem always to be exempted. Plowd. 10; Hardr. 208; Plowd. 82. For though they are to be construed strictly, yet they are to be so construed, as to meet the mischief, which the legislature show a clear determination to suppress.

Let us now examine with this view the act before us. It will be admitted, that its obvious intent was, to regulate all trade in merchandize brought from foreign ports, and to guard the revenue of the United States from frauds. The duties which are payable on foreign commodities are exacted by other laws; but the mode of collection, and the regulations of importation are in a great measure confined to this act. The sections of the act from the 23d, up to the 50th section, contain a series of provisions evidently intended to prevent the importation of all goods, foreign as well as domestic (sections 47, 48), from any foreign country, without the same being put under the inspection of the proper revenue officers. The fact of their having come from a foreign country, and not the conveyance, by which they come, is that which gives the right to duties; and it is the security of the latter, which has engaged the solicitude of the legislature.

Now it has been supposed, that the 27th and 28th sections apply to trans-shipments within four leagues of the coast, or within some district of the United States, before the arrival of the vessel at a port of delivery, and to this construction the court was inclined, from the manifest intention of the legislature resulting from provisions applicable to the progressive order of the voyage. If that opinion be right, and a foreign cargo be brought into a port of delivery in the United States, as for instance into the Vineyard, and thence trans-shipped in another vessel to another port of delivery in the United States, without payment of duties, and landed in the latter port without a permit, it would follow upon the argument of the claimant's counsel that neither the goods nor vessel would be forfeited by the 50th section. Not the goods, for they would not then be brought from a foreign port in the ship; nor the ship, for she would not have come from a foreign port. Now such a construction would be manifestly against the whole scope of the act. It would destroy, by an intermediate trans-shipment, the whole security of the revenue. Precisely the same words are used in the same connexion in the 51st section, and all the regulations prescribed by that section, as to weighing and gauging, and the removal of goods landed on a wharf, would be inapplicable to goods so intermediately trans-shipped. It has indeed been suggested, that this section applies to any foreign goods in any ship or vessel whatsoever, and is not confined to the ship or vessel bringing them from a foreign port. But I cannot feel the distinction. The words are the same, and if the 51st section had at the close contained a forfeiture of the vessel, as it does of the goods, I imagine the construction of both sections must have been the same; and if so, have I not a right to say, that in the 50th section, the words apply to any foreign goods imported in any vessel from any port whatsoever? Further, it is one great object of the legislature, to make the owner of the ship a surety for the fair and upright conduct of the owner of the cargo. Without the connivance of the master, goods to the amount of $400 can hardly be smuggled from the ship. The master has the confidence of the owner, and is responsible to him for his own acts. This strong inducement to watchfulness, to integrity, and prompt interdiction of illegal traffic, would be wholly lost upon the supposed construction of the act in a variety of cases. When I can perceive a construction, which hardly varies the letter of the act, and yet comports with its general intent, which suppresses the mischiefs and enforces the purposes of the general policy, I cannot think that any rule respecting penal statutes is violated by deciding that the present case is within the purview of the 50th section.

After the decisions of the court in the cases of The Hannah [Case No. 6,028], and The Industry [Id. 7,028], at this term, it seemed difficult to avoid this conclusion. But entertaining, as I do, the most entire respect for the learned counsel for the claimant, I can never deem that of light or trivial consideration,

which he shall choose to urge to the court; and if he has failed to satisfy my doubts, it cannot be, that his arguments have wanted either exactness or perspicacity. I affirm the decree of the district court, with costs.

HARMONY, The (CLAYTON v.). See Case No. 2,871.

HARMONY, The (CONCKLIN v.). See Case No. 3,089.

Case No. 6,082.

HARMONY v. MITCHELL.

[1 Blatchf. 549;[1] 8 N. Y. Leg. Obs. 329.]

Circuit Court, S. D. New York. Oct. Term, 1850.[2]

TRADING WITH ENEMY'S COUNTRY — SEIZURE OF GOODS — WHEN JUSTIFIED — TAKING PRIVATE PROPERTY FOR USE OF ARMY — LIABILITY OF OFFICER ORDERING SEIZURE.

1. Where a trader is, during war, engaged in trading with a portion of the enemy's country that has been reduced to subjection, and his trading there is permitted and encouraged by the invading army, his goods cannot be seized on the ground that he is engaged in an unlawful trade with the enemy.

[See note at end of case.]

2. To justify the seizure of property during war, to prevent its falling into the enemy's hands, the danger must be immediate and urgent, not contingent or remote.

[See note at end of case.]

3. A military officer has a right, in a case of extreme necessity and impending danger, for the safety of the government or of the army, to take private property for the public service; and, in such case, the officer is not liable as a trespasser, but the owner must look to the government for indemnity.

[See note at end of case.]

4. But, where property was seized by a military officer, not on account of any impending danger at the time, or for the purpose of being used against an immediate assault of the enemy, by which the seizing army might be endangered, but for the purpose of strengthening the army, and aiding in an expedition against the enemy's force some 200 miles distant, and it was so used, *held*, that the officer was not justified in taking the property, but was a trespasser.

[See note at end of case.]

5. In such case, the liability of the officer for taking and appropriating the property, accrued at the time of the seizure; and if the plaintiff, after the seizure of his goods, does not waive the liability of the officer, or resume ownership over the goods as his private property, he is entitled to recover against the officer in trespass.

[See note at end of case.]

6. In a case where the superior officer who gives the order for the seizure is not justified, neither will the subordinate officer who executes it be justified.

[See note at end of case.]

This was an action of trespass [by Manuel X. Harmony against David D. Mitchell]. The declaration contained three counts, alleging the stoppage and seizing by the defendant, of horses, mules and wagons, with goods, the property of the plaintiff. [Damages $100,000.][3] There was a plea of not guilty, and three special pleas to each count. The first was, that at the time when, &c., the United States were at war with Mexico, and the defendant was lieutenant colonel of a part of the military force employed in the war, under the military command of Col. Doniphan; that the latter, having full and complete authority so to do, commanded the defendant to stop and seize the property, as he had a lawful right to do; and that the defendant merely transmitted the command of Col. Doniphan to his troops, and was not otherwise instrumental, &c. The second special plea was, that at the time when, &c., the United States were at war, and the defendant was lieutenant colonel of a military force of the United States, employed in the war, under the military command of Col. Doniphan; that the plaintiff, being a citizen and resident of the United States, after the war existed, knowing its existence, drove the horses and mules from the territories and jurisdiction of the United States, into the territories and jurisdiction of Mexico, with the design to trade and carry on a friendly commercial intercourse with the citizens of Mexico, and to afford aid to the same in the war; that Col. Doniphan, having full and complete authority so to do, commanded the defendant to stop, seize, &c., as he had a lawful right to do, for that cause; and that the stopping, &c., necessarily occurred in the execution of the command, for that cause, &c. The third special plea was the same as the last, except that it omitted all about Col. Doniphan, and averred the seizure to have been by the defendant, in performance of his duty as lieutenant colonel, and as he had a lawful right to do for that cause, &c. To the special pleas to the first and third counts there were general replications of de injuria sua propria. But to the special pleas to the second count there were special replications. To the first special plea the plaintiff replied, admitting the war, the office and employment of the defendant, the superiority of Col. Doniphan, and that the defendant was bound to obey his lawful commands, and averring that the property was found by the defendant, and known by Col. Donipian, to be owned and used by the plaintiff as his private property; that the plaintiff was a citizen of the United States, and was, with his property, in the peace and under the protection of the United States, of which Col. Doniphan and the defendant had notice; that Col. Doniphan did not command the property to be seized, nor was the same in fact seized by the defendant, for the purpose or in contemplation of any proceeding in due course of law for any alleged forfeiture thereof, but to ap-

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

[2] [Affirmed in 13 How. (54 U. S.) 115.]

[3] [From 8 N. Y. Leg. Obs. 329.]

ply the same to the use of the United States, without compensation to the plaintiff, of which the defendant had notice; and that the property was stopped and seized of the defendant's own wrong, and without the cause in the plea alleged; and traversing the allegations that Col. Doniphan commanded the defendant and had lawful right so to do, and that the stopping, &c., occurred in the execution of such command. To the second special plea the plaintiff replied, admitting the war, the office and employment of the defendant, the office of Col. Doniphan, and that the defendant was bound to obey his lawful commands, and that the plaintiff was a citizen and resident of the United States, and averring that the property was found and known by the defendant and by Col. Doniphan to be owned and used by the plaintiff as his private property; that the plaintiff, so being a citizen, was, with his property, in the peace and under the protection of the United States, of which the defendant and Col. Doniphan had notice, and did not take the property from the territories or jurisdiction of the United States into the territories and jurisdiction of Mexico, except to and in such places as had been and were captured and subdued, and at the time held in subjection by the forces of the United States, and while such places were so held under subjection to such forces and to the United States, nor except by the license and permission of the commanding officers of such forces, duly authorized to grant the same, nor with the design to trade or carry on a friendly intercourse with the citizens of the republic of Mexico, except only with such of them as had then become and were in subjection to the forces of the United States at such places, and by the license and permission of the commanding officers of such forces at such places, duly authorized to grant the same, and not to afford aid to the republic of Mexico or its citizens in the said war, of all which the defendant and Col. Doniphan had notice; that Col. Doniphan did not command the defendant to stop, seize, &c., nor was the property stopped, seized, &c., by the defendant, by reason of the supposed driving from the territories or jurisdiction of the United States into the territories or jurisdiction of Mexico with the unlawful design alleged, nor for or in contemplation of any proceeding for a forfeiture thereof, but to apply the same to the use of the United States, without compensation to the plaintiff; and that the property was stopped, seized, &c., by the defendant, of his own wrong, and without the cause alleged; and traversing the rest of the plea, as before. To the third special plea the replication was substantially the same as the last, mutatis mutandis. Issue having been taken [by rejoinders and similiters] [4] the cause was tried before Mr. Justice NELSON. In the course of the trial, some discussion occurred as to the forms of pleadings. Mr. Justice NELSON intimated his opinion, that the first special plea was bad, and the others perhaps defective, for not alleging a forfeiture. But he admitted all the evidence offered, subject to the objections taken.

The case on the part of the plaintiff was this: An inland trade between the citizens of the United States and the interior northern parts of Mexico, had, from small beginnings, become quite large and important, before the late Mexican War. At first, it was carried on irregularly, in small expeditions from the state of Missouri, chiefly from St. Louis, connected with hunting parties or the fur trade. The merchants of the Atlantic cities soon found it worthy of attention, and larger expeditions were set on foot. The United States government favored the trade, so far as to allow a drawback of duties on exportations in that direction. The Mexican government allowed their military governors to exact duties, which entitled the goods to go to any part of Mexico. The customary exaction at Sante Fé was $500 a wagon load—a specific duty, without much reference to contents or value, which favored the use of large wagons, closely packed with costly goods. The plaintiff was a native of old Spain, but a naturalized citizen of the United States domiciled and residing in New-York. He retired from the firm of P. Harmony's Nephews & Co., for the purpose of entering into this trade. When Texas was annexed, in March, 1845, diplomatic intercourse was suspended between Mexico and the United States, and by many hostilities were expected. Gen. Taylor had been sent down to Corpus Christi, on the coast of Texas, and a squadron from the United States navy was sent along the coast of Vera Cruz. In October, 1845, the Mexican government consented to open negotiations, and requested a withdrawal of the squadron, which was acceded to, and Mr. Slidell was sent as a minister to Mexico. In December, 1845, the president, in his message, stated the situation of affairs, and expressed his hopes of an amicable adjustment. Apprehensions of hostilities, which had checked the trade, having blown over, the plaintiff, in December, 1845, entered into active preparations for a large expedition, to start early in the spring of 1846 from Independence, at the head of navigation on the Missouri river. He selected and purchased his goods at New-York and Philadelphia, some of them imported, and had them arranged and packed expressly for the business. They were sent overland from New-York and Philadelphia to Pittsburg, where large covered wagons were made for them. The wagons and goods were sent to St. Louis, and thence to Independence, the general starting place, were oxen, teamsters, &c., had to be procured. The plaintiff arrived there in April, and was there about a month, engaged

[4] [From 8 N. Y. Leg. Obs. 329.]

in preparing and arranging his expedition. Hostilities with Mexico broke out, quite unexpectedly to all at that time, while the plaintiff was at Independence. The existence of war was recognized by congress, and proclaimed by the president at Washington on the 13th of May, 1846. Before the plaintiff heard of this, and about the 26th of May, he started on his expedition, with a train consisting of fourteen large wagons drawn by twelve oxen each, two travelling cariages drawn by mules, and twenty-six men; the goods costing about $40,000, the wagons and outfit about $10,000, and the expenses of transportation being generally computed at a sum equal to the first cost. There was a garrison of United States dragoons within a few hours ride of Independence. The officers knew of his preparations and intention to go. One of them passed him just after he had started, and knew nothing of any war, and no interruption of the trade appeared to have been apprehended. About ten days afterwards, while the plaintiff was going at the rate of fifteen or twenty miles a day, and when he was fairly out on the prairies, he was overtaken by another officer with dragoons, who notified him of the war, and ordered him to follow on in his rear. Following him, the plaintiff had to take a longer route than usual to arrive at Bent's Fort, situate on the old boundary line between the United States and Mexico, distant five or six hundred miles from Independence, and three or four hundred from Santa Fé. These distances were over a wilderness, without roads or houses, without inhabitants except the wildest tribes of Indians, and without provisions except such as were secured by the rifle. The oxen and mules had to be pastured; the men were all armed, and, securing themselves at night under the wagons, had to defend their property from the Indians, and procure food for themselves. The plaintiff was delayed about a month to allow the mounted troops under Gen. Kearney to precede him, he having permission to follow in their rear. There was some show of resistance by the Mexicans near Santa Fé, but none was really made. The wagon trains of the plaintiff and other traders entered Santa Fé about the 25th of August. New-Mexico was found under subjection to Gen. Kearney, who acted and was recognized as governor. He gave the plaintiff permission to trade in New-Mexico, charging $4 a wagon for a license. It appeared by his instructions, and by those sent to the other generals and commodores, that they were directed to favor the trade with Mexico, as far as practicable consistently with hostile operations. The trade in New-Mexico was small, and the market filled. The plaintiff sold his oxen, and remained until December, when, everything being quiet in that region, Gen. Kearney sent Col. Doniphan, with his regiment of mounted volunteers, down the Rio Grande, to open a communication with and join Gen. Wool, who was supposed to have crossed the Rio Grande from Texas, several hundred miles below, on his way to Chihuahua. Gen. Kearney left another regiment, with some artillery, at Santa Fé, under Col. Price, and proceeded himself with dragoons overland to California. The plaintiff borrowed money, and purchased mules for his wagons at high prices, using ten mules to each wagon; and he, with the other traders, was permitted to join and follow Col. Doniphan southerly down the Rio Grande, along the present boundary between Mexico and the United States, some three hundred miles, to El Paso del Norte, where the Mexicans had a fortification, called San Eleasario. The defendant, Lieut. Col. Mitchell, belonging to Col. Price's regiment, was separately authorized by the latter to open communications with Gen. Taylor, with one hundred mounted men as an escort. As he was going the same road, he joined Col. Doniphan, upon the understanding that he was at liberty to leave him and proceed alone if he chose. Col. Doniphan, just before reaching El Paso, was attacked by surprise at Brazito on Christmas Day, by a considerable Mexican force, which he defeated and pursued, entering El Paso a day or two afterwards. The Mexican troops which escaped retired to the city of Chihuahua, about 280 miles southwest from El Paso, towards the interior of Mexico, and proceeded to fortify themselves at Sacramento, near that place. Col. Doniphan and Lieut. Col. Mitchell, finding at El Paso that Gen. Wool was not at Chihuahua, nor any where within reach of communication (he having in fact gone south to join Gen. Taylor), sent back to Col. Price at Santa Fe for a reinforcement of artillery. The artillery arrived about the 1st of February, under Major Clark, and rested a few days, and then preparations were made for advancing from El Paso to Chihuahua, near which place it was known the Mexicans would be encountered in a much superior force. The plaintiff had been able to make some sales at El Paso. There were about 315 large traders' wagons there, including his. His acquaintance with the Spanish language gave him advantages over others. He was an interpreter for both sides—the Mexican inhabitants, and the American officers. While at El Paso, the funds provided by the government for the United States' troops failed. They procured necessaries through the traders, who, on selling their goods to Mexicans, money being scarce, would take provisions in payment, turn them over at the same prices to the quartermasters, and receive drafts on the United States' disbursing officers in payment. The plaintiff supplied Lieut. Col. Mitchell's quartermaster in this way. His trading with the Mexicans was known and encouraged. The road between El Paso and Chihuahua was over a mountainous desert, excessively bad and rough, and the worst difficulties of all were the long distances which had to be travelled without water, and

often without pasture for the cattle. One of these was of sixty miles, which the heavy wagons could not cross without being three days without water. Traders knew how to ease and manage their cattle, but, when required to march with an army, their ease and convenience would be but little attended to. Either the Mexicans or the Americans first marching over this road to attack the other, would expose themselves considerably, especially to cavalry and to sudden attacks. The plan was discussed and contrived by the defendant and other American officers, of making use of all the traders' wagons, as a protection and defence during the march and attack. Behind and between the wagons the army could march and fight with comparatively little exposure. "Corrals," as they were termed, could be formed, by arranging the wagons in a circle, chaining them together, and forming a kind of fieldwork, behind which all would be safe, and against which cavalry could do nothing. The three hundred teamsters, armed with rifles, formed no mean force of themselves. This was a favorite plan of the defendant, and he urged it strenuously. Nearly all the other traders agreed to come into it. But the plaintiff and two other large traders were opposed to it, deeming the risk too great, and apprehensive that the Mexicans would become hostile to them, and deter them from trading, if they thus made themselves a part of the attacking force. The United States' officers had reports of an insurrection at Santa Fé in their rear, and were in ignorance of the situation of Gen. Wool and Gen. Taylor at the south, having rumors through the Mexicans, that Gen. Taylor was killed and his army taken; but they resolved to proceed rather than remain inactive or retire.

There was some controversy upon the trial as to the orders given by Col. Doniphan. He directed how the wagons proceeding with the army were to march, and directed the teamsters to be organized into companies and battalions, as if mustered into service, they to elect their officers, who were to be recognized as such. It was admitted that his orders were to be communicated by the defendant to the plaintiff; but it was urged that while he gave some discretionary orders to the defendant, he contemplated the exercise of no force by him to compel the plaintiff to proceed. The defendant, however, with a detachment of men, compelled the plaintiff's men, wagons and mules to proceed and march with the rest. The plaintiff protested, both to him and Col. Doniphan, against the act, and this was the seizure and trespass complained of. The plaintiff, some ten days before, had asked leave to proceed to Chihuahua with his wagons without the troops, but had been refused. Some suggestions were made, that by so doing, and then by declining to proceed with the rest, and pretending his mules had been run away with, he evinced a desire to join the Mexicans. Lieut. Col. Mitchell afterwards gave a certificate, stating that the reasons why the traders were compelled to accompany the army were: "1st. We wished to make use of the wagons and bales of goods to form a field-work, in the event of our being attacked by an overwhelming force in the field; 2d. We wished to avail ourselves of the services of the American teamsters, whom we had armed and organized as an infantry battalion, numbering nearly three hundred men; 3d. We wished to prevent this large amount of property from falling into the hands of the enemy, because it would have aided him in paying and equipping his troops." The army turned off westerly from the Rio Grande, about the 13th of February, and encountered the Mexicans at Sacramento on the 28th. The animals of the plaintiff were very much worn and injured by the march, and some of them lost. On the last day's march, about twenty miles, the wagons proceeded, four columns abreast, over rough ground, with the troops marching between them. The Mexican intrenchments were upon an eminence on one side of the road, where it passed between the hills. After a reconnoissance the wagon train and artillery crossed a gulley, made a circuit and galloped up an opposite eminence in front of the Mexicans and formed a corral. The Mexican cavalry sent to oppose this manoeuvre were completely checked and driven back. The United States artillery followed up the advantage, and, a charge upon the intrenchments being immediately made, they were all soon carried, and the whole Mexican force put to rout. The only man killed on the American side was a trader, who had been elected major of the battalion of teamsters. The Mexicans attributed their defeat principally to the "galloping fort," as they termed the wagon train. All the American officers admitted that the wagons had been serviceable. The battle being over, Cols. Doniphan and Mitchell hastened to take possession of Chihuahua. The plaintiff's wagons, men and mules were left to take care of themselves. Some of the mules were taken by the artillerymen and soldiers, and others lost. The wagons were at length taken to the plaza at Chihuahua, and the goods stored with the Spanish consul. Col. Doniphan advised the plaintiff to sell what he could, and he attempted to do so, but the wealthy inhabitants had retired, and he sold but little. Col. Doniphan, after a month or two, being about to retire from Chihuahua with his troops, the plaintiff gave him an order for his goods, leaving them in the hands of the Spanish consul. The Mexican authorities returned to Chihuahua at once, and seized the goods and sold them. They had caused the plaintiff to be published as a man amenable to their vengeance. He dared not remain there, but retired with the army. One trader was killed by the mob. Some others remained in safety.

The defendant contended, that the plaintiff had no right to trade with the enemy; that his property was liable to arrest on that ground; that Col. Doniphan had a right to prescribe in what order the plaintiff's wagons should proceed and march; that the property was liable to fall into the enemy's hands, and it would have been madness to leave it at El Paso; that the emergency was such as justified the taking it, to save the lives of all concerned; that Col. Doniphan had taken it as a public officer, not for himself, but for the government, and the plaintiff's only remedy was by application to congress; that the defendant was a subordinate officer; that he only obeyed the order of Col. Doniphan; that, right or wrong, he was bound to obey it, and it was a lawful order; that the plaintiff had resumed the ownership of his property; and that the abandonment of the goods to Col. Doniphan deprived him of all right of action against the defendant, and occasioned the seizure of the property. The depositions of Col. Doniphan, Major Clark, and others, were read, giving their views of the propriety of the course pursued. The proceedings had in congress on the plaintiff's petition, and the report of the secretary of war on the subject, were read. In this report, the secretary of war (Mr. Marcy) had said: "With regard to the act of Col. Doniphan in taking possession of the train, it appears to have been justifiable under the circumstances, if it was necessary to prevent the train from falling into the hands of the enemy—a result of which Mr. Harmony appears to have been desirous, as he was furnished with Spanish passports. And the same may be remarked of the subsequent forced marches whereby his teams were injured." It appeared that the plaintiff was furnished with a passport given by the Spanish consul in New-York on the 4th of April, 1846, certifying that the plaintiff was a native of Spain, and was travelling to Mexico as a merchant; and that it was a common thing to take such passports irrespective of any war. The chief Mexicans, being of Spanish blood and descent, looked upon natives of old Spain with more favor than upon natives of Missouri or Texas.

After the testimony was closed, the counsel, on the suggestion of the court, discussed the principles of law bearing upon the case.

Francis B. Cutting and Charles B. Moore, for plaintiff, cited and commented upon the cases of Del Col v. Arnold, 3 Dall. [3 U. S.] 333; Murray v. The Charming Betsey, 2 Cranch [6 U. S.] 64; Maley v. Shattuck, 3 Cranch [7 U. S.] 458; The Julia, 8 Cranch [12 U. S.] 181; The Anna Maria, 2 Wheat. [15 U. S.] 327; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, 274, 327; U. S. v. Rice, 4 Wheat. [17 U. S.] 246; U. S. v. Eliason, 16 Pet. [41 U. S.] 291; McKenna v. Fisk, 1 How. [42 U. S.] 241; Fleming v. Page, 9 How. [50 U. S.] 603; Mayor, etc., of New York v. Lord, 17 Wend. 285; Wilson v. Mackenzie, 7 Hill, 95; Sutton v. Johnstone, 1 Term R. 493.

J. Prescott Hall, Dist. Atty., and Lorenzo B. Shepard, for defendant, referred to O'Brien, Military Law, pp. 337, 344; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Martin v. Mott, 12 Wheat. [25 U. S.] 29, 32, 33; The Marianna Flora, 11 Wheat. [24 U. S.] 1; The Rapid [Case No. 11,576]; Wilkes v. Dinsman, 7 How. [48 U. S.] 130, 131; Griswold v. Waddington, 16 Johns. 438.

[Hon. W. L. Marcy, who, as secretary of war, had written the report above mentioned, attended the trial, and, having advised with and assisted plaintiff's counsel, he, at their request, stated his views respecting the cases in which a military officer might destroy property to prevent its falling into the hands of the enemy, or, in an emergency, take it and apply it to the use of the government. He argued that unless the officer agreed with the owner, being a citizen or neutral, to pay what the latter demanded for his property, or obtained the consent of the owner to take it, he made himself personally responsible for what he took for the use of his command, even under the most pressing emergencies. That if a garrison wanted provisions, they could not be permitted to go into a store and take them, and then to justify the act by saying they would otherwise starve. That there was no immediate danger to the property of plaintiff where it was taken; that there must be an existing and pressing danger to justify the taking of it; that the taking it because the officer wished to advance into the enemy's country 200 miles, instead of remaining where he was, could not be justified by the plea of necessity. That in all such cases the officer subjected himself to an action by the owner, although his superiors might have no inclination to censure his course.] [5]

NELSON, Circuit Justice. One ground on which the defence is placed is, that the plaintiff was engaged in an unlawful trade with the public enemy, and therefore his goods were liable to confiscation; and that any person, particularly an officer of the army, could seize the same. The principle of law is admitted; but, as I understand the evidence, this ground of defence has altogether failed. The defendant was not only not so engaged, but was engaged in trading with that portion of the territory which was reduced to subjection by our arms, and where his trading with the inhabitants was permitted and encouraged. The army was directed to hold out encouragement to traders, for the purpose of conciliating the inhabitants, and did so.

Another ground taken by the defendant and relied upon in the defence, stands upon

[5] [From 8 N. Y. Leg. Obs. 329.]

another principle of public law, namely, the taking possession of the goods of the plaintiff at a time when it was necessary for the purpose of preventing them from falling into the hands of the enemy. This has been urged as particularly applicable to his goods, some portions of which consisted of arms and munitions of war, wagons for transportation, &c. Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defence has also failed. No case of peril or danger has been proved, either as it respected the state of the country, or the force of the public enemy, which would lay a foundation for taking possession of the goods of the plaintiff at San Eleasario, the place at which they were seized. On the contrary, the country was in possession of the arms of this government; and there was no enemy or hostile public force at the time in the neighborhood, which put the goods in the danger of being captured. The plaintiff's goods, therefore, stood in the same condition as the goods of any other trader who had been permitted to trade in the country. The evidence fails to make out a case of seizure of property on account of the urgent danger of its falling into the hands of the enemy. The danger must be immediate and urgent, not contingent or remote; otherwise every man's property, particularly on the frontiers, would be liable to be seized or destroyed, as it always will be more or less exposed to capture by the public enemy. There was no immediate or impending peril in the case, as there was no enemy in the neighborhood or advancing to put the goods in danger. They were more exposed to marauding parties than to any public force; and those the plaintiff considered himself able to take care of.

The next ground of defence, which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the commanding officer, for public use. I admit this principle of public law. But this, too, rests upon the law of necessity. I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or of the army, to take private property for the public service. The officer in command of an army upon its march, if it were in danger from the public enemy, would have a right to seize the property of the citizen, and use it to fortify himself against assault while the danger existed and was impending, and, in ordering the seizure, would not be liable as a trespasser. The owner must look to the government for indemnity. The safety of the country is paramount, and the rights of the individual must yield, in a case of extreme necessity. No doubt, if the enemy had been in force in the neighborhood of the United States troops at San Eleasario, with the disparity which existed at Sacramento, and if the same danger had existed there that threatened them at the latter point, the commanding officer might, for the safety of his army, have seized the wagons and teams of the plaintiff, and have appropriated them to the public service while the danger lasted. An immediate and urgent necessity would have justified the seizure for the safety of the army. Looking, however, at the testimony, it seems to me quite clear, that these goods were seized, not on account of any impending danger at the time, or for the purpose of being used against an immediate assault of the enemy by which the command might be endangered; but that they were seized and taken into the public service, for the purpose of co-operating with the army in their expedition into the enemy's country. The mules, wagons and goods were taken into the public service, for the purpose of strengthening the army, and aiding in the accomplishment of the ulterior object of the expedition, which was the taking of Chihuahua. It was not to repel a threatened assault, or to protect the army from an impending peril. In my judgment, all the evidence taken together does not make out any immediate peril, or urgent necessity, existing at the time of seizure, which would justify the officer in seizing private property, and impressing it into the public service. The evidence does not bring the case within the principle of law. There is not only no evidence of an impending peril to be met and overcome by the public force, but the goods were taken for a different purpose. The army had to march over two hundred miles before it reached or found the enemy. The danger, if any, lay in the pursuit; not in remaining at San Eleasario, or returning to Santa Fé. There had, indeed, been a sudden insurrection against the authority of the government at Santa Fé; but it was immediately suppressed.

As to the remaining grounds of defence—the re-delivery of the property, and its acceptance by the plaintiff—the liability of the defendant for taking the goods, and appropriating them to the public service, accrued at the time of the seizure. If it was an unlawful taking, the liability immediately attached; and the question is, whether that liability was discharged or released by any subsequent act of the plaintiff. Col. Mitchell, who executed the order, was not alone responsible. Col. Doniphan, who gave the order, was also liable. They were jointly and severally responsible. Was any act, then, done by the plaintiff, which waived the liability, or by which he resumed the ownership and possession of the goods? Certainly, the abandonment of the goods to Col. Doniphan at Chihuahua cannot be regarded as an act of resumption of ownership; on the contrary, it was consistent with the assertion of his liability. There had been a negotiation between them; Col. Doniphan advised him to sell the goods at Chihuahua, and look to the government for indemnity; and, in pursuance of this, measures were taken for their pro-

tection and safe keeping. I doubt if there be any evidence showing an intent on the part of the plaintiff to resume ownership over the goods as his private property, after they had been seized by the army, or any act done by him that would, when properly viewed, lead to that result.

After the expression of these views by the court, the counsel on both sides declined going to the jury, and, under the law as laid down, the jury rendered a verdict upon the facts for the plaintiff, for $90,806.44.

[NOTE. The defendant then sued out a writ of error from the supreme court, where the judgment was affirmed in an opinion by Mr. Chief Justice Taney, who said that the trading, having been sanctioned by the executive branch of the government, and also by the commanding military officer, could not be considered as commerce with the enemy. Private property may be seized to prevent it from falling into the hands of the enemy or for use of army in some immediate danger such as will not admit of delay. Private property, however, cannot be seized for the purpose of insuring the success of a distant expedition upon which the army is about to march. An officer making a seizure cannot justify his trespass by showing the orders of his superior officer, as an order to commit a trespass can afford no justification to the person committing it. Whether the owner resumed possession of goods after seizure is a question for the jury, and in the present case they were justified in finding that he did not. 13 How. (54 U. S.) 115.]

HARMONY SETTLEMENT (NACHTRIEB v.). See Case No. 10,003.

HARMONY SOCIETY (LEMIX v.). See Case No. 8,239.

HARNDEN (FISHER v.). See Case No. 4,819.

HARNDEN (ROBERTS v.). See Case No. 11,903.

Case No. 6,082a.

HARNEY et al. v. The SYDNEY L. WRIGHT.

[5 Hughes, 474.]

District Court, E. D. Virginia. March 12, 1883.

ADMIRALTY—LIEN FOR SUPPLIES—INNOCENT PURCHASER.

[1. The right to proceed against a vessel in rem for supplies is not analogous to liens at common law or by statute, and is not, like them, affected by mere transfer of possession.]

[2. A ship's liability in rem for supplies attaches to her everywhere.]

[3. A ship is not liable in rem for supplies, unless they are of a kind suited to her, and received directly by her at or near the port where they are furnished.]

[4. A vessel has the burden of proving that supplies furnished in a foreign port were not on her credit in rem.]

[5. A vessel in the hands of an innocent purchaser is liable in rem for supplies furnished her in a state where neither her owner, charterer, nor master resided or were known.]

[Cited in The Pirate, 32 Fed. 488.]

By a charter-party, dated on the 23d day of September, 1880, the Delaware Transportation Company of Philadelphia, chartered to John E. Reeside of Washington City, the steamer Sydney L. Wright, to be used on the waters of Albemarle Sound, in North Carolina, on a route from Elizabeth City to Edenton, from the 1st of October, 1880, until the 1st of May, 1881. The price of the hiring was a fixed sum per month; the steamer was to be delivered to Reeside at Norfolk City, and after her service was ended, he was to return and deliver her at Norfolk. The captain, engineer and fireman of the steamer were to be nominated and appointed by the company, and the captain and engineer were to be paid by the company; which was also to furnish the oil and tallow for the engine and the running lights. Reeside was to pay all other expenses, including the board of the entire crew. There were other stipulations not material to the questions involved in this suit. The company contracted to let, hire, deliver, and give the use of the steamer to Reeside. The steamer was in due time delivered to Reeside and put upon the route designated by the charter-party. Reeside had obtained a mail contract from the post-office department; and his principal object in chartering the Wright was to carry the United States mail on that route. The steamer was employed in this service from October, 1880, until early in March, 1881; when, in consequence of some delinquency on the part of Reeside in paying the charter price for the use of her, the Delaware Transportation Company ordered her home; and she left Elizabeth City for Philadelphia, on or about the 9th of March. The Sydney Wright had, for two or three months before then, been supplied with the coal which she used in her engine, by Harney & Co., of Elizabeth City, the libellants in this suit; and the coal had been put on board of her by Harney & Co., from their wharf, which was the one used by the steamer at Elizabeth City; and this coal had been charged to the steamer by Harney & Co., on their books, in the original entries. The coal which was to be used by the Wright for her trip home, and which was taken on board on the 8th of March, was obtained from Harney & Co., and paid for by a draft of her captain, in their favor, on the company in Philadelphia. When the Wright left Elizabeth City, Reeside was there, and Reeside and Harney, one of the libelling firm, looked over together Reeside's accounts with the firm, on the night of the 8th of March; and on this occasion Reeside gave to Harney & Co. his acceptance, payable in Washington, at four days, for $325.80. This amount Reeside admitted to be due; but a receipt was taken for the acceptance, which Harney says was given on account. The acceptance was never paid, and is still due. The principal indebtedness—probably the exclusive indebtedness to Harney & Co.—was for coal for the Sydney Wright. The steamer went direct to her owners in Philadelphia. Capt. Stoddard, one of the firm of Harney & Co., residing in Norfolk, shortly after this time sent a claim

for coal furnished the Wright, amounting to six or seven hundred dollars, to counsel in Philadelphia, for collection. This claim embraced the amount of the unpaid acceptance of Reeside, before mentioned. After some considerable lapse of time, the counsel in Philadelphia informed Capt. Stoddard that the claim was not a good one against the steamer. The claim was duly presented to the Delaware Transportation Company. On the 20th of December, 1881, after the claim had been sent to Philadelphia and returned, as just stated, the Delaware Transportation Company sold the Sydney Wright to Edward J. Galwey, of New York, for $6500, and received the purchase money in cash. Mr. Galwey is the claimant in this cause. Early in February, 1882, the Wright came to Norfolk on her way southward; which was her first appearance in Norfolk after passing through, going home, nearly a year before. The libel in the present suit was thereupon filed and the steamer arrested. She was soon released on stipulation or its equivalent. The libel claims $748.12; but having been taken out in an emergency, it is since found that that amount is greater than what is claimed as due for the coal furnished the Wright at Elizabeth City. The amount really demanded is $575.65. As between Reeside and Harney & Co., the question is, whether $325.80 or $575.65 is the amount due. This question depends upon another one of fact, viz.: whether a wheelbarrow, which was used by Harney & Co. in measuring the coal delivered from their wharf to the steamer, held 230 or 280 pounds. If it held the latter amount, $575.65 is due. If it held only the former amount, then only $325.80 is due; for which sum the acceptance of Reeside was given. The acceptance itself is lost; but a release of it is filed with their libel by Harney & Co.

Sharp & Hughes, for libellant.
Harmanson & Heath, for respondent.

HUGHES, District Judge. As to the question of fact in this case, I think there can be no doubt, from the evidence, that the wheelbarrow referred to held one-eighth of a long ton, or 280 pounds of coal; and, therefore, that the amount due the libellants, and unpaid, is $575.65. The main controverted question in the case is, therefore, the question of law: whether the charterer of a chartered vessel can bind her for necessary supplies in a foreign port. Here, the general owner was a resident of Philadelphia; and the special owner, or charterer, a resident of Washington City. In Elizabeth City, North Carolina, therefore, the Sydney Wright was indisputably a foreign vessel. Neither her general owner, nor her special owner, nor her master, nor any of her principal officers, were residents of North Carolina. Reeside was only occasionally at Elizabeth City; the general owner of the steamer, never. Reeside was a man of no means, or credit, or even of general acquaintance there. The sequel developed that he was insolvent; for he did not pay the charter price of the steamer which he was using in the execution of a cash contract; and he did not pay even for a two-months' supply of the coal consumed in propelling the steamer. There was nothing in North Carolina to form the basis of credit to the enterprise in which the boat was engaged, except the steamer herself; and the evidence shows that in point of fact the coal now sued for was charged to the steamer, when and as it was delivered by the barrow load. The general owner, who was a stranger there, had sent her into Albemarle Sound for a seven months' service, in charge of one who was a stranger there and an insolvent; who was without personal credit, and without the right to personal credit; sent her there in disregard of the homely admonition in the Black Book of the Admiralty, which is the horn-book of maritime law (Twiss's Ed. vol. 3, p. 261): "A managing owner of a ship or vessel must beware to whom he lets it."

It would seem that this was a clear case of the liability of the vessel for a necessary supply; but it has been so strenuously denied, in argument at bar, that the admiralty lien attached in this instance, that I feel called upon to go somewhat into elementary principles in dealing with this denial. It seems to me that the denial rests upon a misapprehension of the true nature of an admiralty lien. A tendency exists in the minds of many counsel, of a few text-writers, and I may add, in rare instances, of judges of courts, to confound the admiralty lien with the common law lien, from which it differs both in origin and essential character. Thus assimilating two different things, they naturally infer that the two respective liens must be created in like modes by like agencies; and, looking to the analogies of the common law, are apt to fall into the belief that, in order for the admiralty lien to attach to a vessel, it must be created by the owner or by an authorized agent, by means of some act of one or the other of these persons, more or less formal, positive and solemn; that is to say, in some such manner and through some such instrumentality as that by which a common law lien is created; whereas one of the essential incidents of an admiralty lien is, that it is the vessel herself which acts in its creation, she herself being the contracting party or tort-feasor,—ownership, proprietorship, agency, attorneyship, and the like ideas, being ignored. I use the phrase "admiralty lien," although in truth the word "lien" is not properly an admiralty term. Except in the English and American law of admiralty, the term "lien" can hardly be said to belong to the admiralty vocabulary or nomenclature. At common law there was no lien except in conjunction with the possession of the thing which was the subject of it. A tailor could hold the garment, a livery keeper the horse, the hotel-keeper the baggage of a customer,

until his claim against the owner arising from expenditure upon the object of the lien was satisfied. Statute law has extended the lien so as to allow it in favor of the mechanic, who has built a house for another; in favor of the judgment and execution creditor upon the property of the judgment debtor, real and personal; and in many other instances expressly provided for by statute. It has been only by express statute, however, or through the instrumentality of equity in following the law, that the lien at common law has been extended, in special cases, beyond possession.

Wholly different from all this is the admiralty lien. The creditor of a ship has in general no possession: and the admiralty law, which is a universal law, cannot be enlarged by local statute. What it was in its origin it is now, except so far as it has been gradually improved and enlarged by enlightened judges and jurists. And, therefore, what is in modern times called the admiralty lien has no affinity with the common law right of lien. At common law, the right of the lien-holder was to retain and hold the thing as property. In the admiralty, the right of the creditor of a ship is to find, sue and arrest her, as if she were a living person. At common law the right to sue a person and to hold his property bound by lien, were distinct and different. In admiralty there is but one right; which is, to proceed in rem against a ship as a living person, by name; a right to sue and arrest the ship. This admiralty right to sue and arrest a ship, is simply the same right as that which the creditor had in early times to sue and arrest the corpus of his debtor. There were conditions under which the debtor could be thus dealt with, and conditions under which he could not be thus dealt with; and the same is the case with the admiralty right to proceed in rem against, to sue and arrest, the ship. In early times the debtor could be sued and arrested by virtue of the mere fact that he prima facie owed the debt; but the law has been modified so as to authorize arrest only as against non-residents or debtors about to abscond. The admiralty law has in this respect been somewhat modified; but not to as great an extent as the municipal law has been ameliorated in regard to the arrest of debtors.

It is plain that these last mentioned rights of procedure, which are similar in origin and perfectly analogous, are wholly different from the common and statute law right of lien; and it would have been no more improper under the old law to say that a creditor had a lien on, in the sense of a corporeal property in, the person of his debtor, than it is now to say that a creditor has a corporeal lien upon a ship for his claim, before his service of process in rem upon her, and actual arrest. As in the one case, the right of the creditor was simply to sue and arrest; so in the other case, the right of the creditor is simply to sue and arrest. As in the one case there was no "lien," in the common law meaning of the term, before actual arrest; so in the other case, there is in the eye of the admiralty law, no corporeal, possessory "lien" before actual arrest. An admiralty lawyer of the Continent would, I am sure, be at a loss to comprehend the term "lien" as often used by American writers in respect to a ship, although used in cases in which the right to proceed in rem in admiralty were fully recognized. It is true that there are corporeal and actual hypothecations in admiralty by which liens are established upon ships in the fullest sense of the common law lien; as for instance, in the case of bottomry bonds; but the ordinary right to proceed in rem in admiralty, against a ship, independently of such hypothecations, is of an essentially different character. A ship is a traveller and stranger; and if no ship ever went beyond the horizon in which her owner, her master, or her charterer was personally known to local dealers in ships' supplies, there would never have been such a system of laws as that known over the world as the admiralty code. These laws all relate directly to ships as voyagers, strangers and travellers; and the system has grown up in the interest of commerce; and has been adapted to the convenience and requirements as well of ships themselves, as of the classes who deal with shipping.

One of the fundamental principles of the admiralty law is, that when a ship, this stranger and traveller, comes into a port and is there furnished with the repairs or supplies apparently proper for keeping her afloat in the service of commerce, the ship herself being the contracting party, she may herself be sued as a living person for the things furnished, irrespectively of the condition, as to responsibility, or credit, of any individual on board, whether he be owner, or master, or charterer. It is a fundamental principle of the admiralty law, that the material man who ministers to the needs of a ship, whose papers are regular, may ignore, as the admiralty law itself ignores, the persons in immediate charge of the ship; and, be these persons ever so responsible and well known and wealthy, may sue and hold the ship herself for the price of the services or articles supplied to her. This is a law of commerce, as necessary to the welfare of ships and the prosperity of commerce, as it is just to the persons who minister to the wants of ships. It is true that home or domestic vessels are, in many localities, excepted from these wholesome rules, on the principle that cessante ratione cessat et ipsa lex; but I have no concern with that part of the subject in the case at bar, which respects a foreign vessel.][1]

[1] On the subject of liens on domestic vessels, see The Raleigh [Case No. 11,539].

The necessary and just law of commerce, to which I have been referring, is what confers on the creditor of a ship, the right to proceed in rem against her—to sue and arrest her. The body of laws embracing this right is not local. It is universal. It is not an outgrowth of the English or American laws of navigation, or of any local system of jurisprudence whatever. It is as old as the most primitive navigation known to history, and as ancient as any code on earth. It has force everywhere, and follows a ship around the globe, with lengthening chain, into every port known to commerce which she may enter. This right to sue and arrest a ship is as tenacious as the law conferring it is universal. If supplies are furnished her today in Norfolk, and she sails out of port tomorrow to circumnavigate the earth, this liability to suit and arrest will follow her everywhere though she be absent for years and traverse a course as long as the belt of the equator. Through every moment of her absence and at every point in her journey she will continue liable to the right of her Norfolk creditor, to sue and arrest her for his demand. How incongruous, how preposterous, therefore, is the idea of lien in the corporeal and possessory sense of the common law, applied to such a right! How vain is the endeavor, how gross the mistake, of assimilating this right, to the county-court idea of a lien, registered in a local deed-book!

As to the conditions under which the right to sue and arrest a vessel arises, on the presumption that credit for supplies is given to her, it is obvious, first, that the ship must herself be the immediate and direct recipient of the supplies or repairs furnished to her; that is to say, she must be in or near the port where they are furnished, and must receive directly herself, for her own use, the things furnished. It would be too great a stretch of the privilege conferred upon the creditor by the admiralty law, to allow him, on the legal presumption that credit was given the ship, to sue and arrest a vessel to which he has sent supplies at a distance of hundreds of miles, on her own credit. There may be no such vessel. She may not be at the port to which the supplies are sent. She may not be in need of them. They may never reach her. In such a case, obviously, the convenience and requirements of commerce do not demand, nor would they be subserved, by such a stretch of the law of credit in admiralty, as to embrace cases in which so many contingencies may intervene to intercept supplies from the ship.

In the next place, the repairs or supplies should be apparently proper and necessary for the vessel in the condition in which she may be, when receiving them; and they must be furnished, in good faith, for the use and benefit of the vessel.

As a third requisite, it is sometimes contended, that the supplies must be furnished specifically and distinctly on the credit of the vessel. Whatever may be the law on this head, as to a domestic vessel, I do not think it applies to a stranger and foreigner. It is the policy of the admiralty law to discourage such a doctrine as to a foreign ship, and not to listen to evidence tending to show that supplies have been furnished to such a vessel on any other than her own credit. To permit such an enquiry, to allow a question to arise whether the ship or some person were credited by the material man who ministered to her wants, would be of most pernicious influence upon dealings between ships and material men; and, by encouraging litigation on such questions, would create apprehensions of suits in commercial communities which would seriously embarrass foreign vessels coming into port for supplies. The presumption of law is, that supplies proper for a foreign ship have been furnished on her own credit; and the burden of proof is thrown upon respondents to show positively to the contrary. The exception sometimes set up to this general rule, of cases in which, though the vessel be foreign, and her owner also foreign, yet her charterer lives and conducts business in port, and has full control of the vessel, and is known by the material man to have this control and to be responsible for the vessel's contracts, will be adverted to in the sequel.

The authorities supporting the principles announced in what has been said above, are numerous and conclusive. I shall cite, however, only such as bear directly on the case at bar. In the case of The City of New York [Case No. 2,758], Mr. Justice Nelson held, that the agent of the charterers of a vessel could bind her for supplies, even though the libellants knew that the vessel was under charter. In the case of Thomas v. Osborn, 19 How. [60 U. S.] 22 et seq., the United States supreme court held, that the master, though charterer, could bind the ship. The reasoning on page 30, that the owner could protect himself by stipulations, is worthy of special note. In Hill v. The Golden Gate [Case No. 6,491], Mr. Justice Catron and Judge Treat recognized the right of a charterer to bind the vessel. So, in the same case when in the court below [Id. 6,492]. So in the case of Flaherty v. Doane [Id. 4,849], where it is said, "Admiralty liens depend more on services rendered the ship than on any question of agency." In the case of The Patapsco, 13 Wall. [80 U. S.] 329, a libel for coal furnished on the order of the charterer was sustained. In the case of The Phoebe [Case No. 11,064], it was held, that the master, though charterer, could, on a contract of affreightment, bind the ship, and that "the owner has his remedy against the charterer." In the case of The Neversink [Id. 10,133], Mr. Justice Nelson held a vessel liable for supplies of coal furnished apparently at the master's orders. The ship is liable for supplies furnished in a foreign port, though

the owner is there and ordered them in person, if he was non-resident and they were furnished on the ship's credit. The Kalorama, 10 Wall. [77 U. S.] 204. In the case of The Freeman, 18 How. [59 U. S.] 182, it was held that the charterer could bind the vessel for the performance of contracts of affreightment. If so, then a fortiori can he bind her for those supplies without which the contract can not be performed. The power of a master to bind the vessel and her owners even though chartered, is recognized in Bass v. O'Brien, 12 Gray, 477; and Arthur v. The Cassius [Case No. 564]. See, also, The Nestor [Id. 10,126]; The Sarah Star [Id. 12,354]; and The Monsoon [Id. 9,716]; also Mr. Etting's Essay, 21 Am. Law Reg. 2, in note; The India, 14 Fed. 476; and The S. M. Whipple, Id. 354. The case of The India is in all material respects precisely like the case at bar. That of the Whipple is like in its principles. As to whether the coal furnished to the Wright was necessary, the fact that a vessel is in a foreign port, itself creates the presumption of necessity as to supplies furnished. See The Washington Irving [Case No. 17,244]; The Eclipse [Id. 4,268]. And the fact that the supplies are ordered by the master in a foreign port is sufficient proof of the existence of a necessity for the supplies and for credit, in the absence of fraud or collusion. See The Grapeshot, 9 Wall. [76 U. S.] 136; The Guy (a case much like this at bar) Id. 758; The Lulu, 10 Wall. [77 U. S.] 192; The Emily Souder (see paragraph 3 of syllabus), 17 Wall. [84 U. S.] 666; Mr. Etting's Second Essay, 21 Am. Law Reg. 85, notes 2, 4; The James Guy [Case No. 7,195], affirmed 9 Wall. [76 U. S.] 758; The Plymouth Rock [Case No. 11,235], affirmed [Id. 11,237]; and The Metropolis [Id. 9,503]. Nor does the presence of the owner of a vessel in a foreign port, where supplies are ordered by himself, or there being ordered by himself, if he be non-resident, defeat the lien; for this is abundantly shown by the cases supra.

The respondent relies upon the cases of Beinecke v. The Secret, 3 Fed. 665, heard at the same time with Maxwell v. The Secret, Id.; and The Norman, 6 Fed. 406. As to Beinecke's libel, it was for supplies furnished to and shipped by her charterers in New York for the steamer at Jacksonville, Florida, between which port and certain foreign ports the Secret was running. The charterers were residents in New York; the supplies were delivered and charged to them. The Secret was at the time at Jacksonville, or on the route on which she was running. All the facts of the case were in combat with the presumption of law that the supplies were furnished on the credit of the vessel. The Secret was not only not in port, but a thousand miles off; the supplies were, of course, not put upon board of her by the libellant. The vessel was not, therefore, in port under conditions in which it is the policy of the law to encourage the supplying of the needs of foreign vessels; and I think the decision of the court, in this case, against the libellant, was in entire harmony with the authorities which I have cited. The claim of Maxwell against the same vessel was of the same character. The supplies were furnished at the order of charterers resident in New York, and were charged to them. When a part of them were furnished, the steamer, it is true, was at New York, but she was about to sail for Jacksonville. She was allowed to sail while the goods were not yet paid for. The bill for the goods was not sent to the charterers until several days after the steamer had sailed. The facts of the case were all in the teeth of the presumption of law, that the supplies were furnished on the credit of the ship; and placed the case beyond the reason and policy of the law encouraging the furnishing of needful supplies to foreign ships. The claim of Maxwell was in principle identical with that of Beinecke; and the decision of the court was in harmony with the general principle of admiralty, presuming credit to be given the ship, in proper cases for such a presumption.

The case of The Norman [supra] was not so plainly an exceptional one to the general rule. The supplies were furnished in New York, on the order of charterers resident in New York, to a vessel, owned indeed in Boston, but registered in New York. The vessel was running between New York and Nassau; and was in the possession, use and control of the New York charterers; who, if not technically, were actually her owners pro hac vice. The ship was thus practically divested of the foreign character. She was virtually a domestic vessel, owned pro hac vice by home charterers. These special facts strongly conflict with the general presumption of law, that supplies furnished to a foreign ship, in a port where owners, charterers and master are all strangers, are furnished on the credit of the ship; and seem to take this case out of the general rule. I am not disposed to question the propriety of the decision rendered in it; especially as there may have been facts unreported that may have influenced it largely; but I regret that it was not rested on the leading facts to which I have alluded. Where supplies are furnished to a ship which is virtually a domestic ship, on the order of owners or charterers who are residents of the port where they are furnished, and who are well known to dealers in ships' supplies in that port, it may well appear that the presumption of law, that they were furnished on the credit of the ship, is overthrown; and I think a court may well say to a libellant, "you shall not be allowed to manufacture a presumption of law not existing in your case, by charging supplies to a ship, and affecting ignorance of facts which be-

lie the presumption." Exceptions like these, not only do not discredit a great and sacred principle, but really sustain it. I do not think these last cases named are similar in their essential features to the one at bar, or conflict with the general principle of the liability of a chartered vessel for supplies furnished in a port in which she herself, her charterer, and her owners, are all strangers. I will decree accordingly.

[The opinion and statement in this case are published from the original MS. as filed in the clerk's office.]

Case No. 6,083.

The HAROLD HAARFAGER.

[8 Ben. 216.] [1]

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

BILL OF LADING—DISCHARGE OF CARGO—COOPERAGE—DAMAGE.

1. Cement was shipped in a steamship under an ordinary bill of lading. When it was being discharged, the heads came out of some of the barrels, and some were found with loosened staves, so that cement escaped from them on the dock, which was gathered up and replaced, but so as to be injured by an admixture of dirt. The loose casks were re-coopered on the dock; a portion of them, while waiting to be coopered, were left on the dock over night, and being insufficiently covered, the cement was injured by rain. *Held*, that it was the duty of the ship to have had the casks coopered in the hold, if that was necessary to prevent the escape of their contents while being discharged.

2. Even if the casks had become loose in the hold, by being made of green wood and shrinking excessively from the heat of the hold, which was not proved, that would not discharge the ship from her liability for a failure to put them in proper landing order before discharging them.

3. The ship was liable for the cement lost, and for the damage to what was injured by rain and by being carelessly mixed with dirt.

A steamer brought a quantity of Portland cement, shipped under an ordinary bill of lading, and unloaded it at a dock in the East river. Many barrels of cement had the heads stove in and staves loosened, and cement escaped on the dock in quantities, which was afterwards scraped up to fill the depleted barrels, without much care to keep it clean. Some barrels that were in bad condition were re-coopered in the hold, and landed safely; others were not, and were refilled and coopered on the dock. There was so much waste that all the barrels could not be refilled. A number of barrels stood over night on the dock awaiting the coopers, and were covered with a canvass, but not sufficiently to protect them from damage by rain that occurred. The consignees complained to the stevedore and the officer in charge of the ship, during the unloading; and afterwards brought this suit for damage and loss of the cement.

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

Hawkins & Cothren, for libellants.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, District Judge. The demand in this case is based upon a bill of lading in ordinary form, which acknowledges the receipt of 2,000 barrels of Portland cement in good order and condition. The answer avers that the casks in which the cement was packed were improperly coopered, whereby some of the cement escaped into the ship's hold; that this was carefully taken out and well and securely coopered up in barrels; that many of the cement barrels suffered from the ordinary wear of the voyage, and these were coopered and made tight, and the whole cargo in good order and condition, was then delivered to the libellants; and that libellants sustained no damage.

The proofs show that while the casks of cement were being landed from the ship, the heads came out of many of them, and quantities of cement escaped from these and from other casks upon the dock, which was scraped up and replaced in the casks before delivery. It is also proved that cement was lost in this way—some casks when refilled being found not to contain the full quantity shipped. The value of the cement in the refilled casks was also in some cases impaired by the admixture of dirt gathered in the scraping up the cement from the dock. The weight of the evidence also is that 39 casks were detained on the dock awaiting the ship's cooper, and while there were insecurely covered, so that the cement was damaged by rain which fell during the night. The proof is insufficient to show that the casks in which the cement was shipped were different from ordinary casks, or were incapable of sustaining the ordinary wear of such a voyage without injury. It is beyond dispute, that either from the loose condition of the casks, or from the way in which they were handled, quantities of the cement escaped in the landing, whence damage arose.

The ship avers no peril of the seas; she proves no inherent defect in the casks. It was her duty to cooper the casks in the hold, if that was necessary to enable her to land them without losing the contents. Her obligation to handle them so as not to injure the contents is also clear. Her liability is therefore the same, whether the loss arose from the loose condition of the casks when placed in the slings, or from bad handling afterwards.

It was suggested on the trial, but not proved, that the casks were constructed of green wood and that heat in the hold had shrunk the staves, so that the heads and staves were loosened. It is unnecessary to decide what would be the effect upon the ship's liability, if proof had been given of the existence in the wood of the casks of an excessive liability to shrink under the ordinary heat of a ship's hold. It might well be that such a condition would be an inherent defect

that would absolve the ship from liability for the contents of casks lost in the ship's hold. But even such proof would not excuse the carrier for contents lost on the dock in the landing, when that loss could be prevented by the services of a cooper in tightening the staves and heads of the casks before putting them in the slings.

In this case the obligation to cooper the casks in the hold is admitted by the answer, and this duty is alleged to have been performed by the ship. The defense set up is performance. Upon the evidence the contract was not performed, and the libellant is entitled to recover the amount of the damage arising from the loss of cement from the casks refilled, from the destruction of the contents of 39 casks wet while on the dock, and from any diminution in value arising from the admixture of dirt scraped from the dock in the process of refilling. Let a reference be had to ascertain the amount of the loss according to this opinion.

Case No. 6,084.

HARP v. The GRAND ERA.

[1 Woods. 184.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1871.

CARRIERS — CONNECTING LINES OF STEAMERS — THROUGH BILL OF LADING—LIABILITY FOR DAMAGE TO GOODS.

Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received.

[Followed in Richardson v. The Charles P. Chouteau, 37 Fed. 533.]

[Cited in Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 748, 12 Pac. 98; Peterson v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 100, 45 N. W. 575; Knight v. Providence & W. R. Co., 13 R. I. 574.]

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

In admiralty.

George W. Race, W. H. Foster, and E. T. Merrick, for libellant.

R. H. Marr, for respondent.

WOODS, Circuit Judge. On March 14, 1870, A. H. Redford shipped, at Nashville, eight boxes of books, on the steamer Tyrone, to be transported to New Orleans and delivered to libellant. A bill of lading was delivered by the officers of the Tyrone, by which the Tyrone reserved the right of reshipping. The Tyrone proceeded to Cairo and transferred freight and bill of lading to the Grand Era, which received the goods and adopted the bill of lading. On March 25, 1870, the Grand Era arrived at New Orleans and delivered said eight boxes to libellant. The books in five of the boxes were damaged by water, to the amount of $422.91. The answer of George L. Kouns, claimant, alleges that the boxes were not transferred from the Tyrone to the Grand Era, but from the Tyrone to the wharf boat at Cairo, and thence to the Grand Era. That the Grand Era had no agreement or understanding with the Tyrone, but the contract of the Grand Era was made with the shipper at Cairo, and was simply to transport the boxes from Cairo to New Orleans and there deliver them to the consignee. That the Grand Era did not assume or adopt the terms of the bill of lading given by the Tyrone, and did not become privy to or bound by any contract made by that boat. That the books were well and carefully stowed on board the Grand Era and received no damage while so on board, and were delivered in the same condition in which they were received at Cairo. Wm. P. Turpin and John Tansy testify that the books in the boxes were in good condition and dry when delivered to the Tyrone. John M. Cloud, clerk of the Grand Era, witness for claimant, testifies that the books were in apparent good order when received from the Cairo Transfer Company, and they were delivered in the same order. They were stowed on the boiler deck besi le the baggage of passengers, and he saw them every day and saw no damage done them. The original bill of lading went through, and the Grand Era paid the Tyrone her share of the freight. James Kerr, for claimant, testifies that the eight boxes were received at Cairo from one C. T. Hinde, agent of the Nashville Packets. They were received about March 18, and delivered in New Orleans, March 24 or 25. He says: "We gave to Hinde a transfer bill of lading, comprising all the freight shipped by said Hinde to a number of parties. The books were stowed on a barricade, which is a rack between decks, and witness did not see how they could have been damaged by water." The libellant testifies that the bill of lading given by the Tyrone was brought to his store in Camp street on March 25, 1870, and payment of freight demanded by a clerk of the owners of the Grand Era.

The evidence satisfies my mind beyond doubt, that the books were in good condition when delivered to the clerk of the Tyrone, and received on board that boat at Nashville, and that they were in a damaged condition when delivered by the Grand Era to Harp, the consignee, at New Orleans. The evidence does not disclose whether the damage was received while the books were on the Tyrone, or after they had been delivered to the Grand Era. So that the question is presented, is the Grand Era liable for damage occurring while the freight was on the Tyrone, or at the wharf boat at Cairo? As the Grand Era received the goods in apparent good condition,

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

even if she is not liable for damage which was sustained by the goods before such delivery, the burden of proof is on the respondent, to show that the damage did not happen after they were delivered to her. The burden of proof is on the carrier, to show that a loss was occasioned by a cause for which he is not responsible. Nelson v. Woodruff, 1 Black [66 U. S.] 156; English v. Ocean Steam Nav. Co. [Case No. 4,490]. As already intimated, the evidence on this point is balanced and unsatisfactory. But even if the damage occurred on the Tyrone or wharf boat, we think the defendant is primarily liable. When several carriers unite to complete a line of transportation and receive goods for one freight, they are each liable for damages, subject to reclamation against the party by whose act the damage occurred. Hart v. Rensselaer & S. R. Co., 4 Seld. [8 N. Y.] 37. Any other rule would subject shippers and consignees to such great inconvenience and uncertainty as to amount to a denial of a remedy. It sometimes occurs that in the course of transportation, freight passes into the custody of four or five different steamers or railroads, all forming one line and giving through bills of lading. To require the owner to ascertain to which one the damage is attributable before he brings his action, is putting a burden upon him, which makes relief almost impossible. Each carrier is the agent of all the others to accomplish and complete the carriage and delivery of the goods, when a through bill of lading is given and freight charged. Under this rule of law we entertain no doubt that the defendant is liable in this action for the damage sustained by the consignee. The damage is satisfactorily shown to be $422.19, for which, with interest and costs, let a decree be entered against the steamboat and the obligors on the bond of release.

Case No. 6,085.

In re HARPER.

[6 Chi. Leg. News, 279.]

District Court, D. Minnesota. May, 1874.

BANKRUPTCY — BAR TO DEBTOR'S DISCHARGE — FRAUDULENT PREFERENCES, GIFTS, ETC.

[The fraudulent preference "contrary to the provisions of this act," and the fraudulent payment, gift, transfer, etc., of property, mentioned in section 29 of the act 1867 (14 Stat. 531), as being a bar to the debtor's discharge, must be such as are denominated frauds by the terms of the law, and particularly described in section 35. Hence giving a preference more than four months before the filing of the petition, or making a payment, gift, transfer, etc., more than six months before the same date, will not bar the discharge.]

[Cited in Re Wolfskill, Case No. 17,930.]

Demurrer to specifications against a discharge.

Gilman, Clough & Wilde, for creditors.

Gordon E. Cole, for bankrupt.

NELSON, District Judge. John B. Harper, who had been adjudged a bankrupt in this court, having applied for a discharge from his debts, certain of his creditors, opposing such discharge, filed three distinct specifications wherein they set forth the grounds of their opposition. To the first and third of these specifications the bankrupt interposed demurrers, averring that the matters alleged therein are not sufficient in law to prevent his discharge. The questions arising upon these demurrers are submitted to the court for decision. The first specification charges, in substance, that the bankrupt has given a fraudulent preference contrary to the provisions of the act establishing the system of bankruptcy, in that he did within six months before the filing of the petition of adjudication of bankruptcy against him, being insolvent, and knowing that fact, and being indebted to one W. J. Van Dyke in a large sum of money, pay a portion of said indebtedness, with intent to thereby prefer him over the remaining creditors. The question for my consideration, presented by the demurrer to this specification, is whether such a state of facts creates a preference fraudulent under the act and forbidden thereby, which would prevent a discharge.

Section 29 declares, among other things, that "no discharge shall be granted * * * if the bankrupt * * * has given any fraudulent preference contrary to the provisions of this act." There is another clause of this section denying a discharge if, in contemplation of becoming a bankrupt, any payment is made for the purpose of preferring a creditor, but it is not pretended that this specification is framed to cover such a charge. The specification of fraudulent preference must, in my opinion, be governed by the first subdivision of section 35, and can be a preference fraudulent under the act only when made within four months before the filing of the petition in bankruptcy. See Bean v. Brookmire [Case No. 1,168]. It is urged that there is no limitation in section 29 reciting the transactions which forbid a discharge on account of a fraudulent preference, but I think the designation, "fraudulent preference contrary to the provisions of the act," is definite enough, and refers us to the 35th section to ascertain the character of the transaction. The demurrer to the first specification is therefore sustained.

The third specification charges that the bankrupt made a fraudulent transfer of some part of his property, in that he expended large sums of his own money, during the years 1867, 1868 and 1869, in permanent improvements upon property belonging to his wife, with intent to hinder, delay, and defraud his creditors. The demurrer to this specification must also be sustained.

It is true, that the fraudulent acts alleged would entitle the assignee to recover the amount of money expended by the bankrupt

in improvements upon the property owned by his wife, if done with the intent charged. The assignee has the same legal and equitable rights that any creditor had before the adjudication of bankruptcy; but when it is considered that the policy of the bankrupt law, while it provides for an equal distribution of the estate among the creditors, also contemplates the discharge of the bankrupt unless he has committed an act specially mentioned in section 29, I think the character of fraud set up in this specification can not be regarded such as would bar a discharge. In my opinion, the fraudulent payment, gift, transfer, etc., of property mentioned in this section, must be such as are denominated frauds by the terms of the bankrupt law and particularly described in section 35. Such transfers are denounced, and the bankrupt making them forfeits all right to his discharge. The construction urged by the solicitor for the creditors would embrace all conveyances, if fraudulent as to creditors, whether under the bankrupt act, the state statute, or the common law. The right of the assignee to the possession of the entire estate of the bankrupt, and to recover by proper proceedings property fraudulently disposed of, is full and ample; but the limitation of the right of the bankrupt to a discharge is restricted to the prohibitions in section 29, and where the frauds mentioned are not expressly defined therein, we must look to other portions of the bankrupt act for an explanation. This specification does not charge a fraudulent transfer within the terms of section 35, and is not sufficient.

HARPER (CAMPBELL v.). See Case No. 2,360.

Case No. 6,086.

HARPER v. COOKE et al.

SAME v. STEVENS.

[5 Ban. & A. 50.] [1]

Circuit Court, D. Massachusetts. Dec., 1879.

PATENTS—IMPROVEMENT IN FLY TRAPS—NOVELTY—INFRINGEMENT.

Reissued letters patent number 6,493, dated June 22d, 1875, for an improvement in fly traps, *held* to be novel and infringed by the defendants.

[This was a proceeding in equity by James M. Harper against Howard O. Cooke and others, and was heard with another suit of the same nature by the same plaintiff against Nathaniel B. Stevens, for the alleged infringement of reissued letters patent No. 6,493, granted to plaintiff June 22, 1875. The original patent, No. 131,098, was granted to him September 3, 1872.]

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

Thos. H. Dodge, for complainant.
Thos. Weston, Jr., for defendants.

LOWELL, Circuit Judge. These suits are brought for the infringement of the reissued patent, granted the plaintiff, No. 6,493, dated June 22d, 1875, for an improvement in fly traps. The specification and drawings show a cylinder made of wire cloth, inside of which is a much smaller cone of the same material, with a hole in its top; these are supported by a circular wooden block or base, flat on its lower surface and hollowed on its upper surface, and with shoulders and projections upon which the cone and cylinder are to rest, leaving openings for the greater part of the circumference through which the flies are expected to crawl. The operation of this trap is said to be that the flies crawling up through a narrow and dark passage into the part of the trap containing the bait and covered by the small cone, are attracted by the light above and find their way into the large cylinder, but cannot remember the way for a return journey, and collect in the upper trap. The specification disclaims a trap whose base block contains a convex surface upon the inside, and claims: "1. The concave base block, having extensions and shoulders in combination with the cylinder and cone, substantially as described. 2. The base block, having passages in its periphery and a concavity inside thereof, in combination with the cylinder, substantially as described." The advantage of the concave block is that it will retain liquid bait.

In this case, as in so many others, the field of invention has been thoroughly explored before and since the date of the patent, and the inquiry is whether that part which fairly belongs to the patentee is narrow enough on the one hand to escape the earlier constructions, and broad enough on the other to cover those which are later. The patent of Reuben Shaler, granted in 1859, describes a fly trap of wire gauze, which has an upper and lower receptacle connected by a trap-door, which is kept sufficiently open by an upright piece of wire. The base block has a mode of entrance for the flies substantially like that of Harper, but it is convex on the upper or inner side, and the liquid bait was put upon a rag or sponge which was fastened to the block. The other contrivances which are proved to antedate Harper, have not the peculiar advantage of the mode of constructing the entrance, which makes it difficult for the flies to find their way out. It is Shaler's trap which caused the disclaimer in Harper's patent, and it is that which raises the only nice point of novelty. The connection between the upper and the lower trap is much more simple and compact in Harper's contrivance, and the trap-door is dispensed with, as well as wire posts by which Shaler supported his upper bell-shaped receptacle. This is in addition to the change in the base block from convex to concave,

which is admitted to be a useful change. It is not necessary to inquire whether Harper would infringe Shaler, because the patent of the latter has long since expired, but I think it reasonably clear, in view of the existing traps, that Harper made an improvement upon Shaler which will support a patent for a limited claim; that is, for the combination of such a block with such a cone and cylinder as he describes, in substantially the same way.

Then, does the trap made by the defendants Howard and Samuel Cooke, and sold by the defendant Stevens, infringe Harper's patent? It differs in two particulars, which amount to patentable differences in the opinion of the defendant's expert, Mr. Walker, and a patent has been or is to be applied for; but the new patent, if one should be obtained, may infringe the old. The differences are not obvious on a hasty inspection. They are these: The lower and upper cages are firmly fastened together at the bottom. This is an improvement; but as Harper's corresponding cages are so made as to fit together at the same place, the difference is immaterial in the trap when in operation. Then, instead of cutting away a part of the circular base block, so as to leave suitable projections and shoulders to receive the cage or cages, the defendants attach to a circular base block three pieces of bent wire, or thin plates of brass, which serve as shoulders and projections, and at the same time, being elastic, they serve as springs to keep the cage and block united, which is another improvement, but likewise unessential to the trap when in use. Harper describes his cone as fitted closely to the block, but springs would certainly be more effectual than the best fitted unelastic block. The defendants' trap, when standing upon a table ready for use, has a base block with a concave ring cut out of it, on the upper surface, to receive the molasses or other liquid bait, and with openings not distinguishable in function or mode of operation from those of Harper, with an inner and an outer cage of wire gauze, resting upon the block at the same place, and for the same purpose, and in substantially the same way, with those of the plaintiff. From the comparison which I have given, it is apparent, I think, that the defendants have taken the combination of the plaintiff, and that the improvements which they have made are by way of addition to, rather than avoidance of, his mode of construction.

I, therefore, find the patent valid, and to have been infringed. As the defendant in the second case merely sells the traps made by the defendants in the first case, an accounting in the first case will, I suppose, be all that is necessary at present. Decree in the first case for injunction and account. Decree in the second case for injunction.

[For another case involving this patent, see National Manuf'g Co. v. Myers, 15 Fed. 237.]

Case No. 6,087.

HARPER v. DOUGHERTY et al.

[2 Cranch, C. C. 284.] [1]

Circuit Court, District of Columbia. May 7, 1822.

EQUITY—EFFECT OF RESPONSIVE ANSWER — SALE OF A CHATTEL—SPECIFIC PERFORMANCE OF CONTRACT.

1. To constitute a valid sale so as to change the property in a chattel, there must be a certain price agreed upon, and the thing must be delivered, except in the case of a vessel at sea.

2. The answer, so far as it is responsive to the allegations in the bill, is conclusive evidence, unless contradicted by two witnesses.

3. Quaere, whether a court of equity can or ought to decree the specific execution of a contract for the sale of personal goods in any case whatever.

Bill in equity by Samuel Harper against Daniel Dougherty, John McPherson, Daniel McPherson, John McPherson, Jr., Thomas Tuley, and Nathaniel S. Wise. It states that the plaintiff, in March, 1819, purchased of John McPherson & Son, (who were the said John McPherson and Daniel McPherson, carrying on the business of tanning leather under the firm of John McPherson & Son) a quantity of sole-leather to the amount of $2,243.99 then lying in the vats; that it was not delivered because it was not entirely in a state to be removed, and J. M. & Son, were by agreement to complete the leather and deliver it to the plaintiff. That the sale was bona fide; and that J. M. & Son received a valuable and full consideration for the same. That they afterwards failed in business. That John McPherson, Jr. set up a claim to the leather and took possession of it. That he is a man of desperate circumstances, and entirely without property, or the means of paying the plaintiff. That Daniel Dougherty, knowing of the plaintiff's claim, purchased the leather of John McPherson, Jr. but has not paid for it. That J. M., Jr. refuses to deliver up the leather to the plaintiff. The bill then prays an injunction, and that the money in Dougherty's hands may be applied to pay the plaintiff; and for general relief. A supplemental bill states that Dougherty had conveyed the leather by a deed of trust to N. S. Wise to secure the payment of his (Dougherty's) two notes to J. M., Jr. for $1,750 each, and prays that Wise may be made a defendant, and that the plaintiff may have the benefit of the trust, and that the property may be sold to pay the plaintiff's claim. The answer of Daniel McPherson denies that he or any of the firm of J. M. & Son, ever made the sale of sole-leather to the plaintiff, which is charged in the bill; or ever entered into any contract with the plaintiff whereby this defendant or the said firm became bound to deliver to the plaintiff any quantity of sole-leather. The answer of

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

Dougherty admits that he had notice of the plaintiff's claim when he purchased the leather of J. M., Jr. The answer of John McPherson, Jr. states that J. M. & Son, being indebted to him in the sum of $3,201.68 in April, 1818, engaged to deliver him one thousand Spanish hides manufactured into merchantable sole leather. That in April, 1819, Daniel McPherson gave him possession of whatever hides then remained in the tan-yard in part liquidation of his claim for one thousand dollars, and that he sold them to Dougherty for $4,500, and they were delivered to him by Tuley by the authority of this defendant.

Mr. Mason and Mr. Jones, for plaintiff.
Mr. Swann and Mr. Wise, for defendants.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The questions arising in this case are: (1) Was there a complete sale of the leather, so as to change the property, and vest it in the plaintiff? If not, then (2) Was there such a contract for the sale and delivery of the leather as a court of equity will enforce? If not, then (3) Whether there was any contract which gave the plaintiff a specific lien on any, and what quantity of leather. (4) If there was any such sale or contract with Daniel McPherson, or with J. M. & Son, then the title of J. McPherson, Jr. must be examined, because he dates his title in April, 1818, one year before the plaintiff's? (5) If the plaintiff is entitled to any decree in his favor, shall it be for a specific delivery of the leather, or for as much money in Dougherty's hands as will satisfy the plaintiff's claim?

1. To constitute a valid sale of a chattel, so as to change the property, there must be a certain price agreed upon, and the thing must be delivered; except in the case of a vessel at sea, when the transfer is made by the grand bill of sale. In the present case the sale is expressly denied by the answer, which is evidence, and conclusive, unless contradicted by two witnesses to the same point. And it is contended that this answer is contradicted by two witnesses; but this will be considered hereafter, if necessary. By the plaintiff's own showing in the bill, no price was fixed to the leather, and it was not delivered. If, therefore, there was any contract about the leather, it was not such a sale as transferred the property to the plaintiff.

2. Was there such a contract for the sale and delivery of the leather as a court of equity will enforce? This question may be divided. 1st. Was there a contract for the sale and delivery of the leather? and 2d. If there was, can a court of equity decree a specific performance? First, was there a contract for the sale and delivery of the leather? The bill states the affirmative. The answer positively denies it; and the plaintiff has produced no evidence of such a contract. It is true that Mr. Rinker and Mr. Litle testify that Daniel McPherson admitted that the hides which J. M., Jr. claimed were the identical hides which he (D. M.) had sold to the plaintiff; and Mr. Rinker adds, that he understood D. M. as admitting distinctly that he had sold the hides as charged by the plaintiff, and as denying that they were actually transferred to J. M., Jr. The latter circumstance is not noticed by Mr. Litle; but he says that D. M. "added that he did not, at the time, intend to deliver them to said Harper." It may be observed, that these affidavits appear to have been taken ex parte, and without notice to the defendants. There was no cross-examination. The point of the question, which appears to have been put to D. M. in the presence of the committee of the monthly meeting, was respecting the identity of the hides, and not the sale, or the terms of the sale. Neither the price nor the quantity of the leather was mentioned; nor is there the least evidence on that subject. The sale which was spoken of at the meeting might have been the sale which is stated in the defendant D. M.'s answer, which was abandoned, and which is admitted in the plaintiff's affidavit. Admitting, however, that the answer of D. M. is contradicted by two witnesses, yet the plaintiff has failed to prove the terms of the contract. There is no evidence of the quantity of leather sold, nor of the price; nor of the amount due to the plaintiff. What is there, then, for the court to enforce? It cannot make contracts for the parties; nor can it enforce contracts not proved.

3. There is no evidence of any other contract, which gave the plaintiff any specific lien on any quantity of leather. The plaintiff having failed to show any contract which would entitle him to relief in a court of equity, it becomes unnecessary to inquire into the validity of the title of John McPherson, Jr. or of Daniel Dougherty; or to consider the question whether a court of equity can, or ought, in any case, to decree the specific execution of a contract for the sale of personal goods. Bill dismissed, with costs.

HARPER (GRAY v.). See Case No. 5,716.

HARPER (HILLIARD v.). See Case No. 5,716.

Case No. 6,088.

HARPER v. MARINE INS. CO.

[Cited in De Butts v. Bacon, Case No. 3,717. Nowhere reported; opinion not now accessible.]

HARPER (MAY v.). See Case No. 9,333.

HARPER (METROPOLITAN LIFE INS. Co. v.). See Case No. 9,505.

Case No. 6,089.

HARPER v. NEFF et al.

[6 McLean, 390.] [1]

Circuit Court, D. Indiana. May Term, 1855.

CHATTEL MORTGAGE—SECURITY FOR PERFORMANCE OF CONTRACT—SUBSTITUTION.

A mortgage having been given on certain articles of property to secure the payment of $1,500, a subsequent agreement was entered into between the parties to deliver over to the mortgagor the articles of property, on his giving security to sell the same at reasonable prices, and account to the mortgagee every fifteen days for the proceeds, and pay the same over to him, &c. The security was given, and an action being brought on the new agreement, the security pleaded that the original mortgage on the articles had been assigned to him. To this plea the plaintiff demurred. The court held that this plea was no answer to the declaration; that the new agreement was substituted for the mortgage, the plaintiff relying on the personal security given instead of the lien on the articles of property.

[This was an action at law by John M. Harper against Edwin W. Neff and James Blake.]

Henderson & Mackenzie, for plaintiff.

OPINION OF THE COURT. The plaintiff states in his declaration, that on the 21st of January, 1853, by their deed of that date, the defendants bound themselves to the plaintiff to pay him the sum of $1,500, which deed was and is subject to a certain condition thereunder written, which condition—after reciting that said Neff was then indebted to the plaintiff by a judgment in the Marion circuit court in about the sum of sixteen hundred dollars, and that the plaintiff then had a bill of sale on certain articles of jewelry, tools, &c., such as were usually kept in jewelry and watch stores, to secure the payment of said sum of about sixteen hundred dollars, and that said articles of jewelry were then deposited by the plaintiff in the safe at S. A. Fletcher's banking house, and were then of the cost price of fourteen hundred and twenty-nine dollars, and that said plaintiff was then about to re-deliver to the said Neff said articles of jewelry, &c., to be by him sold to the said Neff, returning the proceeds to the plaintiff or his attorneys—was and is, that if the said Neff should use due and proper diligence to make sale of the said articles at reasonable prices, and would, every fifteen days after the same should be delivered to him as aforesaid, render an account and pay over the proceeds of such sales to Henderson & Mackenzie, or the other authorized agents of the plaintiff, until, of such proceeds, the plaintiff should receive the sum of fourteen hundred and twenty-nine dollars, with accruing interest thereon, the obligation should be void. To which condition there was and is also thereunder written this proviso, that if said Neff should prefer to re-deliver to the plaintiff said jewelry or any part thereof, the same should be received by the plaintiff at its cost price on said obligation, and should operate as a payment of fourteen hundred and twenty-nine dollars. The plaintiff avers the delivery to Neff of the jewelry, &c., and that he neither re-delivered the jewelry nor paid the proceeds, or any part thereof, of the sales made, &c. The plea alleges "that at and before the time of executing by said Blake & Neff of the writing obligatory in said declaration mentioned, the said plaintiff held a mortgage or bill of sale executed by said Neff, which is the same bill of sale named in said declaration, by which said Neff mortgaged and sold to said Harper all the jewelry, goods, tools, &c., named in said writing obligatory, and a large amount not mentioned in said writing obligatory, amounting in all to the sum of two thousand, forty-three dollars, and thirty-one cents; which mortgage was conditioned that said Neff should pay to the said Harper the sum above stated, with all interest due and to become due thereon, for which said Neff had executed his certain promissory notes, amounting in the aggregate to the sum aforesaid, which mortgage was in full force and unsatisfied at the time of the execution of said writing obligatory in said declaration mentioned, and said Harper was then holding said goods, jewelry, tools, &c., in said writing obligatory named, by virtue of said mortgage; and the said defendants say that after said writing obligatory had been executed and delivered to plaintiff, the said plaintiff for value received did, after said jewelry, tools, &c., had been, under the terms thereof, delivered to said Neff for the purposes therein stated, assign said mortgage to James Blake, by means whereof the said Blake became and was the owner of said goods, jewelry, &c., in said declaration mentioned, and the said writing obligatory became and was void and of no effect," &c. To this plea the plaintiff filed a general demurrer.

The plea is no answer to the declaration. The agreement on which the action is founded recites a previous mortgage given on the jewelry, tools, &c., to secure the payment of a sum amounting to sixteen hundred dollars. This mortgage in the agreement is called a bill of sale, but that does not alter the legal effect of the instrument. The jewelry, &c., at this time, was in possession of the plaintiff, and the agreement states, that he was about to redeliver the jewelry, &c., to Neff, the mortgagee, who bound himself to sell it at a reasonable price, and pay to the plaintiff or his attorneys, every fifteen days, the amount received on such sales, until the sum of $1,429 should be paid; and Neff had the option to return the articles to the plaintiff, at their cost, in payment of the sum last mentioned, and Blake was security for Neff that he would faithfully perform the agreement. In his declaration, the plaintiff sets forth, as a breach of the undertaking, that Neff had

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

neither paid over any part of the proceeds of the sales, nor returned to the plaintiff the articles, &c. The defendants plead that the original mortgage, which was superseded by the new agreement, was assigned over by plaintiff to Blake, one of the defendants. The plaintiff had relinquished the mortgage by the new agreement, in which Blake was security. The assignment of the mortgage, therefore, could have no effect on the new agreement. The plaintiff, in delivering the jewelry, tools, &c., to Neff, abandoned the mortgage, and relied on the personal security of Blake; and, if the mortgage could have any effect whatever in the hands of Blake, it could have no other than to operate as an indemnity to him for the liability he had incurred by signing the new agreement. The demurrer is overruled, and judgment must be entered on the new agreement.

Case No. 6,090.

HARPER et al. v. NEW BRIG.

[Gilp. 536.] [1]

District Court, E. D. Pennsylvania. March 10, 1835.

MARITIME LIENS—REPAIRS AND MATERIALS—STATE LAW — SALE OF VESSEL UNDER PREFERRED CLAIMS—RIGHT OF LIEN CREDITOR TO SURPLUS —ASSIGNEE OF A VESSEL SUBJECT TO A LIEN.

1. A lien of workmen and materialmen on a vessel, in a port to which she belongs, depends entirely on the provisions of the state law by which it is given.

[Cited in Davis v. Child, Case No. 3,628; Macy v. De Wolf, Id. 8,933; The Alida, Id. 199; Ludington v. The Nucleus, Id. 8,598; The Celestine, Id. 2,541.]

2. The debts for which a lien on a vessel is given, are those contracted by the master and owner for work and materials used in building, repairing or furnishing her: the persons to whom such a lien is given, are the workmen and materialmen, who furnish the work and materials so used.

[Cited in The Alida, Case No. 199; The Velocity, Id. 16,911.]

3. Where work or materials, necessary for building, repairing or supplying a vessel, are furnished on a contract with an intermediate agent or person who is not the owner or master, neither the workmen and materialmen, nor such intermediate person or agent, have a lien on the vessel.

[Cited in Leland v. The Medora, Case No. 8,237; Carroll v. The Leathers, Id. 2,455.]

4. Where money, subject to distribution, is in court after the report of an auditor, the decree does not follow the report of the auditor as a matter of course, because no exception has been taken to it.

5. Where a surplus remains in court, after the sale of a vessel by a proceeding in rem in the admiralty, a party, having a lien or appropriation of the vessel precedently legally fixed, may claim a distribution of such surplus, although his original demand was not such as could be proceeded for in the admiralty.

[Cited in The Fanny, Case No. 4,637; The Panama, Id. 10,703; Remnants in Court, Id. 11,697; Leland v. The Medora, Id. 8,237; The Velocity, Id. 16,911; People's Ferry Co. v. Beers, 20 How. (61 U. S.) 402; The Hendrik Hudson, Case No. 6,358; The Edith, Id. 4,283.]

6. Where a vessel, bonâ fide assigned by the owner, is subsequently sold under a lien of workmen and materialmen, the assignee is entitled to a distribution of the surplus, in preference to a creditor having no such appropriation.

The New Brig having been condemned and sold by the decree of the court, made at August sessions, 1834 [Case No. 3,643], the money arising from the sale was brought into court for distribution. A great number of claims were filed, and among them one on the part of Charles A. Harper and William C. Bridges. All of them were referred to an auditor for liquidation. On his report being made to the court, Messrs. Harper and Bridges filed exceptions thereto.

HOPKINSON, District Judge. In August last a libel was filed in this court, by William S. Davis and George W. Lehman, against a certain vessel called the New Brig, praying for process of attachment against her, and that she might be condemned and sold for the payment of certain debts due to the libellants, and contracted with them by the owner of the brig, for materials furnished by them, and used by them, in building her. The process was accordingly ordered, the vessel was attached, and a final decree of condemnation made, after which the vessel was in due course sold, and the proceeds of the sale brought into court, where they now remain, subject to the order of the court for their distribution. A great number of persons who furnished work or materials for the brig, have presented their claims to the court, and prayed for payment out of the moneys which proceeded from her sale. Among them is the libel and claim of Charles A. Harper and William C. Bridges, who, with their petition, filed their account, consisting of several items, and amounting in the whole to the sum of six thousand and eighty-five dollars and seventy-eight cents. This claim, with all the others, was referred to an auditor to audit and examine all the accounts, and distribute the funds in court amongst the claimants. The auditor has performed this duty, and made a report of his proceedings to the court. No exception was taken to his report, but one on the part of Messrs. Davis and Lehman, which was dismissed; and another on the part of Messrs. Harper and Bridges, which is now to be decided. These libellants take exception to the report: (1) Because the auditor has reported, that a part of their account, or claim, was a lien on the vessel by virtue of the acts of assembly of this commonwealth of the 27th March, 1784 [2 Laws Pa. p. 95], of the 5th March, 1819 [7 Laws Pa. p. 161], and of the 11th April, 1825 [8 Laws Pa. p. 437]. (2) Because he has reported, that in the distribution of the funds arising from the sale of the brig, the claim

[1] [Reported by Henry D. Gilpin, Esq.]

of Messrs. Harper and Bridges should be postponed to the claims of the other claimants enumerated. Some other exceptions are set out, but they depend upon the decision of the question mainly argued at the bar, that is, whether the account of Messrs. Harper and Bridges, or any part of it, gave them a lien on the brig, or a preference of payment out of the funds now in court, on the true construction of the acts of assembly above referred to. Some of the items of this account have not been insisted upon as liens, or debts, entitled to a preference; such as the account of J. Thomas for salt, twenty-three dollars and seventy-five cents; of G. Good, for scraping, twenty dollars; and of advances made by Messrs. Harper and Bridges to Jacob Tees, of cash, at sundry times, to build the brig, two thousand two hundred and forty-eight dollars and twenty-one cents. The other items of the claim consist of the accounts of several persons for work or materials furnished for the said brig, all of which were contracted for by Messrs. Harper and Bridges, and on their credit and responsibility, and the greater part of which has been actually paid by them. More than half of Collins' bill, of four hundred and fifty dollars, is paid, and the whole of that of Baldwin, for copper, amounting to fifteen hundred and eleven dollars and twenty-five cents. Soker's account for ship chandlery, of fourteen hundred and twenty-one dollars and forty-eight cents, is paid. Indeed, there remain unpaid of these accounts, only those of Hart and Flannegan, plumbers, for eighty dollars and sixty-two cents; and W. and S. Brown, riggers, for two hundred and two dollars and forty-four cents.

The claim of Messrs. Harper and Bridges, as they have put it forth in their libel, is as follows: They allege that, between the 22d February, 1834, and the 1st October, of the same year, at the request of Jacob Tees, who was building a new brig at the port of Philadelphia, they did provide, furnish and deliver to the use of the said brig, divers spars, blocks, copper, nails, ropes, rigging and other materials, necessary in the building and rigging of the said brig; and, also, at the request of the said Jacob Tees, did procure and cause divers work, labour and services to be done in and upon the building of said brig, by riggers, painters, plumbers and others, by them the libellants employed and paid for that purpose; and also that they did advance large sums of money to the said Jacob Tees, to be laid out by him, and which were so laid out, in and about the building and rigging of the said brig. The first claim, which charges that the libellants themselves furnished the materials enumerated, cannot be maintained, as they are clearly not of the description of persons mentioned in the acts of assembly, as entitled to the benefit given by them. The last mentioned claim, to wit, for moneys advanced by them, to Jacob Tees, to be laid out in building the brig, is not now insisted upon as entitled to a lien and preference. Of course, the whole case turns on the second allegation, that is, that the libellants did procure and cause divers work, labour and services to be done in and upon the building of the said brig. So the case stood at the argument, since which, on the suggestion of the court, an amendment has been made to the libel, alleging, in substance, that the petitioners did procure and cause to be provided, furnished and delivered to the use of the said brig, and which were used and employed in and upon her, certain enumerated materials necessary for her building. In short, in respect to the materials which are now the subject of controversy, the petitioners allege (1) that they did, themselves, provide and furnish them to and for the brig; and (2) that they did procure and cause them to be provided and furnished by other persons, which persons were afterwards paid and satisfied therefor, by the petitioners.

The argument, on both sides, admits that the right of the petitioners must depend upon the provisions of the act of assembly of Pennsylvania, passed on the 27th March, 1784, and its supplements. The title of this act declares its object to be, "to secure the persons employed in the building and fitting ships and vessels for sea, by making the body, tackle, furniture and apparel of such ships and vessels, liable to pay the several tradesmen employed in building and fitting them, for their work and materials." The preamble of the act declares, that the business of ship building is an important branch of the commerce of the state; that the "tradesmen employed in this business are liable to losses by reason, that the persons employing them are frequently masters of ships, strangers and persons having no fixed property in the country," and that the ships or vessels are not liable to pay the amount of their bills, "whereby their labour and materials have been taken to satisfy other debts." To remedy this evil, it is enacted, that "ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof for or by reason of any work done or materials found or provided by any carpenter, blacksmith and others for, upon and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any, and before any other debts, due and owing from the owners thereof." By the spirit as well as the language of this act, the debts to be preferred, are those which are contracted by the master or owner of a vessel, for work or materials found or provided, for the building of her, and the persons to be secured in the payment of said debts, are the mechanics and materialmen, by whom such work and materials are furnished and provided. These persons are to have a lien, a preference of payment, upon and out of their

own labour and materials, which shall not be taken from them to pay other debts. Neither the policy nor the enactments of the law go beyond this; and the law is satisfied when the debts, described as the objects of its protection, are paid and satisfied. The courts of Pennsylvania, not considering such preference to be entitled to judicial favour, have given a strict construction, to a similar enactment in favour of mechanics and others employed in building a house, in many cases; in that of Williams v. Tearney, 8 Serg. & R. 58, in that of Hinchman v. Lybrand, 14 Serg. & R. 33, and in that of Hills v. Elliott, 16 Serg. & R. 56. The parties to the contract protected by the provisions of the act, are declared to be the owner, or master of the vessel on the one side, and the person furnishing work or materials for her on the other. Indeed the latter are particularly described, as carpenter, blacksmith, mastmaker, sailmaker, shipchandler, and others; so that it would seem, that the mere fact of furnishing and providing materials for a vessel, will not give the lien, unless done by some of the persons mentioned and described in the act; and the supplements afterwards enacted, to extend the protection to venders of sail cloth and lumber merchants, confirm this construction of the law.

The counsel of the petitioners, not denying this construction, has endeavoured to show that the contracts in question, although not made directly by the mechanics and materialmen with the owner of the brig, were so made virtually, by a fair legal implication and intendment. With whom did Mr. Collins, Captain Baldwin or Mr. Ker, make their contracts for the materials furnished by them for this brig? Who was their debtor? On whose responsibility did they part with their property? Did they know Jacob Tees in the whole transaction? Did they make any contract, directly or indirectly with him expressly or by any legal implication? The whole testimony, to which I will generally refer, for there is no contrariety in it on this question, no ambiguity to be explained, shows directly and affirmatively the contrary. Tees was a man of no credit; a man they would trust for nothing; with whom they would have no such dealings, and would make no contracts. It is clear that these contracts were made, not with the owner of the vessel, but with Messrs. Harper and Bridges, on their personal credit and responsibility. The only contract with Tees, was made by the petitioners themselves, for their indemnity and security, but such a contract is also without the bounds of the act, because they do not fall within the description of persons or creditors to whom the lien and preference are given.

But it is contended by the petitioners, that in making these contracts, they acted as the agents of the owner, and that thus the contracts may be said to have been made, by the mechanics and materialmen and the owner, through the agency of the petitioners. The evidence does not sustain this view of the case; certainly the creditors did not consider that they were making contracts with the petitioners, as the agents of Tees, but for themselves and on their own account and responsibility. So they are charged in the bills. The petitioners never made any other suggestion, or pretended they were acting as the mere agents of another. This notion of agency is repudiated by all the cause. But, if it were so, how would it help the petitioners? Either as principals or agents, they have paid the bills; there is an end of the debt so far as the materialmen are concerned; and it is to them that the benefits of the law are given, and not to agents who make contracts, who take upon themselves and guarantee debts, and afterwards actually pay them. From that moment it is a contract between the agent and the principal, either made before the contracts were made for the materials, or raised by the law on his paying and advancing the money for the principal. In either case it is not a contract, or a debt within the provision of the acts in question. The agent makes his contract and arrangement with his principal, for his services, or for his advances, in his own way, for such reward, or such security as they may agree upon, and they look to each other, according to the terms of their contract, for a faithful performance of their respective stipulations. But with all this, the act to encourage ship building and give a preference to mechanics employed in building vessels, has nothing to do. It is a common debt, a common contract between the parties, and to be recovered in the common way. It is also obvious, that in order to support the claim on this ground and to consider it as a debt of the owner, contracted by his agent with the materialmen, it is necessary to drop Messrs. Harper and Bridges as the claimants, for, in their own right, for themselves, they cannot maintain it, and to put in their places, the persons that have been paid. How can this be done? They are answered at once; they are paid; they have no claim or debt, unsatisfied, either against Mr. Tees or his brig. They are no longer creditors, on this account, of the owner, or of the ship, or of Messrs. Harper and Bridges. Their debt is extinguished by the payment; it exists, for no purpose, against any body or thing. A new contract, a new debt, may have arisen by this payment between other parties; but the materialmen have no part or interest in it. But, may the petitioners use the names and rights of other persons to enforce or recover their debt from Mr. Tees? Can they take to themselves, for their own use, the security which the law gave to the materialmen and mechanics, and to them alone? On what ground do they claim this right or this equity? If as agents, paying money for their principal, then it was the payment of the principal, and there is an end of the debt and the security given by the

law for it, and of all the rights dependent upon a connection with the debt; if as sureties, paying the debt of their principal, it must be shown by some authority or established principle of law, that a surety, paying a debt in such circumstances, succeeds to, or may assume the privileges granted by the act of assembly to creditors and contracts of a different character and description. No debt is due to the surety until he pays the original debt, and then one arises, by implication of law, from his principal to him; but the same act, and the same moment that give birth to this new debt, are the death of that which is the object of legislative favour. They do not and cannot exist together. The surety has no debt until he has cancelled, annihilated the claim of the mechanic, nor can the security given for the payment of that debt, secure it. The letter of the law, the policy of the law is satisfied, when those persons for whose benefit they were enacted, are paid, and their contracts fulfilled. It never intended to carry on this preference, to continue this lien, through all the channels of equity that may spring from the original transaction. But if we were to admit that this right of preference, this privilege, is such a one as may be adopted, transmitted by an equitable implication, assumed at will; if it may be separated from the debt it was given and intended to secure, and be attached to another debt, another contract of a different character, with a different consideration, and between other parties, still it is a necessary preliminary, that the right should have existed in the persons from whom it is pretended to be derived. Here, then, we must return to the original debts and the original creditors, on whose rights the petitioners found their present claim, and we shall find that they were not contracted with the owner of the vessel, nor on his credit, nor the credit of the brig, but on a contract with the petitioners personally, and on their credit and responsibility, which, therefore, is not such a contract, nor such a debt, as falls within the provisions of the act of assembly. The persons, then, who furnished the articles in question, sold them to Messrs. Harper and Bridges, by whom they were delivered to Mr. Tees for the use of his brig. On such a sale no lien attached to the brig; no right of preference was vested in them; and, of course, none could be transmitted to the petitioners by implication of law or otherwise.

Under these different views of the case, in no aspect in which it presents itself, can I discover any principle which will authorise me to comply with the prayer of the petitioners, and award to them a preference of payment, out of the funds now in court, arising from the sale of the brig, to indemnify them for the moneys they have actually paid for materials employed in building her. As to the small accounts, or sums, that remain unpaid, but for which they are responsible, they have not even the equity which attaches to the other cases; in fact, they have no debt, no claim, until they do pay. The remaining part of the petition which prays for the remnant, or surplus of the funds in court, after paying and satisfying the preferred debts, as reported by the auditor, will be the subject of the future consideration and order of the court.

The exceptions were overruled, and the report confirmed.

The libel and petition of Messrs. Harper and Bridges, besides the prayer and claim disposed of in the opinion given by the court on the exception to the report of the auditor, contained a prayer that the surplus remaining in court, after satisfaction of the preferred claims, should be adjudged to be paid to them.

HOPKINSON, District Judge (March 20, 1835). The libel and petition of Charles A. Harper and William C. Bridges, trading under the firm of Charles A. Harper & Co. prays, in the first place, that their claim and debt may be paid out of the moneys in court, proceeding from the sale of the New Brig, as a preferred debt, in common with the other debts entitled to a preference under the provisions of the act of assembly of 27th March, 1784; and, in the second place, if that should be denied, that the surplus of said proceeds, remaining after the satisfaction of the claims adjudged to be paid, shall be paid to them. The first prayer of this petition has been denied by the court, and the other is now to be considered and decided. This claim on the surplus or remnant of the proceeds of the sale of the brig, was presented to the auditor, and by him allowed and reported accordingly. It has been argued, that no exception having been made to this report, it is final, and, of itself, entitles the petitioners to the money. I cannot assent to this doctrine. The money in court is sufficient, as it always must be where there is a surplus, to pay all the petitioners, whose claims have been allowed, their respective debts. They are all satisfied, and have neither any interest nor right to interpose in the disposition of the remainder of the fund. There is, therefore, no party in court to take exception to the report of the auditor for the distribution of the surplus; but it is, nevertheless, the duty of the court to look carefully to the disposal of it. It cannot go out of the custody of the court, but by the action and order of the court, and no such order will be made, until the court is well satisfied that the party asking for it is legally entitled to it. It is not a derelict to be picked up by the first person who may lay his hand upon it; it has a legal owner somewhere, and to him only should it be transferred. The decree of the court, in such a case, will by no means follow the report of the auditor as a thing of course, because no exception has been taken to it; but must be made on the judgment

and responsibility of the court, there being no parties whose consent will cure an error.

The power of a court of admiralty over these remnants or surpluses is not an arbitrary power, but is governed by principles, which the court is bound to observe before it acts, whether there be or be not a party in court, having an interest or disposition to obtain a proper distribution of them. We have but few reported adjudications on this subject, but there is enough to put us on the ground, on which such claims should stand. I will advert to them, somewhat at large, because, this being the first case of this description that has called for my decision, I wish to have my views of it fully understood. In the case of The John, 3 C. Rob. Adm. 288, the facts were these. The ship was an American vessel, sold under a decree of the court for wages, which being paid, a surplus remained of about seven hundred pounds. A motion was made to arrest this money on behalf of Messrs. Wright & Co. who had supplied arms and stores to the ship, on a voyage from London to Venice. It was urged, for the claim, that, as it was a foreign ship, the party could have no other remedy. The application was supported by an affidavit of one of the claimants, which exhibited these facts: that, in the year 1798, the American ship John, R. Jackson, master, being in the river Thames, was chartered, on a voyage from London to Venice, with a cargo or freight; that American ships being then exposed to capture by the Algerines and the French, it became expedient that she should be armed for her defence, and have on board additional stores; that the master of the ship applied to the deponent's house to be furnished, with such arms and stores as he stood in need of, and they accordingly furnished them; that, without these supplies the ship could not go on her voyage with safety, and without paying a heavy premium of insurance; that the supply of arms and stores was so furnished on the credit of her voyage, and on the assurance of the solvency of her owner, John Donaldson, of Philadelphia. The ship went on her voyage, and returned to London in 1799, when, on the application of the master, a further supply of stores was furnished. Repeated applications had been made to the agent or broker of the ship, as well as to the master, for payment, but no part could be obtained. When the ship was sold, a principal part of the arms and stores, furnished as aforesaid, remained on board and were also sold, and the proceeds thereof brought into court. The owner, John Donaldson, became insolvent; the master, Jackson, died in America; and the petitioners had no prospect of obtaining payment, unless the court would enable them to recover it out of the balance of the proceeds, arising from the sale of the ship, remaining in court. On these facts, the court thought there was a distinction in the case of foreign ships against which the party could have no other remedy; but there being an attachment of the proceeds on the part of another creditor, and, of course, a conflicting claim, the money was not to be paid to the petitioners until it was removed. Afterwards, this being done, the court said, that the cases had been looked up, and that it had continued to be the practice of the court to allow materialmen to sue against remaining proceeds in the registry; and the payment was decreed. The decree, it will be observed, was for supplies of arms and stores, necessary for the safety of the ship, furnished by the petitioners, directly to her, in a foreign port, at the request of the master, on the credit of her voyage; and the court seems to have considered the petitioners to be, in fact, materialmen furnishing the articles in question directly to the ship. Certainly it was a case in which the master had the right to hypothecate the vessel, and, in a future case, we shall see the importance of this circumstance. This case of The John will further show, that a like decree was refused for a creditor, whose account was of a general and unsettled nature. It was as follows. In September, 1798, the ship arrived at London, from Philadelphia, with a cargo; and, by the master, Jackson, was put into the hands of the appearer, to collect the freights and do the necessary ship's business, as agent. She was chartered for Venice, and the outfit and insurance for that voyage, were paid by him, and he also, by the order of Jackson, insured the ship from Venice to London, and on her arrival made various disbursements and advances for her, which, with some other charges included in his account, made a final balance due to him of two hundred and ninety-six pounds, five shillings and ten pence. He further states, that the owner of the ship was bankrupt, and the master dead in America, and that he has no chance of recovering the balance due to him, but from the proceeds of the ship remaining in court; that he had paid all the tradesmens' bills and demands against the ship, with some exceptions, for which he did not consider himself responsible, they being employed by said Jackson himself. The court rejected the petition, observing that the account was of too general and unsettled a nature to entitle the party to this remedy.

I find a case decided in this court, with much consideration, which confirms the doctrines of that just cited, and explains more fully the principles of the decision. I refer to that of Gardner v. The New Jersey [Case No. 5,233]. It was a suit for mariner's wages, in which a decree of condemnation was passed and the ship sold. There remained a surplus or remnant, after the payment of all the sums adjudged to be paid, with the costs and charges. The petition of the master was presented, stating, that he had expended, during the voyage, for pilot-

age and mariners' wages, and other charges necessary for the ship's use, two hundred and fifty-seven dollars which remained unpaid; and that there was due to him for wages as master, eight hundred and twenty-seven dollars. Another petition was also presented by W. Baldwin, stating that he was employed as physician in and for the ship, on her voyage, and that there was due to him for his services one hundred and sixty-seven dollars. The petitioners respectively prayed, that the sums due to them should be paid out of the surplus moneys remaining in court, after the payment of the sums decreed. The judge says, "When I first came into this court, I made, in several instances, distribution of surplus money, under the idea that I had power so to do, agreeably to the doctrine now stated (in the argument) to justify me in granting the prayers of the petitions: but, on experience, I found myself involved in many difficulties, in the application of this doctrine." He declares that he found it necessary to fix some general rules for his government in the distribution of surplus moneys, and determined "that it shall appear, that a sum claimed out of the surplus or remnant is, either of itself, or in its origin, a lien on the ship, or other thing out of which the moneys were produced." This rule, he says, is justified by the practice of the civil law, of the English chancery, and of the courts of common law. Proceeding on this principle he allowed the claim of the master for the sums paid by him abroad to the mariners, as well as for moneys advanced by him in foreign ports, which he considered to be liens for which the ship was hypothecated. Supplies afforded by materialmen and pilotage, are suable in the admiralty, and "if the master pays demands for those claims, he represents the claimants, and the lien continues on the moneys produced by the sale of the ship." I am not prepared to adopt the suggestion that the lien continued, either upon the ship or her proceeds, after the debt was discharged for the payment of which it was given; but it is enough for the principle, that the debt, in its origin, was a lien on the ship: it was for necessaries furnished in a foreign port, for which the ship was liable, and for which the master had power to hypothecate her. The judge observes, that for materialmen and domestic pilotage, and the sums due on their account, he has generally referred the parties to the state jurisdiction, wishing to avoid collisions, "but for those furnished or paid in foreign ports, or here on ships on their voyage, and not at the port of outfit, the owners being resident here, I have reimbursed or distributed out of surplus moneys, where liens or hypothecations have appeared to me to have attached." On the same principle, wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment. While therefore, the judge allowed the claim of the master to be paid, out of the surplus, for his advances made for the ship abroad, he refused his claim for wages, on the ground that "his contract was clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship." In concluding his opinion he adds, "I deem it an exclusion from a distribution, or a claim to the surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution could not sue in the admiralty for their demands." If, therefore, a lien or appropriation of the thing, or money proceeding from it, is legally fixed, the party may claim the distribution, although the original demand was not such as could be sued for in the admiralty.

Adopting the rules or principles so well explained in the cases I have referred to, we must apply them to the case now under consideration. The claim of the petitioners to the surplus in question may be considered as resting on two grounds, either of which, if maintained, will entitle them to it: (1) The original debt. (2) The bill of sale made and executed by Jacob Tees, the owner of the brig, dated on the 23d November, 1833, by which she was sold and transferred to the petitioners.

1. As to the original debt. It began with a personal contract or arrangement made between Tees and the petitioners, by which they were to procure and furnish materials, and advance money for the building and equipping of the brig, the details of which contract are set out in the deposition of Tees. It was altogether a personal agreement between the parties, giving no lien upon the vessel, and clearly not suable in the admiralty. In the performance of this agreement, the petitioners contracted for and purchased from various persons, certain materials to be used in the construction of the brig, but which were sold and delivered solely on the credit and responsibility of the petitioners, without any reference to or dependence upon the owner, or the brig, for payment. The whole transaction took place here, in the port where the vessel was built and the owner resided. The sale and delivery of the materials in question were, in truth, made to the petitioners and not to Tees; who, however, afterwards received them from the petitioners on such terms, for security and reimbursement, as they had previously agreed upon. It was an affair between themselves, in which the persons who furnished the materials had no part or concern. This case, then, differs in its essential features from that of The John. That was a foreign ship, whose owner was in a distant country, with whom no contract was made, and to whom no credit was given. The advances were made altogether on the credit of the ship and her earnings, and, if she was not made liable for repayment, the creditors had no remedy for the recovery of their demands. The arms and stores, in that case, were furnished by the petitioners directly to the ship, and the court consid-

ered them as materialmen, and not as merchants purchasing the articles from materialmen on their credit, for, in the final decree, the court, as the reason for it, says, "It has been the practice of the court to allow materialmen to sue against proceeds in the registry." Nor will the claim of the petitioners, on the ground of the original debt, stand better on the principles adopted by Judge Peters in the case of Gardner v. The New Jersey [supra]. The debt due by the owner of the brig to Harper and Bridges never was suable in the admiralty, never was a lien on the vessel, nor can be so on the proceeds of her sale. The law never appropriated the brig or her proceeds for the payment of their debt. It was the common case of money paid and advanced, and goods sold and delivered, by one man for the use of another, on a personal contract and responsibility to be sued for and recovered in a court of common law.

The remaining title, which the petitioners set up to sustain their claim to the money in court, is the bill of sale made by Jacob Tees to them on the 23d November, 1833, which, for a consideration of three hundred dollars, grants, sells and transfers to them "the hull of a new brig, now building by said Tees at his ship-yard;" and Tees further engages to finish her. Jacob Tees, in his deposition, says that he gave Harper & Co. that bill of sale as a security for payment of the money the firm advanced, and that he was to pay them two and a half per cent. besides the interest, or to take their notes at four months, without interest until due. The bill of sale on its face assigns and transfers absolutely to the petitioners all the right, title and interest of Tees in and to the brig, or, as explained by his affidavit, gives them a lien or mortgage upon her for the payment of the advances in money and materials made by them for her building. If, then, on the supposition of an absolute sale, the petitioners are considered as standing in the place of Tees, with all his rights, they would be entitled to the surplus money which remains after satisfying all the claims upon the vessel and her proceeds; especially in the absence of any conflicting claim or right to it. But the right of the petitioners stands equally strong on the other ground or supposition. The brig has been fairly and bona fide assigned or pledged to them for the payment of moneys advanced by them, in good faith, to the owner, and actually expended and applied in building her. They have therefore obtained a preference of any general creditor of Tees, even if such a one could come into this court for these funds. They show a "lien or appropriation" of the vessel, which was "legally fixed," and which gives them a precedence over any creditor having no such security or appropriation of this property for the payment of his debt; and the appropriation follows the proceeds or the sale of the brig pledged and appropriated.

Decree. It is ordered, adjudged and decreed, that the surplus and remnant of the proceeds of the sale of the new brig, after payment of all sums adjudged to be paid, and costs and charges, amounting, as appears by the auditor's reports, confirmed by the court, to the sum of thirteen hundred and nineteen dollars and sixty-six cents, be paid by the clerk of the court to the petitioners, Charles A. Harper and William C. Bridges, trading under the firm of Charles A. Harper & Co.

Case No. 6,091.

HARPER et al. v. REILY.

[1 Cranch, C. C. 100.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

WITNESS—IMPEACHMENT—CREDIBILITY.

The declarations of a witness not under oath, may be given in evidence to discredit his testimony.

Trover for two hogsheads of sugar. The defendant moved for the continuance of the cause to the next term on account of the absence of a witness. The affidavit stated that the witness would prove a conversation between himself and Gilpin, a witness who it was supposed would be produced on the part of the plaintiffs [Harper and Lyles].

THE COURT refused a continuance, because the testimony of the defendant's witness would not be competent, on the principle that the declarations of a witness not under oath, shall not be adduced against the witness' declarations on oath. Quaere. See Peake, Ev. 84, 85, and 3 Burrows, 1244. On motion, THE COURT granted a new trial.

Case No. 6,092.

HARPER v. SMITH.

[1 Cranch, C. C. 495.] [1]

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

ACTIONS ON BONDS — OBLIGOR AS WITNESS FOR SURETY—INSTRUCTIONS OF COURT—PLEADING AND PROOF—VARIANCE.

1. The principal obligor in a bond is a competent witness for the surety.

[Cited in Virginia v. Evans, Case No. 16,969; Piles v. Plum, Id. 11,165.]

2. The court will not give an instruction upon a point not material to the issue.

3. An averment that the usurious contract was made in November, is supported by evidence that it was made in September. The variance is not material.

Debt on a joint and several bond, executed by Douglas as principal, and Smith as surety. The action against each obligor was several.

Mr. Taylor, for defendant, offered Douglas as a witness in this action against Smith, and

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

cited Abrahams v. Bunn, 4 Burrows, 2251; Smith v. Prager, 7 Term R. 60; Jordaine v. Lashbrooke, Id. 601; Lockart v. Graham, 1 Strange, 35.

Mr. Swann, for plaintiff, objected, because he swears to discharge himself; for if Harper recovers against Smith, Smith may recover upon motion against Douglas, with the costs of this action.

E. J. Lee, in reply, cited Peake, L. E. 93, 128, 129; Carter v. Pearce, 1 Term R. 163; and Bent v. Baker, 3 Term R. 27.

THE COURT (nem. con.) admitted Mr. Douglas to be sworn.

The plea was usury, and Mr. Swann, for plaintiff, contended that the contract as laid in the plea being that J. & D. Douglas should give their bond, and the bond on oyer being a bond signed "J. & D. Douglas," with only one seal, and the names subscribed by James Douglas only, the evidence did not support the plea. The usurious contract must be strictly proved. Carlisle v. Trears, Cowp. 671.

THE COURT (DUCKETT, Circuit Judge, contra) refused to instruct the jury that the bond produced on oyer was not the bond of J. & D. Douglas, because they supposed the question not material to the issue. The averment in the plea was, in substance, that the bond in the declaration mentioned was executed in pursuance of the corrupt agreement, and the description of the bond, calling it the bond of J. & D. Douglas, was not necessary to be proved, the proof being that the bond in the declaration mentioned was given in execution of the corrupt agreement.

The allegation in the plea was, that the corrupt agreement was made on the —— day of November, and the evidence was, that the terms of the agreement were concluded in September.

THE COURT (nem. con.) said the variance was not material.

HARPER v. STEVENS. See Case No. 6,086.

Case No. 6,093.

HARPER v. WEST.

[1 Cranch, C. C. 192.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

BILL OF EXCHANGE—ACCEPTANCE — EXECUTOR DE SON TORT.

1. If the agent of the drawee of a bill write an order on the back of it to another person to pay it, this order is evidence of the drawee's acceptance of the original bill.

2. Evidence may be given to show that the defendant is executrix in her own wrong, without charging her as such.

Assumpsit, upon a bill drawn by Luke, on West, in favor of plaintiff, and accepted by West, by C. Stephenson, his agent. The evidence was an order drawn by Luke, on West, and on the back of it, an order drawn by Stephenson, in behalf of West, on the treasurer of the theatre.

Mr. Jones, for defendant, objected, that this was not evidence of an acceptance by West.

But THE COURT overruled the objection, being of opinion that if Stephenson was the authorized agent of West, for that purpose, his indorsement, in the form in which it was written, amounted to an acceptance. Moor v. Withy, Esp. 42.

Mr. Jones, objected to the plaintiff's giving in evidence acts to prove the defendant to be executrix in her own wrong, contending that if he meant to rely upon such evidence, he ought to have stated it specially in his application.

But THE COURT (nem. con.) permitted the plaintiff to go into evidence of acts of interfering with the goods of the deceased, &c.

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

HARPER'S FERRY CASE. See Case No. 2,013.

HARRELL (BEALL v.). See Case No. 7,222.

HARRELL (JARRELL v.). See Case No. 7,222.

HARRIES (UNITED STATES v.). See Case No. 15,309.

Case No. 6,094.

The HARRIET.

District Court, E. D. Pennsylvania. July 28, 1848.

SHIPPING—AVERAGE—PORT OF NECESSITY—MEASURE OF DAMAGES—AUTHORITY OF MASTER OVER CARGO—FREIGHT.

1. The expenses and charges of going to a port of necessity are properly the subject of general average only where the voyage has been or might have been resumed; not where it has been abandoned, from necessity.

[See Barnard v. Adams, 10 How. (51 U. S.) 270; Columbian Ins. Co. v. Ashby, 13 Pet. (38 U. S.) 331; Scudder v. Bradford, 14 Pick. 13; Delano v. The Gallatin, Case No. 3,751.]

2. The ordinary measure of damages for the breach of a contract of affreightment, where the goods have been unlawfully disposed of at an intermediate port, is their prime cost, with interest, and charges of shipment and transportation.

[See Jackson v. The Julia Smith, Case No. 7,136.]

3. The master has no authority to sell the cargo in order to make repairs, unless he be clearly unable to procure funds on the credit of the ship, or to hypothecate the cargo.

4. Where a vessel has been captured, on her voyage, and condemned at an intermediate port, and part of the cargo has been restored and sold at the same port, no freight is due therefor.

[See Sampayo v. Salter, Case No. 12,277; The Nathaniel Hooper, Id. 10,032.]

[Decided by Kane, District Judge. Cited in 1 Brightly, Dig. 69, 239, 787, and 792, to the points as stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 6,095.

The HARRIET.

[Olc. 184.] [1]

District Court, S. D. New York. Sept., 1845.

RULES OF COURT—COSTS.

1. Under the rule of this court, in suits in rem for services on board of vessels on the North river, a libellant cannot recover costs when less than $50 is in demand, if he had a clear remedy therefor known to him, in the local courts.

2. The onus is upon the claimant to show that the libellant had such remedy, to entitle himself to a decree for costs.

3. The object of this rule was to prevent an unnecessary resort to the expensive proceedings in rem. It will not be so enforced as to compel the mariner to resort to the local courts only in case his remedy there is convenient and sure.

4. A similar doctrine prevails in the civil law, and is also employed as a means for preventing the creation of costs unnecessarily in the prosecution of demands.

In admiralty.

Mr. Marbury, for libellant.

Mr. Shufeldt, for claimant.

BETTS, District Judge. The libellant sues in rem by a summary proceeding, to recover wages earned by his son, a minor, as a hand on board the schooner Harriet, making trips from Saugerties, Ulster county, to Troy, Albany, Hudson, New-York, Brooklyn, and some other ports on the East river. The testimony of the boy proves the services to have been rendered, and that $17.25 is due for his wages. This evidence is corroborated by other witnesses, except as to the balance due. They were unable to testify to that point. The claimant attempted, by cross-examination of the boy and the exhibition of his own memorandum book, to prove that a larger amount of payments had been made him, but in this he was unsuccessful, and nothing was elicited to conflict with his evidence in chief as to the actual balance due.

Upon the facts proved, in my opinion there can be no doubt that the libellant is entitled to recover, as claimed, $17.25, with interest from the first of August last. Indeed, this is not very seriously controverted by the counsel for the claimant, but the point most discussed and relied upon arises on the question, whether the libellant shall recover or pay costs in this court and in this form of action. It was proved by the boy, that the claimant, who is master and part owner of the schooner, lived in the same township with, and but four or five miles distant from the libellant, and that the libellant made the bargain personally with him for the services for which this suit has been instituted. The claimant further proved that he occupied a house and a small piece of land at that place, as owner, and had money at interest, $700 at one place and $200 at another. The rule enforced in this court in this respect is, in suits in rem for services on board vessels upon inland waters of the state, the libellant shall not recover costs, if he had a clear remedy known to him, in the local law courts. Where the owner or master, hiring a mariner for that service, is of undoubted responsibility, and can be proceeded against conveniently by the mariner at his place of residence, and the seaman chooses to resort to the expensive process of the admiralty, his costs of suit should be borne by himself, and not be thrown upon the owner. The debt may be collected with equal celerity and certainty in a justice's court at a charge of a few shillings, as before this tribunal under the burthen of costs exceeding the amount of the debt. To show that his case does not fall within the principle of the practice, the libellant offered evidence of common report, and the opinion of the neighbors, that the claimant was largely in debt, and dilatory and evasive in satisfying obligations against him, and that it would be difficult to reach his property, if he actually owned any, by process from the local courts. The testimony is not so definite and direct as to establish the fact that debts could not be so collected from the claimant, but they afford a colorable cause or warrant for the libellant to attach the vessel in the first instance, and impose on the claimant the onus of showing that the other method would afford a sure remedy to the libellant, without his resorting to an attachment out of this court.

The testimony offered by the claimant tends to strengthen the doubt as to a clear remedy for the recovery of small debts against him at law. His brother testifies to his ownership and possession of the house and lot of land, but no evidence is offered that he had a dollar's worth of personal property, subject to execution, out of which the debt could be secured in case the libellant obtained judgment against him, and real estate is not bound by such judgment. He is not subject to imprisonment for the debt, and it is not made to appear that the libellant would be in a better condition to make the money by aid of a judgment in a justice's court than without one. He applied for payment three several times to the claimant personally without success, and under the circumstances, I am satisfied he was justified in taking his proceeding in the first instance against the vessel. A principle similar to that invoked by the claimant obtains in courts of civil law. If the defendant, upon being sued, pleads in limine litis, that no demand was made upon him for the debt before the institution of the suit; that he was, and still is, ready and willing to pay the demand claimed, he will not be mulcted in costs; but if no demand was made, and he defends the suit upon other grounds, he is liable for costs. Brown v. Saul, 4 Mart. (N. S.) 438; Howard v. The Columbia, 1 La. 420. The object of the rule was to prevent an unnecessary and wanton resort to the somewhat severe and expensive process allowed in ad-

[1] [Reported by Edward R. Olcott, Esq.]

miralty; but it would counteract the policy which protects a mariner's earnings, to put him to the expense and delay of a suit at law, in order to ascertain whether he could, in that way, recover the wages due him. He should rightly and in equity be restricted to that method only in case his remedy thereby is convenient and sure. I shall, therefore, order a decree to be entered up for the libellant for the wages as above stated, with summary costs to be taxed.

Case No. 6,096.

The HARRIET.

[Olc. 222;[1] 11 Hunt, Mer. Mag. 361.]

District Court, S. D. New York. Nov., 1845.

PRACTICE IN ADMIRALTY—AFFIDAVIT BY ATTORNEY.

1. Courts of law, as a general rule, require affidavits to the merits of a cause to be made by the parties to the action, where a question of diligence or good faith is involved, but the rule is not inflexible, and the deposition of the attorney, upon good cause being shown, is sufficient.

2. The strict rules of the common law are not applicable to admiralty practice. The proctor is, in many cases in point of fact, dominus litis, clothed with all the authority of the party himself.

3. Without regard to that distinction, courts proceeding according to the civil law, admit proctors to exercise all the functions of attorneys at law.

[Cited in Daily v. Doe, 3 Fed. 918.]

In admiralty.

Pritchard, for claimant.

Mulock, for libellant.

BETTS, District Judge. A motion has been made in this case, that the libellant be required to file additional security for costs. It was opposed, upon the ground that the affidavit upon which the motion is based is made by the proctor in the cause, and not by the claimant, whom he represents. The courts of law, as a general rule, require affidavits to the merits of a cause, and in those instances, where the diligence and good faith of a party are in question, to be made by the party himself. Still the rule in those cases is not inflexible, for the deposition of an attorney or other person, may be substituted, when good cause is shown for the change. Sullivan v. Magill, 1 H. Bl. 637; Peake, 97; Geib v. Icard, 11 Johns. 82; Roosevelt v. Dale, 2 Cow. 581; Chase v. Edwards, 2 Wend. 283. In strictness, the principle upon which the affidavit of the actual party is demanded would scarcely apply to proceedings in admiralty courts, as the proctor there, for many purposes, is in fact dominus litis, clothed with all the authority, and bearing the responsibilities of the party himself. Clerke, Praxis Adm. tits. 7, 48, 51; Betts, Adm. 10. Although, by the rules of this court, its practice is assimilated to that of the supreme court of the state upon questions which it has not specifically provided for, yet that would not change essentially the features of admiralty practice, when variant from that of the common law. But I think, in this case, it is in consonance with the established course of law courts to allow affidavits, on motions incidental to a cause, and when the facts cannot be supposed to rest peculiarly in the knowledge of the party, to be made by attorneys and proctors. 2 Wend. 283. This is the invariable course in courts proceeding according to the civil law, the source of the admiralty practice, without reference to any special functions of a proctor differing from a mere attorney. Caulker v. Banks, 3 Mart. (N. S.) 543. The motion is accordingly granted.

[1] [Reported by Edward R. Olcott, Esq.]

Case No. 6,097.

The HARRIET.

[Olc. 229.][1]

District Court, S. D. New York. Dec., 1845.

MARITIME SERVICES — LIEN UNDER STATE LAW—ENFORCEMENT IN ADMIRALTY.

1. Where no materials are furnished or labor bestowed in the refitment or reparation of vessels, services, which are entitled to take the rank and character of maritime, are such as are performed in aid of the ship's company, or the navigation of the vessel, and are rendered while she is afloat upon tide waters.

2. A watchman employed on board a domestic vessel, is, under the state law, entitled to a lien upon her for his services, provided they amount to over fifty dollars, and he may sue therefor in his own name in admiralty.

[Cited in Bradley v. Bolles, Case No. 1,773; Cunningham v. Hall, Id. 3,481; Fox v. Holt, Id. 5,012; The George T. Kemp, Id. 5,341; The Erinagh, 7 Fed. 234.]

In admiralty.

W. Mulock, for libellant.

W. M. Pritchard, for claimants.

BETTS, District Judge. This was a suit to enforce a lien for wages under the state law, as a watch and keeper in charge of the above ship, a domestic vessel, whilst she was lying at the wharf in New-York; and the libel alleges that more than $50 is due therefor. The claimants filed a demurrer in the cause, pleading to the jurisdiction of the court, on the ground that the demand is not of a maritime character, and cognizable in admiralty. It is conceded that the libellant is a mere laborer on shore, not a mariner, and in no way attached to the ship, except sleeping on board nights, and watching her during the day, and that she was moored at the wharf in a dismantled state. I think, upon the statement of the case, those services are not of a character which would, by the maritime law, create a lien or privilege to the libellant against the ship.

[1] [Reported by Edward R. Olcott, Esq.]

When no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime, must be such as are performed in aid of the navigation of the vessel or the ship's company, or in furtherance of her appropriate business, and are rendered whilst she is employed afloat upon tide waters. The privilege has never been extended to draymen, who take her cargo to a vessel, or remove it from her, or to stevedores, who stow it, or discharge it, for the reason that men so engaged on domestic vessels are merely laborers, employed essentially in services distinct and different from navigating, or aiding to navigate or benefit the vessel or crew in actual employment. It is unnecessary to inquire what rule would be rightfully applied, when the vessel is a foreign one, or a keeper is employed on her in the stream, and away from a dock or wharf. But it is urged if that objection prevails, the libellant is still entitled to this remedy, the lien being given him by the local law, and that this court will secure him the benefit of it whether the claim has the character of maritime or not. The statute of the state renders every debt over $50 "contracted on account of the wharfage, and the expenses of keeping such vessel (any ship or vessel within the state) in port, including the expense incurred in employing persons to watch her, * * * a lien upon the vessel, her tackle, apparel and furniture." 2 Rev. St. [2d Ed.] p. 405, § 1, subsec. 3.

For the claimants it is contended that the statute has reference to such debts only as are contracted for wharfage, or keeping the vessel, in which a watchman's expense are included, and that no debt arises against the vessel as to such keeper or watchman, independent of wharfage. I am satisfied this is not the true construction of the act. The controlling and principal object and purpose of the law is to supply security to those who actually benefit vessels in the way pointed out by the statute, and it strikes me that a construction, which would provide a security for those who do not perform the service, and deny it to those who do, would be incongruous in the extreme. The phraseology of the law is somewhat indirect, but by affording a protection, by way of a lien, to those who incur expenses in employing persons to watch a vessel, the legislature palpably regarded the service of watching as the meritorious ground of the lien, and intended its advantages should accrue to whoever supplied that benefit to the vessel. If a wharfinger puts on board a watch, and pays him, those expenses come under the protection of the lien, and only so for the reason, that by such payment he became equitably subrogated to the rights of the man who rendered the service. The privilege created by the act must be considered intended for the service of watching, although so expressed as to embrace also the person who, it might be supposed, would naturally incur the expense of employing the watch. It is conceded that the wharfinger could maintain an action here for this demand, and in my opinion the libellant may proceed in his own name, and enforce in this court his remedy under the statute, provided his claim is proved to exceed $50. [The General Smith], 4 Wheat. [17 U. S.] 438; The Robert Fulton [Case No. 11,890].

Decree for the libellant and against the demurrer, with the usual liberty to the claimants to plead over.

Case No. 6,098.

The HARRIET.

[1 Spr. 33.] [1]

District Court, D. Massachusetts. Oct., 1842.

SEAMAN'S WAGES — ACCEPTANCE OF NONNEGOTIABLE NOTE—WHETHER WAIVER OF RIGHT TO PROCEED BY LIBEL.

A seaman taking the note of the master, not negotiable, and giving a receipt for his wages and putting the note in suit, is not thereby precluded from proceeding by libel against the vessel for his wages.

[Cited in The Eclipse, Case No. 4,268; The Home, Id. 6,657.]

This was a libel for wages promoted by the chief mate of the schooner Harriet. It appeared that the libellant was discharged from the vessel on the 7th of September, at which time the master gave him his note, not negotiable, for the amount of the wages due, and took his receipt in full. On the next day the libellant applied to an attorney and sued out a writ against the master, upon the note, and caused him to be arrested. On the day after his arrest, the master gave notice of the poor debtor's oath. The libellant then applied to the counsel in the present case, who filed a libel against the vessel. The defence was rested upon the ground, that the mariner, by taking the note, and putting it in suit, had lost his lien on the vessel. It appeared at the hearing, that the vessel was hired by the master of the owner, under a contract to victual and man her, and pay over one half of the earnings to the owner.

G. T. Curtis and W. W. Story, for libellant.
R. H. Dana, Jr., for owner.

SPRAGUE, District Judge, held that the note was not payment. It was not a promissory note, in the sense of the law, and was not prima facie evidence of payment, even by the local law of Massachusetts. The mariner received no value for his release. The fact of his suing the master was no waiver of his right to proceed against the vessel. The master, before this transaction, was liable for the wages; and until satisfaction and payment,

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

the mariner might pursue any or all of his remedies at the same time. Decree for wages and costs.

Curt. Merch. Seam. 319; 3 Kent, Comm. 256c; Abb. Shipp. 662, 663, and note; The Betsey and Rhoda [Case No. 1,366]; 1 Pars. Mar. Law, 447, note; 2 Pars. Mar. Law, 581, note.

Case No. 6,099.

The HARRIET.

[1 Story, 251.] [1]

Circuit Court, D. Maine. May Term, 1840.[2]

PENAL STATUTES — CONSTRUCTION — BOUNTY FOR FISHING VESSELS — WHEN IS VESSEL "AT SEA" — MEMORANDUM — FALSE CERTIFICATE — FRAUD — MISTAKE.

1. Although penal statutes are to be construed strictly, yet all the provisions thereof must be taken together, and interpreted according to the import of the words, and not by the mere division into sections, so as to give effect to the objects and intent of the statute. All statutes relating to the same subject matter, are to be interpreted together, and such a construction is to be given to them, consistent with the words, as will avoid the mischief, and promote the objects and policy contemplated by the statutes.

[Cited in The Bolina, Case No. 1,608; Bains v. The James and Catherine, Id. 756; Livingston v. Story, 11 Pet. (36 U. S.) 395; U. S. v. New Bedford Bridge, Case No. 15,867; Harrison v. Vose, 9 How. (50 U. S.) 379; U. S. v. Wilson, Case No. 16,731; U. S. v. Marks, Id. 15,721; U. S. v. One Raft of Timber, 13 Fed. 799; U. S. v. Starn, 17 Fed. 437.]

[Cited in Tilton v. Tilton, 35 N. H. 432; Chicago & N. W. Ry. Co. v. City of Chicago, 148 Ill. 149, 35 N. E. 881.]

2. The 5th and 6th sections of the act of 1813, c. 34 [2 Story's Laws, 1352; 3 Stat. 51, c. 35] and the act of 1819, c. 212, [3 Story's Laws, 1742; 3 Stat. 520, c. 89], relating to the bounty upon all such vessels and boats, employed in the bank and other cod-fisheries, as shall be employed at sea for the term of four months, include within their terms all vessels engaged in the cod fisheries, without limitation or specification as to the length of their fares, or the nature of their fisheries.

[Cited in U. S. v. The Reindeer, Case No. 16,145; U. S. v. The Paryntha Davis, Id. 16,003.]

3. A vessel is "at sea," within the intent of the acts of 1813 and 1819, when she is without the limits of any port or harbours on the seacoast.

[Cited in The Helen Brown, 28 Fed. 112.]

4. In this case, an almanac was offered as evidence of the particular days on which the vessel (the Harriet) sailed and returned, wherein the letters R. and S. and dots were placed against particular days, as being the very days of her sailing and returning. It was *held*, that such a document was not a proper journal or memorandum book thereof entitled to credit, and that for this purpose an exact journal or memorandum of the actual days of her sailing and returning, should have been kept, in the nature of a logbook.

5. Where a vessel was enrolled and licensed for the fisheries, and without an oath having been taken by all the owners to the ownership, as prescribed by the statutes of 1813 and 1819, and fraud and deceit were charged in procuring the bounty allowed by law to such vessels; it was *held*, that it must be satisfactorily proved, on the part of the United States, that the omission by the owners, who did not take the oath, was through fraud and deceit, and not through mistake, in order to render the vessel liable to forfeiture.

[Cited in U. S. v. The Reindeer, Case No. 16,145.]

[Cited in Murray v. Joyce, 44 Me. 347.]

6. Where a certificate, made by the agent of the owner, of the particular times of sailing and returning of a vessel, engaged in the cod fisheries, was discovered to be incorrect and false after the bounty was received, it was *held*, that if the incorrectness and falsity were by mistake, there was no forfeiture under the acts of 1813 and 1819; but if by fraud and deceit, there was.

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

Libel of seizure for an asserted forfeiture under the act of the 29th of July, 1813, c. 34 [2 Story's Laws, 1352; 3 Stat. 51, c. 35], giving a bounty to vessels licensed for, and engaged in, the cod fisheries. The libel charged, among other things, that the Harriet was in 1833 enrolled and licensed for the cod fisheries, and that during the existence of her enrollment and license, she was employed in a trade other than that, for which she was so licensed. It also charged, that the Harriet was, during the same year, enrolled and licensed for the cod fisheries, and that the owners of the said vessel did, by fraud and deceit, obtain the allowance provided for vessels employed in the fisheries, contrary to the act of 1813, c. 34 [c. 35]. The claim and answer denied the material allegations as to the forfeiture. At the hearing in the district court in September, 1836, a decree of forfeiture was pronounced [Case No. 6,100], and from that decree an appeal was taken by the claimants [Boynton and others] to the circuit court.

Mr. Howard, Dist. Atty., for the United States.

C. S. Daveis, for the claimants.

STORY, Circuit Justice. This cause has been very elaborately argued upon the present appeal, both as to the matters of law and matters of fact, arising in it. The only allegation in the libel, which seems now relied on, is that founded on the act of 1813, c. 34 [2 Story's Laws, 1352; 3 Stat. 51, c. 35]. The fifth section of that act, in substance, provides, that there shall be paid, on the last day of December, annually, to the owner of every vessel, or his agent, that shall be qualified, agreeably to law, to carry on the bank and other cod fisheries, and that shall actually have been employed therein at sea, for the term of four months, at the least, of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November, in every year, for each and every ton of the vessel's burthen, if of twenty tons and not exceeding thirty tons, two dollars and forty cents, and

[1] [Reported by William W. Story, Esq.]

[2] [Affirming Case No. 6,100.]

if above thirty tons, four dollars, three eighths of which shall belong to the fishing vessel, and the other five eighths shall be divided among the several fishermen, according to their proportions of the fish taken on board during the season. The sixth section, in substance, provides, that there shall be paid, at the like time, and in the like manner, to the owner of every fishing boat or vessel (the word "boat" not being used in the preceding section) of more than five tons or less than twenty tons, which shall have been actually employed at sea in the cod fishery for the like term of four months, and to his agent, the sum of one dollar and sixty cents upon every ton admeasurement of such boat or vessel; which allowance shall be accounted for as a part of the proceeds of the fares of such boat or vessel, and distributable accordingly, with a proviso, that such boat or vessel shall have landed in the course of the season, not less than twenty quintals of fish for every ton of her admeasurement; and that certain other regulations and proceedings (which are not necessary to be mentioned,) shall be observed and kept by the parties. Then comes the following clause, on which the forfeiture is now claimed; "And if, at any time within one year after payment of such allowance, it shall appear, that any fraud or deceit has been practised in obtaining the same, the boat or vessel, upon which such allowance shall have been paid, if found within the district aforesaid, shall be forfeited; otherwise the owner or owners, having practised such fraud or deceit, shall forfeit and pay one hundred dollars, to be sued for, recovered, and distributed," in the manner prescribed by the act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22]. By another act passed in 1819 (Act March 3, 1819, c. 212 [3 Story's Laws, 1742; 3 Stat. 520, c. 89]), the allowance was increased; and it was thereby provided, that from the passage of that act there should be paid on the last day of December, annually, to the owner of "every fishing boat or vessel," or his agent, qualified agreeably to law to carry on the bank and other cod fisheries, and "that shall actually have been employed therein at sea for the term of four months at least of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November, in every year, for each and every ton of such boat's or vessel's burthen, according to her admeasurement as licensed or enrolled, if of more than five tons, and not exceeding thirty tons, three dollars and fifty cents; and if above thirty tons, four dollars," &c. &c.; with some other provisions not necessary to be mentioned. The second section of the same act provides; "That such parts of the fifth and sixth sections of the act hereby amended (the act of 1813, c. 34 [2 Story's Laws, 1352; 3 Stat. 51, c. 35]) as are contrary to the provisions of this act be and the same are hereby repealed." Now, the Harriet is of the burthen of twenty-four tons and 66/95 of a ton; and one of the questions, made at the present argument on behalf of the claimant, is, whether the forfeiture, provided for in the last clause in the sixth section of the act of 1813, c. 34 [3 Stat. 51, c. 35], in case the allowance is obtained by fraud and deceit, is applicable to any other boats or vessels than those, which are previously enumerated in the same section, to wit, boats or vessels of more than five tons and less than twenty tons; or whether it also applies to the description of vessels in the fifth section of the act, to wit, vessels of twenty tons and upwards.

The main stress of the argument on behalf of the claimant against applying the clause to any other vessels, than those described in the sixth section, is founded on the general consideration, that penal statutes are to be construed strictly; that cases within the same mischief are not to be deemed within any prohibition, unless the words clearly cover them; and that here the natural position of the clause connects it directly with the previous parts of the sixth section, as in pari materia; and that the language, "boat or vessel," are the very words of reference used in that section, whereas the word "vessel" only is used in the fifth section. That there is great weight in that suggestion need not be denied. Penal statutes are to be construed strictly; and cases within the like mischief are not to be drawn within a clause, imposing a prohibition or a forfeiture, unless the words clearly comprehend the case. These are known rules in the administration of justice, which I am not in the slightest degree inclined to question. That the juxtaposition of this clause with other clauses of the sixth section undoubtedly adds weight to the construction contended for, I freely admit. But in construing a statute we are to take into consideration all the provisions thereof; and to look to all the objects and the entire intent of the statute. It is to be interpreted as a whole; nay, the principle goes further, and all statutes on the same subject matter are to be interpreted together. If, then, a clause is found in one section, which, in its general language and import, is equally as applicable to other sections and provisions of the same act, as it is to the very section, in which it is found; if the main objects of those sections, and the true intent and policy of the act will be best promoted by reading it as applicable to all those sections; and if public mischiefs equally within the scope of the statute, would be thereby prevented, and upon a different construction those mischiefs would be left without redress; there certainly is very strong ground to say, that the clause ought to be so construed as to suppress the mischiefs, and not promote or protect them; that, as its language is appropriate, so it shall be construed as intended to include them. Where the public mischief is the same, and the words are sufficient to cover all the cases, it would be against all just rules of interpre-

tation to confine the language to one case only.

Now, in the present case, if the clause had stood by itself, as a seventh section of the act, without the alteration or addition of a single word, there could have been no ground for the argument now addressed to the court; for it would have been an irresistible inference, that "boat or vessel" applied to the "vessels" mentioned in the fifth section, as well as to the "boat or vessel" mentioned in the sixth section. If there was fraud or deceit in obtaining the allowance, (or bounty, as it is usually called) the forfeiture was equally necessary to secure the purposes of the statute,—to protect the honest owner, and to punish the dishonest owner. Now, what possible difference can it make in the construction of a statute, that there is a subdivision into sections? Suppose this act contained no such subdivision, might it not be read precisely in the same manner now, as it would then read, and be interpreted in the same way? Clearly it might; for statutes are construed by the import of the words, and not by the mere division into sections, or periods, or sentences. The intention of the legislatures does not break itself into sections. It is to be drawn from the entire corpus of the act, and not from single passages. But, in the present case, there is another most material consideration in aid of this interpretation, and that is, that the legislature have manifestly adopted it, or acted upon it in the amendatory act of 1819, c. 212 [3 Stat. 520, c. 89]. The first section of that act (already cited in its substance) merges the fifth and sixth sections into one, so far as the allowance or bounty is concerned, and appertions it by the same rule,—the tonnage of the "boat or vessel," and upon the same condition,—the employment at sea for a specific period. It also repeals all such parts of the fifth and sixth sections, which are inconsistent with its own provisions. Henceforth, then, we must read both acts together, as constituting one entire act, striking out the parts repealed, precisely in the same way and manner, and with the same effect, as if the act of 1819, c. 212 [3 Stat. 520, c. 89], had re-enacted in one act all the provisions of the act of 1813, c. 34 [3 Stat. 51, c. 35], except those, which were repealed. Of course, this would leave the clause of the sixth section of the act of 1813, imposing the forfeiture or penalty, in full force; and, therefore, as the language of the new act, as well as this clause, both included the same descriptive words, "boats and vessels," boats and vessels, whether below twenty tons burthen, or above it, would be equally within the reach of the forfeiture and penalty so prescribed. This view of the matter, in my judgment, puts an end to the controversy on this point.

The next question, which has been argued, is, as to the true meaning of the clause, requiring the boats and vessels to be employed "at sea" for the prescribed term. On behalf of the United States a doubt has been suggested by the district attorney, whether boats and vessels employed in the shore fisheries, that is, making short voyages, or fares, or trips, in the fisheries on our immediate coasts, and returning into port within a few days, so that they may be out by day and in port by night, are within the purview of these acts. I profess not to feel the soundness of this doubt. It is plain to me, that the very small tonnage of some of these "boats and vessels," varying from five tons to thirty tons, as well as the known habits and usages of the trade, exhibit on the part of congress an intention to encourage all cod fisheries of this sort, whether on the great and distant banks, or on the coasts of the sea nearer home. The act of 1813, c. 34 [3 Stat. 51, c. 35], speaks explicitly of "the bank and other cod fisheries." Now, the bank fisheries are, in common parlance, always spoken of, as contradistinguished from the shore or coast fisheries. Neither the act of 1813, nor that of 1819, speaks of boats or vessels, which are to be at sea during the whole period of four months continuously, without any intermediate return into port; and if they did, the act would apply to very few, if any, of our vessels engaged in the cod fisheries. It would be most extraordinary, if, when congress provided a bounty to boats and vessels, varying so much in their tonnage as from five tons to thirty tons, and hardly capable of keeping the sea but for short and favorable periods, and which the very terms of the act contemplate would make, not a fare, but "fares," that is, distinct voyages out and home during the four months, I say, it would be most extraordinary, if the very return into port within the period should defeat the bounty. If the boat or vessel be at liberty to return at all, there is in neither act any limitation, as to the frequency of the returns, whether by day or by night, any more than there is as to the "fares" made by her during the season. The seventh section of the act of 1813, c. 34 [3 Stat. 51, c. 35], requires, that the owner of a fishing vessel of twenty tons and upwards, or his agents, shall, previous to receiving the allowance or bounty, produce to the collector a certificate signed by him, therein mentioning the particular days, on which the vessel sailed and returned on the several voyages or fares, she may have made during the preceding fishing season, to the truth of which he shall swear, or affirm. But it no where limits the times or the periods of sailing or of returning. Besides; it is well known, that boats and vessels of this class ordinarily fill up their whole capacity and burthen in a few days, or weeks; and the very object of the acts, in encouraging the fisheries, would be defeated, if they could not, after they were full, return and land their cargo, and go again to sea in quest of more. But it is sufficient for me, that the acts speak a plain and intelligible language

on this subject, applying it to "all boats and vessels," employed at sea during the four months, without any other qualification or limitation, as to the length of their fares, or the nature of their fisheries, whether on the banks, or on the coasts.

Then, as to the other point. What is the true meaning of being "at sea," in the sense of these acts? What is the sea? We all know, that the sea embraces all tide waters on the coast of our country, and the bays thereof. When once any boat or vessel is out of the limits of our ports, or harbours, extra fauces terrae, vel portus, the boat or vessel is in a legal, as well as in a nautical sense, at sea. Mr. Justice Blackstone, in his Commentaries, states this doctrine in a very clear manner. "The main sea (says he) begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and the admiralty have divisum imperium, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb." See 1 Bl. Comm. 110. The same doctrine is stated in Constable's Case, 5 Coke, 106. Lord Hale treats the same subject in his tract, De Jure Maris, and says: "The sea is either that, which lies within the body of a country, or without. That arm or branch of a sea, which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a country. The part of the sea, which lies not within the body of a country, is called the main sea or ocean." Hale's De Jure Maris, etc., Harg. Law Tracts, p. 10. The same doctrine has been repeatedly recognized in the circuit courts, and in the supreme court of the United States. See U. S. v. Furlong, 5 Wheat. [18 U. S.] 184; U. S. v. Wiltberger, Id. 99; The Abby [Case No. 14]; U. S. v. Grush [Id. 15,268]; U. S. v. Coombs, 12 Pet. [37 U. S.] 72. Now, applying this doctrine to the present case, I should say, that the Harriet was at sea, employed in the cod fisheries, the moment that she sailed on her outward voyage, and she had got out of port, or beyond the limits of the port, or harbour, extra fauces terrae, and that she was not at sea, from the moment, that on her return voyage she came within the limits of the port, or harbour, intra fauces terrae. I know of no principle applicable to cases of this sort, by which any allowance can be made for any time, while the vessel is in port, either on the outward or the homeward voyage or fare. Neither do I know of any mode, acknowledged by law, of apportioning the time, half to each part of the voyage or fare; that is, to deem half of the day on the outward voyage to be at sea; and half of the day, on the return voyage, in port. It is to the actual facts, that the law looks, and not to any average or apportionment, not established by these facts. The true duty of the owner and skipper of these boats and vessels is, to keep an exact journal or memorandum of the actual times of being at sea, whether whole days, or parts of days; and thus to enable the collector, or other officers of the customs, to ascertain with entire exactness the true time passed at sea. The mere marking, or mere dotting of an almanac, which might be exchanged or altered at pleasure, would be, and could be no just or sufficient proof of the verity of the marks or dots therein, as expressing the true times. If any document of this sort is to have weight, as an original journal or memorandum, to repel suspicion or to establish verity, it must be some document, which in its nature or character, like a log-book kept at sea, should contain original entries made from day to day, and be beyond question a document not made up for a particular purpose afterwards, upon general recollections and suggestions of the parties in interest. What I desire to say is, that, for the reasons already suggested, the almanac, now produced as a memorandum of the times of the sailing, and of the return of the Harriet on her several voyages or fares, is not a satisfactory document to relieve the case from any otherwise well-founded suspicions of bad faith, or fraud or deceit. It may, or may not, be correct. But it carries no persuasive proof per se under the circumstances of the present case, to satisfy doubts or to control presumptions arising from other portions of the evidence.

Some other objections have been taken in the present case, by the district attorney, which it may be well to dispose of in this place. First, it is said, that the Harriet was not duly qualified, as a vessel licensed for the fisheries, to obtain the allowance or bounty, because all the owners did not take the oath of ownership, required by law to be taken on such enrolment, within ninety days from the granting of the enrolment. The act of the 18th of February, 1793, c. 52, § 1 [1 Story's Laws, 285; 1 Stat. 305, c. 8], provides, that ships or vessels of twenty tons and upwards, which shall be enrolled and having a license in force, shall be deemed vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. The second section of the same act provides, "that in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with, as are made necessary for registering ships and vessels by the act," &c. for the registering and recording of ships and vessels. Act 1792, c. 45 [1 Story's Laws, 269; 1 Stat. 231, c. 6]. Now, this last act requires (section 4) that in order to a registry, an oath or affirmation shall be taken by one or more of the owners, of the ownership, built, &c. of the ship or vessel; and the fifth section provides, that it shall be the duty of every owner, resident within the United States, of any ship or vessel to which a certificate of registry has been granted, to trans-

mit to the collector a like oath or affirmation with that taken by the owner, on whose application the register was granted, within ninety days after the same was so granted; and if such oath or affirmation be not taken and transmitted as required, the certificate of registry granted to such ship or vessel shall be forfeit or void. Now, the argument is, that the same provisions are applicable, and the same forfeiture incurred, by the omission of the other owners of the Harriet to take the required oath or affirmation within ninety days after her enrolment. The Harriet was enrolled on the 16th of April, 1831, and received a license on the 10th of April, 1833. Assuming this objection to be well founded in point of law, (on which I give no opinion,) what then is the predicament of the Harriet, according to the argument? It is, that she was not a vessel licensed for the fisheries during the season, but her enrolment and license were forfeited; and she was in no respect entitled to the bounty. In other words, she was not, within the words of the acts of 1813 and 1819, a vessel "qualified agreeably to law for carrying on the bank and other cod fisheries." But how, then, does the forfeiting clause of the act of 1813 apply to her? It is clear, that it applies only to vessels "qualified agreeably to law" to carry on those fisheries; which, under these circumstances, according to the argument, was not the case of the Harriet. Besides; the forfeiture attaches to the procuring of the allowance or bounty by any fraud or deceit, practised in obtaining the same. How can this be affirmed in the case of the Harriet, as to the owners, who omitted to take the proper oath or affirmation? That was either a mistake, or an omission on their part, and not naturally or necessarily a fraud or deceit. The omission could not amount to a fraud or deceit practised upon the collector; for from the papers in his own office, he knew, or ought to have known, that there had been such an omission or mistake by some of the owners. It may be added, that if this omission be set up as a fraud or deceit, it should be proved to have been so intended; of which there is not a shadow of proof. There can be no doubt, that, in the understanding of the parties, the Harriet was "qualified agreeably to law," in the sense of the acts of 1813 and 1819, to carry on the fisheries; that is, she was enrolled and licensed for the fisheries; and even if the enrolment had become void, and forfeited by the omission, within ninety days, it having been granted in 1831; yet the license granted to her by the collector, in April, 1833, was manifestly supposed by the collector, as well as the owners, to be a good one, under the enrolment, and in no just sense could the obtaining of the license be treated as a fraud or deceit practised upon the collector. Suppose the Harriet had been fairly and truly employed for the full term of four months at sea, during the fishing season of 1833, and had received the allowance or bounty for that year, upon the mutual mistake of all the parties, that she was duly enrolled and licensed, could there be any ground to enforce the forfeiture now insisted on in the present proceeding. But this objection does not in fact arise in the present case. The very libel founds the forfeiture upon the allegation, that the Harriet "was a vessel of the United States, duly enrolled and licensed to be employed in carrying on the bank and other cod fisheries, and being so enrolled and licensed, the owners of said boat did then and there, by practising fraud and deceit, obtain the allowance by law provided for vessels employed in the fisheries, passed &c., contrary to the form of the statute in such case made and provided; whereby the said vessel, her tackle, &c. became forfeited to the United States." Now, this allegation admits the vessel to have been duly enrolled and licensed, and in her character, as a vessel so enrolled and licensed, to have received the allowance. The United States are, therefore, estopped to deny the very foundation, on which the forfeiture is made to rest. In every view of the matter, then, this objection may be dismissed.

Another objection is, that the Harriet was not, in point of fact, employed during the season in the cod fisheries; but was, in fact, employed in the hake fishery. It is said by the district attorney, that the hake fishery is distinct from the cod fisheries, the hake fishery being carried on exclusively in the night. But it by no means follows, that if it be the common usage and custom for vessels employed in the cod fisheries to engage in the hake fishery during the night, as an incident to their principal employment, that the employment is not truly such, as the acts of congress contemplate. We all know, that it is a common usage and incident to the cod fisheries, to fish for and to catch pollock, halibut, haddock, and other fish; and it has never been imagined, that this was not within the scope of the license. Until the mackerel fishery was, by the act of congress, separated into a distinct employment, it was frequently carried on in connexion with, and as an incident to the cod fisheries. No one can now doubt, that mackerel may be still caught in the cod fisheries, if it be not so pursued, as to supersede the principal employment, but is a mere accessory or incidental fishery. This was the doctrine fully recognized by the learned district judge, and afterwards on appeal in this court, in the case of The Nymph [Cases Nos. 10,388 and 10,389]. Upon that occasion, the district judge said: "All the bank and coast fisheries have been carried on under the authority of this license. Pollock, hake, and other fish, which are cured and dried in the same manner as cod; and no doubt has been raised as to the legality of the employment." There is no evidence in this case, which, properly considered, establishes the fact, that the Harriet was exclusively employed in the hake fishery, in contradistinction to the cod fisheries, during the season. Before I should

be prepared to adopt such a conclusion, I should require the most determinate and satisfactory evidence, that the hake fishery was intentionally and exclusively carried on, during the season, as the principal employment of the Harriet in contradistinction to the cod fisheries.

We are driven, then, to the consideration of the mere matter of fact, whether the allowance or bounty of the Harriet was in fact procured by fraud and deceit. The act of 1813, c. 34 [3 Stat. 51, c. 35], in the seventh section, requires, that the owner or owners of every vessel of twenty tons and upwards, or his or their agent or representative, shall, previous to receiving the allowance made by the act, produce to the collector the original agreement or agreements made with the fishermen employed on board the vessel, and also a certificate, to be by him or them subscribed thereon, mentioning the particular days, on which the vessel sailed and returned, on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector. A certificate, purporting to be such as is thus required, was actually subscribed and sworn to before the collector, by Leander Miller, on the first day of January, 1834; and on this certificate the allowance was paid. The certificate states the particular times of the sailing and return of the Harriet on her different fares, (in all nineteen fares,) amounting, inclusive of the days of her sailing and her return, to one hundred and thirty-one days, between the 7th of May, 1833, and the 29th of October, 1833. There is, however, an error in the calculation, apparent on the face of the paper, of ten days, which being deducted, leaves the whole period to be one hundred and twenty-one days only, including the days of sailing and return. It is manifest, therefore, that the Harriet was not, on the very face of the paper, entitled to the allowance, for she was not employed at sea, according to this certificate, four months during the fishing season of 1833. Even supposing, that we were absolutely to look to mere averages of time, which, in my judgment, however common the practice may be, is an incorrect mode of fixing it, for the act requires the vessel to be actually, and not merely presumptively or constructively at sea, for four full months; still, averaging the times of sailing and returning to enable the Harriet to be at sea half the day, and half the day in port, there are but one hundred and twelve days at most, which can be asserted to be her days at sea. This circumstance alone would certainly not be decisive to establish fraud or deceit in the owner or his agent; for it might be by a pure mistake, in which case, although the allowance was wrongfully paid and wrongfully received, yet it was not necessarily or naturally a cause of forfeiture within the act. If, on the other hand, the certificate was knowingly and designedly thus drawn with intent to deceive the collector, trusting to his not detecting the errors in the calculation, then undoubtedly it would be evidence of fraud and deceit. But in point of fact the certificate was false, and was shown to the agent to be false at the time, when it was sworn to. It is now admitted, and indeed, is established beyond controversy, that the particular times stated in the certificate of the sailing and the return of the Harriet were not the true times; but they were put into the certificate by George Miller (an inspector of the customs) with the assent of the agent, to make up the supposed period of four months required by the act, without the slightest regard to the real periods of the Harriet's sailing and return; and thus the collector was imposed upon as to the true and real state of the facts. This fact is, under such circumstances, prima facie evidence of fraud and deceit in the owner or his agent. In order to repel this imputation, George Miller was introduced by the claimant as a witness in the court below, to show the manner and circumstances, under which the certificate was made; and his testimony directly and fully established, that the certificate was made up in the manner above stated; but he denies, that it was done or intended to be done fraudulently or deceitfully. He professes to say, that he deemed it immaterial to state the actual times of the sailing and return of the Harriet, so only, that the four months' employment at sea were actually made out. This is, indeed, most extraordinary conduct on the part of a public officer, in direct contravention of the very language and purport and object of the seventh section of the act of 1813. A good deal of stress has been laid in the argument upon the question, whether, upon the present appeal, George Miller ought to be deemed the witness of the government or of the claimant. I think, that he is to be deemed the witness of the claimant, as he was in the court below. The government have not here adopted or used him as a witness; and unless so expressly adopted and used, he must be treated, as here introduced, as he was in the court below, as a substantial witness for the claimant. To fortify his testimony, evidence is now adduced in the cause to show, that the Harriet was in fact employed in the cod fisheries in the same year, during nearly the whole of the month of November, so as to make up the whole period of four months. An almanac is now also produced by the United States purporting to be the almanac in which the original days of the sailing and return of the Harriet, partly in pencil marks of R. (Return) and S. (Sailing) and dots in ink, against certain days in the almanac, as being the very days of (S.) Sailing, and of Return (R.). Now, I have already had occasion to state, that such a mode of keeping an account of the times of the fares, is not in any just sense a journal; and, as a record or document, it is so easily capable of being

fabricated at any moment, for the purpose of relieving the cause from its distress, that no court of justice, mindful of its own duty, could give it entire credit as a veritable paper. It has very much the air of an afterthought; and it purports to give, in the month of November, a single continuous fare or voyage of fourteen days. November, as we all know, is ordinarily one of our months of uncertain and boisterous weather; and there is evidence in the case, which establishes, that, in that very season, there was at least the usual quantity of such weather, in some of which it might be difficult for the Harriet to keep the sea on our coast without imminent danger of loss or injury. But I do not rely on this circumstance. There is much evidence in the case, on both sides, which might justify comments, if it would assist my own judgment in the final conclusion. After weighing the whole of the evidence, I am entirely satisfied, that the decree of condemnation ought to be affirmed. I proceed upon the admitted ground, that the certificate, as sworn to, was knowingly false; and being so, there was fraud and deceit practised in obtaining the allowance provided by the act. It necessarily misled the collector, and lulled his vigilance. If a man will knowingly swear to a false statement, it is no apology, that he deemed it just as well, as if it contained the truth, because the truth might equally have availed to him for the purpose. The deliberate statement of a falsehood to a public officer, to obtain the allowance, is a fraud and a deceit. Upon such certificate the party may obtain only, what the truth might have entitled him to receive. Still he does receive it by a deceit practised upon the officer; and it has the odious features both of an allegatio falsi, and a suppressio veri. Neither has any claimant a just right to complain, that the court does not place implicit confidence in his subsequent explanations, when he has already shown himself ready to practice, or to countenance, deceit upon public officers. It is but a wholesome administration of public justice, to hold the party bound by the statement, which he has deliberately adopted and solemnly sworn to, as the truth.

The decree of the district court is affirmed with costs.

Case No. 6,100.

The HARRIET.

[1 Ware (343), 348.] [1]

District Court, D. Maine. June Term, 1836.[2]

BOUNTY FOR FISHING VESSELS — FRAUD — FORFEITURE OF VESSEL—MISTAKE IN CERTIFICATE.

1. The forfeiture provided by the act of July 29th, 1813 [3 Stat. 49], for fraudulently obtaining the bounty allowed to fishing vessels, attaches only when there is actual fraud and deceit used in obtaining it.

[Cited in U. S. v. The Reindeer, Case No. 16,145.]

2. If the certificate stating the days which she was employed, and verified by the oath of the owner, is proved to be false, it is prima facie, but not conclusive evidence of fraud and deceit. The owner is not precluded from showing that the errors of the certificate arose from an innocent mistake.

3. If the errors of the certificate are proved to have arisen from mistake, without fraud, the owner may, to avoid a forfeiture, show that the vessel was employed on other days than those named in the certificate.

This was a libel filed by the district attorney on behalf of the United States, against the schooner Harriet [Boynton and others, claimants], of about twenty-four tons burden, for an alleged forfeiture in fraudulently obtaining the fishing bounty. The Harriet was regularly enrolled and licensed for carrying on the bank and other cod-fisheries, for the year 1833, when the forfeiture is alleged to have accrued. A large number of witnesses were examined at the hearing, but the material facts are stated in the opinion of the court.

Mr. Anderson, Dist. Atty., for the United States.

C. S. Daveis, for claimant.

WARE, District Judge. To entitle a vessel, licensed for the cod-fisheries, to the bounty provided by the laws of the United States, it is required that she shall be actually employed in fishing for four months, during the fishing season, which, by the act of July 29th, 1813, is declared to commence from the last of February, and terminate the last of November. The seventh section of the act provides that the owner of any fishing vessel of twenty tons or over, or his agent, shall, before receiving the bounty, produce to the collector, who is authorized to pay it, the original agreement made with the fishermen employed, and also a certificate to be by him subscribed, stating "the particular days on which such vessel sailed and returned on the several voyages or fares which may have been made in the preceding fishing season, to the truth of which he shall swear or affirm before the said collector." The original agreement of the fishermen was produced, and also the certificate required by the law, which were sworn to by Leander Miller, as the lawful agent of the vessel. The certificate states the number of fares, and the day of sailing and returning on each. The total of the several fares, as they are carried out in the certificate, is 131 days of actual employment. But there is a manifest error of computation, of ten days, on the face of the certificate. The eleventh fare, according to the certificate, commenced August the 26th, and terminated by the return of the vessel into port on the first of September. This is carried out sixteen days. Now excluding one day for sailing and returning, and

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

[2] [Affirmed in Case No. 6,099.]

here are but six days of actual employment. Deducting these ten days from the total, and there remain but 121 days, only one day over four months. According to the certificate, she commenced fishing on the 7th of May, and ended on the 29th of October. In this period she is represented as having made nineteen fares, amounting as corrected to 121 days. Now it is satisfactorily proved that she was actually in port between thirty and forty days when the certificate represents her to have been employed in fishing. The certificate, therefore, sworn to by the agent, is proved beyond a doubt to be grossly incorrect.

The incorrectness of the certificate is admitted on the part of the claimant, but it is denied that this is conclusive evidence of fraud. It is contended that he is not precluded from showing how the certificate happened to be erroneously made out, and that the vessel was actually employed in fishing the whole time required by law; that the bounty was fairly earned, and honestly received. On the other hand, it is argued by the district attorney that the claimant is not admitted to show that the vessel was employed on any other days than those included in the certificate and sworn to by the agent of the vessel; that the sworn certificate being falsified, fraud is to be inferred as a presumption of law, and condemnation follows of course. My opinion is, that the claimant is not absolutely precluded from showing that the vessel was employed at other times than those specified in the certificate. The certificate which the law requires is not the original journal or log-book of the vessel, in which the entries are made at the time. If it were, it would certainly be difficult to admit any evidence to contradict the entries which were made from day to day during the employment of the vessel. The certificate ought to be an exact transcript of this journal, so far as relates to the days of sailing and returning. But if, in copying from the original journal or memoranda, an error should be made, I can see no reason why the claimant should not be permitted to show that the error was accidental, and therefore innocent. To hold such an error conclusive proof of fraud, would be giving to the law a construction of extraordinary strictness, and in a statute so highly penal, not warranted, unless the words of the act clearly require it. The sixth section of the act, which is the penal section, provides that "if it shall appear that any fraud or deceit has been practised in obtaining the same, (the bounty,) the boat or vessel on which such allowance has been paid, shall be forfeited; otherwise the owner or owners, having practised such fraud or deceit, shall forfeit and pay one hundred dollars." This language clearly excludes the idea that it was intended to annex the forfeiture and penalty to a mere legal and presumptive fraud. It distinctly implies that there must be intentional fraud or actual deceit. It would be confounding the meaning of terms to call a simple mistake, innocently made, fraud or deceit. If the claimant is permitted to show an error in the certificate, it seems to follow, as a natural inference, that he may, to avoid a forfeiture, prove that the vessel was employed on other days than those mentioned in the certificate. But in order to let in this evidence it ought to be made clearly to appear that the error in the certificate was innocently made, and not with any fraudulent design; and to exempt the vessel from forfeiture, the proof of her employment for the requisite time ought to be full and entirely satisfactory. When the certificate has been falsified by satisfactory proof, and the vessel shown not to have been employed, within the period in which that represents her to have been employed, the time required to entitle her to the bounty, the government has made out undoubtedly a prima facie case of forfeiture, the burden of proof is then shifted on the claimant, and condemnation will follow unless he can show by satisfactory evidence that the vessel has actually been employed the time required by law. Ten Hogsheads of Rum [Case No. 13,830].

To explain the error of the certificate the claimant called George Miller, at that time an inspector of the customs at St. George, who says that he made out the certificate from a journal kept in an almanac, in which the days of sailing and returning were marked; that in making the certificate, he had no reference to the particular days of sailing and returning, to the time she was out in each trip, nor to the number of fares made, but that he took the aggregate of the whole time she was out, divided it into a convenient number of fares according to the size of the blank with which he was furnished, and entered them accordingly, taking care that the whole number of days expressed by the certificate should correspond with the whole number in the almanac. It is not a little singular that any man should suppose that this could be a correct mode of making the certificate when in the certificate itself the agent swears that it truly gives not only the time actually employed, but also the true time of her sailing and returning. It is more so, that an officer of the customs should entertain such an opinion, as, if the certificate does not purport to state the time when the vessel was at sea, the collector is deprived of one of the most efficient checks which he can apply to prevent frauds in obtaining the fishing bounty. The inspectors are directed by the collector, whenever they see a fishing vessel in port, to make a memorandum of the day, and at the close of the season these memoranda are sent to him. When the fishermen apply for their bounty he compares these with the certificate of the days in which they claim to have been at sea, and these journals of the inspectors thus operate as an important check against any fraud which the fishermen may be disposed to practise. But if the certificates do not profess to state

truly the days when the vessel was at sea, it is obvious that information of this kind can be of little use. In fact, it would be just as well to aver in the certificate that the vessel had been employed four months in the fishing season, without stating any particular time. If the bounty is to be paid on such a certificate, it will be nearly impossible, in any case, for the government to detect a fraud. The fishing season includes nine months, from the last of February to the last of November. To convict a vessel, then, of fraudulently claiming for more time than she had been actually employed, it would be necessary for the government to prove negatively that for more than five months she had not been employed in fishing.

When the bounty is paid on a certificate, such as this now appears to be, giving no information as to the particular time when the vessel was employed, it presents a case certainly very much calculated to awaken suspicion. In the present instance, this does not lead to suspicion of fraud on the part of the claimant, for it does not appear that he had any knowledge of the manner in which the certificate was made. On the contrary, the fair presumption from the evidence, is, that he was ignorant of it. But it was well known to his agent, and, in a legal point of view, the act of the agent is the act of the principal. And at any rate it imposes on the court the duty of carefully examining the evidence produced to clear the vessel from a forfeiture. The journal or almanac from which Miller says he made the certificate, has been produced before the court. The first remark which naturally occurs upon it, is, that it is not a journal kept by the skipper, but by one of the men. Parsons, the man who kept the journal, says that it was not kept with a view of its being used in obtaining the bounty, but merely for his own private satisfaction. It does not appear that the skipper kept any account of the time that the vessel was employed. None has been produced, and if he did keep one, as was his duty, it is not a little remarkable that it was not exhibited at the hearing. It was from the journal of Parsons, such as it is, that Miller made out the certificate; but when it is examined it is found not to agree with the certificate in any one particular, except in the day upon which the vessel began her employment. It not only differs in the number of fares, the times when they were made, and the period at which the employment terminated, but also in the aggregate of the whole time. According to the certificate the vessel made nineteen fares, and was employed one hundred and thirty-one days, or, after the correction is made by the deduction of ten days, one hundred and twenty-one days. According to the journal of Parsons, she made twenty-one fares, and, including both the day of sailing and that of returning, she was employed one hundred and thirty-three days; but excluding one of these days from each trip, she was actually employed but one hundred and twelve days. It is not easy to comprehend upon what principle this certificate was made, if it was founded on this journal. The customary mode of computing the time, which is well understood by the fishermen, is to deduct one day from each fare for sailing and returning to port. That it was so understood by the parties in this case, appears from the certificate itself, as the time is carried out with a deduction of one day for each fare. Parsons indeed stated that he did not in all cases mark the days on which they sailed and returned, but that if they left port in the afternoon, or returned in the morning, these were not marked as days employed in fishing. But he does not state in how many instances this occurred, and I see no sufficient reason why, in computing the time from this journal, we should depart from the established usage. The journal of Parsons, with all the aid derived from his own explanation on the stand, not only fails of proving an employment for the time required to entitle the vessel to the bounty, but, computing the time according to the universal practice, it proves negatively that she was not employed that time. I have thus far gone upon the principle that this journal, aided by his examination under oath, is entitled to full credit; or rather that he might be admitted as a witness to prove the time that the vessel was employed, and that these memoranda, which he swears were made at the time, might be used to aid his recollection; for the journal, per se, is clearly not evidence. But in point of fact, if full credit is to be given to Miller, this journal is proved to be so incorrect as to be inadmissible for any purpose. Miller, as an inspector, kept a journal himself, which at the close of the fishing season he returned to the collector. In that journal he had marked this vessel as in port five days, when, according to Parsons' journal, she was at sea. And independent of Miller's testimony, she is proved to have been in port several other days, when according to this journal she was fishing. As the claimant has failed in proving that the Harriet was employed four months in fishing, there must be a decree of condemnation.

[On appeal to the circuit court, the decree of the district court was affirmed, with costs. See Case No. 6,099.]

HARRIET, The (COLEMAN v.). See Case No. 2,982.

HARRIET, The (MOODIE v.). See Case No. 9,744.

Case No. 6,101.

The HARRIET ANN.

[6 Biss. 13;[1] 6 Chi. Leg. News, 268.]

District Court, N. D. Illinois. Feb., 1874.

LACHES IN ENFORCING MARITIME LIEN.

1. A seaman's lien for wages will not be enforced in admiralty, as against a bona fide purchaser, after the lapse of two seasons. Such a claim has become "stale."

[Cited in The Artisan, Case No. 567; The Live Oak, 30 Fed. 78.]

2. Though courts of admiralty are not governed by any absolute rule of limitations, they will never do injustice to bona fide purchasers by the enforcement of old secret liens.

[Cited in The Rapid Transit, 11 Fed. 335.]

In admiralty. This was a libel, filed April 3, 1873, by Ole M. Nelson, against the scow Harriet Ann, for seaman's wages during the years 1869, 1870 and 1871. The vessel was owned by John A. Nelson, who was also her captain. In the spring of 1870, quite expensive repairs were made on the vessel, the money to pay for which was obtained from Amos J. Snell and Clark Lipe, to whom Nelson gave a mortgage for their advances. The libellant worked upon the vessel as a seaman a part of the season of 1870, for which he seems to have been fully paid. In the spring of 1871, Snell and Lipe became owners of the vessel and received a bill of sale of her, which was duly recorded, although Capt. Nelson retained a right to purchase her at a stipulated price during the season of 1871, a right, however, which he never exercised. During the season of 1871, Capt. Nelson continued master of the vessel, and libellant worked upon her as mate from the 24th of August to the close of navigation, for which there is a balance of wages due him. Libellant was fully aware of the advances made by Snell and Lipe and of the final purchase of the vessel. When Snell and Lipe purchased the vessel, she was represented to them to be free and clear of all liens and incumbrances.

Brandt & Hoffman, for libellant.

John C. Richberg, for the Harriet Ann.

BLODGETT, District Judge. Libellant now claims a lien on the vessel for all the wages earned by him for the seasons of 1869, 1870 and 1871, inclusive, which amounts in the aggregate, as his proof shows, to about $560.

There is no statute of limitations applicable to this class of actions. Seamen are said to be the wards of a court of admiralty, and their lien upon the vessel for wages is always recognized and enforced, when the aid of the court is invoked in apt time. What lapse of time shall make a claim for wages, or any maritime lien, "stale," must depend so greatly upon the facts in each case that no general rule can be laid down which can be applied in all cases. The courts will always see to it that injustice be not done to subsequent bona fide purchasers and incumbrancers, by the enforcement of old secret liens. In this district, my learned predecessor has uniformly refused to enforce liens of this character after the lapse of two seasons. Substantially the same rule was applied by the learned judge for the Eastern district of Michigan, in the case of The Dubuque [Case No. 4,110]; and in the case of The Key City, 14 Wall. [81 U. S.] 653, the supreme court says (page 660): "While courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defense. Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued."

Tested by these rules, it seems to me libellant's earnings for the years 1869 and 1870, if anything remains unpaid which was earned in 1870, must be deemed a "stale" claim as against this vessel. No good reason is shown why the wages earned in 1869 were left unpaid, and those earned in 1870 were paid or nearly paid. Indeed there is some proof tending to show that there was an indebtedness between libellant and the owner of the vessel upon which these wages might have applied. Libellant is not shown to have been a man of much pecuniary means or able to do without these earnings.

A different rule, I think, should apply to the earnings of 1871. Snell and Lipe had then become the owners of the vessel, and were bound to see the wages paid. The captain was their agent, and the wages, while a lien on the vessel, became their debt.

A decree will therefore be entered for the wages of 1871, and a reference made to a commissioner to take proof as to the amount of such wages.

NOTE. In a recent case in the Eastern district of Michigan—The Melissa [Case No. 9,400]—it is held that, in order to maintain the defense against a claim as stale, it must be alleged and proved that respondents were purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim. In the case of The Hercules [Id. 6,400], Judge Brown in the Eastern district of Michigan, held that creditors of a vessel plying upon the lakes must enforce their liens, as against bona fide purchasers without notice, during the current season of navigation, or within such reasonable time after the commencement of the new season as might be necessary to arrest the vessel; but that the circumstances of the case would frequently vary the rights of the respective parties.

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

Case No. 6,102.

The HARRIET NEWHALL.

[3 Ware, 105.] [1]

District Court, D. Massachusetts. Sept., 1856.

COLLISION — MEASURE OF DAMAGES FOR LOSS OF CARGO.

1. The nature and measure of damages considered. When intentional and when not.

[2. In cases of loss of cargo by collision the damages are limited to the actual loss, without any allowance for expected profits; hence the basis of the computation is not the value of the cargo at the port of destination, but its prime cost, together with all charges, premiums for insurance, etc. Following The Amiable Nancy, 3 Wheat. (16 U. S.) 546.]

In admiralty.

Shepley & Dana, for libellants.
Howard & Strout, for respondent.

WARE, District Judge. The value put on the vessel on the evidence reported, I think is reasonable, and is confirmed at $1,500. The damage in the loss of the cargo, is presented in the report in a double aspect. First, the original cost, including the ship's stores and furniture is found to be $557.32. Secondly, the value of the same at Boston, her port of destination, provided she arrived in safety, is found to be $1,861.72. Which of these is the true measure of damage in a loss by collision? Damage may be done and a right to indemnity arise under two different conditions. First, under a contract, which a party has failed to perform, and the plaintiff seeks damages for the non-performance. The French law has an appropriate name for these, which are called dommage et enterests; and they include the actual loss sustained and the profits which the party has failed to gain. For in every contract, a profit is expected and constitutes the motive of the contract. If one party is disappointed in this expectation, by the failure of the other to fulfil his engagements, he has a right, according to the circumstances of the case, to demand a sum which will indemnify him for the actual loss and the profits, which have been defeated. See, an example, in Domat, Civ. Law, pt. 1, lib. 3, tit. 5, § 2, No. 4, which is amplified by 6 Toullier, No. 286. The second condition is when the damage is caused by a tort. And this may be presented under a twofold aspect. The first, is when the tort is unintentional, occasioned by a fault indeed, but such a fault as may happen to a prudent and careful man from sudden surprise, by which the mind is thrown off its balance, or from momentary inattention or forgetfulness, to which the most cautious men are liable; faults

Quas in curia fudit
Aut humana parum cavit natura.

Such delinquencies are looked upon with indulgence, and in these the proper measure of damages, it may be assumed with a considerable appearance of reason, is the actual loss sustained, without augmenting it by the profits which the party might have made. The second aspect is when the tort is wilful and malicious; and here the court may and ought, according to circumstances, to enhance the indemnity by adding to the actual loss the expected profits. And the examples referred to above show that this may be done in the case of a wilful breach of contract. In some cases, as in slander, libel, seduction, torts to the person accompanied with contumely and intended to disgrace a man, it has been thought that courts may go beyond a simple reparation of the wrong to the individual, and award damages in poenam. 2 Greenl. Ev. § 253, and note, where the question is fully argued pro et contra. Collision almost invariably belongs to the first class. We never suppose it to be intentional and malicious, and it would seem that the proper measure of damage is the actual loss sustained. 2 Pars. Cont. 459, and the cases in the notes. In the case of The Anna Maria, 2 Wheat. [15 U. S.] 327, which was a wrongful capture by a privateer, the conduct of the captors is described as "a wanton marine trespass for which no sufficient excuse was given. The breaking open of trunks, when keys were offered them, and taking out the crew and putting them in irons and leaving the vessel in this situation, were acts not to be excused." And the ultimate loss of the vessel is represented as resulting from the illegal violence and misconduct of the captors. As the loss, in this case, was the consequence of a wanton and malicious tort, it would hardly have been considered as a harsh judgment, if the court had added to the actual loss, the reasonable profit that might have been expected from the sale of the cargo at the port of destination. Neque malitiis indulgendum est. Dig. 6, 1-38. A wilful trespasser has no reason for complaint, if he is required to put the injured party in as good a condition in every respect as he would have been in, but for the wrong done; yet the court, in this case, held that the true measure of damages was "the value of the vessel and the prime cost of the cargo, with all charges and the premium of insurances where it has been paid with interest." Nothing was allowed for expected profits. A claim of expected profits was presented in a subsequent case,—The Amiable Nancy, 3 Wheat. [16 U. S.] 546,—and was rejected, first on account of the uncertainty of the rule in its application, and secondly, the difficulty of supporting its legal correctness. Though the courts say, that if the suit had been against the original wrong doers, it might have been proper to visit upon them exemplary damages, as a proper punishment for their lawless violence. These decisions establish a rule of damages in cases of marine tort, not only on the highest authority and that bind-

[1] [Reported by George F. Emery, Esq.]

ing on this court, but one that appears to be reasonable when the tort is not malicious. When it is, the latter case comes very near to an authority for going beyond that, nor do I see any impropriety nor any violation of sound judicial principle, in adding the profits of the sale at the port of destination. The difficulty of determining precisely what they might have been, does not appear to me to be an insuperable objection to the allowance of a fair mercantile profit. The Francis was lost by the collision on her return from Newfoundland, where she had been for a cargo of fish. I do not understand that she earned freight on her outward voyage. The fish were taken in fresh and salted by the crew with salt taken out for that purpose. The prime cost of the fish must be considered as what was paid for them in Newfoundland, and of the salt, the price paid in Boston. To this must be added a reasonable charter of the vessel from the time she left Boston to that of the disaster, with wages and subsistence of the master and crew, with the premium of insurance, if any was paid, and if not a fair premium for the voyage.

NOTE. How far courts and juries are, in cases of malicious torts, authorized to award penal damages, is a question perhaps not perfectly settled in the jurisprudence of the common law. The question has been learnedly and acutely examined by Mr. Sedgwick of the New York bar, in a treatise on the Law of Damages, and by Mr. Greenleaf, in the second volume of his excellent treatise on Evidence, No. 253, note. Mr. Sedgwick holds, on the authority of decided cases, that the jury may legally give punitory damages by way of example. Mr. Greenleaf, that only compensatory damages can be given. It is certain that the language often used by the courts, not only in charges to the jury, but in opinions deliberately given on questions of law, goes very far to justify the doctrine maintained by Mr. Sedgwick. Exemplary, vindictive, and punitory damages, and most money damages in poenam, in their fair and common meaning, imply something more than a bare and naked compensation to the complainant. Mr. Greenleaf, by a careful analysis of the cases, has endeavored to show that this language may be satisfied if it is restricted to mere compensatory damages, a simple restitutio in integrum of the injured person, and in some of them he has perhaps successfully shown it; but in others this seems to be doing some violence to the ordinary and natural meaning of the words. Whether all the cases will admit of this construction or not, where the question is reduced to its elements and examined on principle, it seems to be quite clear in theory that Mr. Greenleaf maintains the true principle. Every private wrong that involves a violation of public order, includes two kinds of injury perfectly distinct in their nature; the private damages sustained by the injured individual and the public injury by the example of violation of public order, and the license and encouragement which would be given to the lawless and violent if it were not repressed by due punishment. The individual is to be indemnified by a private action in his own name, the public by their own action and by a penalty proper in its nature and extent to protect the public from the influence of such examples. But there is no reason why the indemnity due to the public for the wrong done to them, should be transferred as a gratuity to the individual through whom they have suffered.

Case No. 6,103.

The HARRIET ROGERS.

[Cited in The Sam Gaty, Case No. 12,276. Nowhere reported; opinion not now accessible.]

HARRIETT, The (MYERS v.). See Case No. 9,992.

HARRILL (UNITED STATES v.). See Case No. 15,310.

Case No. 6,104.

The HARRIMAN.

[5 Sawy. 611.] [1]

Circuit Court, D. California. Nov. 4, 1867.[2]

CONSTRUCTION OF CHARTER-PARTY — WHEN FREIGHT NOT EARNED — DEPARTURE OF CONSIGNEE FROM PORT OF DESTINATION—NO FREIGHT WITHOUT FULL PERFORMANCE — CONTRACT BY CHARTER-PARTY AN ENTIRETY—FAILURE TO PERFORM — WHEN RISK AND DANGER OF VOYAGE A DEFENSE.

1. Where, in accordance with a charter-party, the vessel chartered was to proceed with a cargo from San Francisco to Valparaiso and report there to the commanding officer of the Spanish fleet and discharge at such port as he should name, and afterwards the charterer consented that the vessel might call at the Chincha Islands, and, if it met the commander there or at any other point, might discharge as he might order; and the vessel, having proceeded to the Chinchas, and the master learning there that the Spanish fleet had left Valparaiso badly shattered, returned to San Francisco without going to Valparaiso or meeting the Spanish commander, *held*, that the contract had not been performed; that its performance had not been waived by the fact that the Spanish commander or fleet had left Valparaiso, and consequently that no freight had been earned.

[See note at end of case.]

2. The departure of the consignee named in a charter-party from the port of destination constitutes no waiver of the contract—such contract being not to find the consignee but the port of delivery.

3. Freight being the compensation for the carriage of the cargo, if the carriage is not made the freight is not earned.

4. The contract by a charter-party for the carriage of a cargo to a certain port being an entirety, it must be executed completely or no claim for compensation arises. In case of failure it is immaterial whether the failure of the carrier arises from his fault or his misfortune.

[See note at end of case.]

5. The risk and danger of losing a cargo in performing or attempting to perform a stipulated voyage may be shown in answer to a claim for damages preferred by the shipper for breach of the contract, but such risk and danger will not entitle the carrier to any compensation for partial performance.

[See note at end of case.]

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

On the seventh of May, 1866, C. J. Jansen, the owner of the ship B. L. Harriman, chartered her to Joseph Emeric, the libellant, for a voyage from San Francisco to Cobija,

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

[2] [Affirmed in 9 Wall. (76 U. S.) 161.]

Bolivia, or other ports in the Pacific, the port of discharge to be designated before the sailing of the vessel. The charter-party provided that instructions for the vessel should be given by letter in triplicate, and if the vessel proceeded pursuant to them direct to Valparaiso, the commanding officer of the Spanish navy, who was supposed to be at that port, should have the right to receive a portion of the cargo there, or the whole of it, or to decline to receive any portion there, and to send the ship to another port in Chili, Peru, or the Chincha Islands; and, in such case, that the vessel should proceed immediately to the port named by him, and there complete her discharge. The charterer, on his part, agreed to provide the vessel with a cargo of coal of seven hundred and eighty-six tons, and to pay for the use of the vessel during the voyage fifteen dollars per ton, in gold coin of the United States, one half to the owner at San Francisco two days after the sailing of the vessel, less two and a half per cent. discount for cash, and the other half to the owner on receipt of a canceled bill of lading that the coal had been delivered. On the fourteenth of May the charterer wrote to the master of the ship a letter, designating the first port of Valparaiso as the port to which he was to proceed with his vessel on leaving San Francisco, and directing him when there to report himself to the commanding officer of the Spanish navy, and stating that such officer would have the right to take the whole of the cargo, or a portion of it, or to refuse to take any portion, and to send the vessel to another port, as mentioned in the charter party. On the seventeenth day of May the charterer wrote to the master a second letter, stating that since addressing his previous letter he had received from Panama what he terms "an instruction," which he incloses. This instruction is an extract from a letter of his correspondent requesting him, if he had not attended to all outstanding orders, to suspend operations until further orders, giving as a reason that it was probable that the Spanish naval forces might have changed their base of operations; but directing him, if he had taken up a vessel before receiving the letter, to "instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas." The charterer added to the extract a request that the master would follow the instruction so far as was in his power. On the nineteenth of May the charterer sent another communication to the master, informing him that in case the wind, weather or other circumstances favored his making the Chincha Islands, he was at liberty to call there, without, however, prejudicing the charterer's rights under the charter-party and instructions. The vessel sailed from San Francisco on the twenty-second of May and arrived at the Chinchas on the third of August. Whilst there the master was informed of the bombardment of Callao on the second of May, and that the Spanish fleet had sailed away badly shattered. On the same day a regular Chilean mail steamer arrived and reported that all was quiet at Valparaiso, and that nothing was known of the Spanish fleet. After remaining a few hours at the Chinchas the vessel left, and the captain immediately ordered her back to San Francisco, where she arrived on the sixth of October. On the eighth he made a formal protest and served a copy on the charterer. The owner then insisted that he was entitled to the full freight which was stipulated for the performance of the voyage, and called upon the charterer to receive the cargo, discharge the vessel and pay the balance of the freight claimed. To this demand the charterer refused to accede, alleging that the voyage agreed upon had not been performed. The ship-owner thereupon paid the duties upon the cargo, discharged the vessel and had the coal sold. The charterer then libeled the vessel for breach of the charter-party and the conversion of the cargo to the owner's use. The district court held that full freight had been earned by the ship, and entered a decree in favor of the charterer for the residue of the proceeds of the sale of the coal, after charging him with the expenses of sale and commissions. From this decree the libellant appealed; and two questions were presented for determination: (1) What was the contract between the ship-owner and the charterer? and (2) was that contract performed by the ship or was its performance waived by the charterer or prevented by his fault or omission?

Doyle & Barber, for appellant.

Wm. H. Sharp and S. M. Wilson, for respondent.

FIELD, Circuit Justice. The charter-party provided for a voyage to any port of the Pacific, to be named before the sailing of the vessel, and for written instructions upon this point. These instructions were given in the letter of May 14, and the port of Valparaiso was named. The contract thus became, in this particular, clear and explicit. The charter-party stipulated for the exercise of certain rights over the coal and vessel by the commander of the Spanish navy at Valparaiso, and the instructions repeated the stipulation, and directed the master of the vessel when there to report to him. Both documents were evidently drawn upon the supposition that the Spanish commander was at the time at the port of Valparaiso, and would be found there on the arrival of the vessel. No serious question could be raised upon these documents standing alone. A change in the contract thus accepted and a new destination of the vessel are supposed to have been effected by the letter of May 17. But that letter only directed the master of the vessel to seek the Spanish fleet between Valparaiso and the Chinchas. It was an instruction founded upon the supposition that the fleet might have

changed its base of operations. There was no certain knowledge that such change had taken place; it was suggested as a possibility only, in consequence of which the vessel was to seek for the fleet in passing between the Chinchas and Valparaiso. The contract to proceed to Valparaiso was not abandoned. None of the parties concerned understood the letter as changing the port of destination. The master did not so understand it. In his protest, after his return, he declared that his vessel left San Francisco bound for the port of Valparaiso via the Chincha Islands. He did not pretend that he had made the voyage for which the charter-party stipulated, but contended that the voyage was broken up and his return to San Francisco justified by the withdrawal of the Spanish fleet from the coast of Chili and the absence of its commander, the consignee of the cargo.

The owner of the ship did not so understand the letter. He assumed in a communication to the charterer, written on the sixteenth of June, nearly a month after he had learned of the departure from Valparaiso of the Spanish fleet, that the vessel was obliged under the contract, to proceed to that port, for he mentioned that no provision was made in the charter for the possibility of there being nobody to receive the cargo on the arrival of the ship, and asked for instructions in that event to communicate to the captain.

The charterer did not so understand the letter. He only requested a compliance with the suggestion of his correspondent so far as it was in the master's power, and in his communication of May 19, he accompanies his permission to touch at the Chinchas, with the stipulation that it should not prejudice his rights under the charter-party and instructions. But besides this, he testifies that at the request of the ship-owner, he wrote to his friends at Panama, his associates or agents in the business of supplying the Spanish fleet, to designate some one at Valparaiso to receive the cargo, in the event that the Spanish commander had left on the ship's arrival. The owner was himself examined as a witness, and no denial of this statement was made.

Thus all the parties concerned construed the contract in the same manner, and did not regard its purport or obligation as in any respect changed by the letter of May 17. We may, therefore, safely treat the letter as simply a request that the captain would comply with the suggestion of the charterer's correspondent at Panama, so far as he could do so consistently with the provisions of the charter-party; and that it neither had, nor was intended to have, any other or greater import. If the vessel had intercepted the Spanish fleet between the Chinchas and Valparaiso, the acceptance at sea of the cargo, or a portion thereof, by the Spanish commander, would have been as valid and binding as, in the absence of the letter of May 17, such acceptance would have been at Valparaiso. But there was no obligation resting upon the commander to accept at sea the cargo, or any part thereof, or to make there the option given by the charter-party. He could have pointed to that instrument and replied, that he would exercise his rights and privileges thereunder at Valparaiso. The letter simply provided for anticipating, if the Spanish commander consented, the time and place for the acceptance of the cargo, or for directing its partial or entire discharge at some other port.

Such being in our judgment, the obvious construction of the letter of May 17, it follows that the original contract completed by the instructions of May 14, requiring the vessel to proceed to Valparaiso, was not subsequently changed, and as the vessel only proceeded to the Chinchas, such contract was not performed.

But it is contended that performance was waived by the fact that the Spanish commander, the consignee of the cargo, had left Valparaiso; and that the captain was justified in avoiding the risk of possible seizure of the cargo by the authorities at Chili, which it is assumed he must have incurred had he proceeded to that port in the absence of the Spanish fleet.

The departure of the consignee named from the port of destination constituted no waiver of the contract. The contract was not to find the consignee, but to find the port of delivery. It may be that the consignee had appointed agents to appear for him and represent his interests; and if he had not done so the law indicated the course which the master of the vessel could have pursued—he could have stored the cargo at the shipper's risk. The storing in such case would have been, so far as the earning of freight was concerned, the legal equivalent to delivery to the consignee. Suppose, by way of illustration, the case stated by counsel, that the cargo had been consigned to the president of an incorporated company, and while the vessel was at the Chinchas, authentic intelligence had been received that the company had been dissolved, and that the president had absconded to parts unknown; and thereupon the ship had retraced her course back to San Francisco; would it be pretended in such case that the freight stipulated for the entire voyage had been earned? And if freight would not have been earned in that case, why can it be considered earned in this case? The law of the contract is not changed by the fact that the consignee in one case is a naval commander, whose fleet has sailed from the port of destination, and in the other case is the absconding president of a dissolved company. The principle on which the right to freight depends is simple and well settled. Freight is the compensation for the carriage of the cargo. If the carriage be not made the freight is not earned. The contract is an entirety—it must be executed completely, or no claim for compensation arises. Such is the general rule, and

it is immaterial whether the failure of the carrier arise from his fault or his misfortune. Thus if the carriage be prevented by a blockade of the port of destination—whether such blockade were known or not at the time the contract was made—the freight is not earned. The risk or even impossibility of entering the port in such case constitutes no ground upon which compensation can be claimed, though the voyage be in other respects performed. The only exception to the rule that performance must precede the right to compensation is where such performance is prevented by the fault or omission of the shipper.

In Scott v. Libby, 2 Johns. 336, a vessel was chartered for a voyage from New York to the city of St. Domingo and back. The charterer was to pay an entire sum for the whole voyage in sixty days after the return of the vessel. On arriving in sight of St. Domingo the vessel was turned away by a British cruiser on account of the blockade of the port. The vessel thereupon returned to New York, and the owners refused to deliver the cargo until the freight was paid. In an action of trover for the conversion of the cargo, it was held by the supreme court of New York that no freight was due, that the blockade had dissolved the charter-party, and the claim for freight was gone. The case of Burrill v. Cleeman, 17 Johns. 72, is to the same purport.

The risk and danger of losing the cargo in performing or attempting to perform a stipulated voyage may be shown in answer to a claim preferred by the shipper for breach of the contract; but this is a very different thing from the assertion of a right to compensation where the contract is not performed. When compensation is made dependent upon performance there must be performance, however difficult or dangerous. The difficulty or danger may, in some instances, relieve the carrier from more than nominal damages for not performing the contract; but neither will entitle him to the slightest compensation when the performance is not had.

In this case the contracting parties knew of the war existing between Spain and Chili, and the possible risks and dangers to be encountered in the voyage to Valparaiso. The charterer did not guarantee that the port would be safe or warrant that the Spanish naval commander would be there to protect the vessel on her arrival. It is probable that both parties expected that he would at all times be able to extend protection to the vessel; but as they made no provision for a possible disappointment in this expectation, and for compensation upon such event, we do not perceive upon what principle we can interpolate into the contract a provision of that kind, or, which is equivalent to the same thing, allow compensation as if such provision existed.

Suppose, as counsel pertinently inquires, the ship-owner in this case had sued the charterer for freight, could he have alleged performance of the contract? Clearly not, for no such performance was had. Could he have alleged that the performance was prevented by the charterer? Certainly not, for the charterer had done nothing to prevent the execution of the contract, nor had he omitted anything for which he stipulated, either expressly or impliedly. What, then, could the owner have alleged as a reason for not proceeding to Valparaiso?—that the Spanish naval commander was not there? But the charterer did not agree that he should be there; nor did his absence prevent the vessel from entering the port. But, then, there was danger that the cargo might be seized by the Chilean authorities. This possibility of seizure was one of the perils assumed by the contract, and, like a similar danger where the port of destination is blockaded, did not waive the necessity of performance as a condition precedent to compensation.

Our conclusion is that the charter-party was not performed by the ship; that the freight stipulated for such performance was not, therefore, earned; and that the charterer was entitled, upon the arrival of the vessel at San Francisco, to the possession of the cargo and to a return of the advanced freight. Watson v. Duykinck, 3 Johns. 335; Griggs v. Austin, 3 Pick. 20; and Phelps v. Williamson, 5 Sandf. 578. The decree of the district court must therefore be reversed and a decree entered in favor of the libellant for the amount of the advanced freight and the amount of the proceeds of the sale of the coal (after deducting therefrom the duties paid and the expenses of sale), together with interest on both amounts and costs of suit.

[NOTE. On claimant's appeal to the supreme court, this decree was affirmed in an opinion by Mr. Justice Swayne, holding that the contract of affreightment is governed by the same principles as other special contracts. It is an entirety. Difficulty or improbability of accomplishing the undertaking will not avail as a defense. It is the province of courts to enforce contracts, not to make or modify them. Where there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function. 9 Wall. (76 U. S.) 161.]

Case No. 6,104a.

HARRIMAN v. DODGE.

[Betts, Scr. Bk. 554.]

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

MARITIME LIEN—SUPPLIES—LIABILITY OF MORTGAGEE OF VESSEL.

[A master appointed by the owner, and sailing the vessel on shares with him, has no power to bind one who holds the title merely as security, for supplies furnished in her home port, by representing such person as owner.]

The libel in this case was filed [by Charles Harriman against Sewell V. Dodge] to recov-

er $51.83 for an anchor supplied by the libellant to the sloop Exchange, in May, 1854. The vessel had belonged to one Kingsland, as the libellant knew, having dealt with him as such owner. In November, 1853, Kingsland conveyed her to the respondent to secure his indebtedness to him. The anchor was ordered by McGee, the master, who was sailing the vessel on shares, and who was appointed master by Kingsland in the spring of 1854. In July, 1854, the vessel was conveyed to one Thompson, at Kingsland's request. McGee, when he bought the anchor, said Dodge owned the vessel. The sale was in effect for cash, though delivered without exacting immediate payment. Both parties resided in the city of New York.

Mr. McMahon, for libellant.
Beebe, Dean & Donohue, for respondent.

HELD BY THE COURT (BETTS, District Judge). That the libellant gives no proof of such exigency as would give him a lien upon the vessel for the anchor, under the ruling in the case of Pratt v. Reed [19 How. (60 U. S.) 359], recently decided in the United States supreme court. That, no obligation against the vessel having been created by the sale, the vendor cannot sustain an action against her owner for supplies because of his ownership, without proving that the purchase was his personal act or made by his authorized agent. That if McGee did tell the libellant he was authorized by the respondent to buy the anchor, no authority for that declaration is shown, as he was appointed master by Kingsland, and sailed her on shares with Kingsland; and Kingsland testifies that he never authorized him to make such statements. On the contrary, the testimony goes clearly to prove that the respondent only held a mortgage interest in the sloop, and that the title was all the time in Kingsland. That there is, accordingly, no foundation in law or fact for the action. Libel dismissed, with costs.

Case No. 6,105.

HARRIMAN et al. v. MAXWELL.

[3 Blatchf. 421.] [1]

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

CUSTOMS DUTIES — RECOVERY OF MONEY PAID TO INSPECTOR — UNDERVALUATION — APPRAISEMENT.

1. The case of Corkle v. Maxwell [Case No. 3,231], cited as decisive against the claim of the plaintiffs in this case to recover back monies paid by them to the collector for the services of an inspector of the customs at their private bonded cellar.

2. Where it is not shown by either the invoice, the entry, or the protest, that the goods imported were purchased, it is lawful for the collector to have them appraised at their value abroad at the time of their shipment, and to collect duties on such value, and to impose any consequent penalty for undervaluation, although, in fact, the goods were purchased at the price in the entry, and such price was their fair market value abroad at the time of their purchase. The case of Crowley v. Maxwell [Id. 3,449], cited and approved.

3. Where, on an entry of goods by their consignee, he presented, as a true invoice, one sent to him by their owner, and swore to it, and the collector directed the appraisers to value the goods as of the time of their shipment, and the consignee, before the appraisement was made, applied to the collector to amend the entry, by adding, to the price set down in it, an amount sufficient to raise the goods to their fair market value abroad, "in order to avoid the penalty," which was refused, *held*, that it was lawful for the collector to so refuse, and to impose duties on the value ascertained by the appraisers, and a consequent penalty for undervaluation.

4. The distinction shown between this case and that of Carnes v. Maxwell [Id. 2,417].

5. No error in judgment on the part of appraisers can be revised by this court.

This was an action against [Hugh Maxwell], the collector of the port of New York, to recover back certain sums of money paid to him by the plaintiffs [William Harriman and others]—first, for the attendance of an inspector of the customs at the private bonded cellar of the plaintiffs, in New York; second, for duties, and a penalty for undervaluation, on certain wines, imported in the Argo, from Havre, in the spring of 1849; and, third, for duties, and a penalty for undervaluation, on certain bleaching powders, imported in the Centurion, from Liverpool, in the summer of 1850.

John S. McCulloh, for plaintiffs.
J. Prescott Hall, for defendant.

INGERSOLL, District Judge. The questions involved in the claim to recover back the money paid for inspector's services at the bonded cellar of the plaintiffs, were considered and decided in the case of Corkle v. Maxwell [supra]. It was there decided, that, upon facts such as exist here, there could be no recovery against the collector. For the reasons set forth in the opinion given in that case, this claim must be disallowed.

The wines imported in the Argo were purchased by the plaintiffs at Rheims, in France, in the spring of 1849, but at what particular time does not appear. They were shipped from Rheims for Havre, on the 29th of May, 1849, and, at the latter port, they were shipped in the Argo, for New York, where they were entered for the payment of duties on the 2d of July, 1849. They were purchased at the price set down in the entry, which price was the fair wholesale market value thereof, at the time of purchase, in the principal markets of France, and were appraised by the appraisers, as of the time when they were shipped at Havre, at a greater value than that set down in the invoice. Duties were imposed and paid upon the value as appraised by the appraisers, and a penalty for undervaluation was also

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

imposed and paid. These payments were made under protest. The protest was written on the entry, and was as follows: "We hereby protest paying the additional duty, and the fine as appraised by the appraisers, the invoice value being correct." It did not appear by the entry that the wines had been purchased by the plaintiffs, or how or when they were procured. The protest did not show that they had been purchased. There was no document in the custom-house to show they had been purchased. The protest did not claim any irregularity in the appraisal.

The questions presented on this branch of this case were considered and decided in the case of Crowley v. Maxwell [supra]. For the reasons given in the opinion in that case, the protest in this case would not be sufficient to enable the plaintiffs to recover, even if there had been an irregularity in the appraisal. But the appraisal was regular. At the time it was made, the collector had no knowledge or information of the time when the wines were purchased. Therefore, he could not have them appraised as of the time when they were purchased. Indeed, the proof does not now show the exact time when they were purchased. This item of claim, therefore, must be disallowed.

Upon the importation of the bleaching powders, they were entered at the custom-house for the payment of duties, and a value was set down in the entry, which corresponded with the value set down in the invoice produced and sworn to. The collector gave directions to the appraisers to have the value ascertained as of the time when they were shipped. The plaintiffs were not the owners of the goods, but the consignees merely. The owner of the goods lived in Liverpool, and transmitted the invoice which was presented at the custom-house, as a true invoice. One of the plaintiffs made oath, when the entry was made, that the invoice presented to the collector was the true and only invoice which he had received of the goods, and that that invoice exhibited the actual cost or fair market value of the goods at Liverpool, from which port they were shipped, according to his best knowledge and belief. After the entry had been made and sworn to by one of the plaintiffs, and after the appraisers had been directed to appraise the goods, but before they had actually made their appraisement, the plaintiffs applied to the collector to amend the entry, by adding, to the price set down in it, an amount sufficient to raise the goods to the fair market value abroad, in order to avoid the penalty. They did not name the amount to which they wished the value raised. This the collector refused. No other invoice was received by the plaintiffs than the one presented to the collector, and there was no claim made by them that the price carried out in the invoice, or in the entry as made, was by mistake. They asked for no delay on account of any mistake made by the owner in his invoice, that a correct one might be obtained from him in Liverpool. Indeed, they now claim, by their protest, that there was no error in the invoice, as made and presented to the collector, and that the same was correct. All that they asked was, that they might be permitted to amend the entry which they had made, they having been misled by the invoice which the owner had furnished, by adding, to the price set down in it, an amount sufficient to raise the goods to the fair market value abroad, in order to avoid the penalty. The duties were charged and paid upon the value as ascertained by the appraisers, and the penalty, by way of additional duty, was also paid. The payment was accompanied by a protest, as follows: "The additional duty and penalty on the within entry, we hereby pay under protest, the invoice being correct, and also because we applied to collector to correct our entry, or raise value, before the permit was delivered to the officer on board ship, and before the goods had been seen by the appraisers."

There was no error or improper conduct on the part of the collector in what he did, which the plaintiffs can complain of. What he did was in pursuance of law, and of his duties as collector. The money paid was of right demanded. The invoice which was presented to the collector was furnished by the owner of the goods, at Liverpool, to be so presented. The entry corresponded with the invoice, as the owner intended it should. There was no honest mistake or error in the invoice. It is to be presumed, until the contrary appears, that the owner intended to do what he actually did. He intended, therefore, to make the invoice, and have it presented to the collector, as he did make it, and as it was presented. The appraisers found that the goods contained in that invoice were undervalued. When the plaintiffs applied to the collector to be permitted to raise the prices in the entry, so that the increased duty, by way of penalty, might be avoided, they did not pretend that the invoice or entry had been made out differently from what the owner intended. This case bears no analogy to the case of Carnes v. Maxwell [Case No. 2,417].

It is also claimed by the plaintiffs, that the original invoice was correct, and that the appraisers, in raising the value of the goods, as set down in the invoice, erred in judgment. No alleged error in judgment of the appraisers, if any error there were, can be inquired into or revised by this court. This item of the plaintiffs' claim must, therefore, be disallowed. Judgment for defendant.

HARRIMAN (SCHULENBERG v.). See Case No. 12,486.

HARRIMAN (UNITED STATES v.). See Case No. 15,311.

Case No. 6,106.

HARRINGTON v. FIRE ASS'N.

[4 Wkly. Notes Cas. 432.]

Circuit Court, E. D. Pennsylvania. Oct. 4, 1877.

BANKRUPTCY —ASSIGNEE'S TITLE—PRIOR ATTACHMENT—AMENDMENT OF WRIT.

[A writ of foreign attachment issued from a Pennsylvania court named the defendants in the action as "—— Bowers and —— Wheeler, trading as Bowers, Wheeler & Co." In this state it was served upon the garnishee, but before the return day the writ was amended, under the state statute (Act May 4, 1852, § 2), by inserting the full names of Bowers and Wheeler, and adding the name of another partner. More than four months after the service of the attachment, but less than four months after the amendments, proceedings in bankruptcy were begun against the defendants. *Held*, that the attachment was good as against the claim of the assignee in bankruptcy.]

In bankruptcy. On March 11, 1876, a writ of foreign attachment issued out of the common pleas of Philadelphia county, at the instance of Stein & Co., plaintiffs, against "—— Bowers and —— Wheeler, trading as Bowers, Wheeler & Co.," and the Fire Association of Philadelphia was served as the garnishee. Subsequently, and prior to the return day, the record was on motion amended by inserting the first and middle names of Bowers and Wheeler, and adding the name of Nathan Wheeler to the defendants, upon the condition that the plaintiffs should enter a new bond, which was done. Judgment was subsequently obtained against the defendants. More than four months after the service of the attachment, but less than that time after the amendment, proceedings in bankruptcy were begun against the defendants, and they were adjudged bankrupts. The question here was whether the amended attachment bound the funds in the hands of the garnishee as against the assignee.

Mr. Sulzberger, for plaintiffs in the attachment, argued that they were entitled to the fund, the bankrupt act preserving attachments made more than four months prior to the beginning of proceedings in bankruptcy. It was true that the writ was originally defective in omitting the name of one of the defendants, but this had worked no injury, as the firm had been correctly designated, and the writ amended, before other rights had intervened. The amendment act of May 4, 1852, § 2 (Pa.), was meant to cover just such cases, and was applicable in the United States courts. It was true that in Dunn v. Duncan, 2 Wkly. Notes Cas. 81, the court of common pleas had only allowed the amendment without prejudice to intervening rights, but there the assignment had been made before the amendment should have been allowed nunc pro tunc.

J. G. Johnson, for assignee.

In Dunn v. Duncan the amendment was only allowed to operate from its date, and intervening rights were not disturbed. Here, by the effect of the bankrupt act, the assignee's title as against attaching creditors reverts back four months, and four months before the commencement of bankruptcy proceedings the attachment was bad, as one of the defendant firm had been omitted. The amendment act, supra, was only intended to apply to formal errors. Here the omission is fatal, and cannot be cured. The attachment being a proceeding against defendants' interest in rem, and the res in this case being the property of all the members of the firm, some of whom were not included in the writ, there was no attachment of the partnership interest therein.

THE COURT, (McKENNAN, Circuit Judge, and CADWALADER, District Judge,) entered a decree sustaining the attachment.

Case No. 6,107.

HARRINGTON v. LIBBY.

[14 Blatchf. 128; 12 O. G. 188; 4 Am. Law T. (N. S.) 47; Cox, Man. Trade-Mark Cas. 301; 23 Int. Rev. Rec. 112; 2 Cin. Law Bul. 70.][1]

Circuit Court, S. D. New York. Feb. 8, 1877.

TRADE-MARK — EXCLUSIVE USE OF "BUCKET" FOR COLLARS.

The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, cannot be claimed as a trade-mark, either under the statute or by virtue of the general law of trade-marks.

[Cited in Ball v. Siegel, 116 Ill. 143, 4 N. E. 667.]

[This was a proceeding by George Harrington against James L. Libby for an infringement of a trade-mark.]

James A. Whitney, for plaintiff.
Edmund Wetmore, for defendant.

JOHNSON, Circuit Judge. The plaintiff claims to be entitled to the exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale and sold with the collars. This claim is made not on the ground, that he is the inventor and patentee of pails thus made, or of the material used in making them, or of the art of selling collars by giving away a tin pail with them. But the claim is that this is a trade-mark, and entitled to protection as such, either by force of the statute of the United States on the subject, or by virtue of the general law of trade-marks. It appears that the ornamented tin pail which the plaintiff em-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. Cox, Man. Trade-Mark Cas. 301, contains only a partial report.]

ploys is a common article in commerce, and that pails made of tin, ornamented or unornamented, are and have long been in use for all such purposes as any one chose to apply them to. The question whether any one can seize upon such an article and make title to its exclusive use for a special purpose, by calling it a trade-mark, must be far from clear in favor of the claimant. The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property. It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by the ornamental pattern. There is no name, no symbol, no assertion of origin or ownership. The case strongly resembles that of Payson's Indelible Ink, Browne, Trade-Marks, §§ 271, 272, where the claim was rejected, on the ground, that, if maintained, the effect would be to gradually throttle trade. The case of Moorman v. Hoge [Case No. 9,783], seems to me quite in point. In favor of maintaining the right to the barrel in question in that case, all circumstances of fact concurred, but the court held that the law did not recognize an exclusive right to an unpatented package, nor permit its assertion. I concur in the principles maintained in that case, and think the plaintiff has failed to show such a right in the premises as can entitle him to a preliminary injunction. The motion must be denied.

Case No. 6,108.

HARRINGTON v. McDUEL.

[3 Cranch, C. C. 355.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

ASSAULT AND BATTERY—LEVY BY CONSTABLE.

The plaintiff has a right to enter the defendant's house with the constable, who has a fi. fa., to show the defendant's property, upon which to levy the execution.

Mr. Hellen, for defendant, prayed the court to instruct the jury that the plaintiff had no right to enter the defendant's house with the constable, to show him the defendant's property, upon which to levy the fieri facias upon a judgment in favor of the plaintiff against the defendant.

Beale & Ashton, for plaintiff.

But THE COURT (nem. con.) refused.

HARRINGTON (OGDEN v.). See Case No. 10,457.

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

Case No. 6,109.

Ex parte HARRIS et al.

In re COCHRANE.

[2 Lowell, 568; [1] 16 N. B. R. 432.]

District Court, D. Massachusetts. May, 1877.

BANKRUPTCY—AMOUNT OF PROOF—CREDITS.

1. Where a manufacturer consigned goods to his factors, and drew against them bills, which the factors accepted, for an amount much beyond what the goods ultimately realized, and both parties failed, leaving outstanding acceptances for about $116,000, and goods and their proceeds in the hands of the factors for about $26,000, and both parties became bankrupt, and the factors employing, without objection, the $26,000, made a composition of forty per cent with all their creditors, including the holders of the bills, who reserved a right to prove in full against the drawer and all other parties,—*held*, these creditors, proving against the drawer, need not give credit for the full forty per cent, but must abate their proof in the proportion of 90,000 to 116,000; that is, must give credit for the $26,000 which might, upon their application, have been applied towards paying their bills.

2. Where notes are exchanged, the presumption is that each party is to pay his own.

3. Where notes were exchanged, and the holder has received a payment from the maker of one of these notes, before he offers proof against the estate of the indorser he must prove only for the balance.

[Cited in Ex parte Nason, 70 Me. 368.]

4. The proof is complete when the affidavit is filed with the register or assignee, and payments received after that time need not be credited.

In bankruptcy. John Cochrane, Jr., the bankrupt, was a manufacturer of carpets, and Harris, Chipman, & Co. were his selling agents or factors, and advanced him their notes from time to time, which he indorsed and procured to be discounted. Both parties failed, at which time there were outstanding in the hands of several banks and individuals notes of this kind for about $116,000; and the factors had goods of Cochrane's to the value of about $26,000. Harris, Chipman, & Co. went into bankruptcy March 7, 1876, and offered a composition of forty per cent, which was accepted and recorded April 29, 1876. The several holders of the notes received the forty per cent, and gave Harris, Chipman, & Co. a covenant not to sue them; reserving the right to prove the full amount of the notes against the other parties to them. Cochrane went into bankruptcy March 30, 1876. The question now came up, whether the holders of the notes could prove in full, or for what other amount, against the assets of Cochrane. A proof in full had been made, and afterwards modified, by order of the register, by deducting the amount paid in composition by Harris, Chipman, & Co.; and the petition now was for a revision of this order. The affidavits for proof against Cochrane's estate had been made and sent to the assignee, or to the register, very near the time

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

that the resolutions of Harris, Chipman, & Co. were recorded.

W. Munroe, for assignees of Cochrane.

F. S. Hesseltine, for Harris, Chipman, & Co.

J. R. Bullard and C. K. Fay, for holders of notes.

LOWELL, District Judge. In so far as the notes offered for proof were given for the accommodation of Cochrane, it is immaterial whether payments by the parties who stood in the relation of sureties were made before or after the proof was made in this case, because it is held under our bankrupt law [of 1867 (14 Stat. 517)], by a great preponderance of authority, and upon unanswerable reasoning, that the holder of a bill or note may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of the amount from a surety or quasi surety. See In re Souther [Case No. 13,184]. Of course, the parties dealing together can agree that the creditor shall not have this right, but that it shall belong to the surety, in consideration of his payment; yet even then the course would be for the creditor to prove his note or bill in full, and to give to the surety his proportionate part of the dividends that might be received from the estate of the principal debtor. Here the agreement was that the holder should prove in full against the estate of Cochrane, and any other parties to the notes. But were these notes given for the accommodation of Cochrane? I think they may be so regarded in equity, to the extent that they were not secured by goods, and the proceeds of goods, in the hands of Harris, Chipman, & Co. If the latter had taken up their notes, they would be creditors of Cochrane for $90,000. When both parties failed, the goods and their proceeds were applicable to the notes drawn against them, so far as they would go; and this equity might have been enforced by the holders, under the doctrine of Ex parte Waring, 19 Ves. 345, and that class of cases as applied in this country.

It is a question not so clear whether the holders of the notes or bills, having the right to an appropriation of funds in the hands of a surety, can prove against the principal in full. I have said on one occasion that they cannot, and I have not found any reason to change my opinion. I do not mean to say they might not prove in full by expressly or impliedly renouncing their security; but that is impossible in this case, because the factors have appropriated the security, as they had a right to do, if the creditors did not object; but the result is, that $26,000 of Cochrane's property has gone to pay the debts of Harris, Chipman, & Co., and to this extent I think the general creditors of Cochrane have a right to say that the holders of the notes shall not prove in full against Cochrane's assets. If the whole amount of these notes outstanding and offered for proof is $116,000, each must be reduced in the proportion of $90,000 to $116,000.

There was one debt which presented a different question. Cochrane had exchanged notes with one Pearce, and the latter had paid thirty-five per cent upon all his debts, by some sort of composition. I do not understand that in exchanging notes either party is considered to be accommodating the other: each impliedly undertakes to pay his own notes in consideration of the exchanged note which is to be paid by the other. In this case, credit must be given by the holder of a note coming in to prove against Cochrane's estate, as indorser, for whatever dividend he has received or might have received from Pearce, as maker, before he offered his proof against the assets of the indorser, though not bound to give such credit where Cochrane is promisor. Under our practice, I think a debt is to be considered as proved when it is duly authenticated and sent to the assignee or the register, because ninety-nine in a hundred of all debts not proved at the first meeting are proved in this way. I do not think the date should depend on when the assignee or the register makes a formal entry of its allowance, provided the debt turns out to be just and true.

Referred to the register, to proceed in accordance with this opinion.

Case No. 6,110.

Ex parte HARRIS.

[3 N. Y. Leg. Obs. (1845) 152.]

District Court, D. Maine.

VOLUNTARY BANKRUPTCY—WITHDRAWAL OF PETITION—RIGHTS OF CREDITORS.

1. A voluntary petitioner for the benefit of the bankrupt law cannot withdraw his petition before a decree of bankruptcy, if any of the creditors oppose it, without showing good cause. Such a petitioner is deemed a bankrupt, within the purview of the law, from the time of the presentation of his petition, and before a decree of bankruptcy. He becomes personally subject to the jurisdiction of the court from the time of the presentation of his petition.

2. The creditors may intervene for their own interest as well before as after a decree.

3. The court has jurisdiction over the bankrupt's property from the time of filing the petition, and will, in a proper case, on the motion of creditors, interpose by injunction, or the appointment of a receiver, to prevent the property from being wasted.

4. If the bankrupt neglects to move for a decree of bankruptcy so that an assignee may be appointed, the creditors may move the court for that purpose.

The petitioner [Samuel Harris] filed this petition as a voluntary bankrupt for the benefit of the bankrupt act [of 1841 (5 Stat. 445)] on the fifth of July. Subsequently, on the 20th of August, and before the day for hearing, he filed another petition, stating that he had made arrangements with nearly all his

creditors to adjust and settle their claims, and prayed that he might have leave to withdraw his petition, or that it might be dismissed and no further action had thereon. On the day of hearing, Phillip Torry and three other creditors, who had proved their debts amounting in the whole to 1075 dollars, appeared and filed in writing objections to the allowance of the bankrupt's petition to withdraw, and prayed that due proceedings might be speedily had so that he might be duly decreed a bankrupt, and an assignee be appointed to take possession and administer the estate, and concluding with a motion that a decree of bankruptcy may be passed.

Willis and Preble, for bankrupt.
Mr. Haines, for creditors.

WARE, District Judge. The general question which has been argued in this case is whether a voluntary petitioner for the benefit of the bankrupt law can, after filing his petition and the publication of notice, and before a decree of bankruptcy, withdraw and discontinue his petition, so that no further proceedings can be had upon it, upon his own motion, when the creditors appear and oppose the withdrawal. The bankrupt, by filing his petition, submits himself personally to the jurisdiction of the court, and he becomes bound to obey its orders and directions in the matter of his petition, as well before as after a decree of bankruptcy. The mere filing his petition in conformity with the statute constitutes him a bankrupt, within the purview of the act, before passing the decree, or any action upon his petition on the part of court. It is otherwise in the case of a petition on the part of the creditors against a debtor to have him decreed a bankrupt. Such debtor, under the circumstances named in the act, is liable to be made a bankrupt, but, in contemplation of law, is made one only by the decree of the court.

The application of a volunteer not only gives the court jurisdiction over the person of the bankrupt, but also over his estate; and he is therefore required by the statute to annex to his petition an accurate inventory of all his property, of every name and description, applicable to the payment of his debts. His title to this property is not actually divested until the decree; but that, when passed, has relation back to the time of filing his petition, and retroactively divests his title from the time when the petition is presented. Between the time of the presentation of the petition and the decree, no person has any power of disposition over the property. The bankrupt surrenders it for the benefit of his creditors; and it is placed in the custody of the law for the use of those who may ultimately appear to have the right. It becomes therefore the duty of the court to protect and preserve the property for their benefit. It is held by the court in trust for the creditors. The bankrupt can have no legal right of control over it, if it is suffered to remain in his possession, other than that of a mere depositary for safe keeping; and the creditors, to whom it equitably belongs, have no control except what is exerted through the orders and agency of the court. And it therefore becomes clearly the right and duty of the court to interpose for the benefit of the creditors. The court may interpose by way of injunction to prevent any person from intermeddling with the property, or it may appoint a receiver to take the possession and hold it subject to its orders. In this very case, on the petition of some of the scheduled creditors, suggesting that part of the property was liable to loss from its perishable nature, and also to be wasted by the bankrupt, a receiver was appointed to take the possession for the purpose of preserving and protecting it, and to hold it subject to the orders of the court. This appeared to me to be so clearly within the power of the court, and so manifestly its duty, that it seemed to me that such an order would be made in a proper case almost as a matter of course.

That the court has the jurisdiction after the presentation of the petition, seems to me to be not only exceedingly clear in principle, but to be absolutely necessary to enable it to carry beneficially into effect the general provisions of the bankrupt law. Now upon what ground can it be exercised, except that other persons besides the bankrupt have, in this stage of the proceedings, an interest in the matter. It is not necessary to protect the rights of the bankrupt, and a court is never invested with jurisdiction for the sake of jurisdiction itself. Its powers are given to be exerted for the purposes of general justice, to protect the rights of individuals; and the jurisdiction is given in this instance for the benefit of creditors. If the court had not this power, what would be the situation of the estate in a case of voluntary bankruptcy during the interval between filing the petition and the decree. It would remain in the hands of the bankrupt, and might be wasted and disposed of at his pleasure, without any control from any quarter. The creditors could with no safety interpose to take it out of his possession by legal process; for all attachments would be dissolved by the decree and the costs thrown upon them. The bankrupt would be entirely without restraint either in the waste or disposal of his estate. In the case of waste, the creditors would be absolutely without remedy other than a right of action against an insolvent man. In case of sale, the court might indeed follow the property into the hands of a purchaser with notice, if it could keep on the track, through the dark and intricate labyrinths of secrecy and fraud. But this would be to the creditors an imperfect and expensive remedy. The law, I think, gives them one that is shorter and less onerous, by authorizing the court on their application to lay its hand on

the property, and sequester it for their benefit in the first instance.

If the creditors have an interest in the proceedings before a decree, it will follow that they have a right to intervene in some form for the protection of their interest. They must have a remedy co-extensive with their right. And this I think, is an answer to that part of the argument, which is drawn from 7th section of the statute. That provides that, upon filing the petition, notice shall be given in the manner prescribed, "and all persons interested may appear at the time and place where the hearing is to be had, and show cause, if any they have, why the prayer of the petitioner should not be granted." It is argued that, the statute having given to the creditors the right to appear and make themselves parties in the cause for a particular purpose, this is an implied negation of their right to interpose for any other purpose. No such legislative intention, in my opinion, can be fairly inferred from the language of the statute. The act, as must be obvious to every one, who reads it with attention, considering the number and variety and importance of its provisions, is exceedingly brief and admirably condensed. With very few exceptions, it does not at all prescribe the course of procedure in detail. The 6th section gives the jurisdiction to the district court, and directs "the jurisdiction to be exercised summarily, in the nature of summary proceedings in equity." And for this purpose the court is invested with all the powers of a court of general equity jurisdiction over proceedings in bankruptcy. The law, having thus prescribed the general course of procedure, leaves the court to apply the known forms and processes of a court of equity to the matters and controversies arising under the act. The act provides for two distinct kinds of bankruptcy, voluntary and compulsory. It is only particular classes of persons that are liable to be made bankrupts against their will and by adverse proceedings, and those only on proof of particular acts commonly called "acts of bankruptcy." Under the English bankrupt system, a person becomes a bankrupt from the time of committing an act of bankruptcy; but, under the act of congress, in cases of compulsory bankruptcy he is considered as a bankrupt only from the time of the decree, and, by relation, from that of the filing the petition against him. This seems to me to be the clear result of the language of the act. It provides that "all persons being merchants," &c., "shall be liable to become bankrupts within the true intent and meaning of this act, and may on the petition of one or more creditors," &c., "to the appropriate court be so declared accordingly in the following cases," enumerating the acts of bankruptcy. It is not the act of bankruptcy, nor the petition of creditors that makes them bankrupts, within the true intent of the law, but it is the decree of the court upon the petition. But the decree has relation back to the filing of the petition, and after the decree they are bankrupts from the time when the petition is filed. Under the voluntary branch of the statute, any person may make himself a bankrupt. It provides that all persons whatsoever, with some qualification, which need not here be considered, who shall by petition, in the manner prescribed, apply "to the proper court for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act and may be so declared accordingly by the decree of such court." Section 1. No previous act of bankruptcy is required as a ground of proceeding. A mere declaration of insolvency is sufficient. The simple presentation of the petition in the manner directed by the statute is an act of bankruptcy, and constitutes the petitioner a bankrupt before any decree or any action of the court is had on the petition. The language of the statute is peculiar and strong. It is not said that the petitioner shall be liable to become a bankrupt as in the case of compulsory bankruptcy, but that on his application, and the presentation of his petition, he shall be deemed a bankrupt, within the purview of the act. It is therefore his own act, and not the decree of the court, that makes him a bankrupt.

This view of the law furnishes an answer to another part of the argument, that under the voluntary branch of the statute no person can be made a bankrupt by any adverse action on the part of creditors, and therefore that they cannot intervene for the purpose of moving for a decree. But, if this view of the statute is correct, no decree is necessary for that purpose, because he is made a bankrupt by his own act before a decree. But it is said that it is the petitioner in this case that asks for the action of the court; that he comes in as a volunteer, and has the same right as a petitioner or plaintiff in any other case to withdraw his appearance and discontinue his suit. But in all cases a party coming as a volunteer into court, in a matter where others may have an interest, must move for liberty to discontinue, and when other parties have acquired an interest in the proceedings, the court will either grant the liberty on terms, or refuse it altogether, as justice may require. Now a volunteer petitioner for the benefit of the bankrupt act comes into court, and asks to be discharged from debts, and, in order to obtain this benefit, submits himself to the jurisdiction of the court, and presents all his property to be administered in bankruptcy for the benefit of his creditors. This act alone makes him a bankrupt, and at the same time places all his property beyond the reach of his creditors, except as they may receive it through the court, under whose control it is placed. Nothing can be clearer, then, than that the creditors have an interest in the proceedings

from the moment that the petition is filed. It is only through these proceedings that they can get anything for their debts; nor can the court make the property available for them until a decree of bankruptcy is passed and an assignee appointed. Suppose the petitioner should choose not to proceed with his petition, but let it remain in suspense, with his property thus locked up from his creditors. Should he be permitted thus to hold them at bay according to his own pleasure, that he may negotiate with them on that vantage ground, and impose such terms as he pleases? I think not. He has chosen his part, and he cannot be bankrupt or not at his own pleasure, or as he may find it convenient. He has brought his creditors here to seek such satisfaction for their demands as his estate will give, and, having by his own free choice brought them here, in this court they have rights as well as he. If he does not choose to proceed, they may intervene for their own interest to speed the cause by a motion for a decree, or for the appointment of an assignee, or for any other matter necessary for the protection of their rights. My opinion is that a voluntary bankrupt cannot withdraw his petition at his own pleasure. In the case of Randall [Case No. 11,550], it was decided by the circuit court that proceedings in such a case may be stayed on the motion of the petitioner, on good cause, before a decree of bankruptcy. In that case the cause shown was that he had settled with all his creditors, and no person appeared to object. But the reasoning of the court clearly implies that he cannot withdraw without showing good reason. In this case he alleges only that he has settled with nearly all.

Case No. 6,110a.

In re HARRIS.

[See Case No. 6,110.]

Case No. 6,111.

In re HARRIS et al.

[6 Ben. 375.] [1]

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

PROCEEDINGS IN DIFFERENT DISTRICTS.

A firm was adjudged bankrupt, on petition of creditors, without opposition, the warrant was delivered to the marshal, a meeting of creditors was held, and an assignee chosen, who entered on his duties. Thereafter, one of the creditors applied to set aside all the proceedings as irregular, under the 16th general order, because he had, previous to the filing of this petition against the bankrupts, filed a petition against them in another district: *Held*, that the proceedings in this court were regular, notwithstanding the prior filing of the other petition, and that there was no ground for setting them aside.

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

[In bankruptcy. In the matter of William Harris & Co.]

BENEDICT, District Judge. This is a motion by a creditor to set aside the proceedings which have been had in this case. It appears that certain creditors of the firm of Harris & Co. duly filed their petition in this court, within whose jurisdiction the majority of the members of the firm reside, asking that said firm be adjudged bankrupts by this court. Upon the return of the order to show cause, no opposition being made, the firm proceeded against was adjudged bankrupt by this court, and a warrant duly issued to the marshal. Afterward, a meeting of creditors was held, at which an assignee was duly chosen, who thereafter entered upon his trust.

It is not doubted that this court had jurisdiction to entertain the petition and make the adjudication of bankruptcy. No objection whatever is made to the assignee chosen by the creditors; and, upon their face, all the proceedings taken in this court were regular. The attention of the court was in no way called to the ground of the complaint made by the party here moving, until after the adjudication had been made, and the assignee chosen by the creditors had entered upon his duties.

In this position of the case, one of the creditors appears before the court and shows that, prior to the filing of the petition in this court, he had filed a petition in the Southern district of New York, to have the same firm which, as is alleged, did business in the Southern district, there adjudged bankrupt, to which petition an answer has been filed, and the issues so raised are there pending, undecided and untried.

Upon these facts, it is now claimed by the said creditor that all the proceedings in this court should be set aside as irregular, because of the 16th general order. If this motion had been made or a stay applied for before the adjudication of bankruptcy had been made and an assignee elected, the way to relief would have been easy. And if it were now suggested, that any creditor had suffered detriment in the election of an improper assignee, prompt relief in that regard would be afforded; but, in the absence of any other fact than the mere pendency of a prior petition in another district, which is there being contested, it appears to me that it would be worse than useless to set aside these proceedings, and turn the creditors of this firm over to try the question of its bankruptcy upon another contested petition. No possible benefit to any one from such a course has been suggested on this motion.

I should, therefore, upon the papers before me, deny the motion as needless, even if it appeared that the adjudication was irregular because a prior petition was pending in another district; but I do not see how

the proceedings here can be said to be irregular. General order 16 does not prevent a creditor from taking an adjudication by default, because some prior proceeding, instituted by another creditor, is in another district being defended. The 42d section of the act [of 1867 (14 Stat. 537)] requires the court, upon default, to pronounce an adjudication, and forthwith issue the warrant; and general order 16, while it declares that proceedings on a second petition may be stayed, also declares that the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same be closed.

Here an adjudication was made without any application for a stay, and without any objection by any party, and it must be considered to have been regularly made. I regret that no application for a stay was presented to me before an adjudication had been entered and the title of the assignee become fixed, as then all possibility of confusion could have been avoided; but in the present state of the case, after an adjudication made, no ground for setting aside the proceedings is afforded.

The motion must, therefore, be denied, for the reason above stated, without considering the effect of the conceded fact that the petition filed by the party here moving cannot be heard in the Southern district, because of the pendency there of a petition still prior to his, also unheard. The motion is accordingly denied.

[In Case No. 6,112 a discharge of the bankrupt was decreed from the Southern district of New York.]

Case No. 6,112.

In re HARRIS.

[2 N. B. R. 105 (Quarto, 35).] [1]

District Court, S. D. New York. Sept. 17, 1868.

BANKRUPTCY—DISCHARGE—SPECIFICATIONS.

When the specifications filed in opposition to the discharge of a bankrupt are not sustained by the proofs, a discharge will be granted whenever the register shall certify that the bankrupt has conformed to the requirements of the bankrupt law [of 1867 (14 Stat. 517)].

In bankruptcy.

BLATCHFORD, District Judge. None of the specifications filed by the Leather Manufacturers' National Bank are sustained by the proofs, nor is any ground shown for withholding a discharge. A discharge will, therefore, be granted whenever the register shall certify conformity.

[A motion to set aside the proceedings in the Eastern district of New York was denied in Case No. 6,111.]

[1] [Reprinted by permission.]

Case No. 6,113.

HARRIS v. ALEXANDER.

[4 Cranch. C. C. 1.] [1]

Circuit Court, District of Columbia. April Term, 1830.

SLAVE—RESIDENCE WITHIN COUNTY OF WASHINGTON—FREEDOM.

The right of a citizen of the United States to import a slave into the county of Washington under the second section of the Maryland act of 1796, c. 67, is forfeited by a sale of the slave within three years after the importation.

[Cited in Mary v. Talburt, Case No. 9,192.]

Petition for freedom [by Christopher Harris, a negro]. Verdict for the petitioner. Motion for new trial, on the ground that a sale within three years after importation into the county of Washington does not, per se, give a right to freedom, but is only evidence of importation for sale; and it was agreed that if the court should be of that opinion, a new trial should be granted; and the counsel referred to the case of Jordan v. Sawyer [Case No. 7,521], in this court, in Washington, at April term, 1823, and Maria v. White [Id. 9,076], at December term, 1829. The slave was brought into the county of Washington, with the defendant [Nelly Alexander], to reside; but the defendant sold him before the expiration of three years. By the first section of the act of Maryland of 1796, c. 67, it is enacted, "That it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall cease to be the property of the person or persons so importing," &c., "and shall be free." By the second section it is provided, "That it shall be lawful for any citizen or citizens of the United States, who shall come into this state with a bona fide intention of settling therein, to import or bring into this state, at the time of his or her removal into this state, or within one year thereafter, any slave or slaves, the property of such citizen at the time of his or her said removal," &c. And by the third section it is further provided, "That nothing herein contained shall be construed to enable any person or persons so removing to sell or dispose of any slave or slaves, imported by virtue of this act, or their increase, unless such person, &c., shall have resided within this state three whole years next preceding such sale, except in cases of disposition by will, and dispositions by law for bona fide debts, or consequent upon intestacy."

Mr. Taylor, for petitioner. The petitioner having been imported "to reside," is entitled to his freedom, unless the defendant was protected from the forfeiture of the first section by being within the proviso of the sec-

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

ond section; and she is not protected by the second section, if the petitioner was sold within three years, contrary to the third section.

Mr. Mason, for defendant, submitted the case to the court without argument.

THE COURT (nem. con.) refused the new trial; being of opinion that the third section of the Maryland act of 1796, c. 67, is a qualification of the license to import given by the second section; that is, you may bring your slaves with you to reside, provided you do not sell within the three years. If you sell within the three years you forfeit your privilege under the second section. Judgment for the petitioner.

HARRIS (ALEXANDER v.). See Case No. 168.

Case No. 6,114.

HARRIS et al. v. BABBITT.

[4 Dill. 185.] [1]

Circuit Court, W. D. Missouri. 1877.

OFFICIAL BOND OF CASHIER—LIABILITY OF SURETY IS LIMITED TO HIS OFFICIAL TERM.

1. Suit upon the official bond of the cashier of a savings bank, incorporated under the laws of Missouri. The statute provided that the officers of the bank should hold their offices for "one year, and until their successors are elected and qualified;" but the statute did not require a bond as part of the qualifications of such officers. A by-law passed by the directors, required the cashier to give bond. Harris was elected cashier by the directors, and on January 16th, 1872, he gave a bond, conditioned for the "faithful discharge of his duty, in accordance with law, and the charter and by-laws of the bank." He was re-elected cashier, January 16th, 1873, but gave no new bond, and was allowed by the directors to continue to act without doing so. *Held*, that the sureties were not liable for the cashier's defaults in February and March, 1873.

[Cited in Scott Co. v. Ring, 29 Minn. 405, 13 N. W. 184; Savings Bank v. Hunt, 72 Mo. 601; State v. Ranson, 73 Mo. 92.]

2. His term of office was annual, and the sureties are not liable for defaults happening after another election the next year, and the lapse of a sufficient time to qualify by giving a new bond.

[Error to the district court of the United States for the Western district of Missouri.]

This was an action on the official bond of the plaintiff in error, John S. Harris, as cashier of the Union German Savings Bank, of which the defendant in error [James C. Babbitt] is the assignee in bankruptcy. It is alleged in the petition that the Union German Savings Bank was a corporation organized under the laws of the state of Missouri; that said John S. Harris was, on January 14, 1872, elected cashier of said bank; that on January 16, 1872, he, as principal, and [Seth E.] Ward and [Henry] Muhlbach as sureties, executed their bond in the sum of $25,000, and on the 7th of February, 1872, delivered the same to the bank; that the condition of said bond was, "that if said Harris shall faithfully, honestly, and impartially discharge all his duties as such cashier, in accordance with law, and the charter and by-laws of the bank, then the bond to be void, otherwise to remain in full force and effect." The petition assigned the various breaches of the bond. The answer is a general denial of the breaches set forth in the petition. It alleges that the bond was delivered on the day it bears date, and not on the 7th of February, 1872; that Harris was elected cashier on the 14th of January, 1872, for one year, and no longer; that on the 14th of January, 1873, a board of directors of the bank was elected; on the 16th of January, 1873, the board, at its first meeting, duly elected a president, vice-president, secretary, and cashier, for another year; that at said date, and by said board of directors, said Harris was again elected cashier of said bank for the ensuing year; that, in pursuance of said election, and with the knowledge of the board of directors, all the officers, including cashier, entered upon the discharge of their duties as such officers, and continued to perform their duties until the corporation was adjudged a bankrupt. The replication denied that Harris acted under the pretended election in 1873, but insisted that, from January 14, 1872, and up to March 13, 1873, he was acting under the first bond and first election; that he never gave bond, or otherwise qualified, under the election of 1873; that no successor in office to said Harris was ever elected or qualified. On the trial, the plaintiff read in evidence a resolution of the board, made on the 11th January, 1872, which is as follows: "Resolved, that the bonds required from the different officers for the ensuing year be as follows: Cashier, $25,000; assistant cashier, $20,000; receiving teller, $15,000; paying teller, $15,000; bookkeeper, $5,000; assistant bookkeeper, $3,000; messenger, $2,000; attorney, $1,000." The defendants proved, from the record of the board of directors, that on January 11, 1872, the "new board-elect met, pursuant to requirements of the by-laws," and "proceeded to the election of permanent officers for the ensuing year, with the following result," and, among others, Harris was elected cashier. On January 14, 1873, a new board was elected, said Harris being one of them; and, on January 16, 1873, this new board met, took the oath, elected temporary officers, and then proceeded "to elect the regular officers to act as such for the ensuing year," and, among the others, Harris was again elected cashier, and the board adjourned to the next regular meeting, "to receive the bonds of the different officers as elected." There was no meeting of the board held, as the by-laws required, on the first Tuesday of February or March, 1873, and the first meeting of the board after the election of officers, on the 16th January, 1873,

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

was held on the 13th March, 1873. None of the officers elected on the 16th January, 1873, gave bond for that year. The jury, under the instruction of the court, found a verdict for the plaintiff for $19,168.15, but they specially found that the two breaches of the bond, on which the verdict was based, did not severally occur until February 11, 1873, and March 12, 1873. Judgment was rendered on the verdict, and the sureties sued out this writ of error. The controlling question in the case was, whether the sureties on the bond of the cashier, executed on the 16th day of January, 1872, were liable for his default, on the 11th day of February, and the 12th day of March, 1873. The district court [case unreported] instructed the jury that they were liable. The other material facts appear in the opinion of the court, which was orally pronounced, and is reprinted from the notes of the short-hand reporter.

F M. Black and James F. Mister, for plaintiffs in error.

Henry Flanagan and Karnes & Ess, for defendant in error.

DILLON, Circuit Judge. This is an important case, alike in the amount and in the principles involved. It has been very fully argued by counsel, who, with commendable industry, on one side and the other, have brought before me all the authorities touching the question on which the case turns. If my engagements would permit, I would like to look into it further, and reduce my views to writing. As I may not get time at an early date to do this, and as it is not likely that further examination and reflection would change my views, I proceed to dispose of the case at this time.

The plaintiff below, Babbitt, is the assignee in bankruptcy of the Union German Savings Bank, and Harris and the other defendants, as his sureties, are sued in respect of the alleged liability of Harris, on his official bond, as the cashier of that bank. The sureties alone defend. The bank is a savings bank, incorporated under the laws of this state, and the statute contains a provision applicable to this controversy, to which I will refer presently. The sureties make defence, and the leading question in the case is, whether they are liable on this bond for the default of their principal, for breaches of its condition by him, after the term for which he was elected had expired; and that depends, primarily, on the question whether his election, in 1872, and his term of office, are to be considered as annual. He was elected cashier on January 14, 1872, for one year, or, if the statute applies, for one year, and until his successor is elected and qualified. On January 16, 1873, there was another election, and he was again elected by the directors his own successor, but he never gave any new bond. This suit is on the bond originally given, dated January 16, 1872.

The by-laws of this institution provided for monthly meetings of the board of directors, and if these meetings had been held, there would have been a regular meeting of the board of directors on the first Tuesday of February after this new election, on January 16, 1873, and another such meeting in March. Several breaches of this bond are alleged, but all of them were after the time fixed for the February, 1873, meeting.

Now, the question is, whether the sureties on the bond, given in January, 1872, are liable for these breaches. The only provision of statute applicable to this question, is section 3 of the act in relation to savings banks [Laws Mo. 1877, p. 29], which is as follows: "The affairs and business of any such association shall be managed and controlled by a board of directors, not less than five nor more than thirteen in number, from whom shall be designated by themselves a president, a cashier, and secretary, who shall hold their offices for one year, and until their successors are duly elected and qualified." There is no provision of statute, so counsel on both sides state, in terms requiring the cashier to give a bond, but there is a provision of statute authorizing the directors to make by-laws, and these by-laws were made by the directors, who elected the cashier, who were the managing officers of the institution, and not by the stockholders, or by the body of the corporation at large. Among other by-laws ordained by the directors, was one to this effect: "The officers of the bank, before entering on the duties of their respective offices, shall execute to the bank an obligation, with two or more sureties, as follows: 'Cashier, $25,000,'" etc.

The bond in suit, dated January 16, 1872, is in the penal sum of $25,000, with this condition: "The condition of the above obligation is such, that whereas the above named John S. Harris has been duly elected cashier of the Union German Savings Bank, of Kansas City, Missouri, now, therefore, if the said John S. Harris shall faithfully, honestly, and impartially discharge all his duties as such cashier of the Union German Savings Bank, of Kansas City, Missouri, in accordance with the provisions of law and the charter and by-laws of the said bank, then this bond to be null and void; otherwise to remain in full force."

On the trial, the defendants, the sureties, asked the court to instruct the jury as follows: "That the office of the defendant Harris, as cashier, is an annual office, and if said Harris was elected cashier on the 16th of January, 1873, that is, after the year for which this bond was given, and if he was allowed to go on during the remainder of the said month, and in the months of February and March following, without giving a new bond, then these sureties are not liable for acts of said Harris after the said new election;" which the court refused, and gave this: "I instruct you that the bond sued on

is governed by the statute of this state relating to savings banks, and that this bond, under the statute, should be so construed as to produce no interregnum in the office of cashier. I therefore instruct you, these sureties are liable for said acts of Harris, cashier, up to the commencement of the month of March, 1873."

Now, then, in the first place, as to the authorities in relation to the official bonds of public officers: Under the statutes of various states in this country, public officers are elected pursuant to statutory provisions, which fix their term of office, and in many cases they are elected annually. That is the case in all the New England states. In the New England towns there is an annual meeting, at which the officers are elected, where the citizens assemble, and elect their town officers in a government of pure democracy. They are elected annually, at these annual meetings, and there is usually in these states a provision to prevent an interregnum, that these officers shall continue to hold their offices, not only for a year, but until their successors are elected and qualified.

A great many years ago, in Massachusetts, the question arose, which is presented in this case, whether, under such a provision, the sureties of an officer elected for a year, but where the default in his official duties occurred after the year, but before his successor had qualified, were liable in respect to such default. It came before the supreme court of Massachusetts in Bigelow v. Bridge, 8 Mass. 275, and that court decided that there was no such liability. The same question arose afterwards in Chelmsford Co. v. Demarest, 7 Gray, 1, when Chief Justice Shaw was on the bench, and a thorough examination of it was made. The court held the same way—that the office was annual, and that where the condition of the bond was that the officer should hold until his successor was elected and qualified, that such a condition did not cease to make it an annual office, so far, at all events, as the sureties were concerned. That ruling has been accepted, wherever it has come in question, by all the New England states. In New Hampshire (Dover v. Twombly, 42 N. H. 59), in a fully considered opinion, and in Connecticut (Welch v. Seymour, 28 Conn. 387) the views of the supreme court of Massachusetts have been followed, and they have been adopted in other states. See Moss v. State, 10 Mo. 338; State Treasurer v. Mann, 34 Vt. 371; Mayor, etc., v. Horn, 2 Har. (Del.) 190; South Carolina Ins. Co. v. Smith, 2 Hill (S. C.) *590 (258); South Carolina Soc. v. Johnson, 1 McCord, 41; Commissioners of Public Accounts v. Greenwood, 1 Desaus. Eq. 450; Wapello Co. v. Bingham, 10 Iowa, 40; 38 N. J. Law, 254; Kingston Mut. Ins. Co. v. Clark, 33 Barb. 196.

In some of the states, notably North Carolina, Indiana, perhaps Maryland, possibly Mississippi, where the same question has come up, the courts have decided the other way, and have held, under the clause that "he shall hold until his successor is elected and qualified," that there may be a liability on the sureties for a term extending beyond the year. State v. Berg, 50 Ind. 496; Thompson v. State, 37 Miss. 518; Placer Co. v. Dickenson, 45 Cal. 12; State v. Daniel, 6 Jones (N. C.) 444; Sparks v. Farmers' Bank [3 Del. Ch. 274]. But I must say, in regard to these decisions, that those courts do not seem, in general, to have had their attention called to the reasoning on the other side, and are not as fully considered, in my judgment, as the first line of decisions to which I have referred.

But, when we look at the peculiarities of the present case, I think it can be distinguished from even the latter line of decisions, and that, if they were admitted to be correct in respect to public officers, still it could be possible, on just and solid grounds, to distinguish this case from those. Now, what is this action, when we get to the bottom of it? The plaintiff is the assignee in bankruptcy of this bank, and the legal rights of the parties are precisely the same, in my judgment, as though this bank had never been thrown into bankruptcy; as if this default had occurred, and the bank had continued to be solvent, and the bank itself had brought this same action instead of the assignee in bankruptcy. Nothing is clearer than that, under the Missouri statute, it is contemplated that these officers shall be elected annually, for such is the express provision, that there shall be designated a cashier, who shall hold his office for one year, and until his successor is elected and qualified; and the provision is, there shall be an annual election, that the directors shall be elected annually, and the directors are annually to select their own cashier. A cashier that is satisfactory to one board of directors may not be to another, and they are to elect him each year. In accordance with this provision, they held their election January 16, 1873, and they elected a new cashier—that is to say, they elected Mr. Harris his own successor, but neither he nor any of the other officers gave any new bond.

Now, what is the object of the bond in suit? It is not like official bonds, which are intended to protect the public, and where, unless the provisions of the statute are complied with, the public are comparatively helpless. If a public officer gives an insufficient bond, a citizen may know it, but how can he help it? In this case, however, the bond is required for the indemnity of the private corporation. Who were managing the corporation? The directors. Where is the fault in this case? With whom rests the laches that led to this default? The retention of this cashier without giving a bond—whose fault is that? Who neglected their duty in that regard? It was the officers of this corporation—the men entrusted by the stockholders to manage its affairs. They are in fault for

not requiring the bond. Now, then, as between the assignee representing this corporation, whose agents are to blame—who shall suffer? The sureties who engaged for Harris' performance of his duties for one year, or until his successor is elected and qualified, were blameless, and cannot reasonably be supposed to have intended to undertake an obligation of interminable duration; for if they can be held for what happened in March, 1873, they can be held for what happened in December, 1873, and so on indefinitely. Who is to blame? Who ought to suffer? It is to be observed in this case that the statute does not require a bond. It says, indeed, that officers shall hold their office until their successors are duly elected and qualified. How qualified? It was conceded in the argument, that if this board of directors, in January, 1873, had passed a by-law or resolution, "we dispense with bonds," the bank would have been bound by it; and still, it is perhaps true that this body, having enacted a by-law requiring bonds, they could not be dispensed with without a repeal of the by-law, although the question of estoppel, or waiver of the by-law, might arise, where the directors are the very parties having full control of the matter; but it never could arise if the statute had in terms required a bond.

Under these circumstances, whatever may be the true rule in respect to annual terms of public officers, where it is expressly required by the statute that there shall be qualification by giving of a bond, I am of opinion that, on the facts of this case, these sureties ought not to be held liable for defaults which happened at a time, in February, 1873, after a monthly directors' meeting had passed, and these men had failed to require the new cashier, he being his own successor, to give bond. The judgment of the district court is reversed, and a new trial ordered. Reversed.

Case No. 6,115.

HARRIS v. BERRY.

[1 Hayw. & H. 272.] [1]

Circuit Court, District of Columbia. Oct. 18, 1847.

WITNESS—IMPEACHMENT OF CHARACTER—EVIDENCE.

1. On the question whether the plaintiff's witness can be cross-examined by the plaintiff to discredit himself by confessing on oath that he had made a different and inconsistent statement of the matter, *held*, the plaintiff cannot, for the purpose of impeaching the general character of his witness for veracity, give in evidence facts which would not be admissible upon a direct examination-in-chief.

2. There is no difference in principle between giving general evidence of particular facts, the effect of which is to destroy the general character of the witness for veracity, and which would not be admissible for any other purpose.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Quantum meruit for carpenter's work and labor upon the defendant's house, in Prince George's county, Maryland. Verdict for the plaintiff [William A. Harris] for $1,500.

The defendant [Thomas Berry] moved the court for a new trial—(1) on the ground that the verdict was against the law and the evidence; (2) that the court erred in admitting evidence to go to the jury against the objection of the defendant.

Brent & Brent, for plaintiff.
Joseph H. Bradley, for defendant.

BY THE COURT (nem. con.). This is a motion by the defendant for a new trial on the ground that the court permitted the plaintiff's counsel, who had been surprised and disappointed by his witness, who testified that certain charges in the plaintiff's account were too high, although he had before examined the account and declared it to be correct and that the amount charged was reasonable; whereupon the plaintiff's counsel asked the witness whether he had not before examined the account and made no objection to the prices charged. The counsel for the defendant objected that if the witness answered in the affirmative it would not be substantive evidence in the cause, but would only go to the credit of the plaintiff's own witness. After a long argument the court permitted the question to be put to the witness and aswered, chiefly upon the authority of Greenleaf on Evidence (§ 444), and the cases there cited. No bill of exceptions was taken. The question is whether the plaintiff's witness can be cross-examined by the plaintiff to discredit himself by confessing on oath that he had made a different and inconsistent statement of the matter. All the cases, therefore, which show that the plaintiff may prove by other witnesses that his first witness is mistaken as to the fact, or that the fact was not as stated by the witness, or that the first witness has contradicted himself, may be laid aside as not applicable to the case.

The first and principal case relied on by the plaintiff's counsel is Wright v. Beckett, 1 Moody & R. 414, in which the court, consisting of Lord Chief Justice Denman and Baron Bolland, differed in opinion, so that no order was taken upon the rule to show cause why a mistrial should not be granted upon the ground that the evidence of the plaintiff's attorney, who proved that the plaintiff's witness (Warren) had previously made a different statement inconsistent with his testimony at the trial, had been improperly received. The argument of Lord Denman was to show that it was competent for the plaintiff to prove by other witnesses that the plaintiff's witness, who had surprised the plaintiff by his testimony, had previously made another statement inconsistent with his testimony at the trial. The question between Ch. J. Denman and Baron Bolland was not whether the plaintiff might cross-examine his own witness, and ask him whether he had not previ-

ously given a different account of the facts to the plaintiff's attorney, but whether it was not competent for the plaintiff to prove the same thing by other witnesses. For although the chief justice before whom the cause was tried at nisi prius had permitted that question to be put to the plaintiff's witness, yet in the subsequent argument between the chief justice and Baron Bolland, no notice is taken of the difference between proving the inconsistent statement of the plaintiff's witness. When Lord Denman, at nisi prius, permitted the plaintiff to ask his witness whether he had before given a different account of the facts, Sergeant Jones objected, on the ground that the obnoxious tendency of the question put by the plaintiff was to discredit his own witness, and he might have said that such was not only the tendency, but the object of the question; for the question was not pertinent to the issue, and the answer could not be received as substantive evidence in the cause.

In the cases cited by Ch. J. Denman, in which the party calling a witness attempted to prove by other witnesses, and not by cross-examination of his witness. The right then of the plaintiff to cross-examine his own witness in such a case rests upon Lord Denman's decision at nisi prius in this case, contradicted by the opinion of Baron Bolland, who stated the rule, as it seemed to him to be, "that a party in a cause is not to be permitted to give evidence of a fact for the purpose of discrediting his own witness, unless such fact is relevant to the issue, and so, per se evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness." And in page 432 Baron Bolland said: "With the exception of the opinion of the learned judges in Rex v. Oldroyd [Russ. & R. 88], the authorities are uniform in establishing that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue. It was open to the plaintiff to do so in the present case, but he was not at liberty to prove that his witness (Warren) had previously made a different statement to the attorney, because that was a matter not relevant to the issue in the cause." Mr. Greenleaf (volume 1, § 445), says: "Whether the right of cross-examination, i. e., of treating the witness as the witness of the other party, and of examining by leading questions, extends to the whole case, or is to be limited to the matter upon which he has already been examined in chief, is a point upon which there is some diversity of opinion." This seems to be an admission that he may be cross-examined to the matters upon which he has been already examined in chief. But when the plaintiff asks his own witness whether he has not made a contradictory statement, is that a cross-examination to a matter upon which he has already been examined in chief? If it is, yet it is not upon a matter pertinent to the issue, and therefore comes under the rule mentioned by Baron Bolland. In section 449 Mr. Greenleaf says: "It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby discrediting his testimony; but it is not irrelevant to inquire of the witness whether he has not on some former occasion given a different account of the matter of fact to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him." This applies only to the cross-examination of the witness of the opposite party. In section 455 he says: "But where the question is not material to the issue, but is collateral and irrelevant, being asked under the license allowed in cross-examination, it stands on another ground. In general, as we have already seen, the rule is that upon cross-examination, to try the credit of a witness, only general questions can be put, and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterward by calling another witness." This also applies to the cross-examination of the witness of the opposite party. And again he says: "This rule is adhered to even in the cross-examinations of witnesses; the party not being permitted, as will be shown hereafter (sections 448–450), to ask the witness a question in regard to a matter not relevant to the issue, for the purpose of afterward contradicting him." In the case of Alexander v. Gibson, 2 Camp. 555, the plaintiff called another witness to contradict the testimony of his first witness. The question was not made as to the right of the plaintiff to cross-examine his own witness and so to discredit him.

Starkie (1842, vol. 1, p. 211) says: "The credit of a witness may be impeached, either by cross-examination, subject to the rules already mentioned, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence as to facts themselves." This also refers to adversary witnesses. "It is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue, for this would cause the inquiry, which ought to be single and confined to the matter in issue, to branch out into an indefinite number of issues." Questions put to the witness himself upon cross-examination, are not, it may be observed, open to this objection, since his answer is conclusive as to all collateral matter, i. e., matters not pertinent to the issue. "In the next place the witness may be contradicted by others who represent the fact differently or by proof that he has said or written that which is inconsistent with his present testimony." This also refers to adversary witnesses. In page 216 he says: "And even

where a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses." In the case of Alexander v. Gibson, before cited, it was held that the party might contradict his own witness by proving a material fact relevant to the issue. In pages 216, 217, Mr. Starkie says: "Doubt has been entertained whether it be competent to a party to impeach the testimony of his own witness as to a particular fact by proof that on a former occasion he gave a different account, and so to contradict him by his own statement;" and, further, he says: "It is difficult to come to the conclusion that the party having called the witness is, as it were, estopped from afterward so impeaching his credit." And, again, Mr. Starkie says, in page 215: "The ordinary rules as to the examination of an adverse witness, supply an analogy in favor of the affirmation if the witness is apparently an adverse one." From all of these remarks of Mr. Starkie it seems that his opinion is that it is competent to a party to discredit his own witness by proving upon the party's cross-examination of his witness that he had previously made a different statement of the fact. It seems also to be the opinion of Mr. Greenleaf that it is competent for a party to prove that a witness whom he had called, and whose testimony is unfavorable to his cause had previously stated the facts in a different manner.

In Dunn v. Aslett, 2 Moody & R. 122, Lord Denman, C. J., said: "In Wright v. Beckett I expressed an opinion, formed after much consideration, that the plaintiff might show that the witness had given a different account of the matter; by which different account he had been induced to call him. I remain of that opinion, and I think on the same principle a party calling a witness may examine him as to any fact tending to show he has been induced to betray that party." In Rex v. Oldroyd, Russ. & R. 88, the witness was not called by the prosecutor, and therefore was not his witness. In Ewer v. Ambrose, 3 Barn. & C. 746, it was held that if the witness of the party disappoints him he may prove his case by other witnesses to discredit him generally. It could only go to discredit the witness as to a particular fact relevant to the issue, to wit, the existence of the partnership. In Bradley v. Ricardo, 8 Bing. 57, it was decided that "where a party being surprised by a statement of his own witness calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated by the judge." In Holdsworth v. Mayor, etc., of Dartmouth, 2 Moody & R. 153, at nisi prius before Parke, B., he refused to permit the defendant to discredit his own witness by proving that the witness had made to the attorney a different and contradictory statement. Parke, B., said: "Upon consideration I think the evidence inadmissible. My doubt at first was whether, as the fact was elicited in cross-examination, the witness was not made for this purpose the witness of the plaintiff; and whether, as to this particular fact, not asked to in chief, the party calling him might not show he had given a different account. I never had any doubt but that the opinion of Brother Bolland was right in the case cited (Wright v. Beckett), if the fact were asked to in the examination-in-chief; as by calling the witness you take him for better and for worse, and must not throw discredit on him. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is to discredit the witness. It goes to his general credit to show that he has given a different account of the matter before, and it is a clear rule that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavorable evidence to call testimony to discredit him." In Winter v. Butt, 2 Moody & R. 357, a witness called for the plaintiff failed to prove the facts expected, and on cross-examination stated very important facts for the plaintiff. Crowder, for the plaintiff, in re-examination proposed to ask her as to a statement she made to the plaintiff's attorney. This was objected to, and Wright v. Beckett was mentioned.

ERSKINE, District Judge. "I am decided of opinion that you cannot ask the question. Mr. Baron Parke has, I know, so ruled, 2 Moody & R. 133, and I recollect ruling the same way myself on the Oxford circuit, with the approbation of Justice Patterson, whom I consulted; and I have since talked with several of the judges on the point, and find they are generally of the opinion that Mr. Baron Parke's decision is right." In DeLisle v. Priestman, 1 Browne [Pa.] 182, although the witness was called for the plaintiff, it was competent to the plaintiff to prove he was mistaken in any part of his evidence by calling other witnesses to rectify the mistake, or to swear that on other occasions he had related the story in a different manner. There it would seem that the mistake was of an important matter relevant to the issue. In Queen v. State, 5 Har. & J. 232, the prosecutor was permitted by the county court (Chase, C. J., and Ridgley, J.), to give evidence that his witness had made a contradictory statement to impeach his credit, but that point was not decided, because, as a bill of exceptions would not lie in a criminal case, the court said the question was not regularly before them, and they can only say, "If a similar point had been presented to them they would have given a different decision." In Cowden v. Reynolds, 12 Serg. & R. 283, it was decided that where a party is obliged to call a subscribing witness, he may contradict him as to a particular fact showing that he had told a different story at another time; the question did not go to impeach his general character for veracity, but

only as to a fact pertinent to the issue. In Brown v. Bellows, 4 Pick. 194, the witness was called by the plaintiff from the necessity of the case, he being a subscribing witness, and the court permitted the plaintiff by another witness to disprove the fact which his witness had stated. In Jackson v. Leek, 12 Wend. 106–108, the plaintiff, being disappointed by his witness, was permitted to prove his case by other witnesses. And Savage, C. J., said that "the plaintiff, by disproving the facts sworn by his witness Wooley, did not violate the rule which prevents a party from discrediting his own witness. He did not attack the character of Wooley, but proved the facts to be different from those stated by Wooley. This he was at liberty to do. If this plaintiff calls the subscribing witness to an instrument, who disproves it, the plaintiff may prove it by other witnesses." In Stockton v. Demuth, 7 Watts, 39, the supreme court of Pennsylvania held that a party will be permitted to impeach the character or testimony of his own witness by other testimony necessarily tending to that effect and for that purpose; but having called a witness who disproved his case, he is not thereby precluded from resorting to other evidence to support it. And that a party, by calling and examining a witness accredits him as competent and credible, and is estopped from averring the contrary. In delivering the opinion of the court, Sergeant, J., said: "It seems to be a principle of law that a party cannot discredit the testimony of his own witness and show his incompetency, for it would be unfair that he should have the benefit of the testimony if favorable, and to be able to reject it if the contrary. When, however, the party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who may give contradictory testimony, as in the case of Lowe v. Jolliffe, 1 W. Bl. 365. It would seem, however, that he cannot contradict his witness by adducing any act or declaration of this witness himself of a contrary tenor," "because its only effect would be to impeach the credibility of the witness," although it was competent to the party to prove the fact by other witnesses. In Brown v. Osgood [25 Me. 505], July, 1846, the plaintiff had taken and filed a deposition and the witness was cross-examined by the plaintiff. The defendant declined using it; the plaintiff was compelled to use it to prove certain facts brought out by the cross-examination. The deposition proved a fact necessary for the defence. The supreme judicial court of Maine decided that the cross-examination must be considered as the examination-in-chief, and that the plaintiff had a right to offer evidence to disprove that fact, by showing that the witness was mistaken. In Reg. v. Ball, 8 Car. & P. 745, anno 1839, Erskine, J., at Stafford assizes, said: "You cannot put in evidence for the purpose of discrediting your own witness. You may call other witnesses to disprove the fact denied by this witness, and incidentally contradict her and show her to be unworthy of credit, but you cannot call a witness to give evidence not otherwise admissible, for the purpose of discrediting your own witness. In Reg. v. Farr, 8 Car. & P. 768, the prosecutor stated that he had other witnesses to prove that the statement made by his witness was not true, and proposed to cross-examine his own witness. Patterson, J.: "I cannot allow you to do that; he is your witness, and you must treat him as such." In the case of U. S. v. Jones [Case No. 15,494], the marginal note says: "A party cannot discredit his own witness by proving that on a former occasion he swore differently from what he now sworn. Quere, whether under some circumstances there be an exception to the rule." (But such a decision is not found in the text of the report.)

Mr. Bradley, for the defendant, contends that a party cannot give evidence contradictory to the testimony of his own witness, unless by proving facts which would be substantive evidence pertinent to the issue, if offered in the examination-in-chief.

The question arising from the proceedings in this cause, and upon the motion for a new trial, is, I think, brought down to this: Whether according to the established rules of evidence it is competent for the plaintiff, whose witness has disappointed him in his testimony, to cross-examine his own witness as to matters not pertinent to the issue (and which could not be given in evidence upon a direct examination-in-chief), for the sole purpose of discrediting his own witness. The authorities cited in support of the affirmative of this question are: Lord Ch. J. Denman, in Wright v. Beckett, 1 Moody & R. 414. That opinion, however, is no authority, because the court, consisting of two judges only, Lord Denman and Baron Bolland, differed in opinion, and the point was not decided. Lord Denman admitted that "others of great weight and authority" differed from him in opinion. He cited the following passage from Bull. N. P. 297: "A party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness proves facts in a cause which makes against the party who called him, yet he may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness; but the impeachment of his credit is incidental and consequential only." But he did not consider that authority applicable to the case then be-

fore him. The opinion of Baron Bolland is sustained by Justices Bayley, Oldroyd and Littledale in Ewer v. Ambrose, 3 Barn. & C. 746; by Parke, Baron, in Holdworth v. Mayor, etc., of Dartmouth, 2 Moody & R. 153; by Patterson, J., so stated by Erskine, J., in Winter v. Butt, who also said that he had since talked with several of the other judges on the point, and find they are generally of opinion that Mr. Baron Parke's decision is right; and by Erskine, J., in Winter v. Butt, 2 Moody & R. 357. The decision of Lord Ch. J. Denman in Wright v. Beckett, 1 Moody & R. 414, permitting the plaintiff's counsel to cross-examine his own witness by asking him "whether he had not given a different account of the facts to the plaintiff's attorney two days before," is not supported by the cases cited. The question is not whether the plaintiff may contradict his own witness by proving facts pertinent to the issue, and which would be substantive evidence in the cause, but whether he shall cross-examine his own witness as to a fact not relevant to the issue (and which could not be permitted to be given in evidence in the cause,) merely to throw a general discredit over the witness. This would not be permitted to be done by the counsel for the defendant and a fortiori should not be permitted to be done by the counsel for the plaintiff. 1 Starkie, Ev. (Ed. 1842) 211. In Alexander v. Gibson, 2 Camp. 555, the plaintiff called another witness to contradict his first witness on a point material to the issue. In Rex v. Oldroyd, Russ. & R. 88, the witness was not called by the prosecution, and therefore was not his witness, and was not within the rule; the judge called the witness ex more motor, and the question was whether he had a right to do so, and having done so whether he could call for the witness' deposition contradicting her testimony on the trial. The court held that he could, and the reporter says Lord Ellenborough and Mansfield, C. J., thought the prisoner had the same right; but it is not stated whether the contradiction was in a matter pertinent to the issue. In Bradley v. Ricardo, 8 Bing. 57, it was decided that the whole of the testimony of a witness is not to be rejected because a part of it is disproved by other witnesses, and the court adhered to the rule as laid down in Buller's Nisi Prius.

From the consideration of all the cases and authorities cited I think the rule to be inferred is: "That the plaintiff can not, for the purpose of impeaching the general character of his witness for veracity, give in evidence facts which would not be admissible upon a direct examination-in-chief." There is no difference in principle between giving general evidence of particular facts, the effect of which is to destroy the general character of the witness for veracity, and which would not be admissible for any other purpose. We think there should be a new trial.

Case No. 6,116.

HARRIS et al. v. BRADLEY et al.

[2 Dill. 284;[1] 16 Int. Rev. Rec. 165; 5 Chi. Leg. News, 88.]

Circuit Court, D. Nebraska. Nov. Term, 1872.

WAREHOUSE RECEIPTS—NATURE—RIGHTS OF HOLDERS.

1. In the absence of statute or usage, instruments known as "warehouse receipts" need not be in a particular form.

2. An instrument executed and signed by warehousemen in the following words: "Received in store for account of Bailey & Weightman, 3,000 sacks of corn," is a warehouse receipt, and has an assignable or negotiable quality, and its indorsement and delivery by the persons to whom it was issued to a third person for value, passes the title to the corn, and the makers of the instrument are liable to the holder or assignee, if, without his consent, they afterwards deliver the corn to the persons from whom it was originally received, without the production of the receipt.

[Cited in Rahilly v. Wilson, Case No. 11,531; First Nat. Bank v. Bates, 1 Fed. 710.]

[Cited in Thorne v. First Nat. Bank, 37 Ohio St. 258; Durr v. Harvey, 44 Ark. 301; Union Sav. Ass'n v. St. Louis Grain Elevator Co., 81 Mo. 342; State v. Kirby, 115 Mo. 447, 22 S. W. 455.]

3. The statute of Nebraska on the subject of warehouse receipts construed.

This is an action for three thousand sacks of corn, mentioned in an instrument claimed to be a warehouse receipt, made by the defendants May 26th, 1870, and indorsed to the plaintiffs [Harris, Hutchinson & Co.]. The instrument itself, and the circumstances under which it was indorsed to and is held by the plaintiffs, appear in the special verdict of the jury hereinafter mentioned. Under issues presenting the right of the plaintiffs to recover, and denying liability on the part of defendants, the action was tried by a jury, who, under instructions, found a general and also a special verdict. These are as follows:

General verdict:

"We, the jury, find the issues in favor of the plaintiffs, and assess their damages at the sum of twenty-five hundred and eighty-four dollars.

"But we, the jury, find also the following special verdict, and submit to the court as a question of law, whether, on the facts thus specially found, the plaintiffs are entitled to judgment, to-wit:

"Special verdict:

"(1) We, the jury, find specially that the defendants, Bradley & Robertson, being copartners as alleged in the petition, executed in Nebraska the receipt mentioned in the petition, a copy of which is as follows: 'Neraska City, May 26th, 1870. Received in store for account of Bailey & Weightman, 3,000 sacks of corn. (Signed) Bradley &

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

Robertson.' And delivered the same in Nebraska to said Bailey & Weightman.

"(2) We find that this receipt was endorsed by Bailey & Weightman, and delivered to the plaintiffs, who were partners as alleged in the petition, and commission merchants and grain dealers, doing business at St. Louis, Mo., on or about June 2, 1870, and that plaintiffs still hold it.

"(3) We find that the said Bailey & Weightman delivered the receipt now in suit to the plaintiffs, on or about June 2, 1870, in security for a pre-existing debt, and for advances to be made, and that when this suit was brought, and down to the 1st day of January, 1871, the said Bailey & Weightman owed the plaintiff, on account of such pre-existing debt and such advances, a greater sum than the value of the corn mentioned in the receipt. There is no evidence of the state of the accounts between the said Bailey & Weightman and the plaintiffs since the 1st day of January, 1871, and so we cannot say what sum the said Bailey & Weightman now owe the plaintiffs. We find that the defendants were not aware when they issued this receipt in suit, of any special or other arrangement between plaintiffs and Bailey & Weightman, by which the plaintiffs agreed to advance money or become the indorsers of Bailey & Weightman to raise money, and that they should give the plaintiffs, as security, warehouse receipts for grain, or that this receipt was wanted for any such purpose; and we find that before the defendants, Bradley & Robertson, had noticed that the plaintiffs held the receipt in suit, they had, on Bailey & Weightman's order, shipped the corn mentioned in the receipt in suit to Chicago, for the benefit of Bailey & Weightman.

"(4) We find that the defendants, Bradley & Robertson, at and before the time the receipt in suit was issued, were chiefly engaged in buying, storing, and shipping grain, and were, at or about the time the receipt was given, mainly engaged in thus buying and shipping grain for Bailey & Weightman on a contingent commission, but that they advertised themselves as doing business as commission and forwarding merchants and grain dealers, and to some extent received, stored, shipped, and forwarded from the boats and to the interior of the country, goods for others. The plaintiffs demanded the corn of defendants, Bradley & Robertson, before suit was brought, and they refused to deliver it. We find the value of the corn mentioned in the receipt in suit at the time it was demanded by the plaintiffs of Bradley & Robertson, was the sum of twenty-four hundred dollars, which, with interest to this date, amounts to the sum of twenty-five hundred and eighty-four dollars ($2,584), which last sum we find to be the plaintiffs' damages, if, on the foregoing facts, the plaintiffs are entitled to judgment."

The plaintiffs now move for judgment on the verdicts, which is resisted by the defendants.

Mr. Wakeley, for plaintiffs.
Redick & Briggs, for defendants.

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

DILLON, Circuit Judge. 1. The title to the corn, mentioned in the receipt of May 26th, 1870, was in Bailey & Weightman, and the defendants, Bradley & Robertson, were their bailees. The receipt was the evidence of the title of Bailey & Weightman, and the indorsement and delivery thereof in St. Louis to the plaintiffs, the property being then in Nebraska City, was equivalent to the delivery to the plaintiffs of the property itself. The indorsement and delivery of the receipt of the warehouseman in the course of trade, passes the title and right of possession of the property to the party to whom it is so endorsed and delivered. Such is the law, and such is the understanding of the business community. The legal title to the property passed to the plaintiffs by the indorsement and delivery to them of the evidence of the title. To the extent of their advances, certainly they are purchasers for value, if not, indeed, as respects their pre-existing debt, and they hold the title to the corn to protect their interests. When the transfer was made to them, the defendants became their bailees, and ceased to be the bailees of Bailey & Weightman. All the foregoing principles are established by the judgment of the supreme court of the United States, in the case of Gibson v. Stevens, 8 How. [49 U. S.] 384.

2. The defendants insist that the instrument in suit is not a warehouse receipt, either within the contemplation of the local statute of the state on that subject (Rev. St. Neb. p. 652), or of the law relating to this peculiar class of instruments. See McNeil v. Hill [Case No. 8,914], where the subject is discussed by Mr. Justice Miller.

The fourth special finding of the jury shows that the defendants were engaged in buying, storing, and shipping grain generally, and particularly for Bailey & Weightman (to whom the receipt was issued), on a contingent commission. The defendants advertised themselves to the world as merchants and grain dealers. Clearly they were warehousemen, and it is to be presumed that they were known as such to the business community.

It is urged that the instrument in suit was not intended to be a warehouse receipt, or to be used or negotiated as such, but was intended simply as a memorandum or personal voucher to Bailey & Weightman to show that the defendants had that amount of corn in store for them; and this view, it is argued, is supported by the nature or tenor of the paper itself, since it contains no words indicating that the defendants are to account to any persons other than Bailey & Weightman.

In other words, it is claimed by the defendants, as a matter of law, that in order to give to such an instrument, even when issued by a merchant or warehouseman, a negotiable or assignable quality, so as to estop the makers from showing against a subsequent holder that the property mentioned has not been in fact received, or had, before notice of the assignment, been delivered to the persons to whom the instrument was originally made, the instrument should contain language showing that it was to be, or might be thus used. If the receipt in question had contained, after the name of Bailey & Weightman, the words "or order," or after the word "corn," the words "delivered in virtue of this receipt," or similar language, it is conceded that it would have the qualities of a warehouse receipt, and that a delivery to any person without the production of the receipt, would be at the peril of the warehouseman or party making it. No authorities have been produced to sustain this view; nor is it shown that there is any such custom or usage among warehousemen, or known to the business community.

There is nothing in the statute of the state requiring or implying that such instruments should be of any particular form, and the instrument on which the plaintiffs rely for title would seem to be more formal than some of those in the case of Gibson v. Stevens, before cited.

Under these circumstances, it is my opinion that the defendants were not justified, with this receipt outstanding, in shipping the corn mentioned in it, as the jury find they did, to Chicago, for the benefit of Bailey & Weightman. Judgment for plaintiff.

NOTE. Dundy, District Judge, did not concur in the foregoing views, and, after judgment for the plaintiffs, in accordance with the opinion of the circuit judge, the case was certified to the supreme court upon division of opinion, on the question whether, upon the special verdict, the plaintiffs were entitled to judgment.

The following are the statutory provisions referred to in the opinion (Rev. St. Neb. p. 652):

"To prevent fraud in warehousemen and others.

"Section 246. No warehouseman, wharfinger, or other person, shall issue any receipt or voucher for any goods, wares, merchandise, grain, or other produce or commodity, to any person or persons purporting to be the owner or owners thereof, unless such goods, wares, merchandise, or other produce or commodity, shall have been bona fide received into store by such warehouseman, wharfinger, or other person, and shall be in store and under his control at the time of issuing such receipt.

"Sec. 247. No warehouseman, wharfinger, or other person, shall issue any receipt or other voucher upon any goods, wares, merchandise, grain, or other produce or commodity, to any person or persons, as security for any money loaned, or other indebtedness, unless such goods, wares, merchandise, grain, or other produce or commodity, shall be, at the time of issuing such receipt, the property of such warehouseman or wharfinger, or other person, and shall be in store and under his control at the time of issuing such receipt or other voucher, as aforesaid.

"Sec. 248. No warehouseman, wharfinger, or other person, shall issue any second receipt for any goods, wares, merchandise, grain, or other produce or commodity, while any former receipt for any such goods or chattels, as aforesaid, or any part thereof, shall be outstanding and uncanceled.

"Sec. 249. No warehouseman, wharfinger, or other person, shall sell or encumber, ship, transfer, or in any manner remove beyond his immediate control, any goods, wares, merchandise, grain, or other produce or commodity, for which a receipt shall have been given as aforesaid, without the written assent of the person or persons holding such receipt."

Case No. 6,117.

HARRIS v. BURCHAN et al.

[1 Wash. C. C. 191.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

EJECTMENT—SURVEY.

1. A survey made and returned, and having every appearance of regularity, must be taken as regular, until the contrary is shown.

2. After a survey has been once regularly made under a warrant, under the directions of the warrantee, although not in conformity with the terms of the warrant, the warrant is functus officio, and cannot afterwards be revived, and a survey made under it.

3. A right by settlement and improvement, if a survey of the land included in it shall be made, under a warrant, by the owner of the settlement and improvement, will be merged in the higher title. But, if the surveyor, without the knowledge of the warrantee, makes such use of the warrant, the rights of the warrantee are not thereby affected.

The defendants set up a title in themselves, as holding under James Potter, and deny the title of the plaintiff [David Harris' lessee], upon the ground that his warrant, calling for particular boundaries, was removed to the land in question, but the survey not actually made. On the 27th July, 1774, the plaintiff obtained a warrant for three hundred acres of land, bounding south on W. M., T. M., &c., Hickory ridge; north by the foot of a mountain, including a run that sinks at the mountain's foot; east by S. Matlock's survey, and west by vacant lands. On the 30th August, 1783, Wm. M'Clay, the surveyor, returned a survey of this warrant for three hundred and thirty acres; but it neither joins W. M., nor S. Matlock, by two hundred perches; though it would seem, by the plat annexed to the report, that it was bounded on the east by his land. He states, in his return, that the survey was made on the 10th November, 1774. The plaintiff rested his title and right to recover according to the laws of this state; on his warrant and survey, returned into the office. The defendant, Pennington, sets up a title under James Potter, who, before 1773, settled and improved a part of the three hundred and thirty acres; and on the 5th January, 1773, obtained a warrant for one hundred and fifty acres, to include his im-

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

provement adjoining the land of T. M., and to include the sapling hickory ground. This warrant was, on the 16th June, 1774, surveyed by Wm. M'Clay, to the southward of the land in possession of Pennington, and the survey was returned into the office in 1783. Upon the return of the plaintiff's survey, Potter entered a caveat against a patent's issuing to the plaintiff; he claiming one hundred and fifty acres of the land, by a prior warrant, founded on settlement and improvement. The board of property, reciting the survey made for Potter, and that it appeared to them, that a survey had been made for Harris, on the 10th November, 1774; and that it was doubtful, whether Potter's improvements had been included in his survey; directed James Harris, another surveyor, to lay down the two surveys, that the board might be enabled to decide this point. A survey was accordingly made in 1783, laying down these two surveys, and the adjoining tracts of land, by which Potter's improvements are placed out of the boundaries of his land; but by M'Clay's survey, the lines would include them. Nothing further was ever done in the caveat. Potter dying some years after it was entered; no steps were taken to carry it on. Burchan, the other defendant, lived within the lines of the plaintiff's survey, but out of the lines claimed by the defendant.

Ingersoll and Duncan, for defendants, contended: 1. That the survey made by M'Clay in 1774, of Potter's warrant, was not conformable to his warrant, because it did not include his improvements, and the hickory sapling ground; and was a fraudulent location of his warrant, to favour the plaintiff, his brother-in-law and friend. To prove that his improvements were not included, they relied upon the diagram made by James Harris in 1783, which leaves them out; and upon the depositions of three or four witnesses, who speak of his improvements in 1774, and say, that when James Harris made the survey in 1783, they were left out. They therefore insist, that Potter had a right to survey his warrant over again in 1783, on the land in question, which he did; and at any rate, his warrant entitled him to the land in question, as against the plaintiff. But they principally relied, for both defendants, that the plaintiff's title was defective; because his warrant called for land very different from that in dispute; and that no actual survey of the land in dispute had taken place; but that it was made without going upon the ground, running the lines, and blazing and marking the trees, agreeably to the instructions of the surveyor general to his deputies. They admitted, that if the warrant be special, it gives a right before survey, to the tract so described; and that the surveyor might, notwithstanding, remove the warrant, and survey it elsewhere, if no intermediate rights accrued to be effected thereby; and that even in this latter case, an actual survey was not necessary, provided the circumstance of its being made off the ground, and that it was removed, was disclosed to the officer to whom the survey is returned, and that it is then accepted. But in this case, no such disclosure appeared to have been made, and the caveat prevented the acceptance. As to the fact, that the survey was not actually made; they relied upon depositions, proving that the witnesses were with James Harris, when he made the survey in 1783, and that they saw neither blazes nor marks, except where they came to the lines of old surveys. That the plat, returned by M'Clay, states it to adjoin S. Matlock; whereas it was two hundred perches from it; a mistake no otherwise to be accounted for, than by supposing it to be a chamber survey, and that Wm. M'Clay, in his deposition, taken in this cause, important as he knew the fact to be, does not state that the survey was actually made. The case of Miles' Lessee v. Penner [unreported], decided by Judge Smith, on the circuit, was cited: viz. that in case of a removed warrant, unless an actual survey took place, the plaintiff claiming under it could not recover in ejectment. That where there are many warrants put into the hands of the surveyor, if he runs the outer lines of the whole, he may cut it up in the interior as he pleases. That where the warrant is special, the survey of the same land need not be made on the ground.

On the other hand, it was contended, that it sufficiently appears to the jury, that the survey was actually made on the ground, although the presumption being in favour of the return, evidence to impeach it should be produced. The circumstances relied on are: the caveat in 1782, in which Potter does not state this as a ground of objection; the declaration of the board of property, twenty years ago, and only ten after the survey was made, that it appeared to them, that the survey had been made on the 10th November, 1774; that if, in fact, it were not made, it was wonderful that the land had not been since appropriated by others. Strange, that a man in his chamber, could plot an irregular figure like the present; more likely that he should lay down straight lines; that he could include a spring or run, called for in the warrant; that as to its calling for Matlock's land, it does not certainly follow, upon looking at the plat, that he intended to say, that Matlock adjoined it; and if he did, it must have been a mistake, from his not knowing Matlock's lines. They insisted, that even if the jury should be satisfied that the survey was not actually made on the ground, yet it stood accepted, notwithstanding the caveat.

WASHINGTON, Circuit Justice (charging jury). The questions which I shall first consider are, has James Potter a title to the

land in possession, of both the defendants, or either; and secondly, has the plaintiff a title? As to the land possessed by Burchan, it is admitted, that Potter's warrant for one hundred and fifty acres, or his survey in 1783, would not include it; so that if the plaintiff has a title, he must succeed against Burchan, whatever may be Potter's title, in respect of the land held by Pennington. As to this, it appears that a survey was made of Potter's warrant, by M'Clay, in June, 1774, and that the survey was returned into the office in 1783; and therefore having all the appearances of regularity, it must be taken prima facie to be regular, unless the contrary appears. To prove it irregular, and therefore not binding on Potter, the testimony of three or four witnesses is relied on; who state, they attended J. Harris' survey in 1783, and that Potter's improvement was not comprehended in the survey. But it is worthy of remark; that those witnesses do not speak of M'Clay's survey in 1774, but refer to the lines as run by Harris in 1783; and by comparing Harris's survey with M'Clay's, which it professes to follow, or ought to have followed; it appears that if one of the lines of Harris's survey had been extended as far as M'Clay's ran, the improvement, as laid down in Harris's diagram, would have been included. Against this evidence, is opposed the testimony of William M'Clay himself, who states; that Potter himself pointed out the improvement and hickory sapling on the ground, and that they were included, and that he was present at the survey. Now, most clearly, if Potter chose to locate his warrant as it was surveyed, even though the improvement had been left out; it does not lie in his mouth now, to say that it was not properly located by survey. And if M'Clay's testimony is believed by the jury; and unless they are satisfied that the warrant was improperly surveyed; then in point of law, Potter had, and of course the defendant Pennington has no title to the land, for which this ejectment is brought; because if the warrant was once properly surveyed, and returned into the office, it was functus officio; it merged the prior title by improvement and warrant, and the same warrant could not afterwards be surveyed on the land in question, or on any other vacant land. If, on the other hand, the jury should be satisfied that Potter's warrant was, without his knowledge, or against his consent, removed by the surveyor, to lands to which it did not relate; then the survey was not binding on Potter; his title stands now on the ground it did prior to that survey, and being prior to the plaintiff's warrant, his title is the best, to one hundred and fifty acres, to be laid off in a reasonable shape, so as to include his improvement. You are the proper and sole judges of the credibility of witnesses, and the weight of evidence, and must ascertain this fact; if it be in favour of Potter's pretensions, your verdict ought to be in favour of the defendant, Pennington; if otherwise, in favour of the plaintiff.

The next question is, has the plaintiff a title? because, if he has not, then he cannot recover, however weak the defendant's may be, and this question involves the interest of both defendants. The questions of law raised as to this point, I forbear to give any opinion about, because, upon the fact, it will perhaps be unnecessary; and because the points are of extreme importance—viz. whether, in a case like this, the want of actual survey is sufficient to defeat the plaintiff in ejectment; and whether upon the principles conceded by the defendant's counsel, the survey, quoad every thing not stated as the ground of the caveat, (which does not oppose the survey, but the issuing of a patent for one specified reason,) is not to be considered as accepted; and whether it is incumbent on the party claiming under the survey, to prove that all the necessary circumstances were disclosed by the surveyors. But how is the fact? I have already stated the evidence on both sides, and the arguments urged by each. That the survey is to be presumed regular, until the contrary appear, is a clear principle. Extremely mischievous would be the consequences, if a man, having a paper title, apparently regular, should be compelled, in asserting his title, to prove that the public officers performed their duty. It would be substituting a title, dependent upon the uncertain tenure of men's memories, for a written one. You will therefore consider and weigh the evidence, and the credit of the witnesses, and you must be perfectly satisfied in your consciences, that the survey was not actually made, before you can find a verdict grounded on that as a fact. If the survey was regularly made, then most clearly Potter could not survey, under his warrant in 1783, the land in question, held by Pennington; even although you should be of opinion that M'Clay's survey under his warrant, in 1774, was irregular, and not binding upon him; and in this case, your verdict, as to Burchan, must of course be for the plaintiff; and as to Pennington, also, unless you should be of opinion, not only that his warrant was improperly laid in 1774, but that the plaintiff's also was irregularly surveyed, by his not going on the ground.

The jury found for the plaintiff.

HARRIS (BUTTRICK v.). See Case No. 2, 256.

Case No. 6,118.

HARRIS v. CAPEN.

[37 Hunt, Mer. Mag. 196.]

District Court, D. Massachusetts. Feb. 1, 1857.

SEAMEN—WAGES—SICKNESS.

[A seaman injured during a voyage, and left sick in a foreign port, is entitled to wages during such sickness and up to his arrival home, together with medical expenses, deducting wages actually earned on the return voyage.]

[This was a libel by James E. Harris against Frederic W. Capen, for wages as a seaman.] It appeared in evidence that libelant shipped as an able seaman on board the ship Thomas Perkins, and during the voyage received an injury which partially disabled him, and was left in Liverpool, sick, and the vessel proceeded on her voyage without him. This suit was to recover his arrears of wages, the necessary expenses of his sickness in Liverpool and his wages up to his return to Boston.

THE COURT (SPRAGUE, District Judge), ruled that by the maritime law, it was part of the maritime contract that the owners should be liable for the care of the seamen from sickness or disability arising in this perilous service, and that they were also bound to return them home. This was an implied point of the contract of shipment, as binding as though it were written, and the seaman's wages still continued on during the period of the sickness. Even if he was separated from the vessel by mutual consent to be left in a foreign port, the owners in such case were bound to pay the three months extra wages, two months of which should be paid to the seaman. In this case he decreed to libelant his wages due when the vessel left him at Liverpool, his wages up to the time of his arrival home, and the necessary expenses for medical aid in Liverpool, deducting the amount he may have earned on his return voyage in another vessel

HARRIS (DEXTER v.). See Case No. 3,862.

HARRIS (D'WOLF v.). See Case No. 4,221.

Case No. 6,119.

HARRIS v. EXCHANGE NAT. BANK.

[4 Dill. 133;[1] 14 N. B. R. 510; 3 N. Y. Wkly. Dig. 432; 3 Cent. Law J. 768; 1 Cin. Law Bul. 357.]

Circuit Court, W. D. Missouri. Nov. 21, 1876.

BANKRUPTCY — EFFECT OF AGREEMENT NOT TO RECORD MORTGAGE ON THE RIGHTS OF THE ASSIGNEE.

A deed of trust intended to give a creditor a preference, fraudulent under the bankrupt act [of 1867 (14 Stat. 517)], was executed more than four months before the commencement of proceedings in bankruptcy against the grantor therein; in order to prevent the knowledge thereof from coming to other creditors, and to have it validated by lapse of time, the grantor and beneficiary agreed that it should be kept off the record; after the lapse of four months from the date of the deed of trust, but within four months of the filing of the petition in bankruptcy, the instrument was deposited for record: *Held*, on a bill in equity, filed by the assignee in bankruptcy against the beneficiary to set aside the deed of trust, that the suit was not barred because the proceedings in bankruptcy were commenced more than four months after the execution of the deed of trust.

[Cited in Bostwick v. Foster, Case No. 1,682; Re Oliver, Id. 10,492; Anibal v. Heacock, 2 Fed. 170; Matthews v. Westphal, 48 Fed. 665.]

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

In equity.

Henry Flanagan, for complainant (appellee).

Lay & Belch, for defendant (appellant).

DILLON, Circuit Judge. This is a bill in equity to set aside a deed of trust made by the bankrupt, Bass, for the benefit of the defendant bank [the Exchange National Bank of Columbia] and others, to secure about $26,000. The deed of trust was executed June 14th 1873. It contains an endorsement by the recorder that it was filed for record October 15th, 1873, but it is shown by the proofs aliunde that it was not actually spread at large on the records until between December 10th and 17th, 1873. On the 20th day of February, 1874, an involuntary petition in bankruptcy was filed against Bass, and he was adjudged a bankrupt on the same day.

This suit was brought by the assignee in bankruptcy on the 17th day of June, 1874; and the bill, as amended, seeks to set aside the deed of trust on two grounds: First, because it is fraudulent under the bankrupt act; second, because it was actually fraudulent, being made to hinder and delay creditors.

I think there is no sufficient evidence to overturn the conveyance on the second ground.

As to the first ground, I am of opinion that the proofs show that Bass was insolvent when the deed of trust was made; that the bank knew, or had reasonable cause to know, this fact, and that it intended to secure a preference in contravention of the bankrupt act. I am further of opinion that at the time it was taken it was agreed that it should not be recorded, but should be kept secret until four or six months from its date should elapse, within which it could be attacked under the bankrupt act. Pursuant to this agreement, the bank did not deposit the instrument for record until October 15th (four months and one day), and the evidence tends to show that, out of favor to the bank, the instrument was not actually registered

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

until about the middle of December, just six months after its execution, the officers of the bank being uncertain whether four or six months was the limit. The petition in bankruptcy was filed within four months after the deed of trust was deposited with the recorder.

It is now insisted by the bank that, inasmuch as the deed of trust was executed and delivered more than six months before the proceedings in bankruptcy, it is too late to assail it on the ground that it was made in contravention of the bankrupt act. In support of this position, it is maintained that the deed took effect from the date of its execution, and not from the time it was filed for record or recorded. Gibson v. Warden, 14 Wall. [81 U. S.] 244; In re Wynne [Case No. 18,117]; Sawyer v. Turpin, 91 U. S. 114; Cragin v. Carmichael [Case No. 3,319].

When the question is not controlled by statutable provision, this is a sound general proposition. But it would be against principle and sound policy, and even shock the moral sense, to allow a creditor, pursuant to an understanding with his debtor, intentionally to conceal from other creditors the existence of an instrument which is a fraud upon their legal rights, and for this purpose keep it off the records, to insist that the statute commences to run from the date of the execution of the instrument.

Under the circumstances of the case, I am of opinion that the four months limitation did not begin at least until the 15th day of October (when the deed was filed for record), which was less than four months before the commencement of the proceedings in bankruptcy. This conclusion is supported by many cases, analogous in principle, in which courts of equity have refused to apply the bar of the statute where the fraud has been perpetrated and concealed by the party who seeks to avail himself of the lapse of time. Hovenden v. Lord Annesley, 2 Schoales & L. 609; Bailey v. Glover, 21 Wall. [88 U. S.] 342; Hildeburn v. Brown, 17 B. Mon. 779. The observations of Gaston, J., in Hafner v. Irwin, 1 Ired. 490, 498–500, are very forcible, and strongly sustain the view we have taken.

It is probably a sound principle that if secrecy, or an agreement or understanding not to record, for the purpose of concealing the instrument from other creditors, constitutes part of the consideration or inducement to the making of the security, this will taint the same with mala fides as to creditors injuriously affected thereby; but, however this may be, it will, at all events, preclude the creditor receiving such security (which is all that it is necessary here to decide) from insisting, as to such other creditors, that the instrument takes effect and becomes effectual from the date of its execution, and not from the date of its registry.

This conclusion, viz.: that the deed of trust, as respects creditors, was inoperative until filed for record, is also supported by the registry statute of Missouri (1 Wag. St. §§ 24–26, p. 227), which provides that "no such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

The decree of the district court setting aside the deed of trust is affirmed. Affirmed.

NOTE.—Certain observations in Sawyer v. Turpin, 91 U. S. 114, throw some doubt upon what is said in the foregoing opinion as to the effect of an agreement not to record a mortgage; but it is believed there is no necessary conflict between the points really decided in the two cases. The subject is fully discussed by Love, J. (United States circuit court for Iowa, May term, 1878), in Stephens v. Sherman [Case No. 13,369a]. The principal case was not appealed.

Case No. 6,120.

HARRIS v. FIRTH.

[4 Cranch, C. C. 710.] [1]

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

DOMICIL—SLAVE—PETITION FOR FREEDOM.

1. The place to which a person has removed, with intent to remain there an indefinite time, and as a place of present domicil, is the place of his domicil, although he may entertain a floating intention to return at some future period.

2. If a person comes into this county as a sojourner, and brings with him his slave, and dies here, and his executor has been prevented, by the institution of this suit, from carrying the slave out of the district, the slave is not, by such importation, entitled to freedom.

[Cited in Hindman's Appeal, 85 Pa. St. 469.]

Petition for freedom [by Herbert Harris, a negro], on the ground that he was brought from Virginia into this county, to reside, contrary to the Maryland Act of 1796 (chapter 67). The petitioner offered evidence that one Wilkes, was at the head of a company of sportsmen, (gamblers,) who resided in Richmond in Virginia. That he had hired a house in Washington, in this county, at first for three years, and afterwards for a term not yet expired, and continued to reside therein until his death on the 8th of November, 1834. That during such residence he purchased the petitioner in Virginia and brought him to Washington, where he resided with his master until his death. That Wilkes was considered as a citizen of the world, and before he came to Washington, had lived in Brunswick, in Virginia; sold out there, and lived in Richmond. That shortly before his death he intended, when he had made money enough, to go to the West and speculate in lands.

Mr. Brent, for petitioner, prayed the court to instruct the jury that if they shall find, from the evidence, that Wilkes removed to this county with an intention of remaining here for an indefinite time, and as a place of

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

present domicil, this was his place of domicil, notwithstanding he might have entertained a floating intention to go to the west at some future period. Mr. Brent, in support of his prayer, cited Story, Confl. Laws, 45, 48, and Bruce v. Bruce, 2 Bos. & P. 228, note.

Mr. Coxe, for defendant, cited Story, Confl. Laws, 39, 47; the Maryland Act of 1796 (chapter 67, § 4), respecting sojourners; and the cases Jordan v. Sawyer [Case No. 7,521]; Maria v. White [Id. 9,076]; and Gassaway v. Jones [Id. 5,263]; Zolkowski Case [14 How. (55 U. S.) 400], in the supreme court of the United States; and Harrison v. Nixon [9 Pet. (34 U. S.) 483]; and Aspin's Case; [2] Almy v. Bingham; [2] Robertson on Succession, 468.

THE COURT (THRUSTON, Circuit Judge, contra) gave the instruction as prayed by Mr. Brent. And, at the prayer of Mr. Coxe, for the defendant, further instructed them, in effect, that, if Wilkes, being the owner of the petitioner, came to reside here as a sojourner, and while so being a sojourner, brought the petitioner here, and died, and the defendant since his death, has been prevented by the institution of this suit from carrying the petitioner out of the district, he is not entitled to freedom by reason of his being so brought in.

Verdict for the petitioner.

HARRIS (GIBSON v.). See Case No. 5,396.

Case No. 6,121.

HARRIS et al. v. The HENRIETTA.

[Newb. 284.] [1]

District Court, D. Missouri. March, 1856.

MARITIME LIEN — STATE LEGISLATION — SEIZURE AND SALE OF VESSELS UNDER STATE LAW—EFFECT OF.

1. The admiralty and maritime law of the United States, except where it is changed by act of congress, is as much the law of the United States as if it had been formally enacted word for word in a statute.

2. The laws of the United States "are the supreme laws," and cannot be changed or altered, modified or repealed by state enactments.

[Cited in The Ann, 8 Fed. 927.]

3. No right or privilege given or secured by the laws of the United States, can be abrogated, displaced or superseded by state enactments.

4. A lien given by the maritime law is a right.

5. If a state legislature should pass an act declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the laws of that state, such enactment would have no binding force or effect.

6. The act of the legislature of Missouri, entitled "An act concerning boats and vessels," does not abrogate, displace, or supersede, any lien given by the general maritime law of the United States.

7. A seizure and sale under the Missouri "act concerning boats and vessels," does not divest a lien given by the general maritime law.

[Applied in Ashbrook v. The Golden Gate, Case No. 574. Cited in The N. W. Thomas, Id. 10,386.]

[See, contra, Auther v. The Atlantic, Case No. 668.]

In admiralty.

Hudson & Thomas, for libelants.

E. L. Edwards, for the Henrietta.

WELLS, District Judge. This is a suit in admiralty, brought by the libelants against the steamer Henrietta, Cyrus Mathews claiming as owner. The facts of the case are agreed upon by the libelants and the claimants, and are as follows:

The counsel for the respective parties agree that the following facts shall be admitted on the hearing of this cause, viz.: (1) That plaintiffs were copartners as alleged in their libel, and were residents of Illinois, as stated in said libel. (2) That the stores and supplies mentioned in said libel, and the amounts attached, were furnished to said boat as stated therein: that the same were necessary supplies for said boat, and were furnished before said boat was seized by said sheriff, and that the prices are reasonable. (3) That said boat was over one hundred tons burden: that she was duly enrolled and licensed for the coasting trade: that she was owned in Missouri, and employed in navigating the Mississippi river between St. Louis, Missouri, and St. Paul, in the territory of Minnesota. For the defendant it is admitted: (1) That prior to the issuing of the writ in this case, the defendant had been attached and taken into custody by the sheriff of St. Louis county, Missouri, on various warrants issued out of the St. Louis court of common pleas, on demands which were liens on said boat, under the act of the general assembly of this state, entitled "An act concerning boats and vessels." (2) That there were judgments rendered in favor of said attaching creditors, and said boat was, under an order of said court of common pleas, sold to satisfy said lien claims: that all of said proceedings and said sale were strictly in accordance with the laws of the state of Missouri concerning boats and vessels: that at said sale, the intervener, Cyrus Mathews, became the purchaser of said boat, and received from said sheriff a bill of sale, which is herewith filed, marked A, and made a part hereof. (Signed) Hudson & Thomas, for plaintiff. E. L. Edwards, for Mathews.

It appears from the libel and exhibits, that the supplies were furnished by the libelants, at Galena, in the state of Illinois, in the months of August and September in the year 1855. It further appears, that after the supplies were furnished the boat made a trip to St. Louis, where other supplies were furnished by persons residing there, for which the boat was seized and sold as stated in the

[2] [Nowhere reported; opinion not now accessible.]

[1] [Reported by John S. Newberry, Esq.]

agreed case. The sale took place in December, 1855. Afterwards this libel was filed. It does not appear where the boat was enrolled, but it does appear that the owners resided in Missouri. The only question for the consideration of the court is, whether the seizure and sale in St. Louis, in the state of Missouri, gave a title to the purchaser discharged from the previous lien of the libelants, or whether the vessel is still subject to that lien in the hands of the purchaser. The owners of the steamer resided in Missouri, and the supplies furnished by the libelants, were furnished by them at Galena, in the state of Illinois, where the libelants resided. For this purpose Galena is deemed a foreign port; the port of St. Louis, the home port. Dudley v. The Superior [Case No. 4,115]; Rule 22, Sup. Ct. U. S. When material men furnish supplies in a foreign port, they have a lien upon the vessel for the value of the supplies, by the general maritime law of the United States. That law infers that the supplies in the foreign port are furnished on the credit of the vessel. Id. When the supplies are furnished in the home port, the general maritime law gives no lien. That law infers that the supplies in such home port are furnished, not on the credit of the vessel, but on that of the owners. If there be any lien, it is given by the local law of the state. Id. In this case the lien of the libelants was at least equal, in point of dignity, and prior, in point of time, to that given by the state law, to enforce which the steamer was seized and sold in St. Louis. Upon what principle is it that this lien of libelants, given by the general maritime law of the United States, is divested? They have done no act, the doing of which could divest it. They have omitted to do no act, the not doing of which could deprive them of their lien.

In delivering the opinion of the court in the case of Rankin v. Scott, 12 Wheat. [(25 U. S.) 177], Chief Justice Marshall says: "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant." It is thought, however, and was so urged by the claimant's proctor, that the lien of the libelants was divested or annulled by the proceedings under an act of the legislature, referred to in the agreed case. When a state law creates a lien, a state law may, in some cases, divest it. But that it is not this case. The lien of the libelants is given by the general maritime law of the United States. By the constitution of the United States, congress has the exclusive right to regulate commerce with foreign nations and among the several states; and the courts of the United States are invested with the admiralty and maritime jurisdiction. The ninth section of the judiciary act of 1789 [1 Stat. 76], declares that this admiralty and maritime jurisdiction is exclusively in the courts of the United States. By the act of congress of May 19, 1828 [4 Stat. 278], entitled "An act further to regulate process in the courts of the United States," it is provided, "that proceedings in the courts of admiralty and maritime jurisdiction shall be according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from those of common law, except so far as may have been otherwise provided for by acts of congress," &c.

It is obvious, I think, from the above statement, that the admiralty and maritime law of the United States, unless where changed by act of congress, is as much the law of these United States as if it had been formally enacted, word for word, in a statute. The laws of the United States, I need hardly say, "are the supreme laws," and cannot be changed or altered, modified or repealed by state enactments. Nor can any right or privilege given or secured by them be abrogated, displaced or superseded by such state enactments. A lien given by the maritime law is as much a right as is a mortgage or bottomry bond. It is clear, therefore, that if a state legislature should pass an act declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the laws of that state, such enactment could have no binding force or effect. Dudley v. The Superior [Case No. 4,115], decision of the district court of the United States for the Southern district of Ohio; The Globe [Id. 5,484], in the district court of the United States for the Northern district of New York; Bronson v. Kenzie, 1 How. [42 U. S.] 311. Under these circumstances it would require very clear and explicit language in the statute of a state to convince us that such effect was intended by the legislature. Has the legislature of Missouri passed an act by the provisions of which a lien given by the general maritime law of the United States is abrogated, displaced or superseded? I think not. In my judgment, the steamboat law referred to in the agreed case, relates wholly to liens given by that act;—to liens given by the act, and which the act could provide for taking away. I will at present, refer only to one provision of that act. But it is, I think, conclusive. The thirteenth section is as follows: "Section 13. When any boat or vessel shall be sold under the eleventh section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assignee, be free and discharged from all previous liens and claims under this act." Here, the very act which gives the lien, declares the effect of that lien and a sale under it. That sale is to free and discharge the vessel from all previous liens and claims under that act. Now, as the lien given by the general maritime law of the United States—given in this case for supplies furnished in

Illinois—is not given by the steamboat law of Missouri, it is not affected by that law, nor is the boat freed or discharged from the lien not given by nor claimed under that law. The first section of the act (which gives the state liens), evidently confines those liens to cases where the supplies are furnished within the state. But that is not all: the whole act, and every provision in it, is limited to contracts made within the state. This is put beyond all dispute, I think, by the last case determined by the supreme court of Missouri, in regard to the steamboat law. The supreme court declares that "the statute of this state, concerning boats and vessels, is limited in its provisions to contracts made within the state, with boats used in navigating the waters of this state." And this decision, the court further declares, is made in accordance with the cases of Noble v. The St. Anthony, 12 Mo. 261, Twichel v. The Missouri, Id. 412, and The Raritan v. Pollard, 10 Mo. 583. It will be observed that the thirteenth section of the act (herein given at large), speaks of a sale made under the eleventh section of the act. I will presently show that a sale under the eleventh section is the only sale that could possibly divest a lien given either by that act or any other law. The other sales being mere sales under ordinary executions, which transfer the title of the owner, but nothing more; and if the title of the owner be incumbered, the purchaser takes the title and property with that incumbrance. It is urged, however, that the judicial proceedings (including the seizure and sale), in Missouri, under the steamboat law, transferred the vessel to the purchaser at that sale, freed and discharged from the lien of the libelants.

The lien of libelants, being one given by the general maritime law, not given by the statute of Missouri, and not arising from a contract made within the state, to declare it divested by those proceedings, would seem to be in direct contradiction to the whole scope and meaning of the act, to the express provisions of the thirteenth section in particular, and to the above quoted opinion of the supreme court of Missouri, in James v. The Pawnee, 19 Mo. 517. But there are difficulties, and they arise from decisions of the supreme court of Missouri. These decisions are made in the cases of The Raritan v. Smith, 10 Mo. 527; Finney v. The Fayette, Id. 612, and The Sea Bird v. Beehler, 12 Mo. 569. They all relate to sales under judicial proceedings. In the first cited case it appears that the sale took place in 1843, and of course was governed by the law then in force; and the case was decided, not under the act of 1845 [Rev. St. Mo. p. 180], but under that of 1835 [Id. 102], and the acts supplementary thereto. The provisions contained in the thirteenth section of the act of 1845 had not then been enacted. The provisions of that section are most important, as they expressly declare the effect of a sale, as already seen. Although the language of the opinion is somewhat general, yet it must be taken in connection with the subject it treats; and, by examining the facts it will be seen that the liens were given by the steamboat law of Missouri, and the sales were under the same law. The next case (Finney v. The Fayette, supra), was, as I understand the facts, a suit brought under the steamboat law, in St. Louis, in February, 1842, for supplies furnished in November, 1841. The boat was claimed by one Alexander, who pleaded a suit brought before a justice of the peace in Illinois, against the boat, in December, 1841, under the steamboat law of that state, a judgment obtained against the boat, and a sale in January, 1842, of the boat by a constable, at which sale Alexander became the purchaser. The process under which the boat was sold, was an execution commanding the constable "to make sale according to law, of said boat, or so much thereof as will satisfy the judgment (about $30), and all costs of suit." This sale in Illinois was held by the supreme court of Missouri to divest the previous lien acquired by Finney in Missouri. The lien of Finney arose under an amendment to the steamboat law, passed 12th February, 1839, the same as that contained in the act of 1845.

In delivering the opinion of the court, the judge says: "The case is similar in principle to that of The Raritan v. Smith [supra]. It was then determined that the rules of the maritime law, were, in proceedings against steamboats, to govern when there was a failure of statutory regulations. Maritime liens in respect to the mode in which they may be discharged, vary from other liens. A judicial sale will divest them, in whatever jurisdiction it may be decreed." This opinion is not one giving a construction to a statute of the state of Missouri; but it regards the general maritime law of the United States. And, with the greatest respect for the supreme court of Missouri, I can neither adopt the reasoning of the court, as applied to the facts, nor the conclusion at which it arrives. When a material man, having a lien, proceeds against a vessel, in an admiralty court, a writ issues to seize the vessel, and it also requires that all persons interested should be notified to appear and defend; then notice is published in a newspaper to all interested to appear. Unless the vessel is in danger of perishing, no sale is ordered until all persons interested have an opportunity to be heard. All persons interested are allowed to appear, and set up their claims to the vessel, or the proceeds of the sale of the vessel. When the vessel is sold by an order of the court, it is for the benefit of all concerned. The proceeds of the sale are paid into the registry of the court, and apportioned among all; or if the proceeds be sufficient, all are paid the full amount of their judgment. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, in the case of The Mary, 9 Cranch [13 U. S.] 126, says: "The whole world, it is said, are parties in an admiralty

cause, and therefore the whole world is bound by the decision. The reason on which the dictum stands, will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." * * * "But those who have no interest in the vessel which could be asserted in the court of admiralty, have no notice of her seizure, and can on no principle of justice or reason be considered as parties in the cause, so far as respects the vessel." I could cite any number of cases to the effect that no judgment, or sale under a judgment, can bind any but parties or privies; and that no person is deemed a party unless he have notice actual or constructive, and that, if a person interested would not, from the nature of the proceedings, be allowed to assert his rights, then those proceedings can in no respect affect those rights. Indeed to take away his rights by such doings, would not be judicial proceedings—they would amount to a confiscation, a confiscation of his rights for the benefit of others. Mr. Justice Story, in the case of Bradstreet v. Neptune Ins. Co. [Case No. 1,793], says: "It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence, before his property is condemned." Judge Story further declares that if a person have not such opportunity, and yet is deprived of his rights, the proceedings are not judicial, but arbitrary edicts, deserving not the respect of any other nation, and ought to have no intrinsic credit given to them, either for their justice or truth. Had the material man in St. Louis any notice of the proceedings in Illinois? None appears in those proceedings. Could Finney have asserted his claim or had it allowed against the boat in that suit? I think clearly not. It was an ordinary suit at common law, merely using the name of the boat, instead of the owners, a warrant of seizure like a capias ad respondendum, and a judgment against the boat for some $30; an execution against the boat directing the constable to sell the same, or so much as might be necessary to satisfy the debt and costs. In such suit, Finney would have had no more right to intermeddle, than he would have had if the suit had been against the owner by name. The sale was merely a sale of the right of the owner to so much of the boat as would bring the $30 and costs. And it was of course sold, as in other cases of sales on executions, subject to all mortgages and liens then existing. On such sale there could be no money to divide among other creditors having liens. I have already shown that such proceeding is unknown to a court of admiralty.

The next case referred to above, is that of The Sea Bird v. Beehler. The plaintiff acquired a lien against the boat in St. Louis, under the steamboat law of Missouri, for supplies. After plaintiff's lien was obtained, suit was brought against the owners in Louisiana, and the boat was there seized on writ of attachment against the boat, and sold to satisfy the judgment. The supreme court held that such sale did not divest the plaintiff's lien. In my judgment there is no substantial difference between the sale in Illinois in one case and that in Louisiana in the other case. In both cases the boats were seized and sold merely to satisfy the debts of the plaintiff. No other persons, having claims, had a right to interfere; nor was any money raised by the sales to satisfy other claims. The reasoning of the court in this case, when applied to the sale in Illinois, in the previous case, clearly shows that the sale in Illinois could not divest the lien of Finney in Missouri. The court explains, that there is a great difference between the principles which govern suits and sales at common law and those in admiralty. In the maritime proceedings, it says, the sale is made for the benefit of all whom it concerned. And "this is the case under our statute as it now stands." It further says a sale under our statute concerning boats and vessels, is similar in all respects to sales under the maritime laws: "Such sales are not made for the benefit of any particular creditor, but for the benefit of all persons interested. Provision is made for the distribution of the proceeds pro rata among all who will come forward and establish their claims within a specified time." The court says it is for these reasons that the sales conclude all persons having claims. All the above is very sound law as regards proceedings in the maritime courts. But how does it comport with the sale in Illinois, which, in the previous case, was held to divest the lien in Missouri? In Illinois the sale was merely to raise $30 to pay the plaintiff's judgment, and the boat was sold for his benefit alone. There was no sale "for the benefit of all persons interested." There was no "distribution of proceeds of sale, pro rata, among all who would come forward and establish their claims." The case of The Sea Bird clearly, in my judgment, overturns the previous case of Finney v. The Fayette.

I will now proceed to show that so much of the case of The Sea Bird v. Beehler as declares that sales under the steamboat law of Missouri are like those in the admiralty court is overturned by the next case cited,—James v. The Pawnee. In the case of The Sea Bird, I have quoted the opinion of the court, that sales under the maritime law "are for the benefit of all interested." "The proceeds are divided pro rata," &c., "and this is the case under our statute, as it now stands." In the case of James v. The Pawnee, the court decides (unanimously) that a person having a claim or lien not arising from contract made within the state, cannot be allowed to inter-

vene and have his claim allowed, nor receive any part of the proceeds of sale. The statement of the case is a little obscure, but, to put the matter beyond doubt, I caused the records and proceedings in the supreme court to be examined, and there it fully appears that two complaints were filed against the Pawnee; under them writs issued, the boat was seized and sold under the provisions of the eleventh section; notice was given to creditors to appear. James, who was not one of the original plaintiffs, but who intervened for his interest, filed his claim, which was for coal furnished the boat at Memphis. The claim was allowed in the court below, on the ground that the boat was employed in navigating the waters of this state, and the claim was a lien on the boat. The supreme court reversed the judgment below solely for the reason that the provisions of the steamboat law did not apply to any contracts not made within the state. Here, then, the very foundation of all the reasoning of the court in the last cited cases, is overturned. The sales under the steamboat law are not made "for the benefit of all concerned." Claimants, whose contracts were made in another state, can receive no part of the proceeds of such sale. No provision exists for making distribution among them. Sales under the state law are not like those made by the admiralty courts. I have too high an opinion of the supreme court of Missouri, to suppose for one moment that it would hold, a creditor having a lien on a boat arising from a contract made in another state, could not be heard in a proceeding under the steamboat law, nor have his claim allowed, and yet, at the same time hold that the proceeding deprived him of his lien.

It is obvious, I think, that the previous decisions were made whilst the court entertained the opinion that claims arising on contracts made in other states, could be heard and allowed under the steamboat law in this state. The law, it seems, is now settled that such claims cannot be allowed in this state under that statute. There remains one other matter to notice under the steamboat law, where a bond is given for the return of a steamboat, and the boat is returned accordingly; the boat is not sold under an order of court for the benefit of all the creditors having claims under that act. But a judgment is rendered against the boat by name, and an execution issues, under which "the sheriff may sell such part of the boat or vessel, or her tackle, or furniture, or such interest therein as may be necessary to satisfy the judgment and costs." See section 20. This is a similar proceeding to that mentioned in the case of Finney v. The Fayette, which occurred in Illinois. No part of the steamboat law declares that such sale can divest any liens, not even those given by that act. It is not such sale as is mentioned in section 13, which refers to sales made under the eleventh section, and not to those made under the twentieth section. The supreme court of Missouri, so far as I have noticed, makes no distinctions between the different kinds of sales under that act. But I think I have already shown, that under no principle of law or justice could such proceeding divest any lien—certainly not the lien of libelants. Yet, as far as appears from the agreed case, the sale relied upon by the claimant to divest libelant's lien, may have been of the kind just mentioned. For this reason, also, I would decide against the claim. The opinion of the court, therefore, is, that the libelants have a valid lien, not affected by the sale relied on by the claimant, and that said lien must be enforced.

HARRIS (HOWLAND v.). See Case No. 6,794.

HARRIS (JOHNSON v.). See Cases Nos. 7,387 and 7,388.

HARRIS (KEENE v.). See Case No. 7,642.

Case No. 6,122.

HARRIS v. The KENSINGTON.

[8 Am. Law Reg. 144.]

District Court, South Carolina.[1] Jan., 1860.

MARITIME LIEN—WHEN IT ARISES—WHEN EXTINGUISHED.

1. It is a conceded proposition that, under the general maritime law, a lien arises or is implied for the benefit of material-men, unless the ship be in her home port, or credit be to the master or owner.

[Cited in Durham v. The Eclipse, Case No. 4,268.]

2. Where a lien arises under the maritime law, for the benefit of a material-man, it is not waived or lost because a negotiable note between the parties to the original contract has been taken by the creditor, unless such note was taken as payment; but if the party taking the note makes an absolute transfer of it, the lien is thereby extinguished; hence, where A advanced money for a vessel's supplies and repairs in a foreign port, and the master drew a draft on the owner, which was accepted, but which subsequently came into the libellant's possession and control, and was brought into court to be cancelled, it was held that the lien was not extinguished.

[Cited in The R. W. Skillinger, Case No. 12,181. Questioned in The Napoleon, Id. 10,011. Cited in The Sarah J. Weed, Id. 12,350.]

3. The cases fully cited and commented on.

In admiralty. Libel in rem [by George Harris against the schooner Kensington] for money advanced for repairs and supplies.

MAGRATH, District Judge. The principal, if not the only question in this case is, how far a material-man waives or affects his lien for repairs or supplies under the general maritime law, by taking from the owner or captain a negotiable security. As yet no decision of a court of supreme and controlling authority can be cited; although judges of

[1] [District not given.]

great repute have expressed an opinion. That opinion is, of course, to be weighed, whether it leads to a conclusion which affirms or rejects the proposition; for each tribunal is responsible for the correctness of its judgment; and not at liberty, perhaps to rest upon the mere weight of authority. Especially is this so when a reasonable doubt forbids hearty acquiescence. To the proposition that under the general maritime law, according to the rule of the civil law, a lien arises or is implied for the benefit of the material-man, there is no exception; and the rule is equally well established, that he who advances money with which the material-man is paid, is also entitled to a lien similar to that which the material-man would have had. In the United States, the lien is not allowed in the home port of the vessel, because it is the port at or near which the owner resides; and upon him the creditor has redress by his remedy in personam. It is equally well settled that this lien of the maritime law is superceded by a personal credit given to the owner or master. But the precise nature of this personal credit, how its proof is to be made; and whether, in the case of a negotiable instrument, that proof is supplied or presumed from the mere existence of the paper; are questions of embarrassment and doubt, a partial solution of which is necessary in this case.

It has been held that whatever makes the repairs or supplies a special contract excludes the lien. Bull. N. P. 45. But still the question recurs, what is meant by a special contract? At one time, if the price was named, the lien was excluded. But that doctrine could not be maintained, and is now rejected. Hutton v. Bragg, 7 Taunt. 14. In Stevenson v. Blakelock, 1 Maule & S. 535, an express antecedent contract was held to exclude an implied contract, and with that, the lien which grew out of it. In Ex parte Lewis [Case No. 8,310], a personal contract for a specific sum discharged the implied lien. In The Nestor [Id. 10,126], it was held that in cases of repairs or supplies to a vessel in a foreign port, in addition to the maritime lien, there is an obligation upon the owner and master cumulative to the remedy of the lien. In Murray v. Lazarus [Id. 9,962], a bill of exchange was held as the substitution for the lien which otherwise would have been created; while a recent commentator inclines to the opinion that if the bill or note is that of the master or owner, such would not be the proper conclusion (Fland. Mar. Law, 193); and Judge Betts, insists upon a qualification still broader (The Active [Case No. 34]). At the common law, possession is essential to the lien, and possession excludes the idea of credit; because credit is inconsistent with a continuing possession of the creditor, and without that possession there is no lien. In a question of lien at the common law, if credit is proved as a part of the contract, the lien by the same proof is displaced; the credit and the lien being inconsistent. In all cases, therefore, where the decision is to be made by the rule of the common law, an easy and practical test is supplied.

But it is prolific of confusion to attempt a reconcilement of the rule which applies to the lien at common law with that of the general maritime law. In the one, to lose possession is to destroy the lien; in the other, the purpose of the lien is to allow the owner to have possession; that by it he may derive benefit from the labor which the material-man has bestowed, in being enabled to prosecute his voyage and secure his profits. In the one possession is its essence; in the other it is not a necessary, or even proper quality. In the one, possession is consistent; in the other, inconsistent with the lien. It is obvious how inapplicable to the consideration of a maritime lien are cases deciding questions under the lien of the common law.

In the case before me the lien is implied—created by law—existing independently of contract or agreement as necessary for its support. It is prima facie the security which the law presumes one party intended to give, and the other to take. It survives without possession, or other act sustaining it, until discharged by payment, lost by neglect, or waived by a special contract which excludes it. So high is it held that it will not be affected by the owner's act which creates a forfeiture; takes precedence of a sale to a bona fide purchaser without notice; and is not postponed to a debt to the United States. It is created and supported by the consideration of its indispensable necessity; and is, therefore, not lightly superseded or destroyed by courts, in which its enforcement in proper cases is asked. It must be borne in mind in the consideration of this and cognate questions, that the judgment of courts in Great Britain rested upon a basis not admitted here to be true or just. Who will reconcile the law in questions of this kind as laid down by Lord Coke or Lord Holt, with the more recent legislation of the parliament of Great Britain? And how can we regard as rules for our guidance, decisions founded upon a jealousy no longer tolerated; and intended to subvert a jurisdiction created by the constitution of the United States? In the consideration of a maritime lien in this court we should search for the rule of the maritime law; or for the special legislation of the United States, if it has modified or changed the rule; for the maritime law is the common law of the commercial world; and to nations in their commercial relations, is what its common law statutes or customs are to each. Starting from this point we will find that the lien claimed here is the security which the maritime law implies in the case of those who, in contracts like this, occupy the relation of debtor and creditor. If the lien does not arise it is because it has been waived, lost, or paid. It may be

waived by agreement; as an arrangement for a mode of payment inconsistent with it; or when an exclusive and special credit is given to the owner or master, or both. It must, however, be a special credit; for in cases where the lien exists, there is a liability of the master and owner, auxiliary and cumulative to it. The difficulty of deciding whether there has been a personal credit excluding the lien is the same which we meet in the civil law in the application of the doctrine of novations; in equity in considering the substitution of securities; and at law in deciding how far one contract operates as a suspension of or substitution for another. It is a question of evidence.

We have seen that a bill of exchange drawn by the captain and accepted by the owner, if taken by the creditor, has been held a waiver of the implied lien. Murray v. Lazarus [supra]. Because, it is said, a right to detain for the future event of the bill is inconsistent with the bill. But the reason would be stronger if the bill was per se payment, or if the credit involved in the time for which the bill was drawn was inconsistent with the lien. If the bill is not per se payment, and if the time allowed for its payment is consistent with the lien, the conclusion that its mere existence is proof of waiver, is in the case of a maritime lien perhaps hastily made. The Albatross [Case No. 13,645]. The acceptance of a bill thereby establishing a credit, may be conclusive as to the extinguishment of a lien at the common law; though even in that case I express no opinion; but it is far from conclusive in the case of a maritime lien. In The Nestor [Case No. 10,126], Judge Story considers at great length the nature of the maritime lien, and the modes in which it may be waived or lost. He holds that supplies or repairs in a foreign port are taken, as prima facie furnished on the credit of the ship and owners until the contrary is proved. But that taking a negotiable promissory note implies a waiver of the lien, because the lien may be in the hands of one person and the note in the possession of another. Whatever might be the effect of such a rule, if it were operative as a presumption of law, it is to me quite clear that it cannot be supported for the reason now given. It is admitted in the same case that a continuing liability of the owner and master is not inconsistent with the lien, because they all by law arise at the same time from the same contract. The promissory note is the admission of a liability; and in itself adds nothing to what the law intends; and the promise to pay is no more than the law implies from the liability it has imposed. In fact, therefore, to use the language of Lord Eldon, "the contract for payment for money is itself, in a sense, a security full as good as a note." 15 Ves. 346. That the creditor cannot pursue his remedy while the note is maturing is in effect a credit, but that is not inconsistent with the maritime lien. How far, in any case, a promissory note or bill of exchange supercedes a former contract, is not a rule of law, but results from the agreement of the parties. If then, taking a bill or note is in no respect inconsistent with a maritime lien, it cannot become so because of the allegation that the note may be in the hands of one person and the lien be claimed by another. If that consequence could result in any case, the objection made would have weight in that case, supposing it possible that the lien survives after the transfer of the debt. But it cannot have weight in a case where the note or bill and the lien continue in the hands of the same person to whom they were originally given. Such would be the conclusion in a court of law. 2 Speer, Law, 448; 1 Rich. Law, 228; 2 Rich. Law, 244; 8 Cow. 77; 2 Story, Eq. Jur. p. 474. And such, of course, must be the conclusion in this court, from which we look not only to the court of equity for guidance in certain cases, but to the civil law so far as we can adopt it. I readily concede that the apprehension of damage sometimes leads to the adoption of an arbitrary rule, which may in its operation even embrace cases in which there is no room for that apprehension. But in such cases the rule is positive; and in law a rule which is positive in the construction of rights and liabilities cannot be oppressive. If a bond is taken in settlement of a pre-existing simple contract debt, it extinguishes that debt. This is a presumption, and its general operation is fixed; but evidence may control it, and the security of the bond become cumulative. 2 Rich. Law, 608. If the pre-existing contract is asserted as discharged by a negotiable instrument, and if it is so held, it is not because of a rule of law, but from evidence showing that to have been the agreement of the parties. In Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, the supreme court declined to lay down the rule, although it may be inferred what it would have been if the case had rendered a judgment necessary.

In determining from circumstances, as distinguished from evidence establishing an agreement, how far from them a certain consequence will result, affecting another matter; the nature of the thing to be affected is of much consideration. A greater security merges a lesser; and in securities of equal rank there is room for an easy acquiescence in the conclusion that the latter was intended as a substitute for the former. But the presumption that a higher security was intended to be extinguished by one of less value calls for evidence of the intention of the parties to support it. It is well then, for us to understand the value and nature of this lien or security, and the general principles which are applicable in cases of the substitution of one debt for another. It has been said that the term "lien," used in the sense we have been considering, is technical-

ly incorrect; that lien properly only applies to the security at common law, with its incidents, as we have seen them; and that its qualities are not such as are held by it in common with the maritime lien. That the privilegium of the civil law is more closely connected with the maritime lien; and is "the right which the nature of his credit gives him, (the creditor) and which makes him preferred over other creditors, even those who are inferior in point of time, and have mortgages." Dom. Civ. Law. This priority extends either to all the goods of the debtor, or only to certain things. Among creditors entitled to the privilege in the same degree, (for there are different degrees and qualities of privilege) debts will be paid in the same order, and in like proportions, without regard to the time when they were made. "All privileges make a particular appropriation which gives to the creditor who is privileged, the thing for his pledge; although there be neither covenant nor condemnation which expressly mentions the preference." Dom. Civ. Law, pt. 1, bk. 3, p. 692. Whatever may be this security, privilege or pledge; a jus in re, or jus ad rem; it is enough that when it arises there is a preference in the order of payment; and if the creditor has not the right of a pawnee to sell, or of a lien creditor at common law to retain possession, this court, in both respects, will exercise the power for him. The source, too, of this security, exhibits its nature, and the cause of the respect paid to it. In the same manner in which we have derived from the civil law, the original, so to speak of this security; if, indeed, we are not indebted to that code for the security itself; we must recur to the same code for the principles which are the foundation of the rules which guide us in the substitution of one security for another. In that code this was termed a "novation"; and was effected either by a change of the obligation, or the substitution of one debtor for another; the new debtor being substituted in the original obligation, or making a new covenant. The latter mode was also called a "delegation," but both were comprehended under the title of "novation." The bare effect of a second obligation was not sufficient to produce a novation, unless it appeared that it was so intended; otherwise both would subsist. But mere changes in an obligation, as adding to it new security; or taking part of what it had; lengthening or shortening the time of payment; would not make a novation, because they would not operate to extinguish the first debt, unless it is expressly said, it shall be null. Dom. Civ. Law. The principle of the novation is familiar in equity under a different term, and also at the common law. But while not discarding the aid which we derive from the consideration which a court of law gives to this question, it is rather to the rule as adopted in equity, and to that of the civil law, so far as it is applicable, that we must refer for our guidance in cases like this. In a work of general authority it is said: "Taking of a security has been deemed at most, as no more than a presumption, under some circumstances, of an intentional waiver of the lien; and not as conclusive of the waiver." 2 Story, Eq. Jur. § 1226. "Even the taking of a distinct and independent security, as for instance, of a mortgage on another estate, * * * has been deemed not conclusive evidence that the lien is waived. Taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien, but only a mode of payment." Id.; U. S. v. Lyman [Case No. 15,647]. But the doctrine thus laid down by Judge Story is by him modified in Gilman v. Brown [Id. 5,441]; and still more in its application to maritime securities in The Nestor [supra]. The decision in The Chusan [Case No. 2,717], was rested upon the lex loci contractus. Of these cases it may be said, that while the case of Gilman v. Brown [supra], carried the rule of a waiver of the lien as far as the furthest doubt which had been expressed; the greater extension of it in The Nestor is without any other authority than that of the distinguished judge by whom it was announced. In Gilman v. Brown, Judge Story said: "There is pretty strong, if not decisive, current of authority to lead us to the conclusion, that merely taking the bond or note of the vendee himself for the purchase money will not repel the lien." "But where a distinct and independent security is taken, either of property or responsibility of third persons, it certainly admits of a very different consideration." The waiver, then, as insisted upon by Judge Story, is wholly dependent upon taking a new, distinct and independent security of person or property. It must be distinct; and additional to that which the lien would afford. It may be a new person whose obligation is taken, or additional property made subject to mortgage, to secure the debt. When it is claimed that with no new parties, and without any additional security, an implication arises of the waiver of the lien, it must depend upon the circumstances of the case, as proving either a declaration plain, or manifest intention not to rely longer upon the lien. Mackreth v. Symmons, 15 Ves. 329. Nor will the addition of a new person in all cases discharge the original lien. In Grant v. Mills, 2 Ves. & B. 309, the master of the rolls held that the acceptance of the party upon whom the bill was drawn, was not the addition of a new party, and with it a new security; for the acceptor was not a surety, but considered as a person paying the bill out of the drawer's funds in his hands; and, therefore, that the bill of exchange was only a mode of payment, and not a security. 4 Kent, Comm. 58, and cases cited.

In The Volunteer [Case No. 16,991], Judge Story, in a case where a lien was claimed for freight, and denied because said to have been waived by a charter-party; held that unless there was a stipulation incompatible with the lien, it would attach. Such a test is practicable, and in its operation, just. If applied in this case, it will be seen how the rule laid down in The Nestor, and that also, in Murray v. Lazarus, is untenable. What I have said in relation to the latter case I may repeat as equally applicable to the former; that to make the rule as laid down true, the note or bill must be in itself payment; which it is not; or, because the note or bill operates as a distinct and independent security; which it is not when made between parties to the original contract, and without an agreement making it such; or, because it is inconsistent or incompatible with the original lien, which it is not. None of these consequences are involved in the making of a note or bill; and this is sufficiently proved by the construction given to one of the securities, and which is equally applicable to both; that it is a mode of payment, unless by agreement taken as payment. Lyman v. Bank of U. S., 12 How. [53 U. S.] 225. Raymond v. The Ellen Stewart [Case No. 11,594]. Where the note or bill is transferred to a third person, and becomes his property, the rule may be otherwise than as I have now stated it. But even in that case, the objection that the note might be in the hands of one person and the lien in that of another, could not be supported; because the creditor who had parted with the note could have no claim to retain the lien. If, after the note or bill was transferred the lien continued to exist, it could only continue for the benefit of the person who held the debt; but it could not exist for him, as Judge Story, upon the authority of Emerigon, holds that the lien cannot be transferred. And, as the right to the lien arose from the right to the debt, and could not exist longer than the debt, nor be claimed by the creditor except for the debt; whatever deprived him of the right to the debt would seem also naturally to deprive him of the right to the lien. And if the lien cannot be retained by the creditor because he cannot claim the debt; nor by him to whom the debt is transferred, because the lien cannot be transferred; it would be extinguished by the transfer of the debt; and the difficulty suggested as the reason for the rule cannot prevail, because it cannot and could not arise. This view, however, is in opposition to the opinion of Judge Betts in The Active [Id. 34]. In that case the material-man took the note of the agent of the ship, in payment of supplies. The note was not paid, and the libel was filed to establish the lien: the note being in court and offered for cancellation. Judge Betts held, that the note was not payment, unless agreed to be taken as such: that if not so taken, the lien was suspended during the circulation of the note; and the lien was restored when the note came back to the original holder. But I am not prepared to carry the doctrine to the extent thus laid down. I concede the rule to be, that a note or bill is not payment, unless it has been so agreed. The conduct of the parties may supply the place of; indeed may constitute the agreement. If the party taking a bill or note, uses it as money, by putting it in circulation: giving it the place of money: and making it discharge all the functions which so much paper money would have done, I cannot see in what manner the note or bill was held or treated differently from money. 4 Rich. Law, 59. Is not that use so made of the bill or note, using Lord Eldon's language again, "declaration plain," and "manifest intention," "of a purpose to rely, not any longer upon the estate, (in this case the security,) but upon the personal credit of the individual?" But if this be so, I am less able to agree with the second proposition of Judge Betts, that if the lien is divested, it can be revived without a special agreement. I cannot consider the lien suspended, when the debt is transferred. I have shown that it is divested and extinguished by that act. It cannot be contended that the endorsement is a temporary transfer, for it is an assignment of the debt, with the credit of the endorser as security. In Harris v. Johnston, 3 Cranch [7 U. S.] 311, in treating of the operation of a note conditionally received, the court said, "The endorsement of a note passes the property in it to another, and is the evidence that it was sold for a valuable consideration." The lien, if it did survive, would have to operate to secure the endorser or drawer in the case of a bill, against the non-payment of the maker or acceptor. But such is not the debt which the lien was implied to receive; and if the debt were not of itself privileged, it could not be made such by the effect of a covenant. Dom. Civ. Law, pt. 1, bk. 3, § 5. I am not satisfied that it was ever intended, or can be within the scope of this peculiar security or lien, that it should be invested with the qualities of assignability, or negotiability, which belong to other commercial securities. It was for the protection of the material-man, by securing to him his debt. All the purposes of commerce are answered, and have been, by considering it as operative to this extent. And while I do not see good, I apprehend evil in carrying it farther. It would be impossible to preserve it in the sense of the maritime law, and continue it in a state of suspension, while the debt, to secure which it had been made, had been converted into a negotiable instrument, and passed from the original creditor to some other person as his property. This security, as we have seen, is held in peculiar favor, and entitled to great preference. To allow it to be suspended for the material-man, during the time when a note or bill is maturing in the hands of a third person who held it

as owner, would open a door to the greatest fraud. The evils of such a doctrine pressed upon the learned judge, when he admits that a bona fide purchaser without notice, during the time of suspension of the lien, might be protected in his purchase. Such an admission is unavoidable, when we remember that the tendency of courts, and of legislative bodies, is to discountenance secret liens, because of the opportunities they furnish for the commission of fraud. But the admission is also conclusive of the matter which I am now considering. For, if the security or lien may be postponed to a bona fide purchaser without notice, then it is not that peculiar security which the maritime law affords; and the existence of which is inseparable from the precedence which belongs to it. It is something essentially different. But if it is not this security of the maritime law, it must be, if it is at all, created by the local law of the state, or by agreement of the parties. To neither of these can it be referred; and thus the conclusion seems unavoidable that the concession which must be made as to its effect, when suspended, shows that what is called its suspension is in fact its extinguishment. Such is the rule in the French law. "C'est un principe certain que, quand la causse du privilege cesse, le privilege cesse aussi. Le privilege accordé sur certain chose est de droit etroit, et il droit être plutôt restreint, lors principalement qu'il peut faire prejudice a quel qu'un." Boulay-Paty, tom. 1, 159.

It seems to me the result of cases directly adjudged; and of such others as afford us a basis of deduction; that where a lien arises under the maritime law, for the benefit of a material-man, it is not waived or lost because a note or bill between the parties to the original contract has been taken by the creditor (The Hilarity [Case No. 6,480]); unless there is some evidence showing that the note or bill was taken as payment. But if the party taking the note or bill transfers it to another for a consideration, so that it becomes the property of that person; and thereby loses all right to the note or bill; the implied lien of the maritime law does not follow the debt which has been transferred; while the original creditor by the transfer of the debt, has ceased to have a right to the lien, which is created only for his benefit. That thus, by the transfer, assumed to be absolute, the lien is extinguished; nor will it be revived by taking back the note. An agreement made, may give a new lien; but the implied lien of the law is discharged.

The facts of the case to which this opinion is to be made applicable, are few and plain. The libellant advanced money for repairs and supplies to a vessel in a foreign port. That the advance was made is proved by the draft or bill of exchange which the captain drew on his owner: that it was recognized as proper by the owner, is proved by his acceptance of the draft. The William & Emmeline [Case No. 17,687]. I have said, that merely taking this draft was not a waiver of the lien. The libel avers that it has been the property of the libellant, and subject to his control; and he now brings it into court to be cancelled; delivered to the owner, or otherwise disposed of as the court shall direct. It seems to me that the libellant is entitled to the relief he seeks. The decree will be entered that the draft or bill of exchange be deposited with the clerk, to be delivered to the owner who is the acceptor; and that the vessel be condemned and sold to pay the libellant the amount of his advances, with interest and costs.

Case No. 6,123.

HARRIS et al. v. LINDSAY.

[4 Wash. C. C. 98.] [1]

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

NOVATION—PARTNERSHIP.

Lindsay and Tomlinson were indebted to the plaintiffs, and on the dissolution of the partnership it was agreed that Tomlinson should retain the funds and pay the debts of the firm. Tomlinson afterwards entered into another partnership, and the plaintiffs gave credit to the new firm, which was afterwards dissolved, and at the time of the dissolution, was also indebted to the plaintiffs. It was then agreed that the debts of Lindsay and Tomlinson, and the new debt, should be consolidated, and the whole sum, thus ascertained, was made payable in three promissory notes given by Tomlinson to the plaintiffs, none of which corresponded in amount with the debt of Lindsay and Tomlinson. On the non-payment of the notes, this suit was instituted against Lindsay and Tomlinson. *Held*, the partners cannot by any agreement between them affect the rights of their creditors. But when the plaintiffs, with a full knowledge of such agreement, entered into a totally new contract with the paying partner, entirely changing the nature of the partnership debt, and making it a different debt from that which the retiring partner was bound to pay, and to subject him to a different kind of responsibility; such new contract discharged the defendant Lindsay, and amounted to an acceptance of Tomlinson as the debtor.

[Cited in Mutual Safety Ins. Co. v. Cargo of The George, Case No. 9,981; Regester v. Dodge, 6 Fed. 14.]

[Cited in Tyner v. Stoops, 11 Ind. 31; Bantz v. Basnett, 12 W. Va. 792, 857; Smith v. Shelden, 35 Mich. 44; Hall v. Johnston, 6 Tex. Civ. 110, 24 S. W. 865.]

Action of assumpsit to recover from the defendant $2,091, the balance of an account due from the former co-partnership of Lindsay and Tomlinson. The facts of the case, as opened and proved by the defendant's counsel, were as follow: Lindsay and Tomlinson entered into partnership some time in October, 1815, under the firm of Lindsay and Tomlinson, and after contracting with the plaintiffs the debt in question, they dissolved

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

their connection, some time in January, 1816, upon the terms that Tomlinson should retain the partnership funds, and pay all the debts due from the concerns. Immediately after the dissolution of this co-partnership, Tomlinson entered into partnership with some other person under the firm of Jessy Tomlinson & Co. with whom the plaintiffs had dealings, leaving a balance in their favour of $546, due in April, 1816, when that partnership was dissolved. In the same month, the partnership of Tomlinson and Chambers was formed, which continued until September following, when it was dissolved, being indebted to the plaintiffs in a balance of $3,010. Soon after the dissolution of the co-partnership of Lindsay and Tomlinson, the latter informed the plaintiffs of that event; that he had bought his partner out, and was to pay the debts due by the concern. In September, 1816, after the termination of the co-partnership of Tomlinson and Chambers, an arrangement took place between the plaintiffs and Tomlinson, in consequence of which the above balances, due by Lindsay and Tomlinson, Jessy Tomlinson & Co. and Tomlinson and Chambers, were consolidated into one sum, amounting to about $5,647, for which Tomlinson gave three notes payable in forty, ninety, and one hundred and twenty days, dividing the aggregate amount into three sums, neither of which answered to the balance due from either of the above concerns. The plaintiffs gave their receipt to Tomlinson for these notes, by which they agreed to pass the same to his credit, when they should be paid. Tomlinson having become insolvent, this action was brought against him and Lindsay; but the process was served only on the latter. Upon these facts, it was contended by the defendant's counsel, that the plaintiffs accepted Tomlinson as their debtor, and discharged Lindsay. That as between Lindsay and Tomlinson, the former was surety and the latter principal; and this being known to the plaintiff, who treated Tomlinson as the principal, by taking his own note for what was due, he discharged Lindsay by consolidating the three balances, and giving time for the payment without his consent, and without reserving his recourse against Lindsay. The credit in fact is given exclusively to Tomlinson. Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 Esp. 122; Bedford v. Deakin, 2 Starkie, 178; 2 Johns. Cas. 228. The plaintiff's counsel insisted, that no agreement between co-partners, similar to that which took place between Tomlinson and Lindsay, can in any manner affect the rights of their creditors, or exonerate either from his responsibility to pay the debts, unless he is expressly discharged. That the circumstance of a creditor giving time to the partner who has the funds, and is to pay the debts, cannot amount to an implied discharge; as indulgences of this kind are always expected, and often absolutely necessary. The permission to grant them therefore without producing the effect contended for, is always implied by such an arrangement between the parties as was made in this case. The cases cited are unlike the present.

Mr. Sergeant, for plaintiffs.
Mr. Binney, for defendant.

WASHINGTON, Circuit Justice (charging jury). It is certain that the rights of creditors cannot be altered by any private agreement, which the partners may choose to make with each other when they dissolve their connection. Although the partnership effects are by such agreement to be retained exclusively by one of the partners, who is also to discharge the debts, the recourse of the creditors against the retiring partner remains unchanged, unless by some positive act, which directly, or by a fair inference, amounts to an agreement to discharge him. An indulgence granted by a creditor would not amount to such an agreement. Nor are we prepared to say that even by forbearing to sue, an express agreement to renew the notes of the co-partnership, by accepting those of the paying partner, would discharge the other partner. As to this, we are not called upon in this case to express an opinion. But if, with a full knowledge of the agreement between the partners, that one is to retain the effects and pay the debts, a creditor shall enter into a totally new contract with such partner, by which the nature of the partnership debt is totally changed, so as to become a different debt from that which the retiring partner was bound to pay, or such as to subject him to a different kind of responsibility; such new contract will amount to an acceptance, by the creditor, of the paying partner as his debtor, and to a discharge of the other. That is precisely the present case. The plaintiffs, with full knowledge of the agreement between Tomlinson and the defendant Lindsay, continued to deal with, and to give credit to, the two subsequent co-partnerships of Jessy Tomlinson & Co. and Tomlinson & Chambers; and after the termination of the last of these co-partnerships, they entered into a new contract with Tomlinson, by which they agreed to consolidate the balance due by the three concerns into one sum, and to receive Tomlinson's notes for the aggregate amount, divided into three parts, neither of which answered to the balance due by either house, and to pass the said notes to the credit of Tomlinson alone, when the same should be paid. It was then so contrived by this new arrangement, to which Lindsay was no party, nor had given his assent, that until all the notes, representing the entire aggregate amount of the three balances (for two of which he was not liable) were paid, Lindsay could never plead payment of the balance due by Lindsay and Tomlinson, even although a larger sum than that due by them should have been

paid by Tomlinson, out of the very funds retained by Tomlinson for that purpose. So entire a change of the debt, and of Lindsay's responsibility, operates to extinguish the partnership debt and to discharge Lindsay, as effectually as if Tomlinson had given his bond to the plaintiffs for the same.

Verdict for defendant.

[A rule for a new trial was discharged in Case No. 6,124.]

Case No. 6,124.

HARRIS et al. v. LINDSAY.

[4 Wash. C. C. 271.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1822.

PARTNERSHIP—ARTICLES OF AGREEMENT—LIABILITY FOR DEBTS.

1. Partners, in respect to debts contracted by them during their association, cannot by any agreement between themselves, at the period of their separation, change their condition of principal debtors, or in any way affect the rights of their creditors. If the agreement be that one of them shall retain the partnership effects and pay the debts, they continue nevertheless bound as principals; so that no indulgence granted by a creditor to the paying partner, which falls short of an agreement express or implied to take him as the debtor and to discharge the other partner, can place them in the situation of principal and surety, so as to discharge the retiring partner.

[Cited in Re Johnson, Case No. 7,369; Re Hurst, Id. 6,925. Quoted in Re Parker, 11 Fed. 399.]

[Cited in First Nat. Bank v. Newton [Colo. Sup.] 14 Pac. 433; Robinson v. McFaul, 19 Mo. 549; Rawson v. Taylor, 30 Ohio St. 402; Wildes v. Fessenden, 45 Mass. [4 Metc.] 25; Hoskinson v. Eliot, 62 Pa. St. 399; Hard v. Burton, 62 Vt. 322, 20 Atl. 269.]

2. But it is not meant to concede that where two persons are indebted by simple contract, and the note of one for the amount of the debt is taken by the creditor, it is in all cases necessary to the discharge of the other to prove an express agreement to accept the note in satisfaction. The agreement may be inferred from the nature and operation of the new contract, or from circumstances clearly indicating that such was the intention of the parties.

This was a motion for a new trial. [See Case No. 6,123.]

Mr. Sergeant, for plaintiffs [Harris & Donaldson], insisted that partners being, as to debts contracted by them, principal debtors, they can by no act or agreement between themselves change their situation to that of principal and surety, without the express assent of the creditors: their liability is unconditional; neither of them can be discharged from his obligation but by payment or release, nor can any act of the creditor amount to a release which he did not clearly so intend; and this intention ought, in this case, to have been left to the jury. Forbearance, or giving time to the partner, who, upon a dissolution, is to keep the funds and pay the debts, will not discharge the retiring partner. Neither will a note or bill of exchange accepted by the creditor from the paying partner for the amount of the partnership debt, amount to a discharge of it. The cases from 4 Esp. 89, 5 Esp. 122, and 2 Starkie, 178, which seemed principally to weigh with the court upon the trial of this cause, have been reviewed in the case of Bedford v. Deakin, 2 Barn. & Ald. 210; from which it appears that those cases proceeded on the ground that the notes were received in satisfaction of the partnership debt, which is not the present case; for the stipulation that the notes are to be a payment when they should be paid, is equivalent to a reservation strictly of the plaintiff's original right against both partners.

Mr. Binney, for defendant, admitted most of the general principles laid down by the plaintiffs' counsel. But he contended, that where partners dissolve their connexion, and agree that one of them shall retain the funds and pay the debts, if a creditor, knowing of this agreement, enters into a new arrangement with the paying partner, without regarding his original rights, but agreeing to be paid by that partner, he adopts him as his debtor, and substitutes the new for the old contract. As between themselves, the effect of the agreement between Lindsay and Tomlinson was to make the former surety, and the latter principal. Mont. Partn. 204. This was not binding upon the plaintiff unless he chose to treat them as principal and surety, which he did by the new arrangement with Tomlinson, knowing at the time, as he did, of the agreement between the partners. The question is not always, has the debt been paid or released? It may be, has he agreed to take something in satisfaction of it? A negotiable note taken from the paying partner, without a reservation of the original rights of the creditor, is a satisfaction. Thacher v. Dinsmore, 5 Mass. 299; Wiseman v. Lyman, 7 Mass. 286; Chapman v. Durant, 10 Mass. 47. Such too is the doctrine in 4 Esp. 89, 5 Esp. 122, and 2 Starkie, 178, and such too is the case of Bedford v. Deakin, although it was read and relied upon to prove a contrary doctrine. This is a stronger case than any that has been cited, in as much that in this the debt of the co-partnership was by the new arrangement made by the plaintiffs with Tomlinson, mixed up and confounded with other debts due by Tomlinson; the notes of Tomlinson accepted for the aggregate amount; and a receipt given by the plaintiffs, to credit Tomlinson with the notes when they should be paid.

WASHINGTON, Circuit Justice. This case comes before the court upon a rule to show cause why a new trial should not be granted,

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

upon the ground of a misdirection of the court in the charge to the jury. The material facts of the case may be stated in a few words. Lindsay and Tomlinson, carrying on trade under that name, having had dealings with the plaintiffs, dissolved their partnership early in the year 1816, being indebted to the plaintiffs in a balance of $2,691. It was agreed between them that Tomlinson should retain the partnership effects, and pay all the debts of the concern, and should also pay certain sums of money to Lindsay. Immediately after this transaction, Tomlinson formed a new co-partnership with some other person, under the firm of J. Tomlinson & Co.; and on the 22d of January, 1816, they addressed a letter to the plaintiffs, containing an order for goods, in which they say, "We have bought out Lindsay on Wednesday last. The firm is now J. Tomlinson & Co. We are answerable for what we are indebted to you." This last connection was soon dissolved, being indebted to the plaintiffs in a balance of about $546. In April, 1816, Tomlinson and Chambers formed a co-partnership, which they soon afterwards dissolved, being also indebted to the plaintiffs in the sum of about $3,018. On the 22d of October, 1816, Tomlinson and the plaintiffs entered into an arrangement, by which it was agreed that the above balances due from the three firms should be consolidated, and divided into three parts, for which Tomlinson should give his three negotiable notes to the plaintiffs, payable at forty, ninety, and one hundred and twenty days. This was accordingly done, and the plaintiffs gave to Tomlinson a receipt for the notes, in which it was expressed, that when the said notes should be paid, the plaintiffs would pass the same to the credit of Tomlinson. Neither of the notes was for the balance due by either of the firms. The court charged the jury, at the trial, that by the above arrangement the plaintiffs agreed to take Tomlinson as their debtor for the balance due by Tomlinson and Lindsay, and thereby discharged Lindsay. We unhesitatingly admit that partners, in respect to debts contracted by them during their association, cannot, by any agreement between themselves, at the period of their separation, change their condition of principal debtors, or in any way affect the rights of their creditors. If the agreement be, that one of them shall retain the partnership effects, and pay the debts, they continue nevertheless bound as principals, so that no indulgence granted by a creditor to the paying partner, which falls short of an agreement, express or implied, to take him as the debtor, and to discharge the other partner, can place them in the situation of principal and surety, so as to discharge the retiring partner. To support a defence of this kind, such an agreement must be satisfactorily made out. It is the very point upon which all the cases that were cited at the bar turned. We further agree, that a note, or bill of exchange, given for a pre-existing simple contract debt, does not extinguish it; and that, per se, it affords no ground for presuming an agreement between the parties, that it was given and received in satisfaction of such debt. There are some cases of high authority which seem contrary to this position. 5 Mass. 299; 6 Mass. 343; 7 Mass. 288; 10 Mass. 47. But the weight of authority is, in our opinion, the other way. 1 Strange, 426; 1 Burrows, 9; 3 East, 258; Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253. But in making these admissions, we do not mean to concede that where two persons are indebted by simple contract, and the note of one for the amount of the debt is taken by the creditor, it is in all cases necessary to the discharge of the other to prove an express agreement to accept the note in satisfaction of the original debt. The agreement may be inferred from the nature and operation of the new contract, or from circumstances, clearly indicating that such was the intention of the parties.

It was strongly insisted by the plaintiffs' counsel, that the question in this case turned altogether upon the intention of the parties to the new contract, to be discovered from the circumstances which attended it; and that the court ought to have left that matter to the jury, as the basis on which their verdict should be founded. We admit, that if the agreement to take the notes in discharge of the original debt be a mere inference from circumstances, tending to show that such was the intention of the parties, the jury were the proper judges of such intention, and ought to have decided that point. But the ground upon which the charge proceeded was, that the new contract amounted to an agreement to discharge Lindsay; and that the intention of the parties formed no part of the question which the jury had to decide. There were, in fact, no circumstances in the case, other than such as grew out of written documents, the construction and legal effect of which, was proper for the consideration and decision of the court. In the case of Johnson v. Weed, 9 Johns. 310, the note of a third person was taken for goods sold, and a receipt in full was given by the vendor. The court left it to the jury, under all the circumstances of the case, to say whether there was a special agreement by the vendor to receive the note absolutely as payment. But a receipt in full is never conclusive evidence of payment, and is open to inquiry. Much less was it conclusive that the note was received as payment of the original debt; and whether it was so intended or not, was a question properly submitted to the jury. In the case of Herring v. Sanger, 3 Johns. Cas. 71, it was decided, that a note given by one partner after a dissolution of the co-partnership, for a debt due by the partners, and a receipt for the note when paid to be in full of the debt, was no payment of the precedent debt; not on the ground of intention, but of the fair import of the contract. And in Evans v. Drum-

mond, 4 Esp. 89, the court decided that, by taking a new bill from the paying partner, the partnership debt was discharged, without reference to the intention of the parties. We therefore take the rule to be, as it is before laid down, that where the discharge of the precedent debt depends upon the nature and operation of the new contract, the question is properly within the province of the court to decide.

The only question then, in this case is, whether the arrangement entered into between the plaintiffs and Tomlinson on the 22d of October, 1816, amounted to an agreement to take Tomlinson as the debtor, and to discharge Lindsay? It has been freely admitted by the defendant's counsel, that the plaintiffs were not bound by the agreement made between Tomlinson and Lindsay, at the time when they dissolved their copartnership. And it is not denied, nor could it be on the other side, that the plaintiffs were at full liberty to confirm that agreement, so far as to affect their own interest. Have they not done so? With full knowledge of that agreement, they consented, not only to take the notes of Tomlinson for the amount of the precedent debt, and to credit him for the same when they should be paid; but that the character of the precedent debt should be totally changed, and its identity destroyed, by mixing it up with other debts with which Lindsay had no concern. And, as if to render this confusion of debts still more confused, the aggregate amount of three distinct debts was so divided, and the evidence of them so contrived, that neither of the parts answered to either of the precedent debts, and neither of the original debtors could say, at any time, prior to the entire payment of all the notes, when he was discharged, in part or in whole. Lindsay was not consulted in relation to this new arrangement; and although he had made provision for the payment of the debt for which he was liable, the parties to the new contract placed it beyond his power to find out when that debt was discharged; and although, if sued for the same, he could have proved payments made by Tomlinson out of the very effects left with him for that purpose; still, as, by the new contract, the plaintiffs were not bound to credit this debt with any payments which might be made to them, he could not have avoided the demand by any evidence short of that which should prove a discharge of all the notes. Tomlinson incapacitated himself to apply the payments he might make to either of the precedent debts. The application was made by the contract; the credit was to be given to Tomlinson alone, the original debtors being placed totally out of view. If Tomlinson had paid a sum equal to the whole of the debt due by Lindsay and Tomlinson, and directed the same to be applied to the discharge of that debt, the plaintiffs might have refused, and answered, that they knew only Tomlinson in the transaction, to whom alone they were bound by their contract with him, to credit the payments he might make. If the effect of the agreement was not to substitute Tomlinson as the debtor, in the place of Lindsay and Tomlinson, the payments which Tomlinson might make on account of the debt due by Lindsay and Tomlinson, ought to have gone to their credit. But if he was taken as the debtor, he alone was entitled to the credit, and then there is a perfect consistency between the two parts of the agreement.

It was strongly insisted by the plaintiffs' counsel, that nothing short of an express agreement to that effect could discharge Lindsay from his original liability; and there are certain loose, general expressions, to this extent, to be met with in some of the cases. But those expressions should be construed with reference to the particular case in which they were used. In Murray v. Gouverneur, 2 Johns. Cas. 438, and in some others where we meet with this language, there was nothing which even implied an agreement that the note or bill should be taken in satisfaction of the precedent debt; and it has been already stated, that the mere acceptance of a note or bill, is not, per se, a discharge of a precedent simple contract debt. In Herring v. Sanger, 3 Johns. Cas. 71, before adverted to, the receipt stated that the note, when paid, was to be in full of the debt due from the partners; the plain import of which was, that in the event of the note being paid, and not otherwise, it was to go to the credit, not of the maker of the note, as in this case, but of the original debt, which was considered as still existing, and in full force. The terms of the receipt were tantamount to an express reservation of the rights of the creditor against both the partners. In the case of Evans v. Drummond, 4 Esp. 89, there was no agreement of any kind that the bill should be taken in satisfaction of the original debt. The mere circumstance of the creditor taking the bill of the paying partner, after he knew that the other partner had nothing to do with the concern, was considered as amounting to a discharge of that other partner. Such too was the case of Reed v. White, 5 Esp. 122. The case of Bedford v. Deakin, 2 Barn. & Ald. 210, was much relied upon by the plaintiffs' counsel; not only as destructive of the nisi prius cases above referred to, but as laying down principles opposed to those on which the opinion of this court was founded. We think quite otherwise. That case was shortly as follows. Deakin, Bickley and Hickman, being partners in trade, drew the bill of exchange upon which the action was brought by Bedford, as indorsee. The bill was duly protested, after which the partnership was dissolved. Bickley, through the medium of a friend, informed the plaintiff of the dissolution, and that by an arrangement made

between the partners, he, Bickley, was to provide for this bill. He then offered the plaintiff his own notes for the principal and interest then due, payable at four, eight, and twelve months, with an indorser, whom he named. Upon receiving notice of this arrangement and offer, the plaintiff observed that he held very good security already, and did not wish to prejudice it. He agreed, however, to receive the notes of Bickley, reserving strictly the security of the three partners. The notes were accordingly delivered; but the protested bill was nevertheless retained by the plaintiff. The notes, when they became due, were taken up by the plaintiff. Hickman and Bickley became bankrupts, the former, prior to the date of the above notes, and the latter two or three years afterwards. The reasons assigned by all the judges, why Deakin, the solvent partner, was liable to pay the original bill, notwithstanding the arrangement made between the partners, and the securities afterwards received by the plaintiff from Bickley was, that the plaintiff never agreed to receive Bickley as his debtor, and to discharge the other partners; but on the contrary, he, in express, terms, reserved, strictly, the security of the three partners; and as an additional proof that the other partners were not intended to be discharged, he retained in his possession the evidence of his claim against them. Abbot, C. J., in delivering his opinion, relies altogether upon the express reservation of the original security of all the partners; and after stating this reservation in italics, he observes, "it cannot therefore be said that the plaintiff agreed to take Bickley's notes as a satisfaction of his claim on the original bills." In answer to the argument founded on the renewal of the notes by Bickley, he relies upon the circumstance, that the plaintiff retained the possession of the original bill of exchange, in consequence of which, Deakin was bound to take notice of the renewal of the notes by Bickley, and that he, Deakin, remained still liable. Mr. J. Bayley observes, that the notes given by Bickley could not amount to a satisfaction of the original debt, unless when they were taken, they were so intended by the plaintiff, "or unless the plaintiff's conduct has, without the fault of Deakin, produced mischief to him." To show that the first branch of the proposition had not occurred, he relies on the express reservation by the plaintiff, of his original security; and as to the last, that the evidence of that security had never been delivered up, and therefore Deakin could not be injured by supposing that it was paid, or that something had been accepted in satisfaction of it. The other judge rests his opinion upon a general principle of law which no person can dispute, and upon the express reservation. Now the difference between that case and the present exists in the following particulars. In that, the creditor reserved, in express terms, his claim against all the partners; he reserved it by the strongest implication, in retaining the evidence of that claim; and the other partners could not, without their own default, be injured by the acts of the plaintiff, since they were bound to take notice that the renewed note was not accepted in satisfaction of the claim against them. There was then no agreement, express or implied, to discharge the other partners. In this case, there was no reservation of the plaintiffs' claim against the partner who had retired; on the contrary, there was an express agreement to credit Tomlinson with the notes given by him, when they should be paid. There was no implied reservation of the plaintiffs' claim against Lindsay, by retaining the evidence of it, since there was no evidence of it which could have been surrendered to Tomlinson; and lastly, the amalgamation of this debt with others due by Tomlinson, in such a manner as to destroy its identity, and to deprive Lindsay of the means of knowing whether it was due or not, and when and how it was discharged, partially or wholly, produced a total change in his original situation, and exposed him to all the injury which such an arrangement could not fail to subject him to. Where then was the notice to Lindsay that the original debt was still unsatisfied, which is so much relied upon in the case of Bedford v. Deakin? He certainly would never obtain it from a view of the new contract; every part of which was calculated to beguile him into the belief, that it was discharged by the negotiable notes of Tomlinson. The rule for a new trial must be discharged.

Case No. 6,125.

HARRIS et al. v. McGOVERN et al.

[2 Sawy. 515.] [1]

Circuit Court, D. California. Jan. 26, 1874.[2]

SAN FRANCISCO'S TITLE TO LANDS—WHEN PERFECTED—THE STATUTE OF LIMITATIONS OF 1863—LIMITATIONS—DISABILITIES—SUCCESSIVE POSSESSION.

1. The title of the city of San Francisco to its municipal lands within its charter limits, as defined by the act of incorporation of 1851 [Laws Cal. 1850–53, p. 944], became perfected July 1, 1864, under section 5 of the act of congress of that date, entitled "an act to expedite the settlement of titles to lands in the state of California" [13 Stat. 332].

2. The statute of limitations of 1863 commenced to run in favor of the adverse possession of such lands, existing at the time of the passage of said act of congress of July 1, 1864 [9 Stat. 631], as early, at least, as the date of the passage of said act.

[See note at end of case.]

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

[2] [Affirmed in 99 U. S. 161.]

3. When the statute of limitations once begins to run upon a right of action to recover lands, it is not interrupted by the subsequent descent of such right of action to a party laboring under a disability to sue at the time of such descent cast.

4. Where the disseizor conveys his title and possession, and his grantee immediately succeeds to the same possession, in pursuance of such conveyance, the possession of both constitutes one entire continuous possession for the purposes of the statute of limitations.

[Quoted in San Francisco v. Fulde, 37 Cal. 349.]

[5. Cited in Ohm v. City and County of San Francisco, 92 Cal. 437, 28 Pac. 585, to the point that legislative grants have all the effect of a patent.]

[See note at end of case.]

Action to recover one hundred vara lot No. 19, of the Laguna survey. This lot is within the charter lines of San Francisco, as defined in the act of incorporation of 1851. It lies west of Larkin street, and north-west of Johnson street, and is within the limits covered by the Van Ness ordinance. On September 25, 1848, T. M. Leavenworth, as alcalde, issued a grant for this lot to a party designated in the grant by the name of Stephen A. Harris. At that time there was at San Francisco a man named Stephen A. Harris, and another named Stephen Harris. In 1850, said Stephen Harris left California, and never returned. He went to New Jersey, where he resided several years, then removed to Illinois, where he died on November 5, 1867, leaving a will, in which he devised certain property, including said lot nineteen, to the plaintiffs, who are his children, and his heirs-at-law, and who at his death were minors. On May 1, 1854, Stephen A. Harris, at San Francisco, by deed in due form, conveyed said one hundred vara lot to one Blackstone. The defendants deraign title to said lot through said Blackstone, and they and their grantors have been in possession, claiming title adversely under said conveyance, since the spring of 1864. It does not appear that any party was in the actual possession or occupation of said premises on January 1, 1855, or between that time and July, 1855. This action was commenced on January 14, 1870. The plaintiff, Edward H. Harris, attained his majority in March, 1869; and Letitia Harris Shimer, the other plaintiff, in May, 1868. The plaintiffs claim title as devisees, and as heirs of said Stephen Harris, who is claimed to be the real party designated in the grant by the name of Stephen A. Harris, and the party to whom the grant was actually made. The testimony tends strongly to show this claim to be well founded; and for the purposes of this decision, I shall assume the grant to have been, in fact, made to said Stephen Harris. Defendants [John McGovern and others] set up the statute of limitations as one defense.

Wm. Higby and P. B. Ladd, for plaintiffs.
S. M. Wilson, for defendants.

SAWYER Circuit Judge (after stating the facts). One defense relied on by defendants is the statute of limitations. Stephen Harris was the party disseized, the adverse possession under a paper title in all respects regular on its face, having commenced several years before his death. The statute of limitations of 1863 is the one applicable. St. [Cal.] 1863, p. 325. Under this statute the time limited began to run, at least from the date of the act of congress of July 1, 1864, to settle land titles in California, at which time the title of the city of San Francisco to the municipal lands within the limits embraced by the Van Ness ordinance, became final. 13 Stat. 333, § 5.

In Montgomery v. Bevans [Case No. 9,735], Mr. Justice Field says: "Now, though the title of the city, as stated in the previous opinion, is Mexican in its origin, and was recognized and established by the decree of the circuit court of the United States, as modified by the act of congress of March 8, 1866 [14 Stat. 4], yet all adverse interest of the government to the lands within the corporate limits of 1851, being released by the act of July 1, 1864, the titles conferred by the Van Ness ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done." As the titles derived through tthe city thus became final, the title of the city itself must have become final, and the plaintiffs claim title through the city and the Van Ness ordinance.

The statute, therefore, began to run during the lifetime of Stephen Harris, and more than five years before the commencement of this action. The question under the statute then is, did the statute, having once commenced to run, continue to run notwithstanding the death of Harris, and the vesting of the title and right of action in his minor children, or was the running of the statute suspended during the minority and consequent disability of the plaintiffs? In other words, is the case within the exception of the sixteenth section of the statute, allowing those who are under disability five years after the disability ceases within which to commence the action? Under all the English statutes, it has long been settled that the exception only applies where the right of action first accrues during the disability—that when the statute once begins to run, it continues to run, and overrides all disabilities of every kind subsequently arising. Ang. Lim. §§ 477–479; Walden v. Heirs of Gratz, 1 Wheat. [14 U. S.] 296; Mercer's Lessees v. Seldon, 1 How. [42 U. S.] 37; Roberts v. Moore [Case No. 11,905]; Den v. Richards, 3 J. S. Green [15 N. J. Law] 347; Stowel v. Zouch, 1 Plow. 353; Doe v. Jones, 4 Term R. 300. The construction of the New York statute is settled in the same way. Demarest v. Wynkoop, 3 Johns. Ch. 129; Fleming v. Griswold, 3 Hill, 85; Becker v. Van Valkenburgh, 29 Barb. 324, 325.

But counsel for plaintiffs insist that the statute of California is different from the English and New York statutes, and that the decisions under those statutes, consequently, have no application. In this they are mistaken. Section sixteen of the statute of California, as amended in 1863, so far as it touches this question, is an exact transcript of section sixteen of the statute of New York, from which it was taken. It is as follows: "If the person entitled to commence any action for the recovery of real property * * * be at the time, such title shall first descend or accrue, either. First, within the age of majority," etc. St. 1863, 326. The language of the statute of New York is: "If any person entitled to commence any action in this article specified * * * be at the time, such title shall first descend or accrue, either," etc. Ang. Lim. Append. 62, § 16. It will be seen that the language is identical. The language itself is clear, independent of authority; it is, if any person "entitled" to commence an action be at the time, "such title"—that is, such title, or right to commence the action, referring to the word "entitled," in the language of the first part of the clause—"shall first descend or accrue." It only excepts the case when the right or title to commence the action "first descends" or "first accrues." It excepts only once, and that "the first." Now, in this case, the right or title to commence the action "first accrued" to Harris, the ancestor, and not to the plaintiffs. So, also, our statute is substantially a transcript of the English statute of 21 James I, which reads: "If any person * * * that is or shall be entitled to such writ (that is to commence such action), * * * or that hath or shall have such right or title of entry, be or shall be at the time of said right or title first descended, accrued, come or fallen within the age of twenty-one," etc. Ang. Lim. §§ 477–479, and Id. Append. 4, § 2. The language in all these statutes is subsequently identical, and must receive the same construction. The construction had long been thoroughly settled by judicial decisions when this provision was adopted in this state, and such construction must be presumed to have been adopted with the language. Besides, I think the construction correct.

It is further insisted that the defendants had not, personally, been in possession during the entire statutory periods, and that they cannot connect their possession with the possession of their grantors in order to make up the full term. There is nothing in this point. Harris was disseized under a claim of title, as early as 1864, and the disseizors transferred the possession acquired by them with their title to their grantees. The possession of the defendants is the same as that of their grantors—the possession and the interest were continuous. This principle has been long and repeatedly recognized by the courts of California. San Francisco v. Fulde, 37 Cal. 349. The conclusion attained renders it unnecessary to consider the other interesting points made by defendants. It results that the bar of the statute attached before the commencement of this action, and the defendants are entitled to judgment and costs. Let judgment be entered accordingly.

[NOTE. Plaintiffs took a writ of error from the supreme court (99 U. S. 161), assigning for error that the court erred in the conclusion of law that the statute of limitations began to run as early as July 1, 1864, that the defendants were in possession for more than five years subsequently, and that the defendants were entitled to judgment. The judgment of the circuit court was affirmed in an opinion by Mr. Justice Clifford in a review of the facts, holding that where the property is so situated as not to admit of use or residence, neither actual occupation, cultivation nor residence are absolutely necessary to constitute legal possession if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.]

HARRIS (NICHOLS v.). See Cases Nos. 10,243 and 10,244.

Case No. 6,126.

HARRIS v. NUGENT.

[3 Cranch, C. C. 649.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

MARITIME JURISDICTION—FERRYBOAT — LIABILITY OF MASTER FOR WAGES.

1. The maritime law does not apply to such boats as the Tyber steamboat, a ferryboat running between Washington and Alexandria.

[Cited in Murray v. The F. B. Nimick, 2 Fed. 90.]

2. The master of such a boat is not personally liable for the wages of the hands.

Appeal from the judgment of a justice of the peace for the wages of [William B.] Nugent on board the Tyber steamboat, a ferryboat, or packet, running between Washington and Alexandria. Nugent was the plaintiff below. The evidence which he relied upon was the following paper: "Shipped W. A. B. Nugent, May 6, 1829, on board the Tyber steamboat, at twenty-two dollars per month. For the steamboat Tyber, John Harris." And parol evidence that Harris was the master of the boat; but had been dismissed before suit brought. The justice had given judgment only for the amount of wages up to the time when the master was dismissed.

THE COURT (nem. con.) reversed the judgment; being of opinion that it was not a personal engagement by Harris, and that the maritime law did not apply to such boats, so employed.

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

Case No. 6,127.

HARRIS et al. v. The PROMETHEUS.

[N. Y. Times, March 5, 1857.]

District Court, D. New York.[1] 1857.

DAMAGES BY COLLISION—DEMURRAGE.

[1. The rule of damages in collision for delay while undergoing repairs is the amount the vessel would have produced for chartering in the business in which she has usually been employed.]

[2. There can be no recovery in collision for delays caused by storms, or by ice or obstructions in the harbor or river where a vessel may be, after necessary repairs are made.]

This case came up on exceptions to the report of the commissioner to whom it had been referred to compute the damages which the libelants [John A. Harris and others] were entitled to recover by reason of a collision between the schooner Mechanic and the steamship [Prometheus]. The commissioner, among other items of damage, reported "for what the vessel would have chartered for 76 days, while undergoing repairs, at $27.50 per day, $2,090," to which the claimants excepted.

Beebe, Dean & Donohue, for libelants.

Clark & Rapallo, for claimants.

Before INGERSOLL, District Judge.

HELD BY THE COURT: That the rule in such cases is that the libelant recover for the use of his vessel during the time necessary to make the repairs; and by the use of the vessel is meant what she would produce for chartering her in the business in which she had been usually employed. That if, after the necessary repairs are made, the vessel is further detained and kept from her business, either by storms or other state of the weather, by ice or other obstructions in the harbor or river where she may be, or from any other cause not directly produced by the collision, for such further detention there can be no recovery. That from the evidence in this case it does not appear what number of days was necessary for the repairs. That if the amount allowed per day was what the vessel was worth with a full crew on board, then that amount is too large.

Referred back to commissioner for an additional report.

HARRIS (RIPLEY v.). See Case No. 11,853.

Case No. 6,128.

HARRIS et al. v. The ROBINSON.

[Cited in The Williams, Case No. 17,710, and in The Illinois, Id. 7,005. Nowhere reported; opinion not now accessible.]

HARRIS (SHIRLY v.). See Case No. 12,798.

[1] [District not given.]

HARRIS (UNITED NICKEL CO. v.). See Case No. 14,407.

HARRIS (UNITED STATES v.). See Cases Nos. 15,312–15,315.

Case No. 6,129.

HARRIS et al. v. WHEELER.

[8 Blatchf. 1;[1] 14 Int. Rev. Rec. 147.]

Circuit Court, S. D. New York. March 19, 1870.

ADMIRALTY—ADVANCES TO VESSEL IN DISTRESS—REPORT OF COMMISSIONER—OBJECTION TO, ON APPEAL.

In a suit in admiralty, in personam, for alleged advances to the respondent's vessel in a port of distress, the district court, before making a decree establishing the libellant's right to recover, and before any hearing of the cause, made an order, referring it to a commissioner to ascertain and report the amount due to the libellant. He reported such amount and the proofs he had taken. No objection was taken by the respondent, before the commissioner, to the allowance made, no exceptions were filed in the district court to his report, and it did not appear that any objection was made in that court to such allowance: *Held*, that the respondent could not, on appeal, object to items of allowance, in respect to which it did not appear that objections had been raised in the district court.

[See note at end of case.]

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

[This was a libel by George Harris and others against Samuel G. Wheeler, Jr., to recover for supplies furnished to the steamer Eutaw.]

Charles Donohue, for libellants.

Lyman B. Bunnell, for respondent.

WOODRUFF, Circuit Judge. The only objection to the decree of the district court, which was suggested on the hearing of this appeal, is, that the commissioner by whom proofs of the amount due the libellants were taken and reported, erroneously allowed to the libellants commissions on advances made for supplies and repairs to the respondent's vessel, and commissions upon the value of her cargo, as compensation for services, care, and responsibility in superintending the removal of her cargo, and the preservation and relading thereof after the repairs were made. No proofs were taken in the district court, and the proceedings before the commissioner appear to have been intended and conducted as preparatory to a hearing of the cause, and before any decree establishing the libellants' right to recover. No objection appears to have been taken to the said commissions before the commissioner, and no exceptions were filed to his report, nor, so far as appears from the transcript of the proceedings, was any objection made in the district court to the allowance of the items now objected to.

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

Ordinarily, where the right to recover has been established by decree, and a reference is had to compute the amount of damages or sum due, the proceedings of the commissioner in allowing or rejecting items cannot be reviewed on appeal, if objections were not made before the commissioner, nor exceptions filed and passed upon in the district court. The Commander-in-Chief, 1 Wall. [68 U. S.] 43. And, where it appears that, by way of expediting the proceedings, the parties consent to a reference in advance, in order that the district court may, if a recovery is decreed, at once insert the sum reported due, I find it difficult to say that the party charged may proceed in the district court to final decree, without raising the question by exception, or in some mode that shall show that the district court was called upon to pass upon the specific objection, and afterwards, and for the first time, raise such objection in this court, on the appeal. To permit this is unfair to the appellee, who, if the objection were earlier taken, might, in very many cases, obviate the objection or supply other proof to sustain his claim.

If the reference was simply to take proofs and report them to the court, then, indeed, all questions raised before the commissioner would be before the district court at the hearing, without the necessity or propriety of filing exceptions, and it may be that all questions, whether raised before the commissioner or not, would be necessarily involved in the hearing upon those proofs, and it might be the duty of the district court to pass upon them, and the right of the appellant to be heard thereon in this court. The reference here was to ascertain and report the amount due. The liability was assumed, either by consent, or because that alone was left open for discussion. The commissioner reported the amount due and the proofs upon which that report was based. In this respect, the proceedings of the commissioner were the same as upon the usual reference to compute, after a decree establishing the right. In such case, there was certainly no technical or other difficulty in filing exceptions to be heard in the district court when the cause was brought to a final hearing, or after settling the question of liability.

In respect to the making of objections and filing of exceptions, I am clearly of opinion, that the case stands upon the usual ground; and the objections not heretofore raised should not, in respect to items of allowance, be heard in this court. The decree must, therefore, be affirmed.

[NOTE. From this decree the case was appealed to the supreme court by the original respondent (12 Wall. [79 U. S.] 136), where a motion was made to dismiss the appeal. The motion was denied in an opinion by Mr. Justice Clifford, holding that an appeal was subject to the same rules as are prescribed in law in cases of writs of error; and further, when a cause is brought here upon a writ of error sued out under that section (22 of Judiciary Act; 1 Stat. 85), and all proceedings are regular and correct, the judgment of the circuit court must be affirmed, but the cause cannot be dismissed, although there is no question presented in the record for revision. The grounds of the motion were that no exceptions were taken to the proceedings before the commissioner, or none before the court. No definite defense was set up in the answer.

[While this appeal was pending, the libellants issued execution, and the respondent made a motion to set the execution aside. It was so ordered (Case No. 6,130), the implied reason being that the said appeal was premature. A second decree was entered on May 27, 1871, reciting the decree of affirmance entered on March 19, 1870 (from which this appeal was taken), and ordering that the appellee have judgment against the appellant (Wheeler) for the costs taxed in the first decree, together with the sum claimed, amounting altogether, with interest, to the sum of $5,444.69, for which judgment was thereby entered against the appellant, and ordered that the appellees have execution therefor. From this judgment a petition of appeal was filed in the supreme court, and a motion was thereafter made to dismiss it.

[The court, in an opinion by Chief Justice Chase, dismissed the first appeal as irregular (13 Wall. [80 U. S.] 51): "It may be that the first appeal was from a decree which might be taken as final if the second decree had not been rendered." The second decree seems to have been rendered in order to settle the practice in that circuit that a decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.]

Case No. 6,130.

HARRIS et al. v. WHEELER.

[S Blatchf. 81.] [1]

Circuit Court, S. D. New York. Dec. 6, 1870.

DECREE IN ADMIRALTY—FORM OF—EXECUTION.

The respondent in a suit in admiralty appealed to this court from the decree of the district court in favor of the libellant, and, after a trial, an order was entered in this court affirming the decree of the district court, with costs: *Held*, that no execution could issue in this court, until the entry of a formal decree awarding a recovery to the libellant.

[This was a libel by George Harris and others against Samuel G. Wheeler, Jr. See Case No. 6,129.]

Charles Donohue, for libellants.
Lyman B. Bunnell, for respondent.

WOODRUFF, Circuit Judge. The libellants in this cause obtained a decree in the district court for advances made to a vessel belonging to the respondent, and, from that decree, the respondent appealed to this court. The cause was here tried, and, on the 19th of March, 1870, an order, signed by the judge, was entered with the clerk, affirming the decree of the district court, with costs. [Case No. 6,129.] After the lapse of more than ten days, proceedings were stayed for a short period, by request of the judge and with the concurrence of counsel, but it is not necessary to state anything further on that subject, since it is not deemed to affect the pres-

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

ent motion. It is sufficient to say, that, after more than ten days, the respondent appealed to the supreme court of the United States, giving a bond duly approved and sufficient in form and in amount to operate as a stay of execution. The libellants, notwithstanding such appeal, having caused their costs in this court to be taxed, issued execution. Thereupon, the respondent makes the present motion to set aside the execution, insisting, first, that no execution can regularly issue upon a mere order of affirmance; second, that the respondent has ten days after a judgment in form awarding to the libellants a recovery of some amount ascertained and settled by the terms of a final decree. On the other hand, it is insisted by the libellants, that the order of affirmance is the final judgment, within the meaning of the act of congress limiting the time within which appeals may be taken,—Act Sept. 24, 1789, § 23 (1 Stat. 85); Act March 3, 1803, § 2 (2 Stat. 244),—and the appeal is, therefore, too late; that such order of affirmance is frequently the only order made in this court, and appeals have, in many cases, been heard in the supreme court of the United States, when no other order or judgment of the circuit court appeared in the record; and that the execution is regular.

It is not, for the purposes of this motion, indispensable that I should pass upon the question whether the respondent was regular in taking his appeal when no judgment had been entered, other than the order of affirmance. In Silsby v. Foote, 20 How. [61 U. S.] 290, in equity, an appeal to the supreme court was taken within ten days after the decision of the court was announced and entered in the minutes, and before a decree was settled and entered; and, after such formal decree was made, another appeal was taken. On a motion to dismiss, the court declare, in their opinion, that either appeal is regular, in view of the differing practice prevailing in different circuits; but, as it was not proper that there should be two appeals in the same case, they dismiss the latter and allow the former to stand. The opinion plainly indicates, that the last appeal would have been sustained had it been the only appeal taken. But this case, if it be deemed to settle the rule that an appeal may be taken before a judgment in form is entered, comes short of determining that it must be taken before such judgment, in order to operate as a stay of execution. It is, however, pertinent to observe, that the twenty-third section of the act of 1789 and the second section of the act of 1803, are held to require the judge, on signing the citation, on appeal, to require security in a sum sufficient to cover the whole judgment, damages and costs, as well as the costs in error. Catlett v. Brodie, 9 Wheat. [22 U. S.] 553; Stafford v. Union Bank, 16 How. [57 U. S.] 135. The inference is plausible, at least, that, until some actual award of damages and costs to a definite amount, the party appealing does not know, and the judge taking the security does not know, what should be the amount of the bond, nor in what amount the sureties should justify; and that no judgment can be said to be rendered, and more especially no decree in admiralty can be said to be passed, until some actual award of recovery by the libellant is made.

The question here, as above suggested, is not whether the appeal which has been taken is regular, for, however regular it may be, it was not taken within ten days from the entry of the order appealed from, and, for that reason, cannot operate as a supersedeas or stay of execution, if that order be deemed a decree passed within the act. The Roanoake [Case No. 11,875]. If the case was not ripe for an appeal, then such appeal would be dismissed, and it necessarily follows that it can have no influence on the present motion; that is to say, if it was premature and would be dismissed by the supreme court, then it cannot stay the libellant's proceedings. If it was not premature, but will operate to give the supreme court jurisdiction, still, not having been taken within ten days after the entry of the order appealed from, it cannot stay execution, unless I should hold that an appeal may be taken before the ten days begin to run, within which it must be taken. In view of the decision in Silsby v. Foote, above referred to, I prefer to leave it to the supreme court to say whether the ten days begin to run so soon as the time arrives when an appeal may be taken; and whether, if the respondent waits until the actual entry of a decree which settles definitely all the details, his appeal, if taken within ten days thereafter, will stay execution.

Here, an execution has been issued when there is no judgment or decree awarding to the libellants a recovery, not awarding to them any execution or other means of giving effect to the decision of the court. I am informed that it has not been unusual, in this circuit, to issue execution in cases in admiralty, when no other judgment that an order of affirmance has been made or entered, the proctor, for that purpose, taking the amount of damages to be collected from the decree in the district court, and the costs of appeal from the taxation by the clerk. I think such a practice both loose and irregular, and I am not aware of any like practice anywhere. Even if an appeal to this court in a cause in admiralty were a mere appeal on which the proceedings below were reviewed, and nothing more, no execution should issue out of this court without an award of a recovery. In the state courts, when a cause was removed by writ of error, and a judgment of affirmance was rendered, with a remand of the record, a judgment was necessary to enable the prevailing party to have execution for the costs in error. But, here, a cause in admiralty is removed into this court for a new trial, and the proceed-

ings here are of a mixed nature. The question is not limited to the inquiry whether the district court decided the case correctly on the merits, but whether, upon the case as made in this court, the libellant is entitled to recover, and, if so, how much. As to certain questions, the parties will be concluded, if the questions have not been raised in the court below; but, properly speaking, the inquiry here is not a question of affirmance or reversal, but a question of the right to a decree, upon the trial in this court. When no new proofs are presented in this court, and the conclusion is that the decree below was the proper decree upon the proofs, it has become usual to express that conclusion by calling it an "affirmance;" but I regard that as technically inaccurate. The proper decree here is, that the libellant recover, &c., or that the libel be dismissed, and the claimant or respondent recover his costs, when costs are awarded; and no execution should issue until some award of a recovery in this court has been made. In ordinary cases at law, no execution could be issued without such an award, and, although judgment would become final after four days in term, that alone did not warrant the issuing of an execution. The execution herein must be set aside.

[For further proceedings, see note to Case No. 6,129.]

HARRIS, The SARAH. See Cases Nos. 12,345-12,347.

HARRIS, The SARAH B. See Case No. 12,344.

HARRIS, The WILLIAM. See Case No. 17,695.

HARRIS, The WILLIAM A. See Case No. 17,686.

HARRISON, The. See Case No. 5,038.

Case No. 6,131.

HARRISON'S CASE.

[1 Cranch, C. C. 159.] [1]

Circuit Court, District of Columbia. March 26, 1804.

HABEAS CORPUS—FORM OF PETITION.

Upon petition for habeas corpus, the petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy.

Petition for habeas corpus. Robert Harrison was committed for leaving his ship. Act Cong. June 20, 1790, c. 51, § 7 (1 Stat. 134). Discharged.

THE COURT required a petition in writing, and a production of the warrant of commitment, or a copy, or affidavit of refusal of the jailer to give a copy.

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

Case No. 6,132.

HARRISON v. The ANNA KIMBALL.

[Hoff. Op. 464.]

District Court, N. D. California. Nov. 28, 1859.

PILOTAGE — PERFORMANCE WITHIN A STATE—ADMIRALTY JURISDICTION.

[1. A contract for pilotage, to be performed wholly within a state, cannot be enforced in admiralty.]

[2. A claim for half pilotage, given by a state law for services offered and refused, cannot be enforced in admiralty.]

[This was a libel in rem by C. H. Harrison against the ship Anna Kimball for half pilotage.]

A. Glassell, for libelant.

T. R. Wise, for claimant.

HOFFMAN, District Judge. The libel in this case is to recover half pilotage claimed to be payable under the laws of this state, when the services of a pilot are offered and declined. The case is clearly not of admiralty jurisdiction. It has been decided by the supreme court, in a recent case, that a contract of affreightment for the transportation of goods from one port to another in the same state, is not cognizable in the admiralty. Maguire v. Card, 21 How. [62 U. S.] 249. They have also decided that liens given by the state laws to material men, who supply domestic vessels, cannot be enforced in this court; and in the case above cited, the general and just principle is established, that contracts growing out of the completely internal commerce of the states, which is the subject of regulation by their municipal laws, should be left to be dealt with by the local tribunals. Whatever may be said of a claim for pilotage performed on the seas and to outward bound vessels, it is clear that a contract for service performed between Benicia and this port cannot be enforced in the admiralty.

In this case, however, no services were rendered. The claim is for an allowance given by the state law to pilots who offer their services. Independently, therefore, of the objection just noticed, it would seem that there has been no contract made or services rendered which the court could take cognizance of. Admitting that the service, if rendered, would have been maritime, and that a contract for pilotage to be performed wholly within the state could be enforced in this court, it by no means follows that the admiralty could have jurisdiction to enforce a payment of a statutory allowance, where no service has been rendered or contract entered into. It had been generally considered on the authority of the case of The General Smith, 4 Wheat. [17 U. S.] 439, that a lien given by state laws to a domestic material man could be enforced in the admiralty. But this was upon the idea that the contract for materials to a vessel about to proceed on

a voyage was essentially of a maritime character, and the state law giving a lien was considered, not as giving the court jurisdiction, but as showing that lien was contemplated by the parties making the contract, and as repelling the presumption which would have otherwise arisen, that contracts of this description when made in the place of the owner's residence are made on his personal credit and not on that of the vessel. In this view the state laws were permitted to affect the remedy, but it was never considered that the nature of the contract (i. e., whether maritime or not,) and the jurisdiction of this court as an admiralty tribunal under the constitution of the United States could be enlarged or diminished by state legislation. I understand the recent decision of the supreme court to affirm the doctrine not only that no liens created by state laws alone can be enforced in the admiralty, but that no contracts growing out of "the completely internal commerce of the states," are of a maritime nature or within the jurisdiction. It thus appears that under no view of the subject which has ever been taken, so far as I am informed, could a claim for half pilotage given by state laws be enforced in this court as a maritime contract or a maritime service.

It is urged that under the circumstances of the case the court ought not to decree costs against the libellant. I cannot perceive any reason for departing from the general rule. The discretion possessed by the court on the subject of costs is not an arbitrary or capricious discretion. It must be exercised in obedience to general rules, and must be governed by solid reasons. It is said that the recent decisions of the supreme court have overruled former cases, and have declared the law to be different from what for a long period it had been by the courts and the profession supposed to be. Without inquiring how far this consideration should affect the disposition of costs in any case, it is sufficient to say that it appears to me that, independently of those decisions, the libel in this case could not be maintained. A decree dismissing the libel, with costs to be taxed, must be entered.

Case No. 6,133.

HARRISON et al. v. BOYD.

[4 Cranch, C. C. 199.] [1]

Circuit Court, District of Columbia. May Term, 1832.

INSOLVENCY—DISTRICT OF COLUMBIA—DISCHARGE OF DEBTOR—BAIL-BOND.

Quaere, whether a non-resident creditor is bound by the discharge of his debtor under the insolvent law of the District of Columbia, who had been arrested at his suit, but who, at the time of the discharge, was out upon a bail-bond to the marshal.

[Cited in Brook v. Brown, Case No. 1,931.]

The defendant [Daniel Boyd], having been discharged this morning under the insolvent act of the District of Columbia, Mr. R. S. Coxe, offered to appear for him without special bail.

C. Cox, for plaintiffs [Harrison and Sterret], said that they were non-resident creditors, and not bound by the defendant's discharge, inasmuch as he was not confined at their instance, at the time of his discharge. By the act of congress of the 6th of May, 1822 (3 Stat. 682), it is "provided that no discharge under this act, or the act to which it is amendatory, shall operate against any creditor residing without the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined." Davis' Laws D. C. p. 362. The defendant had been arrested on a capias ad respondendum, at the suit of these plaintiffs, but had been discharged by the marshal from that arrest by giving an appearance bail-bond to the marshal, before his discharge under the insolvent act, so that at the time of his discharge he was not literally confined at the instance of these plaintiffs.

R. S. Coxe, contra, cited Clay v. Smith, 3 Pet. [28 U. S.] 411, and contended that a non-resident creditor, by making use of our court to compel payment had made himself a resident creditor quoad hoc; and the defendant having given bail, (it was only an appearance bond,) was thereby in confinement at the instance of these plaintiffs. He cited also the case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 362–364, and Shaw v. Robbins, Id. 369, cited in a note to Ogden v. Saunders.

But THE COURT (THRUSTON, Circuit Judge, absent,) being divided in opinion, the motion to appear without bail—did not succeed.

CRANCH, Chief Judge, was of opinion that the plaintiffs, by bringing suit here, had not ceased to be "residing without the limits of the District of Columbia," within the meaning of the act of congress; nor could the defendant be considered as confined at the instance of these plaintiffs after he had given an appearance bail-bond whereby he was released from the custody of the marshal. His sureties in that bond had none of the rights and power of special bail, who receive the body of the debtor into their custody and keeping, and may even confine him if necessary.

MORSELL, Circuit Judge, thought that by bringing suit here, the plaintiffs were, for this purpose, to be considered as not residing out of the limits of the District of Columbia.

C. Cox, for plaintiffs, also cited the case of Harrison v. Gales [Case No. 6,136], special bail of Gilbert C. Russell, in this court at December term, 1828, and Farrow v. Brown [Id. 4,689], special bail of Russell, at the

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

same term; where the plaintiff was a resident of Virginia at the time of Russell's discharge under the insolvent act of this district, and had then a suit against Russell, pending in this court, for his debt; in which case a majority of this court, namely, Cranch, C. J., and Thruston, J., refused to relieve the bail on the ground of Russell's discharge under the act.

Case No. 6,134.

HARRISON v. The ECLIPSE.

[Crabbe, 223.] [1]

District Court, E. D. Pennsylvania. Nov. 9, 1838.

FREIGHT—CONTRACT OF MASTER OF VESSEL.

1. Where a master agrees, with a mariner, to carry the latter's goods, free of expense, a charge for freight thereon cannot be supported, as between the master and mariner.

2. Whether the master can bind the owners on a contract to carry goods free of freight, Qu.

This was a libel for wages [by John Harrison, a mariner, against the schooner Eclipse, Wade, master.]

O. Hopkinson, for libellant.

Mr. Fallon, for respondent.

After examining various matters of fact, by which it appeared that the gross sum due to the libellant was $102 23, and that the respondent was entitled to credits thereon to the amount of $35, HOPKINSON, District Judge, continued, as follows:

The respondent claims additional credits.

1st. For freight on the libellant's goods, $38 68. On this subject we have the evidence of the pilot, who says, that he heard the captain of the schooner say to Harrison, "I wish you would fill her up—I won't charge you a cent for it." The witness also says that the schooner was then in want of ballast, and was not full when she went to sea. The only answer to this evidence is the denial of the respondent that he made any such agreement. In the contracts of the master with the mariners, he is the only party who acts on behalf of the vessel. This was a part of the contract with the mate; he is induced to put his goods on board of the schooner—perhaps to purchase them—on the faith of this promise, and we may treat it as part of his contract as mate. Now, however, the captain tells him, "I had no authority to make that promise;" for it is the captain who appears here and makes defence. I would make strong presumptions to prevent the injustice of such a breach of promise. If the captain has violated his duty to the owners in making this promise, let him answer to them. But it is he who now sets up this claim, and the owners have nothing to do with it. It is said in Abb. Shipp. p. 130, that it seems that the master of a trading vessel, intrusted with his command for the purpose of procuring goods on freight, cannot bind the owners by an engagement to carry goods free of freight; and a case in 1 Taunt. 391 (Dewell v. Moxon), is cited. The case before us being a contract with a mariner, with other peculiar circumstances, and the question being between the mariner and the master, in a suit to which the owners are not parties, may be distinguished from that cited. Whether the captain could bind his owners by this agreement, may be settled between them; but I cannot, on that account, discharge the master from his engagement, under the circumstances of the case. Nor do I mean to admit that, if the question between the master and owners came directly before me, I should accede to the doctrine above mentioned. I should, at least, give it a careful examination, before I yielded to it; at present, it appears to me to be a restriction on the power of the master in the employment of the ship, inconsistent with the acknowledged authority of the master over the conduct and management of a trading ship. He is considered as the confidential servant and agent of the owners in the employment of the ship, and they are bound by every lawful contract made by him, relative to such employment. By "lawful" contract I understand a contract not prohibited by the laws of the country. I think the charge of freight in this case cannot be supported.

2d. The respondent claims a charge for the absence of the libellant, without leave, for eleven days, at Galveston. The proof is that he was absent eight or ten days; that he went off before the vessel was unloaded, which operation it was his particular duty to attend to. No evidence has been given of any permission for him to go; or that there was any necessity for his absence, either on his own account, or on that of the ship. I take the shortest time mentioned by the witnesses, eight days, and allow a charge against him of seven dollars on this account.

On the facts and principles I have adopted, the case will stand finally thus:

Amount due the libellant.....		$102 23
Credits to the respondent:		
Cash	$35 00	
Eight days absence.....	7 00	
		42 00
		$60 23

Decree for the libellant, for $60 23, and costs.

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

Case No. 6,135.

HARRISON v. EVANS.

[1 Cranch, C. C. 364.] [1]

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

TROVER—SLAVE—COMPETENCY OF WITNESS.

1. In an action upon the case against the owner of a stage-coach, for taking away the plaintiff's slave, evidence may be given, on the part of the defendant, that the plaintiff had given

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

the slave a written permission to seek a new master, and if such permission be without limitation of time or place, the plaintiff cannot recover.

2. The office-keeper of the defendant is a competent witness for the defendant, because he is liable to the defendant if the plaintiff recovers, and to the plaintiff if he fails to recover, in this suit.

Trover for a mulatto woman slave, named Nell; with a special count for carrying away the plaintiff's slave, without his consent, whereby she was lost to the plaintiff.

Jones & Morsell, for defendant, offered evidence that the plaintiff had permitted the slave to go about and hire herself where she chose.

W. H. Dorsey and F. S. Key, for plaintiff, objected.

But THE COURT (nem. con.) permitted the evidence to be given to the jury. The count for trover was abandoned by the plaintiff's counsel.

Dennison Darling was offered as a witness for the defendant. It had been proved that he was the keeper of the defendant's stage-coach office, and had ordered the driver to call at Mrs. Thompson's and take a servant, who proved to be the slave in question. It was objected, by the plaintiff's counsel, that he was interested; because if the plaintiff recovers against Evans, Evans could recover against him.

But THE COURT (nem. con.) overruled the objection because the witness is indifferent. For although if the plaintiff recovers against Evans, Evans may recover against Darling; yet, if plaintiff does not recover against Evans, he may against Darling, so that he would be liable in either event.

THE COURT, also, (FITZHUGH, Circuit Judge, absent,) at the prayer of the defendant's counsel, instructed the jury, in effect, that if the slave had a written authority from the plaintiff, without limitation of time or place, to seek for a new master, the plaintiff could not recover in this action, although such authority was not shown to the defendant or his agents.

Verdict for plaintiff, $180. New trial refused.

HARRISON, The (FRANCIS v.). See Case No. 5,038.

HARRISON (GAGER v.). See Case No. 5,171.

Case No. 6,136.

HARRISON v. GALES.

[3 Cranch, C. C. 376.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

INSOLVENCY—DISCHARGE—LAW OF ALABAMA.

Discharge under the insolvent law of Alabama. Exoneretur.

[Cited in Brook v. Brown, Case No. 1,931.]

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

Mr. Bradley, moved to discharge the bail [Gales], the debtor having been discharged both by the law of Alabama, and by that of this district. Mr. Bradley produced a certified copy of the law of Alabama, and of the proceedings under it.

The plaintiff was a citizen of Alabama, and obtained judgment here against Russell, but Russell was not in confinement upon that judgment when discharged under the insolvent law of this district.

Mr. Wallach, for defendant, contended, that by bringing suit here the plaintiff was to be considered as pro hac vice residing in this district, so that the discharge operated against him, although the defendant was not in confinement at his instance at the time of the discharge; and referred to the case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 213.

Upon this point, however, THE COURT gave no opinion; being satisfied as to the discharge under the law of Alabama.

Bail exonerated, (THRUSTON, Circuit Judge, absent.)

Case No. 6,137.

HARRISON v. HADLEY et al.

[2 Dill. 229; 5 Chi. Leg. News, 206; 17 Int. Rev. Rec. 26, 44; 7 Am. Law Rev. 560.] [1]

Circuit Court, E. D. Arkansas. Jan. 13, 1873.

ENFORCEMENT ACT — XIII., XIV., AND XV. AMENDMENTS—ELECTION CONTEST—JURISDICTION OF UNITED STATES COURTS.

1. The federal courts have no jurisdiction in any form of action or proceeding over cases of contested elections for state officers, except in the single case provided for in the twenty-third section of the enforcement act (16 Stat. 140), in which the sole question touching the title to the office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude.

[Cited in Manley v. Olney, 32 Fed. 709; Pierson v. Philips, 36 Fed. 838.]

2. The circuit courts of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States; there must also be an act of congress expressly conferring the jurisdiction.

3. A citizen does not lose his rights because congress has not vested in the courts of the United States original jurisdiction in cases where rights and benefits are claimed under the constitution of the United States. The state courts are open to such citizen, and in such cases the rule of decision in a state court is the same as it would be in a United States court.

4. The court comments upon the XIII., XIV., and XV. amendments, the civil rights act, and the enforcement act, and is of the opinion, under the evidence in the case, that they do not apply to the alleged exclusion of the voters at the election in controversy, as they were not excluded on the ground of race, color, or previous condition of servitude.

5. Injunction denied, bill dismissed, and case distinguished from Kellogg v. Warmouth [Case No. 7,667], in the district of Louisiana.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Am. Law Rev. 560, contains only a partial report.]

[This was a bill in equity by William M. Harrison against Ozro. A. Hadley, acting governor of the state of Arkansas, James M. Johnson, secretary of state, Marshall L. Stephenson, Elhanon J. Searle, and John T. Bearden.]

The complainant alleges in his bill that at the general election held in this state, on the 5th day of November, 1872, there were, by law, to be voted for and elected two associate justices of the supreme court of the state, and that, at said election, the complainant and John T. Bearden were in fact and in truth duly elected to said offices, but that the respondents, acting in conjunction with the registrars, judges of election, and county clerks, in several counties in the state, have, by various illegal and fraudulent acts and practices, which are set out in the bill at great length, and with much minuteness, defrauded the complainant and said Bearden of the said offices to which they were so duly elected; that the secretary of state made an illegal and fraudulent canvass of the votes cast for said offices, by which it is made to appear that Elhanon J. Searle and Marshall L. Stephenson were elected to said offices, and that the governor of the state has illegally and fraudulently issued commissions to said Searle and Stephenson for said offices. The bill further alleges that if respondents Hadley and Johnson are not at once restrained from changing, altering or destroying the documentary evidence in relation to said election, the same will be obliterated, defaced or destroyed, and the complainant thereby greatly delayed, if not entirely prevented from obtaining justice. The bill alleges that some voters, wrongfully and fraudulently deprived of the right to register and vote, were white citizens, and some of them colored citizens, but there is no averment in the bill that the persons so wrongfully deprived, as alleged, of the right to register and vote, were so deprived on account of their "race, color, or previous condition of servitude," nor is it averred that such a number of voters were deprived of the right to vote on account of "race, color or previous condition of servitude" as to change or alter the result of the election. The bill prays, among other things, that the respondents, Searle and Stephenson, may be enjoined from exercising the functions and duties of the offices of associate justices of the supreme court; that the respondents, Hadley and Johnson, may be required to file in this court all the records and papers in their custody or control, pertaining to said election, and that they be enjoined from in any manner altering or destroying the same; that the respondent, Johnson, may be compelled by the order and mandamus of the court to send for and procure returns of said election from certain counties, from which it is alleged no returns have been made; that a general supervisor of election may be appointed, and that the supervisors of election, appointed under the act of June 10, 1872 (17 Stat. 348), may be required to make to such general supervisor "returns of said general election," and concludes with a prayer for general relief. All the respondents have answered under oath. The respondents Searle and Stephenson deny all the material allegations of the bill, and charge that by the illegal and fraudulent acts and practices of the friends and partisans of the complainant they were deprived of many votes, and their majority cut down, and, that but for such acts which are set out at length, and with much particularity, their majority would have been much greater than it is declared to be by the secretary of state. The respondents, Hadley and Johnson, specifically and fully deny all the illegal and fraudulent acts charged against them in the bill, and incorporated in their answer in a demurrer to the bill, in which they assign as cause of demurrer, that the court has no jurisdiction of the case made by the bill, and that upon the face of the bill the complainant is not entitled to the relief he prays for. The judge ordered an argument on the demurrer to the bill.

A. H. Garland, U. M. Rose, M. L. Rice, M. W. Benjamin, and Gallagher & Newton, for complainant.

T. W. Yonley, E. H. English, F. W. Compton, and Wilshire & Allen, for respondents.

CALDWELL, District Judge. Has the circuit court of the United States jurisdiction of the case made by the bill? This question does not relate to the form of the action merely, but the demurrer challenges the jurisdiction of the court to make any adjudication in any form of action upon the facts stated in the bill. It is not to be disguised that this is in effect a proceeding to contest in a United States court the title to a state office. And if this court has jurisdiction of this case, on the facts stated in the bill, then it has jurisdiction in all cases of contested elections, and that jurisdiction can be invoked to try every case involving a dispute as to which of two persons has been elected to any office, from the lowest township officer to the chief magistrate of the state. If such unqualified jurisdiction in this class of cases has been conferred, the court will not hesitate to assume and exercise it, however laborious and delicate it may be; but if it has not been expressly conferred by act of congress, it can not be assumed. On a question of jurisdiction the court has no discretion; if the suitor brings his case within the jurisdiction of the court he must be heard, and if his case is not within the jurisdiction of the court, he can not be heard, no matter what the merits of his case may be.

The question in the case before the court is not whether, under the recent amendment to the constitution, congress might not confer, without any qualification or limitation, jurisdiction on the circuit courts of the United

States, to determine a controversy between two citizens of the same state, involving the title to a state office, but the question is, have they done so? Although congress may possess the power under one, or all of the recent amendments to the constitution of the United States, to confer this jurisdiction on the courts of the United States, yet if they have not done so this court can not exercise it. It is an error to suppose that the courts of the United States have original jurisdiction to enforce or protect every right or privilege secured or guarantied to the citizen by the constitution of the United States, and acts of congress passed under its authority. For although the constitution of the United States declares that "the judicial power shall extend to all cases in law and equity arising under this constitution and the laws of the United States," it was early decided that this provision of the constitution did not itself vest in the circuit or district courts of the United States any jurisdiction whatever, but that those courts could exercise jurisdiction only in cases in which it had been expressly conferred by congress. Confessedly, the grant of the judicial power to the United States authorizes congress to confer on the courts of the United States a much broader original jurisdiction than they have done. But the principle is now established that the circuit court of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of congress expressly conferring the jurisdiction. The circuit court is a court of limited jurisdiction, and the supreme court has said that "the fair presumption is (not as with regard to a court of general jurisdiction that a cause is within its jurisdiction, unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears." Turner v. Bank of North America, 4 Dall. [4 U. S.] 8; U. S. v. Hudson, 7 Cranch [11 U. S.] 32; McIntire v. Wood, Id. 506; Hubbard v. Northern R. Co. [Case No. 6,818]; Ex parte Cabrera [Id. 2,278]; Sheldon v. Still, 8 How. [49 U. S.] 441; Karrahou v. Adams [Case No. 7,614]. It does not result that because congress has not vested in the courts of the United States original jurisdiction in cases where rights and benefits are claimed under the constitution of the United States, and acts of congress passed under its authority, that a citizen loses these rights and benefits. The state courts are open to him, and in such a case the rule of decision in the state courts is precisely the same that it would be in a court of the United States. In the case at bar, for instance, whatever rights or benefits the complainant may be entitled to under the constitution and laws of the United States, must be adjudged to him in the state courts. This rule is imperative, and is found in the words of the constitution which declares, "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." If it is suggested that the state courts might misinterpret the constitution and laws of the United States, and a suitor in those courts might thus be deprived of the rights and privileges claimed under the constitution and laws of the United States, there is a ready and satisfactory answer. Congress has wisely provided for such a contingency, by declaring that in all such cases the judgment of the state court "may be re-examined and reversed or affirmed in the supreme court of the United States." Section 25, Judiciary Act. And by far the larger number of cases involving rights claimed under the constitution and laws of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment in the state courts. Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 304; Story, Const. § 1702; Serg. Const. Law, 276, 277; The Moses Taylor, 4 Wall. [71 U. S.] 411–430. And a right of action given by an act of congress "does not imply a right to sue in the courts of the United States unless it is expressed." Bank of U. S. v. Devaux, 5 Cranch [9 U. S.] 61–86. Keeping these rules in view, let us inquire whether this court has jurisdiction of the case made by this bill. The jurisdiction is sought to be maintained under the acts of congress, passed to enforce the provisions of the recent articles (XIII., XIV., XV.) of amendment to the constitution of the United States, and known as the "Civil Rights Bill," approved April 9, 1866 (14 Stat. 27), and the "Enforcement Act," approved May 31, 1870 (16 Stat. 140), and the amendments thereto, approved February 28, 1871 (16 Stat. 433).

It is plain the civil rights bill does not confer jurisdiction on this court upon the case made by the complainant's bill. It may be conceded that the terms of that act are broad enough to embrace all persons without regard to their descent or color, but it is not pretended that the complainant in this case does not enjoy the "full and equal benefit of all laws and proceedings for the security of person or property," enjoyed by any other citizen; nor is it claimed that he is "denied or cannot enforce in the courts of judicial tribunals of the state any of the rights secured to him" by that act. The fifteenth article of amendment to the constitution of the United States, declares "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude. The congress shall have power to enforce this article by appropriate legislation." Congress has legislated under this article, and that legislation is found in the enforcement act. The first sec-

tion of that act provides: "That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude." Succeeding sections of the act make ample provision for securing and protecting citizens otherwise qualified to vote from the deprivation of that right on account of their "race, color, or previous condition of servitude." This is done by giving to the injured party a right of civil action for damages, and punishing the guilty party, criminally, and in all such cases jurisdiction is expressly conferred on the United States courts. The twenty-third section of the act is the only one conferring jurisdiction on this court in cases of contested elections, and that section is in these words: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in congress, or member of a state legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offer to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrent with the state courts, jurisdiction thereof so far as to determine the rights of the parties to such office by reason of the denial of the right guarantied by the fifteenth article of amendment to the constitution of the United States, and secured by this act." This section bears upon its face evidence that it was drawn with unusual care and precision. By its terms the jurisdiction of this court in cases touching the title to an office is expressly limited to "cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color or previous condition of servitude." The language of this section is definite and precise, and is decisive of this case. Counsel who drew the bill in the argument frankly admitted complainant was unable to bring his case within the requirements of this section. It is clear from the bill itself that the alleged frauds were perpetrated without reference to the "race, color or previous condition of servitude" of the voters or candidates, and, if perpetrated, were prompted by no other or different motive than that which ordinarily impels men to commit such crimes. There is no other section of this or any other act of congress from which the jurisdiction in such cases can be deduced. Congress has not attempted to confer the jurisdiction except upon the single ground specified in this section, and it is therefore needless to inquire whether, under the constitution, they might extend the jurisdiction to all, or any other cases of this nature. Of the constitutionality of the section in question, I entertain no doubt.

In the argument reference was made to the case of Kellogg v. Warmouth [Case No. 7,667], pending in the United States circuit court for the district of Louisiana. The bill in that case is drawn with special reference to this twenty-third section, and all the necessary averments made to bring the case literally within its terms. The bill in that case charges expressly that the qualified voters who offered to vote, and whose votes were rejected, "were refused the right to vote on account of their race, color and previous condition of servitude." And these averments are repeated in reference to every fraudulent and illegal act charged in the bill, and are assigned and relied on as the sole ground for all the relief sought and prayed for by the bill. And from the newspaper report of that case it appears that the leading counsel for the complainant (Mr. Beckwith) rested the jurisdiction on the twenty-third section of the act and these averments in the bill, and that the court grounded, as indeed it must have done, its judgment on the question of jurisdiction on this section and these allegations in the bill. Saying nothing of the form of the proceeding and the particular relief sought and granted in that case, it is clear that the facts stated in the bill, brought the case exactly and literally under the twenty-third section. This the counsel for complainant in the argument broadly conceded had not been done in this case, because the complainant could not conscientiously make the averments required by that section to confer jurisdiction. In support of the jurisdiction, one of the counsel for complainant, in the argument, read from speeches made by senators in congress, while the enforcement act was pending before that body. An examination of the official report of the proceedings of congress, discloses the fact that the particular section of the bill to which those speeches related, was afterwards stricken out, and is not now found in the act. Indeed, if anything was wanting to show that congress never designed to confer on the courts of the United States jurisdiction in this class of cases, beyond the single case covered by the twenty-third section, it would be found in the legislative history of this measure. See Cong. Globe (2d Sess., 41st Cong.) p. 3561, where the principle of giving jurisdiction to United States courts in this class of cases is first broached in section 5 of the bill

there set out. It was much discussed by senators, and finally, with the consent of the chairman of the committee having charge of the bill, it was stricken out. Id. pp. 3570, 3654. Subsequently it was renewed by Senator Carpenter, in an amendment proposed by him (Id. p. 3680), and his proposition, after a modification, making it in legal effect what the twenty-third section now is, was adopted by the senate (Id. p. 3680), and passed that body (Id. p. 3690). The house not concurring in the amendments made by the senate, the bill went to a committee of conference, where the principle of conferring on the courts of the United States jurisdiction in contested elections, in any case, was specially considered, and the twenty-third section, as it now stands, was the result of that consideration, as is shown by the report of the committee to each house. The chairman of the committee of conference on the part of the senate, in reporting the action of the committee to the senate, referred particularly to the twenty-third section, and said, "The committee of conference have redrawn the section (23) very carefully, narrowing it down to the particular issue where the right to vote is denied for that specific reason (race, color, or previous condition of servitude), not drawing anything else before the United States courts, and for the purpose of giving effect to this fifteenth amendment." Cong. Globe (2d Sess., 41st Cong.) p. 3753. The chairman of the committee of conference on the part of the house, in reporting the action of the committee to the house, after quoting the twenty-third section, as it now stands in the statute, said: "I should have preferred, because I do not deem it essential to the success of this measure, that the senate had not raised this question with the house of contesting any election in the (United States) courts; but having raised it, I am content to enact the provision, with the limitation now put on it (into a law), and leave it thus forevermore, assured as I am it can work no possible harm, because in any event and in every event it leaves in the courts of the United States no power save to determine the single question where the person offering his vote shall have it rejected simply on the ground that his right, guarantied under the fifteenth amendment to the constitution of the United States, is denied. * * * I do not believe, under any possible condition of things, it would be necessary, as the constitution now stands, to vest in any of the courts of the United States any jurisdiction over the question of contested elections, beyond the express jurisdiction with the express limitation contained in the twenty-third section of the report." Cong. Globe (2d Sess., 41st Cong.) p. 3872.

It will be seen from these reports that the twenty-third section in its present form was the work of a conference committee, that embraced among its members, lawyers and jurists of eminence and national reputation, who were not likely to err in interpreting the work of their own hands.

Both houses of congress approved and assented to the views of the committee by adopting their report. The text of the act will admit of no other or different interpretation than that given to it by this committee. It is not pretended that the opinions of individual legislators can be received to alter the text or control the interpretation of an act of congress; but where, as in this case, an act has been carefully considered and revised by a conference committee, their opinions carefully and deliberately expressed, when they accord with the plain text of the act, show very conclusively that congress was not mistaken as to the legal effect of the language of the act, and did not intend that it should receive an interpretation different from the one plainly expressed.

It is suggested that although the court may not have jurisdiction of the principal subject matter, it may yet have jurisdiction to grant the auxiliary and ancillary relief prayed for in the bill. In answer to this suggestion, it is enough to say that there is no act of congress conferring jurisdiction to grant such auxiliary and ancillary relief, and the reasoning that excludes the jurisdiction of the court over the principal subject matter of the suit applies with equal force to the ancillary and auxiliary relief sought. The complainant is clearly mistaken in supposing the supervisors of election appointed in this state, under the act of congress approved June 10, 1872 (17 Stat. 348, 349), have any authority to supervise or report upon the election of state officers. No return or report they might make in reference to the election of any state officer could have any official sanction, or be received as evidence in this or any other court. The court having no jurisdiction on the case made by the bill to determine in any form of action the right of complainant to the office in dispute, it is needless to inquire whether a bill in chancery will lie in such case, or whether the remedy must be by quo warranto. And for the same reason it is unnecessary to inquire whether the court, supposing it to have jurisdiction, could grant the several injunctions and restraining orders prayed for in the bill. The complainant must, therefore, be remitted to the justice of his own state tribunals, where from the foundation of the government down to the present time, the exclusive jurisdiction over cases of contested election for state offices has been vested and still remains, except where the case turns solely on the single fact specified in the twenty-third section. The demurrer to the bill is well taken, and the injunctions and other extraordinary writs and relief prayed for are refused, with leave to complainant to have a reargument upon the demurrer, before a full bench at the next term. Demurrer sustained.

NOTE.—No desire was expressed at the term to have the questions decided in the foregoing

opinion heard before the full bench. Enjoining the governor of a state in the federal courts, Murdock v. Woodson [Case No. 9,942]. Indictment of governor, U. S. v. Clayton [Case No. 14,814].

Enforcement Act — Mode of Administration. As part of the judicial history of the circuit, it may be of interest to the profession to be appraised of the manner in which the anomalous and delicate duties required of the judges of the federal courts by the act of Congress, entitled "An act to amend an act approved May 31, 1870, entitled 'An act to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes,'" approved Feb. 28, 1871, and the first section of the act approved June 10, 1872, amendatory thereof, have been performed. This will appear by the following statement: In July, 1872, various applications from the state of Arkansas having been made to the circuit judge, in conformity with the act of congress providing for the appointment and defining the duties of "supervisors of elections," in which applications the petitioners stated their desire to have the registration and succeeding election guarded and scrutinized (the said election being one at which representatives in congress were to be voted for), the circuit judge, under the amendatory act, approved June 10, 1872, made and transmitted to the clerk of the circuit court for the Eastern district of Arkansas, the following designation and appointment: "United States of America, Eighth Judicial Circuit, ss. Being unable, by reason of distance, and from other causes to perform and discharge the duties within the state of Arkansas, imposed by 'An act to enforce the rights of the citizens of the United States to vote in the several states of this Union, and for other purposes,' and acts to amend the same, I do hereby select and appoint in my place and stead to act for and within the said state of Arkansas, the Hon. Henry C. Caldwell and the Hon. William Story, who are respectively the judges of the district courts of the United States for the Eastern and Western districts of Arkansas; and if one of the said judges shall be absent from the state, or unable to act, then the appointment shall be to the other solely, and severally, and I do hereby direct and assign to them, or to either of them, as aforesaid, within and for the state of Arkansas, the performance of all duties, and acts, and the exercise of all powers, functions, and jurisdiction, by the aforesaid acts of congress imposed and conferred upon me. Given under my hand at chambers, in the city of Davenport, this, the 6th day of August, A. D. 1872. John F. Dillon, Circuit Judge, Eighth Judicial Circuit." On the tenth day of August, 1872, court was opened at Little Rock, and the foregoing appointment entered of record, and the said judges notified thereof. An order was made of record that the court remain open from day to day for the performance of the duties imposed and the exercise of the powers conferred by the said acts of congress. On the thirteenth day of August, 1872, the following letter was addressed to the chairman of the Republican and Democratic State Central Committees, respectively, both of whom,—among many others, —had asked the benefit of the said acts of congress:—"Little Rock, Arkansas. Sir: I am directed by the judges to advise you that in pursuance of the act of congress and the order and appointment of the circuit judge, the circuit court of the United States is now open in this city, and will remain open for the purpose of appointing supervisors of election for the various election precincts of this state under the act of congress providing for the same. When this jurisdiction is invoked by proper petitions, the act provides for the appointment of two supervisors of election for each precinct, who can read and write the English language, and who are of different politics, and qualified voters of the precinct. I am also directed by the judges to say, that owing to their limited personal knowledge of men and their politics, in the various parts of the state, they will be unable to select, upon their own knowledge, proper persons, having the required qualifications to act as such supervisors. In view of this fact, and inasmuch as the act of congress provides that the supervisors of each precinct shall be opposed in politics, the judges have determined to devolve on the Democratic and Republican State Central Committees, respectively, the responsibility of recommending one of the supervisors for each precinct. The persons so recommended by your committee will be appointed by the court, unless it be shown that they do not possess the qualifications required by the act, or are otherwise unfit for the position, and in such case your committee will be notified and requested to recommend some other suitable person. This practice will insure each party a representative of its choice upon the board. The court trusts that your committee will recommend men for the appointment of supervisors whose standing and character will be a guarantee that they will honestly discharge the duties imposed on them by the act of congress. Very respectfully, Ralph L. Goodrich, Deputy Clerk U. S. Circuit Court." Recommendations were made accordingly, and the persons recommended were appointed unless known or shown to be unfit for the duty, and persons in each election district or voting precinct thus appointed received a commission, under the seal of the circuit court, by which "they and each of them were authorized and empowered jointly and severally, to exercise and discharge all and singular the rights, powers, and duties conferred on 'supervisors of election' by the first section of the act of congress aforesaid, approved June 10, 1872." It may, perhaps, properly be added that no complaints reached the court or its judges, of the course adopted, but on the contrary, they had many evidences that their action was universally satisfactory to the citizens of the state.

Case No. 6,138.

HARRISON v. HADLEY et al.

[See Case No. 6,137.]

HARRISON (McCALL v.). See Case No. 8,671.

Case No. 6,139.

HARRISON v. McLAREN.

[10 N. B. R. (1874) 244.] [1]

District Court, S. D. Mississippi.

BANKRUPTCY — PROOF OF DEBT — PREFERENCE — SHIPMENTS BEFORE BANKRUPTCY BUT AFTER INSOLVENCY.

1. A. & Co. had been for a number of years the commission merchants of the bankrupts, who were merchants, dealing mainly in cotton. They advanced a large sum of money to the bankrupts, supposing that they had advanced the entire cash capital required by the bankrupts, and expected in return to receive all the cotton shipped by them. Notes of the bankrupts were presented for payment at the office of A. & Co., and were protested for nonpayment. A short time after this, one of the bankrupts visited A. & Co., and informed them that they were hard pressed, that they owed a large debt besides that due to A. & Co., and requested aid in arranging it. A. then went to the place of residence of the bankrupts and obtained a judgment for the amount due his firm, with the intention thus to receive the entire estate for

[1] [Reprinted by permission.]

an equal distribution among the creditors. On a motion to expunge the proof of debt of A. & Co., *held*, that they had reasonable cause to believe their debtors insolvent before obtaining their judgment.

[Cited in Harris v. Hanover Nat. Bank, 15 Fed. 788.]

2. Shipments of cotton after the insolvency to A. & Co., when they made advances at the time to the bankrupts, were not a preference, but in effect a sale of so much cotton to procure the necessary means to realize upon their assets.

In bankruptcy.

HILL, District Judge. The question now presented arises upon the application of the trustees of the estate of the bankrupts, to expunge the claim of T. H. and J. M. Allen & Co., answer, exhibits, and proof. The application alleges that the said creditors received from the bankrupts large shipments of cotton, which they sold, and applied the proceeds to the payment of their debts; that at the time this was done, the bankrupts were insolvent, and that the shipments so made were done with intent to give said creditors a preference over their other creditors, and that said creditors when they received such shipments knew, or had sufficient and reasonable cause to believe the bankrupts insolvent, and that the shipments were made with the intent to give such preference. Allen & Co. admit the reception of the cotton, but deny that they knew, or had cause to believe, the bankrupts insolvent, until the 16th of November, 1873; also deny that they knew that there was any intention, on the part of the bankrupts, to give them a preference over other creditors. Upon the issue as thus made, both parties have submitted proof, which has been duly considered, and from which I am satisfied there was not such intentional fraud as to deprive these creditors from a pro rata share with the other creditors, they agreeing to account for any part of the proceeds of the sale of said cotton, to which the court may deem them not entitled, to the exclusion of the other creditors.

The question for decision is, as to whether or not, when the cotton was received, these creditors knew, or had reasonable cause to believe the bankrupts insolvent, and that the shipments made were intended as a preference, and did Allen & Co. then know or have reasonable cause to believe the existence of these facts, the insolvency of the bankrupts at the time being admitted? Allen & Co. had for a number of years been the commission merchants of the bankrupts, who had advanced them money, accepted and paid their drafts, notes, and other obligations, to a large amount; the bankrupts were merchants in Yazoo City, and as such advanced to the planters money and supplies of all kinds necessary to enable them to carry on their planting operations, and who in payment agreed to deliver their cotton crops to the bankrupts, which cotton, by agreement with Allen & Co., was to be shipped to them in New Orleans, to be sold by them as factors and commission merchants, and after payment of commissions and charges, the net proceeds of sales were to be placed to the credit of the bankrupts upon the advances made. Such was the agreement and usual mode of dealing between the parties. Allen & Co. agreed with Harrison & McLaren to advance to them during the commercial year ending the 1st of September, 1873, the sum of seventy thousand dollars, to be paid in the mode stated, and did advance that amount, and something more, showing a balance of seventy-five thousand dollars due Allen & Co. 1st September, 1873, Allen & Co., believing that the only indebtedness of Harrison & McLaren was to them, as they supposed they had advanced the entire cash capital and credit being employed by Harrison & McLaren, and expected in return to receive all the cotton shipped by them. On the 8th of October, 1873, a small note of a few hundred dollars, made payable to another party, but payable at Allen & Co.'s office, in New Orleans, was presented for payment, and protested. On the 28th and 30th of the same month, two other notes, payable to other parties, at the office of Allen & Co., were presented for payment, and protested; these notes were, together, for ——. On the 16th of November, Harrison visited New Orleans, and informed Allen & Co. that they were hard pressed; that they owed a large debt beside that due to Allen & Co., and requested aid in arranging it, which Allen & Co. were unable to do, under the money panic then prevailing. J. M. Allen, a member of the firm, having this, and other mercantile matters in Mississippi, especially in charge, returned with Harrison to Yazoo City, where he found numerous creditors pressing for payment, and the debtors unable to pay, and advised Harrison & McLaren to go immediately into liquidation. He also found the creditors endeavoring to sell their claims to the debtors of the bankrupts, to arrest which, by obtaining judgment and garnishment on the debtors, he was advised to obtain judgment on his debt against Harrison & McLaren, and summon the debtors as garnishees, and by agreement with the bankrupts, a judgment was entered in the circuit court of Yazoo county, then sitting, but which was set aside. J. M. Allen testifies that there was no intention to set up this judgment as a lien, but to secure the entire estate for an equal distribution among the creditors, and there is no reason to doubt the correctness of this statement. The business was carried on between Allen & Co. and Harrison & McLaren, up to this visit to Yazoo City, Allen & Co. continuing to make advances, and to receive shipments of cotton, the latter greatly exceeding the former.

The principles of the bankrupt law [of 1867 (14 Stat. 517)] are pretty well settled; the difficulty is in applying them to the facts of

the case as above stated. The insolvency being admitted, the next question is, when did Allen & Co. have reasonable cause to believe it? Whenever a knowledge of such facts was brought home to them, which would lead a prudent man, having the interest which they had in the inquiries, to inquire into the pecuniary condition of their debtors, which inquiry, when made, would have developed their insolvency. It is well settled that commercial insolvency under the bankrupt law is the inability of a merchant, banker, trader, manufacturer, or miner, to meet and pay his commercial debts as they fall due in the usual course of business; not that his property, when sold under legal process, is insufficient to pay all his debts. This last may be termed legal insolvency. Under ordinary circumstances, when a merchant permits his commercial paper to go to protest, it would afford a strong presumption against his commercial solvency, subject, as a matter of course, to be rebutted by evidence, but these presumptions must be considered in the light of surrounding circumstances at the time. The first note was protested during the money panic, and may be held as rebutting the presumption raised by the non-payment of this note. And, were it not for other circumstances, might be held as rebutting the presumption arising from the non-payment of the other notes. But, after the non-payment of the first note, there were, to November 1st, presented for payment, and which were not paid, at the office of Allen & Co., commercial paper of the bankrupts in all, the sum of —— dollars. It must be remembered that Allen & Co. did not suppose the bankrupts were indebted to others to any considerable sum up to the presentation of these notes; but this being known, it was reasonable to suppose that these were not all the debts they owed, and it does seem to me that as prudent men as these creditors are shown to be, they should, by this time (November 1st), have made inquiry, and which they no doubt would have done but for the paralysis produced by the panic, and which inquiry would have developed the insolvency, both commercial and legal, of Harrison & McLaren, their debtors; and such being the case, must be held to have had reasonable cause to believe them insolvent the 5th of November, by which time the inquiry might have been made.

The next question is, were these shipments made with the intent to give them a preference? The deposition of neither Harrison or McLaren has been taken on this subject. It is urged in argument that these shipments were made in the usual course of business, and therefore negatives such intent; but Harrison & McLaren must have known their commercial insolvency; that is, that they could not pay their commercial paper as it fell due in the usual course of business, and, if they knew anything about their business, must have had reasonable cause to believe themselves legally insolvent. Such being the case, they must have known that the placing of all the cotton they could command in the possession of Allen & Co., their principal creditors, was giving them a preference; that it was such preference there can be no doubt, and, according to an old and well settled rule, they must be presumed to have intended the natural result of their own act; and there is no proof to rebut this presumption—the reasons are all in its favor. Allen & Co. had supplied them with means to a large amount, indeed, had furnished the means upon which they had carried on business for years. They doubtless felt under more obligations to them than all their other creditors together—like all men, when sinking, looked to some one for help, and looked to these friends. This help could not reasonably be expected but by placing all their cotton, as soon as they could get it, in the possession of these large creditors. This was natural and nothing morally wrong, and only forbidden by the policy of the bankrupt law. It is ingeniously and forcibly urged on behalf of these creditors, that all the shipments made after September 1st do not amount to more than the pro rata share of these creditors, and therefore cannot be deemed an intended preference, or a preference at all; that if a merchant has only enough to pay half his indebtedness, he may, without any violation of the bankrupt law, pay each creditor half what he owes him. This is very plausible, but practically will be found of difficult application, if such a case could be found. The payment to one of that amount would be a bird in his hand, whilst the others would only have a bird in the bush, which would give the former a preference; but it is evident such was not the intention of these parties, but is exactly what their creditors resist. They ask to keep all the birds they have, and an equal division of those afterward caught. Under the proof, these shipments received after the 5th of November, must be held as intended preferences.

The remaining question is, did Allen & Co. know, or have reasonable cause to believe they were preferences, and so intended? That they were preferences in point of fact, cannot successfully be denied; and that, under the principles stated, they must be held as having been so intended, I believe equally well established. That Allen & Co. must be held to a knowledge of that which it was their duty to know, or, in other words, cannot take advantage of their ignorance to the prejudice of others holding equal rights under the law; and, such being the case, must be held as knowing the result of the reception of those shipments as an intended preference in all received after the 5th of November. It is urged, on behalf of these creditors, that the advances made after this time, or up to the suspension, negative all such knowledge; but this by no means follows. It was their interest to make these advances.

This was necessary in order to procure the cotton. If Harrison & McLaren refused to make further advances to their customers, the cotton would be withheld, and if these creditors did not furnish the means to them, they could not furnish their customers; besides, would have been induced to ship to those who would furnish them. It is also urged that, under the bankrupt law, the balances must be struck at the commencement of the proceedings in bankruptcy. This is so when there have been no intentional preferences made on the credit side of the debtor's account; but to allow such intended preferences would defeat the very policy and object of the bankrupt law—that is, equality among the creditors. But this rule is not disturbed by giving credit for the advances made after the 5th November, upon the shipments received after that date. This was, in effect, a sale of so much cotton to procure the necessary means to realize the assets of these failing merchants. All the cotton received before the 5th November, when received, vested in Allen & Co. a lien for the payment of the balance then due them; consequently the proceeds of the sale of such cotton should be credited upon the balance then due.

I am referred, on behalf of these creditors, to the case of Tiffany v. Lucas, 15 Wall. [82 U. S.] 410. This case, when examined, does not apply to the present. That was a case of sale to one not a creditor, and not a preference. Also to the case of Wilson v. City Bank [17 Wall. (84 U. S.) 473]. That was a case of a judgment-lien, without any aid or assent on the part of the defendant, beyond mere passive non-resistance; but the court holds that a very slight circumstance showing an affirmative desire upon the part of the debtor, would change the rule. Then the subsequent advances should be credited upon the proceeds of the sales of the cotton received after the 5th November, and the balance of such proceeds added to the amount of assets subject to general distribution, and charged to Allen & Co. upon the amount of their dividend, it being admitted that their dividend will amount to more than such balance, or if it should, only the balance need be paid over. The account of Allen & Co. does not show the dates at which the cotton was received by them, but only the date of the sales, and there is no proof in the record supplying these dates, consequently the case must go to the auditors for proof, and an account showing the net proceeds of the sales of the cotton received by Allen & Co. after the 5th of November, the advances made after that time, and the balance of such net proceeds of sales, after giving credit for such advances.

HARRISON (NICHOLLS v.). See Case No. 10,229.

HARRISON (RINEHART v.). See Case No. 11,840.

Case No. 6,140.

HARRISON et al. v. ROWAN et al.

[Pet. C. C. 489.] [1]

Circuit Court, D. New Jersey. April Term, 1818.

EQUITY PRACTICE — SERVICE OF PROCESS OUT OF STATE—AMENDMENT TO BILL.

1. The eleventh section of the judiciary act of the 24th of September, 1789 [1 Stat. 78], which relates to service of process, is not a denial of jurisdiction, but the grant of a privilege to the defendant not to be sued out of the state where he resides, unless he shall be sued with process in the state where the suit is brought.

[Cited in Kitchen v. Strawbridge, Case No. 7,854; Clarke v. New Jersey Steam Nav. Co., Id. 2,859; Romaine v. Union Ins. Co., 28 Fed. 639.]

2. But the defendant may wave that privilege by a voluntary appearance; yet if he plead the fact of his not having been served with process within the state where the cause has been commenced and the cause is set down for a hearing on this plea, on the equity side of the court, the docket entries showing a prior appearance by a solicitor of the court, cannot be taken notice of.

[Cited in Flanders v. Aetna Ins. Co., Case No. 4,852; Picquet v. Swan, Id. 11,135; Wilson v. Pierce, Id. 17,826; Lee v. Aetna Ins. Co., Id. 8,181; Winans v. McKean R. & Nav. Co., Id. 17,862; Romaine v. Union Ins. Co., 28 Fed. 631; Reinstadler v. Reeves, 33 Fed. 310.]

3. An amendment was allowed after argument, by which the plaintiff was allowed to traverse the fact of such an appearance having been entered.

This case came on upon a plea to the bill, which was set down by the plaintiffs [Josiah Harrison and others] for hearing. The bill respects land lying in New Jersey. The plea states that the defendants [Thomas Rowan and wife] are citizens and residents of Pennsylvania; that they were served with subpoenas in this cause in that state, and not in the state of New Jersey. It was contended in support of the plea, that the jurisdiction of this court is completely denied by the eleventh section of the judiciary act of the 24th of September 1789 (2 Laws [Bior. & D.] 60 [1 Stat. 78]). The following cases were cited: Hollingsworth v. Adams [Case No. 6,611]; Emory v. Greenough [Id. 4,471]. Against the plea, it was shown by the docket entries, that, after service of the subpoenas, the defendants' appearance was entered by a solicitor of this court; and that, after sundry orders made in the cause, ruling the defendants to answer, this plea was filed. It was contended, First. That the eleventh section does not apply to a case like the present, where the court has jurisdiction of the subject of the suit, and of the parties, they being citizens of different states, and where no other federal court can have jurisdiction, the subject of the suit, viz: land, lying within this state. Second. That the jurisdiction is not excluded, and that all that the defendants can claim, is personal exemption from

[1] [Reported by Richard Peters, Jr., Esq.]

being compelled to appear out of the state they live in, unless they were served with process in this state. But that they have waved this privilege by voluntarily appearing, and that it is not competent to them afterwards to retract the waver. They cited [Logan v. Patrick] 5 Cranch [9 U. S.] 288; [Massie v. Watts] 6 Cranch [10 U. S.] 148. It was further contended, that this was not a case within the eleventh section, because the subpoena is not an original process. The plaintiff has a right to file his bill, which in chancery is the first step, and the subpoena is merely notice to the defendant to appear and answer.

WASHINGTON, Circuit Justice. There is no doubt, but that this is a case to which the judicial power of the court extends within the meaning of the constitution, as well as the words of the eleventh section of the law referred to. It is a suit in equity, where the matter in dispute exceeds 500 dollars; and it is between a citizen of the state where the suit is brought, and a citizen of another state. That part of the section which respects the service of process, does not amount to an exception from the general grant of jurisdiction, but secures to parties residing out of the district in which the suit is brought, a privilege of not being liable to be served with process out of the district in which they reside, or of being compelled by such service to appear in any other district. The expressions used in the clause, respecting arrests, clearly import this and no more, and though the phraseology of the next clause seems more applicable to the case of jurisdiction, still it ought to receive the same construction, since the subject is the same, except that it applies to other modes of proceeding than that mentioned in the preceding clause. That the non-residence of the defendant does not affect the jurisdiction, is obvious from this, that service of the process at any time after it was taken out, and before the return day, gives to the court full possession of the cause; and yet the words of the clause are, that "no civil suit shall be brought," &c. But it appears to the court, that this construction is fully warranted by the decision of the supreme court, in the case of Logan v. Patrick, 5 Cranch [9 U. S.] 288. In that case, the suit in equity was brought in the circuit court of Kentucky, against a citizen and resident of Virginia, who was not served with process in Kentucky; nevertheless he appeared and answered, and the question was whether the court had jurisdiction of the cause. The supreme court decided in the affirmative. Now it is clear that if non-residence formed an objection to the jurisdiction, unless the process had been served in Kentucky, the subsequent appearance could not have given jurisdiction to the court. But being a mere matter of privilege, it was waved by a voluntary appearance which rendered the service of process unnecessary. And it must be remarked, that this was not the case of an injunction merely, but the bill also prayed for a conveyance of the land in question.

It appears then, that this exemption from the service of process in a state other than that in which the defendant resides, or of being compelled to appear in a suit in another state, may be waved by the voluntary appearance of the party. But the question is, has such waver taken place in this case. The appearance of the defendants accompanied by a plea claiming the benefit of the privilege, cannot certainly amount to a waver of the privilege, inasmuch as they could not have pleaded the privilege without appearing. But the court is of opinion, that the previous voluntary appearance of the defendants at a former term by a solicitor of this court, unaccompanied by any objection, would amount to such a waver, if upon this plea stating that fact, the court could take notice of the docket entries. This we think cannot with propriety be done. Whether the defendant appeared or not, is a matter of fact which he may deny. His appearance was entered by a solicitor of the court. But was he authorised to do this? We think it would be improper to preclude an enquiry into this fact, by deciding it on pleadings which do not put it in issue. The plea therefore must be supported, unless the plaintiffs should move to amend. The plaintiffs made this motion, which was granted. The defendants also obtained a rule to show cause why the appearance should not be struck off, on the ground of its having been entered by mistake.

[NOTE. A demurrer to the bill for want of parties was sustained in Case No. 6,143, and the plaintiff given leave to amend. In Case No. 6,141 an issue devisavit vel non was tried, and a verdict rendered for the plaintiff. In Case No. 6,142 a new trial was awarded.]

Case No. 6,141.

HARRISON v. ROWAN.

[3 Wash. C. C. 580.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1820.

WILLS—ISSUE DEVISAVIT VEL NON—SANITY OF TESTATOR—EVIDENCE.

1. Where a testator has given a fee to A, if she should survive his daughter, dying without issue then living, A is not a witness in support of the will.

2. A witness may depose as to what he thought of the testator's sanity, at or about the time the will was made; but not as to what the witness had declared upon the subject to others.

[Cited in Clark v. Ohio, 12 Ohio, 493; Thompson v. Kyner, 65 Pa. St. 377; Waddington v. Buzby, 45 N. J. Eq. 174, 16 Atl. 690.]

3. Upon the cross examination of a witness, he may be asked leading questions, to draw from him a further disclosure than he made upon the principal examination, and in refer-

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

ence to the matter testified about. But not as to other matter.

[Cited in Moody v. Powell, 17 Pick. 499; Legg v. Drake, 1 Ohio St. 292; approved in People v. Oyer & Terminer County Court, 83 N. Y. 459. Cited in Hildreth v. Marshall, 51 N. J. Eq. 250, 27 Atl. 465.]

4. The proceedings of the orphans' court, upon the offer of a will for probate as to personal property, and the decree of the prerogative court refusing the probate, are not evidence upon this issue; and if the one party read part of a deposition, to show that a witness had contradicted himself, the other side may read the whole, to prove his consistency.

[Cited in State v. Phillips, 24 Mo. 485.]

5. It is not necessary for the devisee to prove, that the will was read to the testator in the presence of the witnesses. In general, this is to be presumed; but if the testator was blind, or incapable of reading; or if a reasonable ground be laid for believing it was not read to him; or that there was fraud in the transaction; it is necessary for the devisee to satisfy the jury that the will was so read, or that the contents were known to the testator.

[Cited in Vernon v. Kirk, 30 Pa. St. 221; Hovey v. Hobson, 55 Me. 256; Kahl v. Schober, 35 N. J. Eq. 466.]

6. The testator should appear to have had a sound disposing mind and memory; that is, that he was capable of making his will, with an understanding of what he was doing.

[Cited in Hall v. Unger, Case No. 5,949.]

[Cited in Aurand v. Wilt, 9 Pa. St. 56; Harden v. Hays, Id. 162; Davis v. Calvert, 5 Gill & J. 284; Beaubien v. Cicotte, 12 Mich. 490; Kinne v. Kinne, 9 Conn. 103–105; Trish v. Newell, 62 Ill. 204; Benoist v. Marvin, 58 Mo. 316; Thomas v. Stump, 62 Mo. 275.]

7. A man may be capable of disposing by will, and yet incapable to make a contract, or to manage his estate. The question is as to competency when the will was made, though evidence of acts and sayings before is always admitted.

[Cited in Hovey v. Chase, 52 Me. 309.]

8. The evidence of attesting witnesses to the will is most to be regarded.

9. Where an issue of "devisavit vel non" is directed out of chancery, in England, the practice is, for the judge who tried the cause to return, with the verdict, his notes; and if the chancellor is dissatisfied, on the ground of the admission of improper evidence, or the rejection of what was proper, or for other reasons, he will direct a new trial; but no exception can be taken, at nisi prius, to the opinion of the judge who tried the cause. In the circuit courts of the United States if the court is supposed to have erred in any of these particulars, the proper mode is to move the court, sitting in equity, for a new trial.

[Cited in Pfeil v. Kemper, 3 Wis. 318; Kinne v. Kinne, 9 Conn. 105; Potts v. House, 6 Ga. 324; State v. Pike, 49 N. H. 399.]

This was an issue of devisavit vel non, directed, by this court, on its equity side, to try whether John Sinnickson did make a valid and legal will, to pass his real estate? During the trial, the following points of evidence were ruled by the court.

1. The plaintiff offered to examine one of the daughters of Mrs. Dick, (now living,) in support of the will. An objection was made to the competency of the witness, on the ground of interest; it being contended, that she has a contingent estate in certain property comprehended within the following bequests; viz. "If my daughter should have, and leave issue living at her death, and if it shall also happen, that my son Francis shall die without lawful issue, then I give to the issue of my daughter, in fee, Petits' farm. But if my said children shall have no such issue, then I devise the said farm to my sister, Sarah Dick, and to her heirs, in fee simple; and if she shall not survive my said children, I devise the same to the heirs of the said Sarah, in fee." It was contended by the plaintiff's counsel, that Mrs. Dick took an estate in fee, and that the limitation over, to her heirs, was void; and consequently, that the witness had no other interest, than what an expectant has; which affords no objection to his competency.

BY THE COURT. The clause of the will must be taken altogether; and every part of it should be carried into effect, if it can. The clear meaning of the testator, was to give a fee simple estate to Mrs. Dick; provided she should survive the daughter, dying without issue, then living. But if Mrs. Dick should die before the happening of such contingency, then the estate was to vest in the heirs of Mrs. Dick, as purchasers, by way of executory devise. The witness, therefore, has a contingent interest in supporting the will; which, we think, disqualifies her from being a witness.

2. A witness may be asked, what opinion he formed of the sanity of the testator, at or about the time of the will being made; but not what he said to third persons upon the subject.

3. Upon the cross examination of a witness, he may be asked leading questions, to draw from him a further disclosure than was made upon the principal examination, and in reference to the matter testified about. But if the cross examination respects new matter, leading questions cannot be asked.

4. The plaintiff's counsel having, upon the examination in chief, asked some questions respecting the sanity of the testator, is not, on that account, prevented from examining witnesses, to rebut the evidence of the defendant upon that subject; although it was irregular for the plaintiff, in the first instance, to give evidence of sanity. All that he has to do, is to prove the due execution of the will, according to the form prescribed by the statute. Incapacity, or fraud, is the defence set up on the other side, which the plaintiff is then called upon to repel. Nevertheless, it would be too rigid to preclude the examination of his witnesses on that subject; because he had irregularly asked some questions respecting it, in the first instance.

5. The defendant offered to read the proceedings in the orphans' court, upon the offer of this will for probate, as a testament of personal estate; and the decree of the prerogative court, refusing probate. This was objected to, and the following cases were cited, 6 Cruise, Dig. 10; 1 Ld. Raym.

744, 262; Pennington [1 N. J. Law] 47. In support of the evidence, was read the act of assembly, made in 1784; 3 Day, 326; Spencer v. Spencer [Case No. 13,233].

PENNINGTON, District Judge, stated, that, until the law of 1784, the jurisdiction of the ordinary was always considered, in this state, as being similar to that of the ecclesiastical court in England, and confined entirely to testaments of personal estate. That the validity of a will, in relation to real estate, was open for decision of the common law courts, upon a trial in ejectment, or upon an issue of devisavit vel non, directed out of chancery. That the act of 1784 made no alteration in this respect; and that it has always been so understood, and such has been the practice.

WASHINGTON, Circuit Justice, concurred in the opinion, that the evidence was inadmissible, for the reasons assigned by Judge PENNINGTON.

6. If one of the parties reads part of a deposition, in order to prove that the witness who gave it contradicted what he has now stated upon his examination in court, the other side has a right to refer to the whole deposition, to support the consistency of the witness.

For the plaintiff, it was contended, that it is not necessary to prove, that the will was read to the testator before the witnesses, even although the testator was blind. 5 Bos. & P. 415; Shep. Touch. 54; 2 Johns. 404. That capacity to make a will is always to be presumed, till the contrary is proved. 5 Johns. 158. That the person who impeaches the will on this ground, must do it by proving facts, and not by the opinions of witnesses. Swinb. Wills, 78. And that no extremity of bodily imbecility is sufficient to prove mental incapacity. Swinb. Wills, 111; 8 Vin. Abr. 54, pl. 8; 3 P. Wms. 130; Phil. Ev. 375; 1 Wash. [Va.] 225. That testimony to prove incapacity, given by the attesting witnesses, is to be cautiously received; as they are guilty of great misbehaviour in having attested it when their opinion was against his sanity. 3 Mass. 330; Pow. Dev. 709. That the question is merely as to a general testamentary capacity, and not a capacity in reference to the particular will. Pow. Dev. 145; Swinb. Wills, 79, 80. Upon the subject of fraud, that no evidence short of direct fraud and circumvention is admissible;—not to be collected from circumstances. Swinb. Wills, 10, 11; 8 Term R. 147, c. 3, case 61. As to admitting evidence of declarations of the testator at other times, and leaving out of the will certain parts of the testator's property. 2 P. Wms. 209; 2 Bin. 622.

Cases cited for the defendant: Southard [2 N. J. Law] 455; Pow. Dev. 718; Peake, Ev. 490; 2 Burn. Ecc. Law, 513; 1 Fonb. 12, 114; Swinb. Wills, 112.

Before WASHINGTON, Circuit Justice, and PENNINGTON, District Judge.

WASHINGTON, Circuit Justice (charging jury). This is an issue directed by this court, sitting in equity, to try whether John Sinnickson made a valid will for disposing of his real estate; and this is the question which you are to decide, upon the evidence which has been laid before you. The plaintiff holds the affirmative of this question; and all that he has to do, is to satisfy you that this will was executed in due form, according to the laws of this state. This he has done; and no question has been made at the bar upon this point. But the defendant impeaches the validity of the will, upon the following grounds:—1. Want of a testamentary capacity in the testator, to dispose of his property by will; and, 2. Fraud and circumvention produced upon the testator by the person who drew the will. A third objection was made, by one of the defendant's counsel; which was, that the will is not proved to have been read over to the testator, in the presence of witnesses. We understand this to be made as a substantive objection to the will, although it was not so argued by the other counsel on the same side, who very properly considered it merely as a badge of fraud, that it was not proved to have been read. We will, therefore, at once dispose of this point, by observing, that it is not necessary, in order to establish the will, that the person claiming under it, should prove that it was read over to the testator, in the presence of the attesting, or of other witnesses. It would be an unwise provision in the law, to require this to be done, inasmuch as most men are careful to confine to their own breasts the manner in which they have disposed, or mean to dispose, of their property by will. The domestic peace and harmony of the testator's family might be very unhappily jeoparded, if publicity were necessary to be given on such occasions. The law presumes, in general, that the will was read by or to the testator. But, if evidence be given that the testator was blind, or from any cause incapable of reading; or if a reasonable ground is laid, for believing that it was not read to him, or that there was fraud or imposition of any kind practised upon the testator, it is incumbent on those who would support the will, to meet such proof by evidence, and to satisfy the jury either that the will was read, or that the contents were known by the testator.

We now proceed to lay down some general rules, for assisting the jury in coming to a satisfactory conclusion upon the two points of capacity and fraud; and to notice some of the arguments at the bar, for the purpose of giving the sanction of the court to such of them as we think are consonant with law, and our disapprobation of those which are not.

1. As to the testator's capacity. He must, in the language of the law, have a sound and disposing mind and memory. In other

words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged; —a recollection of the property he means to dispose of;—of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary, that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient, if he has such a mind and memory as will enable him to understand the elements of which it is composed—the disposition of his property in its simple forms. It is the business of the testator, to dictate the purposes of his mind; and of the scrivener, to express them in legal form. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of his bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business; as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will; and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions, than they would in comprehending business in some measure new. The soundness of the testator's mind, is to be judged of from his conversation, or from his actions at the time the will is made, or from both taken together. It is not sufficient, per se, that he should be able to describe his feelings, or to give suitable answers to ordinary questions. This he may do, and yet the mind may be too much diseased, to enable him to dispose of his estate with understanding and discretion. It must also be remembered, that the fact of competency is to be decided by the state of the testator's mind, at the time when the will was made. And although evidence of the state of his mind, and of his bodily health, before and after that time, may be given, in order to shed light upon its condition at that period, still, such evidence is no otherwise to be regarded. For, although it should be proved, that at a prior or subsequent day, he was incapable of making a will from the effect of a temporary cause, such as fever and the like, it will not follow, that he was so when the will was executed. In weighing the evidence of sanity, that of the attesting witnesses is most to be regarded; because it is more likely, that they should be attentive to the conversation and actions of the testator, than mere bystanders, who do not feel themselves particularly connected with the transaction. On the other hand, the subscribing witnesses are, in some measure, parties to it; and there are few persons so ignorant as not to know, that the sanity of the testator is essential to the validity of his will.

As to the subject matter of the testimony, it may be well to remark, that the mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing. To this, as a general rule, the opinions of medical men, even although they did not see the testator, may be considered as an exception. A physician may, with some degree of accuracy, form an opinion of the nature of the disorder, and its probable effect upon the mind, where the symptoms are truly stated to him; because, from a long course of experience and observation, by himself and others of the profession, such have been the ordinary effects of these symptoms. But, to entitle such opinions to the regard of a jury, they should be satisfied by the other evidence in the cause, that the symptoms did exist, in the particular case under consideration. And if the opinions of these professional gentlemen, should differ materially, as to the ordinary effects of certain symptoms, the jury must weigh their evidence, as in other cases, and decide according to the opinion they may form of the comparative judgment, learning, and experience of the witnesses themselves. In this case, the physicians who have given testimony, have differed essentially from each other, in the opinions delivered to the jury; and there is no inconsiderable collision in the evidence of the other witnesses, respecting the material symptoms of the disorder; which, it is agreed on all hands, caused the death of the testator. It is proper to observe, upon this subject, that the opinion of the physician, who attended the testator during his last illness, is, for the most obvious reasons, always entitled to more regard than the opinions of physicians who had not this advantage. If the jury should be of opinion, that the testator was not competent to make his will, they will of course find for the defendant. If they should not be of this opinion, they will then inquire, 2dly, whether the will in question, was obtained from him by fraud, or circumvention of any kind.

It is contended, in support of the charge of fraud, that the testator is proved to have been for a long time in the habit of using spectacles; and that he was without them on the evening when his will was executed; —consequently, that he could not have read the will himself, after it was written; and that the evidence lays strong ground for believing, that the will was not read to him by the person who wrote it. It is further insisted, that the unnatural disposition of so

large a portion of the testator's estate, from an only and beloved daughter, to persons less nearly related to him, and this, in many respects, in opposition to previously formed resolutions, not shown to have been changed, and to declarations in proof of such resolutions,—and the bequest of a considerable property to the wife of the person who drew the will;—unitedly establish the charge of fraud and circumvention. That these circumstances, if proved to the satisfaction of the jury, deserve their serious consideration, is unquestionable. For, although fraud is never to be presumed, yet it is not necessary to prove it by direct and positive proof. Fraud most commonly veils itself in mystery; and it is by circumstances only, that it can in general be detected and brought to light. It should, nevertheless, be recollected, that these circumstances should be so strong, when combined and examined, as to satisfy the jury of the existence of the fact they are adduced to establish. It will not do, if they affect the judgment with nothing more than doubt and suspicion.

The charge of fraud is repelled by the plaintiff upon the following grounds:—1st. That Mr. Harrison, who wrote the will, did not obtrude himself upon the testator, but was sent for, and confided in, by him, to perform this service, as he before had done other professional services.—That it was written by the direction of the testator, who acknowledged to the witnesses, that Mr. Harrison had not been officious in the business. 2d. That the testator declared, before the will was made, that he had arranged and digested the disposition of his property in his mind, and required only some person to commit it to writing. 3d. That Mr. Harrison was in the room with the testator for three or four hours, and had, therefore, abundant time to write and to read over the will to him. And lastly, that the testator, after signing the will, acknowledged to the witnesses that it was his will; and added, that he was perfectly acquainted with its contents; and being asked by Mr. Harrison who was to take care of it, he answered—"You, of course." Mr. Harrison is the sole executor and trustee of the whole estate. It is insisted by the counsel, and we think with great weight, that, if the testator knew what he was about, and was possessed of sufficient understanding to make a valid will, his acknowledgments to the witnesses, and his direction to the executor to take charge of the will, amount to strong and persuasive evidence that he was acquainted with its contents. Whether the grounds of the plaintiff's and defendant's arguments are made out by the proofs in the cause, you must decide. There is considerable contradiction in the testimony of the witnesses, on one side and on the other. It will be your duty to reconcile them as far as you can; and, in weighing evidence, to compare not only the credibility and characters of the opposing witnesses, but their judgment and opportunities of giving correct information respecting the facts they have related. You are to say, whether John Sinnickson had a sufficient capacity to make a testamentary disposition of his real estate, with discretion and understanding, at the time when this will was executed by him; and if he had such capacity, then, 2d, whether this is his will, or whether he was induced to execute and acknowledge the same by fraudulent practices, or imposition of any kind. If you find the first question in the negative, or the last in the affirmative, your verdict ought to be for the defendant; if otherwise, you should find for the plaintiff. In weighing the evidence, should you think it doubtful, or balanced, you ought to incline in favour of sanity, and against fraud.

Verdict for plaintiff.

The defendant's counsel tendered a bill of exceptions to the opinion of the court, in rejecting the record of the sentence of the prerogative court, against the probate of his will, as a testament of personal property; and, also, to that part of the charge, in respect to the alleged necessity of proving that the will was read to the testator.

WASHINGTON, Circuit Justice. A bill of exceptions to the opinion of the judge, who tries, at nisi prius, the issue directed from the court of chancery, is quite a novelty. The practice in England is, for the judge to send to the court of chancery, with the verdict, the notes taken at the trial; and if the chancellor is dissatisfied with the verdict, either because improper evidence was admitted, or legal evidence rejected; or because of the evidence given to the jury, or the opinions of the judge at nisi prius, he will direct a new trial, and sometimes set the verdict aside. We see no reason, why the practice should be different, because the issue is tried by the same court which directed the issue. The only question will be, ought a new trial to be granted? And the evidence, and all the proceedings at law, being before the same judges, it cannot be necessary, nor would it be proper, to present them for reconsideration and re-examination, in any other form, than on a motion for a new trial.

[NOTE. In Case No. 6,140 a plea that defendants were not properly served with process was supported, and the plaintiff given leave to amend. A demurrer to the bill for want of parties was sustained in Case No. 6,143, and the plaintiff again given leave to amend. In Case No. 6,142 a new trial of the issue to determine the validity of the will was awarded.]

Case No. 6,142.

HARRISON v. ROWAN.

[4 Wash. C. C. 32.] [1]

Circuit Court, D. New Jersey. April Term, 1820.

MISCONDUCT OF JURY—GROUNDS FOR NEW TRIAL.

1. If the jury, after they are sent out, and before their verdict is rendered, take refreshments without leave of the court, it is misbehaviour in them; but the verdict is not affected thereby, unless they are furnished by the party in whose favour they find.

2. It is no objection to a verdict that the juryman at one time dissented, while the jury were absent from the court, if he afterwards agreed to the verdict, although he preferred giving no verdict, and stipulated with his brethren that none should be rendered, unless the court should refuse to discharge them. Evidence of such facts coming from a juryman is entirely improper.

3. The rules which prevail in England relative to new trials of issues out of chancery, are not applicable to the circuit courts of the United States, where the same judges that direct, superintend the trial of such issues. Here, the only question can be, are the judges satisfied with the verdict?

4. Washington, Circuit Justice, stated, that the verdict was supported by the evidence, and that he was satisfied with it. But this is not enough. The court should be satisfied; and the district judge not being satisfied, a new trial ought to be granted.

The jury having found in favour of the plaintiff [Case No. 6,141], the defendant now moved the court for a re-trial of the issue upon the following grounds: (1) That the jury, before they had agreed on a verdict, ate and drank at the expense of the plaintiff in whose favour they found, without the leave of the court. (2) That one of the jurymen did not, in reality, agree to the verdict, but assented in order to get discharged; and being told that the court would keep the jury together till they did agree. (To prove the facts upon which both these grounds were taken, the defendant offered the affidavits of some of the jurymen, which were objected to. The court directed them to be read, reserving the necessary observations on the competency of the evidence, till the opinion upon the whole case should be given.) (3) That the property being of great value, and the inheritance involved in, and bound by the verdict, a new trial ought upon general principles to be granted. (4) That the verdict was against the evidence. The evidence given in support of the two first grounds is stated in the opinion of the court; and to prove that such evidence is admissible, the following cases were relied upon: 2 Morg. Essays, 25, 26, 21; Vin. Abr. 452, tit. "Trial," pl. 22; 1 Mass. 530; Coxe [N. J. Law] 123, 166; 1 Wash. [Va.] 336, 337; 2 Morg. Essays, 46, 47; 2 Wash. [Va.] 80; 1 Wash. [Va.] 79. To prove that the objection to the verdict, if made out in evidence, is fatal: Co. Litt. 227b; 1 Vent. 125; 12 Mod. 111; 3 Bl. Comm. 375, 376; Freem. 79. As to the manner in which the verdict was agreed to, it was insisted that it was, in principle, the same as throwing up which way it should be, because the dissenting juryman put his opinion to coincide with his associates, upon the uncertain decision of the court to discharge, or to keep the jury together. (3) In support of the third ground were cited: 2 Vern. 75, 37, 38, 419; 3 Taunt. 91; 2 Term R. 113; 1 Dick. 87; 2 Dick. 500, 683; 3 Atk. 542; 2 Ves. Sr. 553; 2 Ves. Jr. 287; 7 Brown, Parl. Cas. 1, 10, 11; 3 Brown, Parl. Cas. 218, 220; 6 Brown, Parl. Case. 440; 13 Ves. Jr. 290; 1 Vern. 293; 1 Ves. Jr. 133; 1 Hen. & M. 550. (4) On the last point were cited: Amb. 210; 9 Ves. 169; 2 Atk. 320. For the plaintiff, and in support of the verdict it was contended on the first point, that the affidavits of the jurymen are inadmissible. 2 Tyler, 11; 2 South. [5 N. J. Law] 487; 3 Burrows, 1696; 5 Burrows, 2666, 2667; 1 Term R. 11; 2 W. Bl. 963. As to the objection itself, if the facts be properly proved, the rule is, that taking refreshment without leave of the court, is no ground for setting aside the verdict, unless it is done at the expense of the successful party, though it is a misdemeanour in the jury. It is not proved in this case, that the refreshments were furnished at the instance, or with the knowledge or consent of the plaintiff. (3) The cases cited in support of this ground fall far short of it; and even were they more in point than they are, they would not apply to the circuit courts of the United States, on account of their peculiar organization, uniting in the same body both the law and equity jurisdiction. The only practicable rule is to be found in the satisfaction or dissatisfaction of the judges with the verdict. 2 Madd. 368, 381; 3 East, 345.

Joseph R. Ingersoll and Mr. Southard, for defendant.

Richard, Stockton & Ewing, for plaintiff.

WASHINGTON, Circuit Justice. This is a motion made by the defendant, to award a new trial of the issue directed by this court, sitting in equity; to be tried, and which was tried at the bar of the law side of the court. The issue was devisavit vel non; and the jury have found in favour of the validity of the will. The reasons assigned in support of the motion are: (1) The misconduct, and also the conduct of the jury in making up their verdict. (2) The value of the property in dispute, and because the verdict binds the inheritance. Lastly, because the verdict is contrary to the evidence.

1. In support of the first objection, the defendant has offered the affidavits of some of the jurymen, as well as of the marshal, and of the innkeeper where the jury were confined, which prove that the jury were furnished with refreshments of meat and drink

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

more than once, either at their own request, or from the mere good will of the innkeeper. These refreshments were furnished and used by the jury before they had agreed upon their verdict; but they were not provided at the request, or with the knowledge of the plaintiff, so far as appears by the evidence. After the jury had delivered in their verdict, and were discharged, the plaintiff ordered a breakfast to be prepared for them, at the same inn where they had been confined, of which they partook; after which the innkeeper made a gross charge against the plaintiff, in which he included in one sum, the cost of the breakfast, and of the refreshments before furnished to the jury, but without distinguishing them, and the bill was paid by the plaintiff. But it does not appear that the plaintiff knew at the time that the refreshments were so charged.

Upon these facts, the court is of opinion, that the first reason assigned for granting a new trial is not supported by the principles of law. The rule long established, and uniformly observed is, that the jury are guilty of misbehaviour, if, after they are sent out, and before their verdict is rendered, they eat or drink without the permission of the court; but the verdict cannot be impeached for that reason, unless it appear that the refreshments furnished were at the expense of the party in whose favour the verdict is found; and where this is the case, the court will not only grant a new trial, but will set aside the verdict so found, as unfit to be spoken of to a second jury. The reason of the latter part of the rule is, to prevent the jury from being tempted to find a verdict against their unbiased sense of the right of the case they are to decide upon, by motives of gratitude or of feeling, for favours, however slight, conferred by either of the parties after they leave the bar. But neither the rule nor the reason of it, applies to this case. The refreshments were not provided at the expense of the plaintiff nor with his privity or consent. Nor does it even appear that when they were furnished, the innkeeper intended to charge the plaintiff with them, or that he supposed he was authorised to do so in consequence of any custom prevailing in this state in similar cases. Neither does it appear that when the bill was paid, the plaintiff knew that refreshments had been furnished the jury; although if the fact had been otherwise, the court is not prepared to say that that circumstance would affect the verdict. As to the conduct of the jury in relation to the verdict. Two of the jurymen have sworn that they differed in opinion from the other ten, and expressed to them their conviction that the will was not a good one, and declared that they could not find in favour of it. That the jury then came into court, and after stating by their foreman that they could not agree, applied to be discharged. This the court refused, and requested the jury to return to their room. After they had remained together for one night, Skenk, one of the dissenting jurymen, informed his companions that his opinion remained unchanged; but that if he stood alone, he would not hold out against the other eleven. They were all, however, anxious to find a verdict, and Skenk at length said that he was willing to return into court, and to let the foreman deliver a verdict for the plaintiff; and if the jury were not polled, he would let the verdict pass, but that if they were polled, he should declare his dissent; nevertheless, if after that the jury should be again sent out, he would agree to the verdict. The jury then came in, were polled, and Skenk declared his dissent from the verdict. The jury being again sent out, they agreed upon a verdict, returned into court, were again polled, and each juryman answered that he agreed to the verdict in favour of the plaintiff. No fraud or improper conduct appears to have been practised on the jurymen, collectively or individually, by any person, with a view to deceive or mislead them. The question then is, ought a new trial to be granted upon this state of facts? We think not.

The affidavits of jurymen stating their dissatisfaction with the verdict at the time it was rendered, the motives which influenced their conduct and induced them to submit to its being so rendered, and thus to contradict what they had openly agreed to in court, ought never to be tolerated. What the foreman, who is called upon in the presence of his associates to pronounce the decision of the whole body, declares that decision to be, ought not to be afterwards contradicted by some of that body; unless it can be made satisfactorily to appear that the foreman was mistaken in delivering the verdict, or stated it differently from what it really was. It would be a most pernicious practice, and in its consequences dangerous to this much valued mode of trial, to permit a verdict, openly and solemnly declared in court, to be subverted by going behind it and inquiring into the secrets of the jury room, to find out from some of the members of that body, what was the process by which they or others had come to the result declared by their verdict. See Comb. 14; Sayer, 100. But if, in ordinary cases, it would be dangerous to allow jurymen, possibly after they had been tampered with, to criminate themselves by giving such evidence; how much more is it to be reprobated, when the faithfulness of the report made by the foreman being called in question, and each juryman being required to say, (and he says it under the sanction of his oath first made) whether he agrees to the verdict so pronounced, he answers in the affirmative? After openly declaring that he does agree to it, any subsequent declaration to the contrary, though upon oath, is inadmissible; and if he be so lost to all sense of propriety as to be willing so to contradict himself, the court ought not to permit him

to do it. But admit, for a moment, that evidence from such a source is proper; the court cannot perceive that that which is given in this case discloses any legal reason for setting aside this verdict or for granting a new trial. Two of the jurymen were of opinion that the will was not valid, but yet were willing that the foreman should report the finding of the whole body to be in its favour, in case the jurymen should not be called upon, each man to speak for himself. Upon that occasion, those jurymen declared their dissent. Being sent back by the court with a recommendation to discuss and reconsider the subject, Mr. Skenk, and perhaps the other dissenting juryman, agreed to find in favour of the bill, if the discharge of the jury, which was first to be applied for, could not be obtained. The application having been made and rejected, and the jury remanded to their room, the verdict was agreed to by all the jurymen, and they severally declared in court that they did so. There was no deceit or misrepresentation practised upon the dissenting jurymen, to lead them to surrender their former opinions. The fair conclusion to be drawn from these facts is, that although those jurymen differed at first from their associates, and to the last preferred giving no verdict if it could be avoided, yet that their opinions were not so clear upon the evidence as to forbid the conscientious surrender of them to the judgment of so large a majority of their body. Mr. Skenk states in his affidavit, that when the jury were sent out the last time, they all agreed upon a verdict, and that they so answered upon being polled in court. The theory of jury trials must necessarily imply a principle of compromises and concession, amongst the members of that body. In cases of conflicting evidence, where the credit of the witnesses must be weighed and decided upon, or where damages are to be assessed for the measure of which no legal rule is prescribed; it is inconceivable that twelve men should arrive precisely to the same result, unless upon the principle just stated. This has been called by the defendant's counsel a chance verdict, because the agreement of the dissenting jurymen to unite in it, was to depend upon the decision of the court not to discharge the jury. This may be in part true; but the chance was not to decide whether the verdict should be for the plaintiff or for the defendant, (which would have met with the severe reprobation of the court,) but whether they should find a verdict or not. If the dissenting jurymen preferred the latter, it is no objection to the former, if in fact, they agreed to the verdict in case their wish to be discharged should be disappointed.

2. The next reason assigned for the new trial is, the value of the property in dispute; with the additional circumstance that the inheritance will be bound by the verdict. A number of English cases have been cited upon this point, which, it is contended, prove that under such circumstances it is almost a matter of course to direct a re-trial of the issue. If this be so, we can only say that the reasons which may have produced such a rule are inapplicable to the circuit courts of the United States, organized as they are. In England, as in many of the states of this union, the chancery and common law courts are entirely distinct and unconnected; and if the chancellor should find it necessary to have a fact material to the right of the cause ascertained by a jury, he is obliged to send an issue to one of the law courts for this purpose, and the only information which he can obtain of the circumstances which attended the trial, is from the report and notes of the judge, before whom it took place. But the only motive for directing the issue is, to inform the conscience of the chancellor; and unless he is, or ought to be satisfied, by the report made to him of the trial, he very properly sends the issue back to be re-tried. If he be satisfied with the verdict, he will not direct another trial, unless under very peculiar circumstances, and certainly never as a matter of course, in any case. The judge who tried the cause may certify that he is satisfied with the verdict, and yet, the chancellor, notwithstanding he has not the same opportunity of forming an opinion as to the correctness of the verdict, may not think that he ought to have been satisfied. But the judges of this court, who direct the issue for the purpose of informing their consciences, superintend also the trial of it. They have the same advantages which the law judge has in England of hearing the viva voce evidence of the witnesses; of observing their deportment, as well as that of the jury; and of attending to the strictures of the counsel upon the evidence given in their presence. If under these circumstances, they are satisfied that the verdict is warranted by the evidence, upon what rational ground can they direct another trial? Would a second verdict similar to the first do more than satisfy their consciences? and if it should be different, is it probable that the judges would be satisfied?

The rule then contended for by the defendant's counsel (if indeed it be a rule of the English court of chancery) would, in its application to the circuit courts of the United States, be absurd and irrational, and such a one as we could not consent to adopt. But we do not think that the counsel are at all supported by the cases they have relied upon, whether decided before, or since the American Revolution. Without reviewing those cases in detail, we state, as the result of our examination of them, that there is not one, either English or American, which comes up to the point contended for. It will be seen by a careful investigation of all the cases, that although the value of the property in dispute, and the binding effect of the verdict upon the inheritance are spoken of as influencing the decision, yet others are associated

with them, which have a particular and a sensible bearing upon the subject: such as that the interests of third persons were involved; that the parties had not sufficient time to investigate the title; doubtful titles involved; the discovery of new evidence; the dissatisfaction of the law judge, or of the chancellor, with the verdict; as well as other circumstances, which it will be seen existed in the cases, and were noticed by the chancellor in delivering his opinion. After this examination of the reasons mainly relied upon for a re-trial of the issue, we come to the third ground, which was not so much pressed, but which we think deserving of the highest consideration.

3. Is the verdict warranted by the evidence? or in other words, ought we to be, and are we satisfied with it? Speaking for myself, I must declare that I am satisfied. But my brother who sat with me upon the trial of the issue, authorizes me to say that he is not entirely so. This difference of opinion, upon a question which conscience alone can decide, is conclusive to induce my acquiescence in the motion. As a man, I am satisfied with the verdict; but as a judge, I ought not to be satisfied, unless the court is so. Let a new trial be awarded, upon payment of the costs of the former trial.

[In Case No. 6,140 a bill in equity was filed beginning the present suit. A plea to the jurisdiction, that defendants were not properly served with process, was supported, and the plaintiff given leave to amend. In Case No. 6,143 a demurrer to the bill for want of parties was sustained, and the plaintiff again amended. In Case No. 6,141 an issue devisavit vel non was tried, and a verdict rendered for the plaintiff.]

Case No. 6,143.

HARRISON et al. v. ROWAN et al.

[4 Wash. C. C. 202.] [1]

Circuit Court, D. New Jersey. April Term, 1819.

EQUITY JURISDICTION—DEVISAVIT VEL NON—WANT OF PARTIES TO BILL—LUNATIC—AMENDMENT.

1. A court of equity has jurisdiction in a suit brought by the trustee against the cestui que trusts, to direct an issue devisavit vel non; and to decree possession of the land to the trustee to enable him to execute the trust.

[Cited in Baker v. Biddle, Case No. 764; Hayden v. Davis, Id. 6,259; Pierpont v. Fowle, Id. 11,152; Goodenow v. Milliken, Id. 5,535.]

2. General principles regulating equity jurisdiction.

3. It is no cause of demurrer for want of parties, that a lunatic is not made a party; but it is a good objection for want of parties. For although his committee, if he has one, is made defendant in another capacity, still the lunatic should be a party, and then he answers by his committee; if he has none, the court appoints a guardian to answer for him.

4. Whenever an objection is made for want of parties, the court gives leave to amend, and make proper parties.

This was a suit on the equity side of the court. The bill stated that John Sinnickson, of the state of New Jersey, departed this life, leaving two children, the female defendant and one son, then and yet a lunatic, named Francis; having first duly made and published his last will and testament; whereby, amongst other things, he devised to the plaintiffs, Josiah Harrison and his successors, his real and personal estate in trust, out of the profits and interest, to raise an annuity of $1,400 for the sole and separate use of his daughter, the female defendant, exempt from the control of her husband, and certain annuities and legacies for the use of the other plaintiffs in the cause, constituting the said Harrison his trustee as aforesaid, and sole executor. That after the decease of the testator, the said Harrison offered the said will for probate in the orphans' court, which was rejected upon the ground that the testator had not a sound and disposing mind when he made his will; which decision was, upon appeal, affirmed by the prerogative court, and administration of the said estate was granted to the defendant Thomas Rowan; who possessed himself of all the real estate of the testator, and also of his personal estate to a large amount. That the said defendant had also taken out a statute of lunacy against Francis Sinnickson the son, and procured himself to be appointed his committee. The bill charges that John Sinnickson, at the time he made his will, was of sound and disposing mind and memory; that the will was written by and according to his directions, and was read over to, and fully approved and duly executed by him. The prayer of the bill is, that an issue may be directed to try whether the testator did or did not make the said will, and that possession of the real estate should be decreed to the plaintiff Josiah Harrison, to enable him to execute the trust contained in the will; and that the annuity devised to Mrs. Rowan might abate pro tanto, according to the amount of the personal estate of which the defendant Rowan had possessed himself, the same being charged with the payment thereof equally with the real estate. A plea to the jurisdiction was put in and overruled; upon the ground that though the defendants were residents of Pennsylvania, and were there served with the process, yet that it now appeared judicially to the court, that they had regularly entered their appearance by a solicitor of the court, and had submitted to sundry orders which had been made in the cause.

The cause was now argued upon a demurrer to the whole bill, and the following causes were assigned: (1) That the cause is not within the jurisdiction of a court of equity, the plaintiffs having a plain, adequate, and complete remedy at law. (2) Because the

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

bill seeks to abate the annuity devised to Mrs. Rowan. (3) Because Francis Sinnickson is not made a party to the cause. In support of the first cause of demurrer, it was insisted that under the sixteenth section of the act of congress of 24th September, 1799, as well as upon general principles, this bill cannot be supported, since there is a plain and complete remedy at law by ejectment, and that the chancery never entertains a bill for the proof and establishment of a will of lands, but leaves the party to prove it in the trial of the ejectment. Where bills of this kind have been entertained, it has been merely to perpetuate the evidence. 1 Madd. Ch. Prac. 206, 207; Coop. Eq. Pl. 125; 2 Ab. 424; 3 Brown, Parl. Cas. 358; 1 Eq. Cas. Abr. 130; 1 Vern. 105; 2 Har. Ch. Prac. 93, 130; 2 Madd. 239; Mitf. Eq. Pl. 126. Surrender of the title papers which is asked for in the bill is no ground of jurisdiction. Coop. Eq. Pl. 125. (2) It was denied that this is a proper case for abating the annuity devised to Mrs. Rowan, because the decision of the courts of probate being conclusive as to the validity of the will to pass the personal estate, so much of the will as charges this annuity on that fund, is to be considered as forming no part of the will. (3) Francis Sinnickson, one of the heirs at law of the testator, is an essential party to this suit, and his lunacy affords no excuse for not making him a defendant. He is not a party, inasmuch as process is not prayed against him; and in truth as he is a citizen of this state, none can issue against him; which is fatal to the jurisdiction of the court. 2 Ves. Sr. 431; 1 Har. Ch. Prac. 506; 2 Dick. 460; 1 Johns. Ch. 546. It was answered by the plaintiffs' counsel, as to the first point, that the proving and establishing a will are one of the ordinary branches of the court of chancery, particularly in the case of a trust, where the trustee brings the bill to enable him to execute the trust. But all doubt is removed in a case where the cestui que trust is the plaintiff, and seeks to have the trustee placed in a situation to execute the trust. Pow. Dev. 714; 3 P. Wms. 192; 2 Atk. 25; 2 Dick. 589; 2 Atk. 56; 1 Madd. 359, 360; 1 Atk. 491; 1 Dick. 74; 3 Brown, Ch. 347; 2 Atk. 424; Eq. Draftsm. 86; 2 Com. Dig. 379; 3 Atk. 366; 1 P. Wms. 156, 226; 1 Madd. 437, 438; 2 Atk. 120, 424; 1 Ves. Sr. 177; 1 Atk. 628. As to the second point it was answered, that if the argument on the other side were well founded, it would furnish no cause of demurrer. Whether the plaintiffs are entitled to an abatement, can only be decided at the hearing. On the third point was cited 2 Madd. 225, 226. Besides, it was stated by the plaintiffs' counsel, and not denied, that since the filing of the bill, Francis Sinnickson has died intestate, and without issue.

Richard Stockton and Mr. Ewing, for plaintiffs.

Mr. Wall and J. R. Ingersoll, for defendants.

WASHINGTON, Circuit Justice. This is a bill on the equity side of this court, filed by a trustee and others claiming the benefit of the trust, under the will of John Sinnickson, deceased, against one of the heirs at law of the testator, and her husband; praying, amongst other things, an issue to be directed, to try whether the testator did, or did not, make the said will; and in case the verdict should be in favour of the will, then that the same may be carried into execution, and the trustee be decreed to be put into possession of the lands devised to him in trust to enable him to execute the trust; and that the defendant may be decreed to deliver to the trustee the deeds and muniments of title of said lands, which the bill charges to be in his possession. To this bill the defendant has demurred, and the principal question of importance arising out of the demurrer is, whether this court has an equitable jurisdiction of the cause. It is contended in support of the demurrer, that this is a case purely of a legal nature, for which a legal remedy is provided; and, therefore, that the jurisdiction belongs exclusively to the common law courts; that the substantial objects of the suit are to recover the possession of the lands mentioned in the will, which the bill charges to have been taken by the defendants, and to have the will established; both of which objects, it is insisted, may be completely attained by an ejectment at the suit of the trustee against the heir at law, or any other person holding the possession. There being, therefore, a plain and adequate remedy at law, the jurisdiction of the equity side of this court is taken away; not only upon general principles of law, but by the express provisions of the sixteenth section of the act of congress, commonly called the "Judiciary Law" [1 Stat. 82].

The whole of this argument proceeds upon the assumed ground that in every case, where a court of law is competent to afford a remedy, a court of equity cannot take cognizance of it, and grant relief; and great reliance seems to be placed upon the section of the act of congress referred to. But this is not the opinion of the court. The expressions used in that section, "plain, adequate and complete," if they affirmed the jurisdiction of the equity side of the court, might possibly admit of a construction to enlarge the jurisdiction beyond the ordinary sphere to which it has hitherto been extended; they certainly would not abridge it. But used as they are, they go no farther than to recognise and adopt the long and well established principles of the English court of chancery, upon the subject of the ordinary jurisdiction of a court of equity. Any other construction would unsettle those great land marks which have hitherto separated the two jurisdictions of the common law and equity courts; and would introduce all that uncertainty which is usually attendant upon every new system. Proceeding then upon the ground of the estab-

lished jurisdiction of the court of chancery, we know that there are a number of cases in which a concurrent jurisdiction is exercised by the two courts; and in many of them, the ground of the equity jurisdiction is not that the common law courts are incompetent to afford a remedy, but that such a remedy is less complete than the court of equity, from the nature of its organization, is capable of affording. Cases, for example, of fraud, account, dower and partition are clearly cognizable in the common law courts; and yet the court of chancery has always exercised a concurrent jurisdiction over them, upon the ground above mentioned. Courts of law have, in modern times, and with great propriety, dispensed with profert of a lost bond; and yet, the original jurisdiction of the court of equity to grant relief by establishing the instrument, remains unimpaired. We hold it, therefore, to be perfectly clear, that where a case is otherwise proper for the jurisdiction of a court of equity, it is no objection to its exercise that the party may have a remedy at law. On the other hand, we do not mean to lay it down that the mere circumstance that a more complete remedy can be afforded in the former, than in the latter court, is of itself a ground of jurisdiction. The inquiry must always be, whether the case is within any of the general branches of equity jurisdiction, as claimed and exercised by that court. The court has deemed it proper to make these general observations upon the equity jurisdiction of this court; not because the case under consideration rendered them necessary, but to correct what we consider to be an erroneous construction of the act of congress, referred to on this subject.

We now proceed to the more particular examination of the objection as applied to the present case. That the trustee might maintain an ejectment against the defendants, to recover the possession of the lands now in controversy, on the trial of which suit, the validity of the disputed will might, and necessarily would be decided, cannot be denied; nor does the court think it necessary to decide whether this suit were brought by the trustee alone, he would, or would not be entitled to the relief prayed for. The real plaintiffs in this cause are those who claim a beneficial equitable interest in the land devised by the will, and it will not, nor has it been denied, that the court of chancery has a clear original jurisdiction in such a case: not only so; but that jurisdiction is exclusive, the cestui que trust having no remedy at common law, either against the trustee, or against any other person holding adversely the fund, charged with the trust. It is true, as has been observed, that the trustee has a remedy at law to recover the possession, and thus to enable him to execute the trust. But are the cestui que trusts obliged to wait until this course has been pursued? They are at all times competent to assert their equitable demands, however well or ill inclined the trustee may be to perform his duty. It was not indeed denied by the defendants' counsel, but that this bill might have been maintained by those persons, if the trustee had been a defendant in the cause; but it seemed to be supposed, that this acknowledged equity is tainted by the co-operation of the trustee. If indeed there was any weight in this argument, the court would dismiss the bill as to the trustee; but surely it could afford no good reason for dismissing it as to the other plaintiffs, who can obtain relief no where but in equity. But there is in reality nothing in the objection. The jurisdiction of the court of chancery, upon the application of a cestui que trust, to enable the trustee to execute the trust, and to compel him to do so, stands upon the same ground. In both cases, the trustee must be a party to the suit, either as plaintiff or defendant, in order that he may be bound by the decree, and that the cestui que trust may thereby have the full benefit of it. Upon general principles, therefore, we hold the jurisdiction of the equity side of the court to be indisputable, and if so, the ground of the demurrer is removed. The bill charges that John Sinnickson made a valid will, under which the plaintiff, Josiah Harrison, claims a right to the possession of the lands devised to him for the use of those entitled to the beneficial interest in them. The demurrer having admitted the truth of these allegations, it is difficult to conceive upon what ground the court can dismiss the bill. The relief prayed for is to decree the defendant to deliver to the trustee the possession of the lands devised to Harrison by the will. If the validity of the will to pass real estate be admitted by the heir at law, such a decree follows of course; because, having jurisdiction of the cause, the court possesses every incidental power necessary to the due exercise of that jurisdiction. If the validity of the will be denied, the course of the court is to direct an issue to be formed to try that question at law by a jury, and upon the verdict which may be found, to grant, or to refuse, the relief.

There are two minor points raised by the demurrer, which remain to be disposed of. The first is, that the bill prays an abatement of the annuity devised to the defendant, Mrs. Rowan, on a ground which the counsel for the defendants deny to be correct, and this is assigned as one of the causes of demurrer to the bill. The short, but conclusive, answer to this objection is, that, whether the annuity ought to abate or not, is a question not fit to be decided at this stage of the cause; and even if it were clear that the prayer is an improper one, that would not afford a ground for a demurrer to the whole bill. The other point is, that Francis Sinnickson, the son of the testator, is not made a party to the bill, and this is assigned as another cause of demurrer. The bill states that this son was, during the life of the testator, a lunatic, totally incapable of managing his affairs, and so

continued to the time of bringing this suit. That a statute of lunacy had been taken out against him, and the defendant, Thomas Rowan, appointed his committee; but no process is prayed against the lunatic. It is contended by the plaintiffs' counsel, that this was not necessary, inasmuch as the only person who is competent to defend him, is made a party defendant in the cause. The court is of a different opinion. A lunatic, as well as an infant, though both are incompetent, and may be equally so to act for themselves, must, in cases where their interests are sought to be affected by the decree, be made parties to the suit; and, if as defendants, this can only be done by praying process against them. In the latter case, the court appoints a special guardian to defend him in that suit, and he answers the bill by the guardian so appointed. A lunatic, against whom process is issued, answers by his committee, under an order of the court appointing him for that purpose. If he has no committee, the court appoints some person as guardian to defend the suit, and to answer for the lunatic. The court is of opinion that Francis Sinnickson is an essential party to this cause, being a co-heir with his sister, of the testator; that his interest can not fail to be affected by any decree the court can make. This objection therefore is well taken. But the court cannot yield to the argument which was pressed upon us by the defendants' counsel, that, as Francis Sinnickson is stated to have been a citizen of New Jersey, the court has not jurisdiction of the cause, and that the bill ought to be dismissed; although it is admitted that he has died since the institution of the suit. For although the court would not make a decree in the cause unless all proper parties were before it, yet the objection for want of parties is not to the jurisdiction of the court, for that has been decided to be complete between the present parties, but to the relief sought against the present defendants, without joining the other heir. Where this objection is made and sustained; the court will order all proper parties to be made; but if by the death of those parties, such an order becomes nugatory, the omission to make them parties, or the want of jurisdiction in the court to make them such, cannot warrant an absolute dismission of the bill as to the defendant properly before the court; if, when the order is asked for, the difficulty is removed by the death of those who ought originally to have been made parties. Although, therefore, the demurrer for want of parties must be sustained, the death of Francis Sinnickson not appearing on the pleadings; yet the plaintiff will be at liberty to amend his bill by suggesting his death.

This was accordingly moved for and granted.

[In Case No. 6,140 a plea that defendants were not properly served with process was supported, and the plaintiff given leave to amend. In Case No. 6,141 an issue devisavit vel non was tried, and a verdict rendered for the plaintiff. In Case No. 6,142 a new trial was awarded.]

Case No. 6,144.

HARRISON v. STERRY et al.

[Bee, 244.] [1]

District Court, D. South Carolina. Nov. 13, 1807.

BANKRUPTCY—PRIORITY OF LIEN OF UNITED STATES—FOREIGN COMMISSION OF BANKRUPTCY—ATTACHMENT.

1. If the persons or property of debtors of the United States are within the jurisdiction of our courts, the United States have a priority to all other claimants.

[See note at end of case.]

2. The attachment act of this state is not affected by a commission of bankruptcy in England. No difference here between foreign and native creditors, under that act.

[Cited in Blake v. Williams, 6 Pick. 288.]

[See note at end of case.]

3. An agent of the United States in England cannot, by conforming to the bankrupt laws there, lessen the priority established in favour of the United States here.

[See note at end of case.]

Bird, Savage and Bird, merchants of London, had been agents for the United States from the month of June, 1802, about which time they had received remittances on account of the United States, amounting to 127,171 dollars; with other sums that have been since put into their hands: and this long before the existence of any other lien produced in this cause. In November, 1799, a house consisting of the same parties was established at New-York, under the firm of Robert Bird and Co. On the 10th December, 1801, Henry Mertins Bird, and Benjamin Savage, the London partners, executed a power of attorney to Robert Bird, the partner, residing at New-York, in the usual form, appointing him their attorney for their joint and separate concerns, or as partners with Robert Bird, under the firm of Bird, Savage and Bird, of London, or Robert Bird and Co. of New-York. In this deed, none but the usual powers are given to Robert Bird. On the 3d December, 1802, a deed under seal was executed by Robert Bird in the names of Bird, Savage and Bird, which he signed and sealed for himself, and for each of them, as their attorney. On the 31st January, 1803, he signed another paper of the like tenor and import, but without a seal, in the name of Bird, Savage and Bird, and Robert Bird and Co. By these he assigned to the complainant Harrison, his executors, administrators and assigns, upon the trusts therein mentioned, all their shares in certain goods and merchandize on board the ship Semiramis, bound to the East Indies, and the profits thereof; and also the debts of Legaré, Theus, and Prioleau, and two other mercantile houses

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

in Charleston. It does not appear that these papers were recorded, or notice of the assignment given to the debtors. Six days after the date of this assignment, the house of Bird, Savage and Bird, in London, stopped payment; and on the 27th March following the house of Robert Bird and Co. at New-York, did the same. On the 2d April, 1803, the first attachment against the property of Bird, Savage and Bird, was lodged in this city. Divers others were lodged on the 15th, 16th and 23d. The bankruptcy of the firm in London was declared in England 12th June, 1803. That of the house in New-York was declared on the 5th December following.

BEE, District Judge. This bill is filed by Harrison the assignee, under the sealed deed of December, 1802, and the unsealed instrument of 31st January, 1803. He prays that this court will aid him in recovering the assigned property, and direct him in the application of it. Answers and claims have been filed by many creditors of the bankrupts; by the assignees in England, and those under the commission in New-York. These compose, altogether, six classes of claimants. 1st. Harrison, as private assignee for particular creditors of Robert Bird and Co. 2d. The United States. 3d. The attaching creditors residing in the United States. 4th. Attaching creditors who reside abroad. 5th. Assignees under the commission at New-York. 6th. Assignees under the British commission.

In determining on these different and clashing interests, I feel much satisfaction in the assurances of all the parties, that the final decision will be made by the supreme court of the United States.[2] This consideration induces me to proceed in the cause with less reluctance than I should otherwise do; and in the discussion I shall first speak of the claim of the United States as entitled to priority over the rest. Fortunately, I can be at no loss upon this point; for the case of U. S. v. Fisher and Blight [2 Cranch (6 U. S.) 358], in the supreme court, has, in my opinion, settled it. They determine that the United States had a priority, in all cases whatsoever, and I should feel myself bound by this as the law, even if I entertained a different private opinion. But I readily concur; for the pleadings and evidence shew that Bird, Savage and Bird, had received large sums of money as public agents of our government, before any other lien on their property existed. This gave a clear equitable priority not only under the spirit, but also under the letter of the act of congress. It is objected that these bankrupts resided abroad; but this is not entitled to weight, for they could not, otherwise, have exercised their agency. Their persons, indeed, were not amenable to process from our courts, but their property in the United States was certainly liable. They were to all intents and purposes, receivers of public money, and are fully within the case of Blight and Fisher above mentioned. Nor do I think, as was contended, that any other agent of the United States could destroy their priority of claim by proving their debt under the commission of bankruptcy in England, voting for assignees, or laying an attachment against the property of the bankrupts. The decision in Blight and Fisher made every step of this sort unnecessary; but does not convert such endeavours to support a right into arguments for its destruction.

As to Harrison's claim under the sealed deed, and unsealed paper, I think it cannot be supported to the extent contended for. Robert Bird had not, by the usage and custom of merchants, a power to execute a deed of this sort, and to sign and seal for his partners, without a more special authority. He could not have done so if he had been on the spot with the other partners; must less can he be allowed thus to charge them, at the distance of three thousand miles. Besides, between the date of these papers and the failure of Bird and Savage, there was only an interval of six days. If, therefore, it should be determined that this is the deed of Bird and Savage, it must be considered as executed in contemplation of bankruptcy, and, of course, bad. All that can pass under these instruments will be Robert Bird's share in the partnership stock comprehended in them.

The third class of claimants are the attaching creditors here. The attachment act of this state is founded on a broad basis, and no commission of bankruptcy in England, even before our separation from that country, was ever allowed to interfere with its operation. Nor can the commission, taken out at New-York, avail in the present case, because these attachments were laid before it was obtained. Two thirds, therefore, of the property mentioned in the deed and unsealed paper executed to Harrison, must be liable to the attaching creditors, according to priority in the lodging of their attachments. As to the British creditors who have attached, our act makes no distinction between them, and those of the class I have just considered; nor shall I attempt to make any. If any surplus should remain after satisfying the preceding claims, the assignees under the New-York commission will be entitled to receive it. Let all costs of suit be paid out of the funds of the bankrupts remaining in the hands of the district attorney, after satisfaction of the claim of the United States. And let the registrar, acting as master, lay before the court a statement of the several demands as they will be affected by this decree.

[NOTE. From this decree all the parties except the United States appealed. The opinion of the supreme court was delivered by Chief Justice Marshall (5 Cranch [9 U. S.] 289). He held that the words of the act of April 4, 1800 (2 Stat. 19), which entitled the United States to a preference, did not restrain that privilege to contracts made within the United States or

[2] [See note at end of case.]

with American citizens. "The right of priority forms no part of the contract itself. It is extrinsic." Nor, according to the sixty-second section, is this priority waived by proving the debt before the commissioners of the bankrupt.

[The assignment made to Harrison was held to be of no validity against the claimants, because, being merely an assignment of a chose in action, it was a contract, rather than an actual transfer, and because it was made under circumstances which expose it to the charge of being a fraud upon the bankrupt laws. The attaching creditors have no lien, and can only claim a dividend of the balance with the other creditors. The interest of Robert Bird in the company (one-third) was held to go to his assignee. The remaining two-thirds were held liable to the attaching creditors according to the legal preference obtained by their attachments.]

Case No. 6,145.

HARRISON et al. v. STEWART et al.

[Taney, 485.] [1]

Circuit Court, D. Maryland. April Term, 1851.

BILL OF LADING—BREACH OF CONTRACT—MEASURE OF DAMAGES—PARTIES TO SUIT.

1. The contract created by the signing of a bill of lading for the carriage of goods from one seaport to another, is a maritime one, and within the jurisdiction of the admiralty.

2. Where goods are shipped on board a vessel advertised to sail for a particular port, and a bill of lading is signed for their delivery at that port, the ship-owners are bound to carry the goods, by that ship, to the port of destination, unless prevented by some event beyond their control.

3. A refusal to perform the voyage, without any legal justification, renders them liable to damages for their breach of contract.

4. In such case, if the consignee of the goods be merely the agent of the shippers, the latter are the proper parties to the suit, and entitled to recover the damages sustained.

5. Where, under the above circumstances, the ship-owners offered to return the goods, and the offer was not accepted, the measure of damages to the shippers is not the full value of the goods: damages to that amount are given to the owner when the property is withheld from him against his consent, or has been lost through the misconduct of the defendant.

6. The ship-owners were not bound to buy the goods because they had broken their contract; but were bound to make compensation for the damages sustained by its non-performance.

7. Neither could the opportunity which offered of shipping the goods by another vessel, without any additional cost or risk to the owners of them, be used as a bar, or in mitigation of damages; the shippers were not bound to seek or accept any other mode of conveyance, and it was the duty of the ship-owners to transport the goods in the manner specified in the bill of lading.

8. The damage to the owners of the goods is, the difference in value between the goods at the port of shipment, and the price they would have commanded at the port of destination, if the contract had been performed; profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from the breach of the contract.

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

The respondents [David Stewart and George R. Vickers] were owners of the ship Charles and residents of the city of Baltimore. In the year 1849, they advertised her to be ready to receive freight for San Francisco, and that she was then loading at the port of Baltimore, and would positively sail about the 20th of February. On the 17th of February, the libellants [William H. Harrison and Benjamin Harrison] shipped certain merchandise, to be carried to San Francisco, and received a bill of lading therefor, by which they were made deliverable, at that place, to Joseph W. Finley, or his assigns. Finley was to go out as supercargo, and these goods were consigned to him for sale. Being unable to get a full cargo, the owners determined to break up the voyage, and on the 7th of March, made arrangements with the owners of the ship Andalusia, then in the port of Baltimore, and advertised to sail for San Francisco, by which the freight which had been intended to be sent by the Charles, was to be received on board the Andalusia, on the same terms as were expressed in the bills of lading given to the shippers by the Charles. The libellants declined to accede to this arrangement, or to receive their goods back again, but insisted that they should be carried by the Charles, according to the terms of the bill of lading; or else that the respondents should purchase the goods, at the invoice price, including expenses. The respondents declined to do either, and deposited the goods in their warehouse, subject to the order of the owners, and notified them of that fact. This libel was filed by the owners of the goods against the owners of the Charles, to recover damages for a breach of contract, in not delivering the goods at the port of San Francisco, claiming the whole value of the goods. The district court decreed in favor of the libellants, for one hundred dollars damages and costs [case unreported], from which decree they appealed to this court.

John Glenn and John Nelson, for libellants.
Wm. Schley, for respondents.

TANEY, Circuit Justice. This case involves some questions of much commercial interest, and has been fully argued by counsel; some preliminary points, however, which have been suggested in the argument, are, I think, free from difficulty. For it is very clear that, under the decisions of the supreme court, the contract created by signing the bill of lading was a maritime contract, and within the jurisdiction of the court of admiralty. It is equally clear, that the ship-owners were bound to convey the goods to the port of destination, on the ship Charles,

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

unless prevented by some event beyond their control; and having refused to perform the voyage without any legal justification, they are liable to damages for their breach of contract. And as the libellants were the owners of the goods, and the consignee nothing more than their agent, they are the proper parties to this suit, and entitled to recover the damages they have sustained.

The material question upon this appeal is, whether the damages awarded by the district court do not fall short of the amount which, in point of law, they are entitled to recover. In forming an opinion upon this subject, it is necessary, in the first place, to examine upon what grounds damages are to be given, and by what rule they are to be estimated. And it is proper to state, with precision, the principles upon which the judgment of the court is founded, in order that the decision in this case may not be misinterpreted or misunderstood.

It appears that, after the respondents had determined that the ship Charles should not proceed to San Francisco, they offered to forward the goods by the Andalusia, without any additional cost or risk to the shippers; that this ship was quite equal, in her character and qualities for this voyage, to the ship Charles; and upon the refusal of the libellants to accept this proposition, the respondents offered to return the goods. But this was also refused; and the goods have since remained in the warehouse of the respondents, subject at all times to the order of the owners, if they chose to receive them.

Under such circumstances, there can be no just reason for awarding to the libellants damages to the amount of the value of the goods. Damages to that amount are given as a compensation to the owner when property is withheld from him against his consent, or has been lost by the misconduct of the defendant; but in this case the shippers have not lost their goods, nor have they been detained from them for a moment against their consent. The legal right to them remains, and has always remained in the libellants; the goods themselves have always been within their reach and subject to their control, since the voyage was abandoned; and as they have not lost the property or possession of the goods, by the conduct of the ship-owners, there would seem to be no justice in compelling the respondents to pay them their value. The ship-owners are not bound to buy them, because they have broken their contract; but are bound to make compensation for the damage sustained by its non-performance.

Neither can the opportunity which offered of shipping the goods by the Andalusia, without any additional cost or risk to the libellants, be used as a bar, or in mitigation of damages. The shippers were not bound to seek or accept any other mode of conveyance; it was the duty of the ship-owners to transport the goods in the manner specified in the bill of lading; and that contract required that they should be carried to the port of destination in the ship Charles; nothing could excuse them from the performance of that duty but some unforeseen event which they had not the power to control; and if they failed to perform it, it is no excuse to say, that the libellants might have accomplished the same object by another ship, or another contract. The shippers had a right to the faithful execution of the contract they had made, and to rely upon it; and were under no obligation to look further, or accept any other contract as a substitute for it.

Under this contract, the respondents were bound to deliver these goods to the consignee of the libellants, at the port of San Francisco, and the damage which they have sustained, is the difference in the value between the goods in the port of Baltimore, in the hands of the libellants, and the price they would have commanded, if the respondents had fulfilled their agreement. This is the amount of loss which the breach of contract occasioned, and is, therefore, the amount of compensation which ought to be awarded to them. It is upon this principle that the case of Bell v. Cunningham, 3 Pet. [28 U. S.] 83, was decided by the supreme court, and the rules there laid down are equally applicable to contracts of this description. The case of Smith v. Condry, 1 How. [42 U. S.] 28, depended upon different principles; it was a case of collision; the owners of the cargo were owners of the injured vessel, and might have forwarded the cargo by another ship, if they supposed the market would be better by an earlier arrival at the port of destination; if there was any loss, therefore, from the delay, it was occasioned by the acts of the owners of the goods. The owners of the offending vessel had no right to take possession of the cargo and forward it to its destined port; the injury which they had done, was, the amount to which they had damaged it, and diminished its value by the collision, at the time and place where it happened.

The remaining inquiry is, would the goods, if delivered according to the bill of lading, have commanded a higher price than they were worth in Baltimore, when the voyage was abandoned? In determining this question, we must take into consideration the time when the vessel ought to have sailed, and the ordinary length of the voyage. She was advertised to sail "positively," about the 20th February, 1849, and she was bound to sail on or near that day. The language of the advertisement does not confine her to a precise day, and it would depend upon the usage of trade to determine what delay was admissible; but in the absence of evidence as to usage, the language of the advertisement would not justify a delay of more than a few days, for it is upon the faith of this promise, that the merchant must be presumed to have shipped his goods to a market known to be subject to sudden and great

fluctuations, and if he sustains a loss by the unreasonable delay of the vessel, he is justly entitled to compensation.

It is, however, not necessary to pursue this inquiry; for if the Charles had sailed on the day mentioned in the advertisement, she could not, upon any reasonable calculation, have arrived at San Francisco until late in June. Captain Hugg describes the state of the market from May 1849, until near the close of the year, during which time he was in California, or on that coast; and Captain Codman describes it, in like manner, from the 18th of August to the end of that year. They are both evidently men of much intelligence and observation, and fully acquainted with the matters of which they speak; and they both describe the market at San Francisco as in a state of great depression during the whole time they were respectively acquainted with it, and testify that the goods proposed to be shipped by the libellants, at the prices mentioned in the invoice, must have resulted, not in a profit, but in a heavy loss.

It is very true, that Mr. Finley thinks otherwise; his testimony has been taken under the act of congress, ex parte, since the decree was passed in the district court; and he states that, if the Charles had sailed at the time for which she was advertised, and arrived in the usual period of such a voyage, he could have sold these goods for an hundred per cent. profit on the invoice price; but he does not mention any period in the spring of 1849, when the market became suddenly depressed. The testimony of Captain Hugg certainly applies to a period antecedent to that at which the Charles could possibly have arrived, and Captain Codman, who arrived there in August, found the market in the same state of depression described by Captain Hugg; and although all of the witnesses agree that the market of San Francisco has been subject to sudden and violent fluctuations, there appears to have been nothing but a continued glut and depression of price, from May, 1849, to the close of that year, so far as concerned articles like those contained in the libellants' invoice.

It may be, that Mr. Finley having remained in California ever since he went there in the spring in 1849, may have confounded in his memory prices, which may have prevailed at an earlier period of the spring, with the prices of the period of which we are speaking; at all events, it is incumbent upon the libellants who claim the damages, to prove that they have sustained damage; the court cannot presume the fact. Upon this point there is a direct conflict between the testimony of Mr. Finley and that of Captain Hugg, a witness equally respectable and entitled to equal credit; and the testimony of the latter is also supported by that of Captain Codman—not only by the state in which he found the market, but also by the character of the population he describes, and the unsuitableness of the goods mentioned in the invoice to such a class of persons as, at that time, composed the population of San Francisco. The testimony of Mr. Finley cannot outweigh this proof, that no actual loss was sustained.

In relation to the prices that might have been obtained for those goods, at Coquimbo, or other ports usually touched at in the Pacific, it is sufficient to say, that there is no evidence upon this subject; Mr. Finley as well as the other witnesses, must be understood as speaking of the market of San Francisco. And if this testimony is to be understood as referring to other ports, and to be correct as to prices there, it could not alter the judgment of the court. The contract of the respondents was to deliver the goods at San Francisco; there is no engagement to stop or deliver them at other ports. Their value at that port is, therefore, the true test; and profits that the shippers might have made, by ulterior speculations, and by shipping them from San Francisco to other places and better markets, are too remote to be taken into consideration, in estimating the damages arising from a breach of this contract.

The decree of the district court must, therefore, be affirmed, with costs.

Case No. 6,145a.

HARRISON v. The SUSAN LUDWIG.

[Betts, Scr. Bk. 268.]

District Court, S. D. New York. May 4, 1853.

SALE OF VESSEL WITHOUT NOTICE TO OWNERS—DIVESTITURE OF TITLE.

[A vessel when sold by the master, without notice to the owners, was safely anchored in the harbor of St. Thomas, and not exposed to any immediate peril. She was of feeble structure and adjudged unseaworthy, and was liable to destruction by being worm-eaten. It did not appear that with slight repairs she could not have been brought home, or that she would have been materially worse if continued in her then situation until her owners were heard from. *Held*, that the sale did not divest the owners of their title.]

[This was a libel in rem by Alexander T. Harrison against the schooner Susan Ludwig, her tackle, etc., to recover possession.]

Before BETTS, District Judge.

The schooner was sold by order of the master, at auction, at St. Thomas, under the assumption of a case of extreme necessity, and that her total loss would follow without such step.

Held, that the master has no power to sell a vessel of his own authority, unless it appears on the spot that such sale is indispensable, and there be satisfactory evidence that he proceeded in entire good faith. The evidence of the master to the necessity and the up-

rightness of his own conduct is of cardinal importance, and the clearest reasons must be furnished for not producing it. He is bound to use the credit and means at his command to preserve the vessel, and also to communicate with his owners, and repair the vessel so as to bring her to the best port of repair practicable; and cannot sell her merely on his judgment, or that of surveyors, that her sale would best promote the interests of her owners. The master's powers in such case are strictly limited; and the more modified rule of maritime law in that respect does not depart from the fundamental principle that the necessity of a sale must be of so urgent a character as not to admit of any other alternative without imminent hazard of a total loss. This vessel had not been disabled at sea; she was safely anchored, and not exposed to any immediate peril. She was of a feeble structure and adjudged not seaworthy, and was liable to destruction by being worm-eaten; but it does not appear in the proofs she could not, with slight repairs, have been brought to the United States, or that she would have been materially worse if she continued in her then situation until her owners were heard from. Her hull and spars, with small bower anchor, were sold for $40. Held that the libellants are not divested of their ownership by the sale, and that a decree be entered to deliver the vessel to them. Question of costs reserved.

HARRISON (TRYPHENIA v.). See Case No. 14,209.

Case No. 6,146.

HARRISON v. URANN et al.

[1 Story, 64;[1] 3 Law Rep. 92.]

Circuit Court, D. Massachusetts. May Term, 1840.

PARTIES IN EQUITY—JURISDICTION OF UNITED STATES COURTS—CITIZENSHIP.

1. The question of the jurisdiction of the United States courts as to parties, can only apply as between the very parties, who, by a false allegation, are brought within their jurisdiction. If, therefore, one of several defendants admit, that his citizenship is rightly described, so as to found the jurisdiction of the court against him, the other defendants have no right to interfere in the matter.

[Cited in Bains v. The James and Catherine, Case No. 756; Jewett v. Cunard, Id. 7,310.]

[Cited in Smith v. Ford, 48 Wis. 145, 2 N. W. 150.]

2. Where a bill in equity was brought against several individuals, averring, that all of them were citizens of Massachusetts, and two of the defendants put in a plea, averring, that their co-defendant was not a citizen of Massachusetts, it was *held*, that the right to contradict this averment in the bill in this respect, and thus to oust the jurisdiction of the court, was a personal privilege of that co-defendant, of which he alone was entitled to avail himself.

3. The courts of the United States will dispense with the joinder of those persons, whose citizenship, if they were made parties to the suit, would oust the jurisdiction of the court, whenever, without prejudice to their rights, the court can proceed to decide the merits of the case as between the other parties properly before it.

[Cited in Nesmith v. Calvert, Case No. 10,123.]

Bill in equity. The bill was brought by [Thomas] Harrison, as administrator of Ellen Harrison, averring himself to be a citizen of Pennsylvania, against the defendants [Richard Urann, Elisha Copeland, Jr., and John Van Buskirk], averring them all to be citizens of Massachusetts, and was founded upon certain transactions, in which Van Buskirk acted as trustee of Ellen Harrison, with the other defendants, Urann and Copeland, with the assent and knowledge of the plaintiff, her husband. It is unnecessary to state the particulars of the bill. Two of the defendants, Urann and Copeland, put in a plea, averring, that their co-defendant, Van Buskirk, was at the time of filing the bill a citizen of Pennsylvania, and not a citizen of Massachusetts.

Mr. Gray, for plaintiff.

B. R. Curtis, for defendant.

STORY, Circuit Justice. The sole question in this case is, whether the present plea can be supported, it being filed by Urann and Copeland, alone, averring, that Van Buskirk is not a citizen of Massachusetts, as averred in the bill, but is a citizen of Pennsylvania, Van Buskirk not joining in the plea, nor contesting his own citizenship, as averred in the bill. Since the passage of the act of congress of the 28th of February, 1839, c. 36 [5 Stat. 321], this is a question of far less importance than it formerly would have been; since, even if Van Buskirk be a necessary and proper party to the bill, in the sense of a court of equity, that act enables the court to dispense with his being made a party, and to proceed to decide upon the merits, as far as it may, between the parties before it, without prejudice to the rights of other persons. Indeed, it has been for a long time the practice of the courts of the United States to dispense with the joinder of parties, who, if they were made parties to the suit, would, in consequence of their citizenship, oust the jurisdiction of the court, whenever without prejudice to their rights, the court could proceed to decide the merits of the case between the other parties properly before it. See West v. Randall [Case No. 17,424]; Wormley v. Wormley, 8 Wheat. [21 U. S.] 421, 451; Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 69; Mechanics' Bank of Alexandria v. Setons, 1 Pet. [26 U. S.] 306; Vattier v. Hinde, 7 Pet. [32 U. S.] 252; Boone's Heirs v. Chiles, 8 Pet. [33 U. S.] 532; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152; Carneal v. Banks, Id.

[1] [Reported by William W. Story, Esq.]

181; Harding v. Handy, 11 Wheat. [24 U. S.] 103; Mallon v. Hinde, 12 Wheat. [25 U. S.] 193; Milligan v. Milledge, 3 Cranch [7 U. S.] 220. The act enlarges the operation, and confirms the propriety of this practice.

In the present case, it appears to me, that the plea cannot be maintained. It is a personal privilege of Van Buskirk, and a personal exception to the jurisdiction of the court, to contradict the averment in the bill, that he is a citizen of Massachusetts, which he alone is competent to take for himself. The other defendants have no more right to plead that he is not a citizen of Massachusetts, than they would have to plead that he was an infant, or that another co-defendant was a feme covert, or was under any other personal incapacity to be sued. The citizenship of a party to a bill in equity is strictly a matter in abatement of the suit; and in no degree touches the merits. This is clear from the decision of the supreme court in Livingston v. Story, 11 Pet. [36 U. S.] 393, where the court treated the plea, that the party was not a citizen of the state, as alleged in the bill, as a plea in abatement, founded on the personal disability or personal character of the party, although in its effect it might go to the jurisdiction of the court. In short, it is a personal right and personal privilege of the party himself, of which he alone can take the advantage, as a defendant, and with which his co-defendants have nothing to do. Suppose, in this case, Van Buskirk should come into court, and expressly admit or positively assert himself to be a citizen of the state of Massachusetts, would it be competent for any co-defendant to controvert the fact, or to insist upon an abatement of the suit, notwithstanding such an admission? Clearly, upon the true principles of pleading, both at law and in equity, such a plea would under such circumstances be unmaintainable. The main stress of the argument in support of the plea is, that the suit only lies between citizens of different states; and, therefore, it is a question going to the jurisdiction of the court under the constitution of the United States. But if it be so, it can only apply as between the very parties, who, by a false allegation of citizenship, are brought within the jurisdiction; for, as to all other parties, who are citizens of different states, there is nothing that affects the constitutional jurisdiction of the court. The privilege, therefore, if it be one, of being exempted from the jurisdiction of the court, is one purely personal, and if the party chooses to admit, that his citizenship is rightly described, so as to found the jurisdiction against him, I am not able to perceive, what right other parties have to intermeddle in the matter.

The plea in this case is an entire novelty; and I am not aware, that it has ever been supposed for a moment, that any defendant has a right to contest the alleged citizenship, except of himself, or of some party, who is a plaintiff; for if the jurisdiction be well founded as to himself and the plaintiff, it is a matter for the consideration of the court in examining the merits of the controversy, how far it can, or ought to proceed to a decree, without having other persons before it, and how far they can properly be dispensed with. Whether, in this case, the court can properly make a decree for the plaintiff, without having Van Buskirk before it as a party in his character as trustee, is a question of a very different nature from that now under discussion. Whether he is a necessary or proper party will depend upon the act of congress, and also upon the general principles, which regulate the exercise of this branch of equity jurisprudence. I have no difficulty in overruling the plea and assigning the defendant to answer further in the premises. Plea overruled.

HARRISONVILLE (BONHAM v.). See Case No. 1,629.

HARROLD (BYRD v.). See Case No. 2,269.

Case No. 6,147.

The HARRY.

[9 Ben. 524.] [1]

District Court, E. D. New York. May, 1878.

COLLISION ON RARITAN RIVER—LIGHTS—EVIDENCE.

When at the trial the witnesses for one of two colliding vessels testified that the bowlight of their vessel was burning, and on the day after the hearing of the cause the owners of the vessel caused the court to be informed, by their advocate in open court, that although the light was burning it was covered with a tarpaulin at the time of the collision, *held*, that such a statement, made under such circumstances, though forming no part of the evidence given at the trial, must be regarded as an admission given in the cause, of the fact so stated.

Two tugs, the Harry and the May-Flower, each with a coal-boat in tow alongside, encountered one another at night on the Raritan river, and a collision ensued, whereby a "chunker" towed by the May-Flower was instantly sunk with her cargo. The master of the chunker libelled both tugs for the loss of his boat, the coal on board, and his personal effects.

Henry T. Wing, for libellant.
Beebe, Wilcox & Hobbs, for the Harry.
Man & Parsons, for the May-Flower.

BENEDICT, District Judge. The collision out of which this controversy has arisen was plainly caused by the erroneous opinion formed by the pilot of the May-Flower, as he approached the Harry and her tow, that he was approaching a tow either at anchor,

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

or going in the same direction with the May-Flower. If the pilot of the May-Flower was justified by the facts in forming that opinion, no fault was committed in shaping his course to pass to port instead of starboard of the Harry, as he had the right in such a reach of the river to choose either method of passing a tow, at anchor, or moving in the same direction he was.

The pilot's opinion was justified by the facts if the Harry omitted to display the lights prescribed to be displayed by moving vessels, and the decisive question of the case therefore is the question of fact whether the Harry, as she approached the May-Flower, was displaying the proper lights to indicate that she was an approaching vessel.

The evidence as to the lights on the Harry is conflicting. There is positive evidence from those on board the Harry that her side and bowlights were set and burning, but the credit of those witnesses is impaired by the circumstance that when upon the stand they omitted to disclose the fact that their bowlight, although burning, was at the time covered with a tarpaulin. When the evidence was closed the testimony of those on board the Harry was calculated to convey to the court the idea that the bowlight of the Harry was not only burning, but visible to approaching vessels, whereas, as matter of fact, it was not then visible at all, having been covered from sight.

The fact that the head-light of the Harry had been so covered, was stated to the court, by the advocate for the Harry, in open court, upon the day after the hearing of the cause and, as was declared, the statement was made to the court by direction of the owners of the Harry. A statement so made, although forming no part of the evidence, when made under such circumstances must be regarded as an admission in the cause, and it has been so considered.

Looking then to the facts stated by the respective witnesses and the credit to which their respective statements are entitled, the weight of the evidence appears to be in favor of the conclusion that the proper lights were not displayed on the Harry. The only lights she displayed were the two vertical lights, but these lights would not in the absence of the side and bowlights show an approaching vessel that she was a tow in motion; on the contrary, under the circumstances, and in the absence of other lights they were calculated to create the erroneous opinion formed by the pilot of the May-Flower when he saw them that the tow was at anchor, or going the same way, and must render the Harry responsible for the accident that resulted therefrom.

The decree will, therefore, be that the libel be dismissed with costs as against the May-Flower, and that the libellant recover as against the Harry the amount of the damages sustained by reason of the collision mentioned in the pleadings.

Case No. 6,148.

HARSHMAN v. BATES COUNTY.

[3 Dill. 150.] [1]

Circuit Court, W. D. Missouri. 1874.[2]

MUNICIPAL BONDS — CONSTITUTION OF MISSOURI—PRECEDENT VOTE—EFFECT OF CONSOLIDATION ON PREVIOUS VOTE.

The constitution of Missouri (article 11, § 14) requires a two-thirds vote to authorize municipal subscriptions to the stock of a railroad corporation. A township voted stock in company A, which afterwards, under a general law of the state, consolidated with company B, and formed thereby a new company, C. *Held*, that a subsequent subscription by the township to company C, by virtue of the prior vote to company A, was unauthorized, and bonds which on their face recited these facts, were void, even in the hands of a bona fide holder for value.

[Distinguished in Thomas v. Scotland Co., Case No. 13,909; Washburn v. Cass Co., Id. 17,213. Cited in Foote v. Johnson Co., Id. 4,912.]

[Cited in City of Mt. Vernon v. Hovey, 52 Ind. 569.]

[See note 2 at end of case.]

This is an action [by G. W. Harshman], against the county of Bates on a large number of coupons originally attached to bonds issued by the county court of the above named county.

The following is a copy of one of the bonds and coupons as set out in the petition (form of the bond): "No. 46. United States of America. $1,000. State of Missouri, county of Bates. Issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake & Gulf Railroad Company, consolidated Oct. 4th, A. D. 1870. Know all men by these presents, that the county of Bates, in the state of Missouri, acknowleges itself indebted and firmly bound to the Lexington, Lake & Gulf Railroad Company, in the sum of one thousand dollars, which sum the said county of Bates, for and in behalf of Mount Pleasant township therein, promises to pay to the said Lexington Lake & Gulf Railroad Company or bearer, at the Bank of America, in the city and state of New York, on the 18th day of January, A. D. 1886, together with interest thereon, from the 18th day of January, A. D. 1871, at the rate of ten per cent. per annum, which interest shall be payable annually on the presentation and delivery at the said Bank of America, of the coupons hereto attached. This bond being issued under and pursuant to an order of the county court of Bates county, by virtue of an act of the general assembly of the state of Missouri, approved March 23d, 1868, entitled, 'An act to facilitate the construction of railroads in the state of Missouri,' and authorized by a vote of the people, taken May 3d, 1870, as required by law, upon the proposition to subscribe ninety thousand dollars to the capital stock of the Lexington, Chillicothe

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

[2] [Affirmed in 92 U. S. 569.]

& Gulf Railroad Company, and which said railroad company last aforesaid, and the former Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company were on the 4th day of October, 1870, consolidated, as required by law, into one company, under the name of the Lexington, Lake & Gulf Railroad Company. And which said last named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties, whatever, of the two said several companies forming said consolidation, or either one of them. In testimony whereof, the said county of Bates has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under the order thereof attesting the same and affixing the seal of said court. This done at the city of Butler, county of Bates, this eighteenth day of January, A. D. 1871. Attest: W. J. Smith, Clerk of the County Court of Bates County, Mo. B. H. Thornton, Presiding Justice of the County Court of Bates County, Mo. County Court of Bates County, Mo. (Seal.)"

The following is the form of the coupons: "$100. Butler, Bates county, Mo., January 18th, A. D. 1871. The county of Bates acknowledges to owe the sum of one hundred dollars, payable to bearer on the 18th day of January, 1873, at the Bank of America, in the city and state of New York, for one year's interest on bond No. ——. W. J. Smith, Clerk County Court Bates County, Mo."

The plaintiff in his petition alleged that on the 18th day of January, 1871, the defendant issued its several bonds set out in the several counts of the petition (to recover the amount evidenced by coupons on which the suit was brought), by which it bound itself to pay to the Lexington, Lake & Gulf Railroad Company and for and on behalf of Mount Pleasant township, in said county, one thousand dollars, which it promised to pay to said company at the Bank of America, etc. It alleges that prior to the 5th day of April, 1870, certain tax-payers of Mount Pleasant township petitioned the county court of Bates county, setting forth their desire to subscribe $90,000 to the stock of the Lexington, Chillicothe & Gulf Railroad Company, and thereupon the court ordered an election in the said township for May 3, 1870, which was held, and two-thirds of the qualified voters of the said township voting thereat voted for it. It further alleged that on the 14th of July, 1870, another corporation was formed by the name of the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and that these two corporations, one being the Lexington, Chillicothe & Gulf Railroad Company, and the other being the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, were on the 4th day of October, 1870, consolidated under the name of the Lexington, Lake & Gulf Railroad Company. That thereafter, to-wit, on the 18th day of January, 1871, the county court of Bates county, "in pursuance of the authority conferred upon it by the said vote of the people of said township, subscribed the said sum of $90,000 in behalf of said township to said Lexington, Lake & Gulf Railroad Company (the consolidated railroad company); and that said bonds (to which the coupons in suit were annexed) were, among others, issued by said court in payment of said subscription."

Plaintiff in his petition also states that said Lexington, Chillicothe & Gulf Railroad Company was by the terms of its charter to commence at the city of Lexington, in Lafayette county, Missouri, and thence to run southwardly from said city to Holden, on the Pacific Railroad, in Johnson county; thence southwardly through said county of Johnson and the county of Cass, in the direction of Butler, in Bates county, and thence southwardly to such point in said county as might be found most advantageous to connect said railroad with Fort Scott, Kansas; and that said Lexington, Lake & Gulf Railroad Company was, by the terms of consolidation, agreed upon between said Lexington, Chillicothe & Gulf Railroad Company and said Pleasant Hill Division of said Lexington, Chillicothe & Gulf Railroad Company, to commence at said city of Lexington, and to run thence southwardly along the original route of said Lexington, Chillicothe & Gulf Railroad to the southern boundary of Lafayette county, and thence south-westwardly through Jackson county to the city of Pleasant Hill, on the Pacific Railroad, in Cass county; thence southwardly through said Cass county to the south line of said county, where it was to intersect the original route of the said Lexington, Chillicothe & Gulf Railroad Company; and from such point of intersection to such point in said Bates county as should be required to enable said consolidated company to demand, receive and avail itself of the subscriptions voted it by Mount Pleasant township as aforesaid, and by the township of Grand River, in said county, or either of them; thence to such point in or through Bates county as might be found most advantageous to connect with railroads, constructed or to be constructed in the state of Kansas, or to extend southward through such counties in Missouri as might be most advantageous to connect or consolidate with railroads leading to the states of Arkansas or Texas, or to the Gulf of Mexico. Plaintiffs state that the amount of capital stock of said Lexington, Chillicothe & Gulf Railroad was fixed by its charter at two million dollars, and that the capital stock of said consolidated road was also fixed by said articles of consolidation at two million dollars, and that the duration of each of said corporations was fixed at one hundred years. Plaintiffs state

that said town of Butler is in or about the center of said Mount Pleasant township, in Bates county; and that said consolidated road is now located, graded and bridged from the said city of Lexington along the route of said consolidated road, as above described, to said town of Butler, and for several miles southward of said town; that southward of said town, so far as built, it pursues the same general direction as the proposed line of said Lexington, Chillicothe & Gulf Railroad, as above described; and that northward thereof it pursues identically the same line in the counties of Bates and Lafayette, and that the greatest divergence between said two lines at any point is fifteen miles, and that the distance between said town of Butler and said city of Lexington is eighty-three miles. The plaintiff alleges that he became a holder of the coupons in suit before maturity and for value, and asks judgment for the amount thereof.

The defendant demurs to the petition on the ground that it shows that the county court had no authority in law to make the subscription recited in the bonds or to issue the bonds in payment therefor, and because it also shows that the question of making the subscription to the new or consolidated company was never submitted to a vote of the people of Mount Pleasant township, nor assented to by them as required by the constitution and laws of the state.

T. K. Skinker, for plaintiff.

Glover & Shepley and C. C. Bassett, for defendants.

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

DILLON, Circuit Judge. The following facts are recited in the bonds (the coupons on which are in suit), and alleged in the petition:

1. That the bonds were "issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake & Gulf Railroad Company, consolidated October 4, 1870."

2. That they were issued by the county "for and in behalf of Mount Pleasant township," under the act of March 23, 1868, known as the "Township Railroad Aid Law." Laws 1868, p. 93; 1 Wag. St. p. 313.

3. That the proposition submitted on the 3d day of May, 1870, to the voters of the township, and by the requisite majority then assented to, was whether they would authorize the county court to "subscribe $90,000 to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company."

4. That afterwards, July 18, 1870, another corporation was newly formed under the laws of the state, namely, the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and that afterwards, October 4, 1870, under the act of March 24, 1870, these two companies (as recited in the bond) were "consolidated as required by law, under the name of the Lexington, Lake & Gulf Railroad," (the payee of said bond)—"which last named company," the bond continues, "as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, moneys and properties whatever of the two said several companies forming said consolidation, or either of them."

5. That afterwards, January 18, 1871, the county court, claiming to be authorized thereto by the above mentioned vote of May 3, 1870, in Mount Pleasant township, and reciting this vote in the bonds, as its source of power, made the subscription, not to the company to which it had been voted, but to a new company, into which that company had, after the vote, but previous to the subscription, been merged or consolidated under the laws of the state.

Upon these facts, all of which appear on the face of the petition, and, substantially, all of them, on the face of the bonds in suit, the question is, whether the bonds are valid and binding obligations in the hands of a bona fide holder? This case contains an element not in the Cass county township bond cases decided at this term on demurrer, growing out of the fact that here the subscription was made after the vote was taken, to a new or consolidated company. Jordan v. Cass Co. [Case No. 7,517].

The case also differs, as I think, from other cases in this court, and from cases decided by the supreme court of the United States, in the circumstance that all of the facts relied on as showing the want of power to issue the bonds, are recited in the bonds themselves; and clearly, as it seems to me, it must be true that the holder of these bonds is chargeable with actual notice of the facts therein stated concerning them; and if such facts show that in point of law the county court had no power to make the bonds, the holder is conclusively presumed to have knowledge of such want of authority. If the facts stated in the bonds, and averred in the petition, show that there was no power to issue the bonds, and if the plaintiff is affected with notice of these facts, and of their legal consequences, we have no question here as to the rights of an innocent holder for value; for the case is the same as if the action were by the railroad company to which the subscription was made and the bonds delivered.

The case differs also from those in which the subscription was made by the county court without a vote of the people, under authority to do so, contained in special charters granted prior to the adoption of the constitution, as in Nicolay v. St. Clair Co. [Case No. 10,257], decided at this term.

The provisions of the constitution, and the general law of the state in pursuance of it, apply to this subscription; so that, as between the county or the people of the township, on the one hand, and the railroad company, or any holder of the bonds with actual

notice, on the other, an assent of two-thirds of the qualified voters of the township to the making of the subscription is an indispensable prerequisite to its lawfulness, and to the validity of the bonds issued in payment therefor.

The constitution of Missouri, of 1865, contains the following: "The general assembly shall not authorize any county, city or town to become a stock-holder in or loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall consent thereto." Article 13, § 14.

And this requirement of a two-thirds vote as a condition of the right of any county, city or town, to take stock in or loan credit to any railroad company, is also made in the enactments of the legislature passed in pursuance of the above mentioned provision of the constitution. Wag. St. p. 305, §§ 17, 18, And such a precedent vote is also required in the township railroad aid act of March 23, 1868, under which the vote was taken and the bonds now before the court were issued. Jordan v. Cass Co. [supra], at this term.

Accordingly, the question was submitted to the voters of Mount Pleasant township, on the 3d day of May, 1870, whether they would subscribe $90,000 to the Lexington, Chillicothe & Gulf Railroad Company; and the requisite two-thirds of those voting at the election voted therefor. But before any subscription was made, or bonds issued, or steps taken to carry out this vote, the company in whose favor the aid was voted consolidated with a distinct corporation not in existence when the election was held, and the two (as recited in the bond) were merged "into one company, under the name of the Lexington, Lake & Gulf Railroad Company;" to which, in January following, the subscription, under the vote of the previous May, was made, and the bonds in suit issued.

The consolidation was made under the act of March 24, 1870, which authorizes a majority in interest of "any two or more railroad companies in the state * * * to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the liabilities and obligations to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation." Wag. St. p. 314, § 56. So that, upon the face of the act, it appears that upon the consolidation being effected in pursuance of its provisions, the old corporations are merged in the new, which, however, succeeds to all the rights, powers, privileges and immunities, and is subject to all the liabilities and obligations, of both the companies making the consolidation. And such would appear to be the effect of the consolidation, were there no statute provisions upon the subject. Clearwater v. Meredith, 1 Wall. [68 U. S.] 40; McMahan v. Morrison, 16 Ind. 172; Tomlinson v. Branch, 15 Wall. [82 U. S.] 465.

Under the legislation of the state, when two companies consolidate and form one, the stock is changed, and the former companies become extinct, and the line of the road is changed as may be provided in the articles of consolidation. In the case before the court, the nature of the changes in the line of the road of the consolidated company is set forth in the petition. And it seems to me to be perfectly clear, upon well-settled principles of law, that a subscriber to the stock of company A, after it has consolidated with company B, and formed company C, can not be compelled by the latter company to pay the subscription; and the plain reason is that such was not his contract. Such a change is structural and organic, and is not binding upon a non-assenting subscriber or stockholder, unless the right to make it is given by statute, or was reserved at the time the corporation was created, or the contract of subscription made.

In support of these views, the case of Clearwater v. Meredith, supra, decided by the supreme court of the United States, is a direct authority; and if it can not be reconciled with the majority opinion in the Pacific R. Co. v. Hughes, 22 Mo. 291, it would not be difficult, perhaps, to show that the views of the supreme court of the United States, aside from their authoritative force in this court, are most consonant with principle, and with adjudications elsewhere. It follows that if the subscription which Mount Pleasant township authorized by its vote had actually been made, it could not have been enforced by the new company; if made by the county court to the new company, it would be without authority, and bonds issued therefor would be both unauthorized and without consideration, and could not, therefore, be enforced by the new company, or by any holder with notice of the facts, unless by virtue of the act of March 24, 1870.

But the case in hand is one where no subscription was ever made to the company to which it was voted; and it might be conceded that if it had been actually made, the right to it would pass by operation of the statute to the new company, without the concession involving the consequence of a liability upon a subscription made for the first time after the new corporation was formed.

The opposite view would nullify the constitutional provision, by defeating the purpose it was designed to accomplish. The theory of the constitution and the acts of the legislature passed in pursuance of it, is, that no stock in a railroad company shall be taken by the public corporations or municipalities of the state, unless two-thirds of the voters sustain it; and it is necessarily implied that the company whose stock is to be taken and paid for in bonds must be specified and known. Is it possible that when

the people vote that they will take stock in a particular company, which is named, this will authorize the county court to make the subscription to another corporation? The frauds which such a doctrine would produce, and the injustice which would result from it, may be readily foreseen, and need not be portrayed. By such a construction the constitutional provision, which was conceived in the highest wisdom, and was intended to remedy for the future a mischief then already begining to be felt, would be deprived of effective operation, and rendered of little or no value. The principle, where the law requires a precedent vote, and the vote is in favor of the municipal or public corporation subscribing to the stock of a particular company, that a subscription to the vote of another and distinct corporation is unauthorized and not binding, was decided by the supreme court of the United States in the case of Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676, and that, too, in a case where the face of the bonds did not so fully as in the case at bar display the history of their issue, and of the subscription in which they originated.

In my judgment, under the principles established by the cases of Clearwater v. Meredith, and Marsh v. Fulton Co., above mentioned, the county court of Bates county had no power to make the subscription recited in the bonds here in question, or to issue the bonds; and I consider this view to be consistent with the many cases in which that court has decided, in substance, that nothing but a want of power to issue such securities can avail against a holder for value, without actual notice of the equities set up by the way of defense.

I might dwell upon the fact that the statute in relation to the consolidation was, as in the case of Clearwater v. Meredith, permissive and not mandatory upon the companies; and point out the hardship of holding the township or its people bound by a subscription to a consolidated company, when they had never authorized such a subscription, nor ever had an opportunity to vote against or oppose the consolidation; but it is scarcely necessary to do so.

As the facts which in law show the bonds to have been issued without authority appear on their face, and are alleged in the petition, it is my judgment that the plaintiff can not recover thereon; and accordingly, the demurrer to the petition will be sustained. Judgment accordingly.

KREKEL, District Judge, dissented.

Thereupon the circuit judge announced the following points of disagreement between himself and the district judge:

The judges of the court were opposed in opinion upon the question whether the petition set forth a legal cause of action against the defendant. Also, upon the question whether the demurrer to the petition ought to be sustained. Also, upon the question whether the county court had authority, under the constitution and laws of the state of Missouri, to subscribe to the stock of the consolidated company, under the vote of the 3d of May, 1870, in favor of one of the companies, which, after the vote, but before the subscription, consolidated with another company, forming thereby the company to which the subscription was made and the bonds issued. Also, upon the question whether the recitals in the bonds affected the plaintiff with notice of facts which defeat his right to recover thereon.

NOTE 1. The foregoing decision was made before the judgment of the supreme court in Nugent v. Supervisors of Putnam Co., 19 Wall. [86 U. S.] 241. That case differs from the one above reported, in this: There the subscription to one of the constituent companies was before the consolidation, here it was afterwards. In this case there was nothing but a bare vote before the consolidation and that, without more, creates no contract between the municipality and the railroad company. This is clear in principle and is settled law. Aspinwall v. County of Jo Daviess, 22 How. [63 U. S.] 364; Dill. Mun. Corp. § 42. Under the constitutional provision requiring a vote of the people before any municipality shall "become a stockholder in or loan its credit to any company," I still think that the subscription, or agreement to subscribe, must be to the company in whose favor the vote was taken, and that this vote cannot be carried over to the consolidated company and the subscription made to it. Whether this view is reconcilable with the opinion of the supreme court in the Nugent Case, remains yet to be decided. I think the cases can be and ought to be distinguished, and after reading the foregoing opinion in the light of the opinion of the Nugent Case, I am still satisfied with it, and that any other doctrine practically nullifies the constitutional provision, which originated in necessity and was intended to protect the people from the abuse of the power to aid railroads by loaning them their credit or purchasing their stock. See Thomas v. Scotland Co. [Case No. 13,909].

[NOTE 2. From this judgment sustaining the demurrer the plaintiff appealed to the supreme court (92 U. S. 569), where, in an opinion by Mr. Justice Bradley, the judgment of the circuit court was affirmed. The "Township Aid Act" of 1868 was held to be repugnant to the fourteenth section of article 11 of the constitution of Missouri adopted in 1865, the specifications mentioned therein being held to embrace every political organization which could be supposed capable of making a subscription.

[The objection to the validity of the subscription on the ground that the vote was for one company and the county court substituted another was also sustained. "The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent." "It does not continue in existence powers to subscribe for stock, given by one person to another, which, by the general law, are extinguished by such a change."]

HART (BENJAMIN v.). See Case No. 1,302.

HART (BOUCICAULT v.). See Case No. 1,692.

Case No. 6,149.

HART v. BRIDGEPORT.

[13 Blatchf. 289.] [1]

Circuit Court, D. Connecticut. March 28, 1876.

MUNICIPAL CORPORATION — NEGLIGENCE OF SERVANTS—ULTRA VIRES.

1. A municipal corporation is not liable to an injured party, for the negligence of its mayor and its police officers, who have sufficient power and ability to preserve the peace and protect property, in not discharging the duty of protecting private property against a known violation of law.

2. The distinction pointed out between the public, governmental duties of a municipal corporation and its private or corporate duties.

3. A municipal corporation is not liable for the unlawful acts of its officers, committed ultra vires, and not colore officii, in the known and wilful violation of law.

[Cited in Greenwood v. Town of Westport, 60 Fed. 571.]

[Cited in Russell v. City of Tacoma (Wash.) 35 Pac. 606.]

At law.

Levi Warner, for plaintiff.

Morris W. Seymour, for defendant.

SHIPMAN, District Judge. This is an action of trespass on the case, against the city of Bridgeport, a municipal corporation incorporated by the legislature of the state of Connecticut. The plaintiff [Carmi Hart], a citizen of the state of New York, alleges, in his declaration, that, on June 23d, 1869, he was, and ever since has been, the owner and possessor of a described parcel of land within the corporate limits of the city of Bridgeport, and upon which a planing mill, foundry and other buildings were situate, and that he was also the owner of a steam engine, boiler and other machinery situate in said buildings, of all which real and personal property he was, on said day, entitled to the undisturbed and quiet enjoyment; that, "on said day, the defendant was, and ever since has been, a municipal corporation, under and by virtue of the laws of the state of Connecticut, having a mayor and other executive officers under his and its control, and having police authority and powers, and a legally constituted police, employed and paid by said city, and under its control, and having all other powers incident to, and necessary for, the full and ample protection of property within its limits, and especially for the protection of the property of the plaintiff, hereinbefore described, from the injury, wrongs and trespasses hereinafter mentioned, all of which powers were given and granted to the defendant to enable it, among other things, to protect the said property of the plaintiff and others, and that it then became and was, and ever since has been, the duty of said city of Bridgeport, by reason of the facts aforesaid, and by virtue of the laws of said state of Connecticut, to protect the plaintiff from the injury to his said property and estate, hereinafter mentioned and described; yet the plaintiff says, that the defendant, its duty in the premises not regarding, did not perform the same, and did not protect the plaintiff in the possession, use and enjoyment of his said property, but wholly neglected and refused to protect him therein, as it might have done, and as it was its duty to have done, but, its said duty not regarding, and contriving and intending to injure the plaintiff, the defendant, on said 23d day of June, 1869, suffered sundry persons, without law or right, and contrary to the mind and will of the plaintiff, and with the full knowledge and assent of the defendant, and in presence of the mayor and police of said city of Bridgeport, with force and arms, to enter into and upon the said premises of the plaintiff, then in the possession of the plaintiff, and to continue in and upon said premises thereafter, until and upon the 27th day of June, 1869, and with the knowledge and consent of the defendant, and of the mayor and police aforesaid, on and during the days aforesaid, unlawfully and with force and arms, to eject the plaintiff from said premises, and tear down and remove said building, and carry away, break and destroy said steam engine and boiler, and said machinery and patterns, and dispose of the same to their own use, whereby the plaintiff has wholly lost and been deprived of the same, though the plaintiff then and there requested and demanded said defendant to protect him in his said property from said unlawful acts so done as aforesaid, as the defendant well knew that all said acts of violence, by which said property was so destroyed, were done without right, or claim of right, to do the same, and that the same were done in violation of law; yet, then and there contriving and intending to injure the plaintiff, the defendant, by its officers and agents, protected said persons in the doing of said unlawful acts, and in the destruction of said property, and, by its officers and agents, then and there prevented the plaintiff from resisting the destruction of said property, as he might and would lawfully have done had he not been so prevented by the defendant, by means of which neglect, wrongful acts and trespasses of the defendant, the plaintiff has been greatly injured, and has lost and been deprived of said buildings, steam engine, boiler, machinery, and patterns of machinery, to the damage of the plaintiff." To this declaration the defendant has demurred generally.

(1.) The principal question of law presented by the demurrer is, whether a municipal corporation is liable to an injured party, for the negligence of the mayor and its public officers, who have sufficient power and ability to preserve the peace and protect property, in not discharging the duty of protecting private

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

property against a known violation of law. The general question of the liability of municipal corporations for negligence in the performance of public governmental duties, and in the performance of corporate duties, has been frequently considered by the courts in this country. The decisions of those courts to which we are accustomed to yield the highest respect, have been uniform, and the results which they have reached are clearly stated by Chief Justice Butler, in Jewett v. New Haven, 38 Conn. 387. The principles which are here quoted, though contained in a dissenting opinion, are those which have been adopted by an undivided court in four recent cases in this state. The dissent was upon the application of the principles in the particular case which was then under consideration. The learned chief justice says: "1. Officers and agents of the government partake of its immunity, and are not liable for negligence in the performance of functions or duties which are strictly governmental, whether such agents act in a corporate or individual capacity. But such immunity does not reach to or protect a contractor or his servants, who contracts with the government, or its officers and agents, to perform a governmental work. 2. Municipal corporations, to the extent that they are authorized or directed to exercise public governmental powers and perform public governmental duties, solely for the general good, are governmental agencies, and entitled to immunity in respect to the acts of their subordinate officers or agents. But, where the power and duty are not governmental, and, in special cases, where they are, but where the corporations derive some special pecuniary benefit or advantage from the exercise of the power, or have specially undertaken to perform the duty, in consideration of some special advantage, the rule is otherwise, and they are liable, like other corporations, for actual misfeasance. 3. The original and ordinary municipal agencies for this state are counties, towns and school districts. Special city and borough charters have also been granted to the inhabitants of densely populated portions of towns, at their request, in part to enable them to exercise the ordinary governmental powers which the town before exercised over the same territory, more efficiently, but mainly to enable them to enjoy a variety of other special powers and privileges not governmental, for the special benefit of the local community." To the same effect are the cases of Oliver v. Worcester, 102 Mass. 489; Buttrick v. Lowell, 1 Allen, 172; City of Richmond v. Long's Adm'r, 17 Grat. 375; Western Sav. Funds Society v. City of Philadelphia, 31 Pa. St. 175; Bailey v. Mayor of New York, 3 Hill, 531; Lloyd v. City of New York, 1 Seld. [5 N. Y.] 369; Martin v. Brooklyn, 1 Hill, 545; Western Homeopathic College v. City of Cleveland, 12 Ohio St. 375; Hewison v. New Haven, 37 Conn. 475; Torbush v. City of Norwich, 38 Conn. 225; Mead v. New Haven, 40 Conn. 72; and Weightman v. Washington, 1 Black [66 U. S.] 39, 49; and it may be considered as settled, that "a city which has assumed, or on which is imposed, a public governmental duty, is not liable for the nonperformance or negligent performance of such duty, and it makes no difference that the duty is imposed by a special charter which the city has accepted." Hewison v. New Haven, 37 Conn. 475.

The principal difficulty which courts have experienced, has been in ascertaining, clearly and accurately, the line of demarcation between public governmental duties and private or corporate duties, and has not been in the determination of the question, whether, for a refusal to discharge public duties, the corporation was or was not liable. Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrong-doers, the construction of highways, the protection of health and the prevention of nuisances. The execution of these duties is undertaken by the government because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of intercommunication are benefits in which the whole community is alike and equally interested. Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit. Examples of well understood corporate powers are, the right to make sewers, to introduce water and gas, to establish parks, to build public markets, to regulate private carriers. The difference between these two classes of duties is thus stated by Chief Justice Nelson, in Bailey v. Mayor of New York, 3 Hill, 539: "The distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But, if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the

corporation, quoad hoc, is to be regarded as a private company."

Such being the general distinction between governmental and corporate duties, there has never been any difference of opinion as to the class within which the preservation of the peace and the protection of property belongs. The duty has universally been considered to be of a public nature. It is discharged, in general, by the police force of the state or city. These officers are officers of the law, whose appointment is delegated to the city by the state, in order that this general duty may be easily and conveniently performed, and are not, in the exercise or in the non-exercise of their police powers, agents or servants of the city.

(2.) It is claimed by the plaintiff that the declaration also alleges a positive trespass, and the actual commission of an unlawful act by the city authorities, for which the corporation is liable as a trespasser. The allegations are, that the defendant, by its officers and agents, protected the persons who were destroying the plaintiff's property, and prevented the plaintiff from resisting the destruction of said property, as he might have done had he not been so prevented. It is further alleged, that the acts of violence were well known by the defendant to be done without right or claim of right, and in violation of law. The substance of these averments is, that the mayor and the police officers were co-trespassers, not acting colore officii, but in open and known hostility to the requirements of law. Assuming that the averments are sufficiently definite to sustain the action, the corporation is not liable for the unlawful acts of its officers, committed ultra vires, and not colore officii, in the known and wilful violation of law. Thayer v. Boston, 19 Pick. 511; Buttrick v. Lowell, 1 Allen, 172; Western Homeopathic Medicine College v. City of Cleveland, 12 Ohio St. 375. The demurrer is sustained.

Case No. 6,150.

HART et al. v. DELAWARE INS. CO.

[2 Wash. C. C. 346.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

MARINE INSURANCE — ABANDONMENT OF VESSEL — REPAIRS — FREIGHT.

1. Insurance on the freight of the Hannah, at and from New-York to Wilmington in North-Carolina, and thence to Barbadoes, and back to Philadelphia. At Wilmington, a cargo was prepared to be shipped in the Hannah, had she arrived there. The vessel was forced, by stress of weather, to put into Norfolk, and arrived there in a state of wreck. The agent of the plaintiffs gave notice to the defendants' agent at Norfolk, and requested him to have all the repairs made that were necessary; which he declined. The repairs would have cost upwards of 3000 dollars, at which sum the vessel was insured. The plaintiffs offered to abandon, and the vessel was sold for 325 dollars. If the injury which the vessels sustained, exceeded one-half of her value, the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, though they should exceed what they were liable for, if only a partial loss had taken place.

[Cited in Peele v. Merchants' Ins. Co., Case No. 10,905.]

2. The underwriters are not bound to make or direct the repairs, in any case; but if the injury sustained exceed one-half the value of the vessel, and if the underwriters would prefer the voyage being prosecuted, they must engage to pay what will be necessary to fit her for the voyage, though it should exceed the sum underwritten.

[Cited in Peele v. Merchants' Ins. Co., Case No. 10,905.]

3. The refusal of the agent of the defendants it pay for such repairs only, as the defendants were liable for, and not for all the necessary repairs, authorized the abandonment.

4. Risk is the subject of the contract of insurance, and until the risk commences, the contract does not attach.

5. Generally, an inchoate right to freight does not commence until the cargo is put on board; but if the freight is insured in a valued policy, the right to indemnify attaches, if any part of the cargo is shipped.

6. If the insured, in virtue of a contract with a third person, has an inchoate right to freight as soon as the voyage commences, although before the cargo is taken in, there the risk commences, and the policy attaches, in virtue of the contract, as soon as the voyage commences.

Action [by Hart, Vandyne and Patterson] on a policy of insurance, dated 3d September, 1806, on freight of brig Hannah, at and from New-York to Wilmington in North-Carolina, at and from thence to Barbadoes, with liberty to go to another British island, at and from thence to the city of St. Domingo, there, and at the usual loading places on the coast, and after completing her cargo, to return to New-York. The usual memorandum was at the foot, which proceeded to state, that it was understood the vessel was insured, in and out of port, during the whole voyage. The policy, as to the printed part, was the common form of a policy on cargo, but at the foot was declared to be on freight: 2000 dollars was subscribed, at a premium of 11 per cent. The same defendants also underwrote policies on the vessel and cargo, at the same premium. The order of insurance stated, that the cargo was to be taken on board at Wilmington. It appeared in evidence, that the brig, on the 25th of August, sailed on the voyage insured, but was so injured by tempest on the coast, that she was obliged to cut away her masts, and got into Norfolk, a wreck, about the middle of September. The defendants having an agent at Norfolk, (viz. Mr. Granberry,) the plaintiffs' agent (Mr. Myers) applied to him to have the vessel repaired. It appeared, from the testimony of Myers, that Granberry refused to have all the repairs made that were necessary, and also refused to agree to pay for the whole that might be made, although he consented to pay

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

for the repairs in part. About the middle of December, Myers wrote a note to Granberry, calling upon him to have the necessary repairs made, or to direct what repairs should be made, and to agree to pay Myers all such sums of money as he should expend in the repairs, and in supplying the wants of the captain. In answer to this note, Granberry declined making the repairs himself, but consented that Myers should have such as are usually made, and promised to pay whatever sum the defendants may be liable to pay. It was proved by a Mr. Williamson, a shipwright, that he was directed to repair the vessel, and that he went on board to do so: but that the captain refused to allow him, saying that Myers had spoken to another shipwright to do it. The vessel was about fourteen years old, her tonnage 146, and it is stated by the witnesses that her repairs would have cost upwards of 3000 dollars. She was insured at that sum. On the 1st of January, the paintiffs offered to abandon, which was refused. The vessel was sold as she lay, at public action, for 325 dollars. It was proved, that a cargo of staves was provided, and was waiting for her at Wilmington, which, after the loss of the vessel, were sold at a small loss. Had she performed the voyage, she would have earned a freight equal to the sum insured.

The recovery was resisted, upon the following grounds—First. That there was not a total loss. It was the duty of the owner to repair his vessel, to enable her to earn her freight; and the insurers were not bound to repair, or to direct what repairs were to be made, or to bind themselves to pay for them. But if they were so bound, they had agreed, by their agent, to do all that could legally be required, viz. to make usual repairs and to pay what they were legally bound to pay. Besides which they offered to make the repairs, and were refused by the captain. Marsh. Ins. (2d Ed.) 488, 582; 1 Johns. 205, 321. Second. There was no inception of this risk, and consequently the policy never attached. The plaintiff had not an insurable interest, until the cargo was taken on board. Marsh. Ins. (2d Ed.) 278–280, 323; Abb. Shipp. 203. If it be contended, that wager policies are allowable in this country, which may well be questioned, still they should upon their face appear to be so, as interest or no interest, free of salvage, etc. Park, Ins. 259. Third. The loss was treated as a partial loss for three months; and it was then too late to abandon.

On the other side, it was contended, that the loss was total, when the vessel got to Norfolk, the repairs amounting to more than half the value of the vessel. Where this is the case, the insurer must agree to pay for the repairs at all events, if he would prevent the insured from abandoning. Goss v. Withers, 2 Burrows, 683; Dacosta v. Newnhan [2 Durn. & E. (2 Term R.) 407.] Second. Under all the circumstances of this case, the contract between the parties amounted to an agreement that the risk should commence with the commencement of the voyage; in which case, it does not differ from a charter party. 6 Term R. 478; 7 East, 400; Park, Ins. 267; 2 East, 544; 3 Term R. 362. Third. No abandonment is necessary, upon a policy on freight. 5 Bos. & P. 310.

Edward Tilghman and Mr. Tod, for plaintiffs.

Rawle & Condy, for defendants.

WASHINGTON, Circuit Justice (charging jury). The first question is, was there in this case a total loss? It is strongly to be presumed, from the age of the vessel, her tonnage, the cost of her necessary repairs, and the price at which she sold, that the injury to be repaired would have exceeded more than half her value; but of this, you are to judge. If this was the fact, the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, although they should exceed what the underwriter would have been answerable for, if only a partial loss had happened. It is true, that the underwriter is not bound to make, or to direct, the necessary repairs, in any case. But if the injury sustained is such that the insured may turn it into a total loss, the underwriter, if he would prefer the voyage being prosecuted, must engage to pay what may be necessary to fit her to prosecute the voyage, though it should exceed what otherwise he might be liable for.

The question then is, did the agent of the underwriters agree to answer for such repairs? Mr. Myers declares, that he would only consent to pay for partial repairs; and it appears, by his answer to Mr. Myers' note, that he would only agree to pay what the underwriters were legally bound to pay. But the underwriters were not bound to pay beyond their subscription, and the repairs would have cost between three and four thousand dollars. The insured, therefore, was not bound to make those repairs at his own risk, and was consequently at liberty to treat the loss as total, unless you should be satisfied, by Williamson's evidence, that whatever difference may have arisen between Myers and Granberry, the latter did consent to repair the vessel, and would have done so, had he not been prevented by the captain. If Williamson is believed, it is certainly very difficult to account for, and still more so to justify, the conduct of the agents of the insured upon this occasion, in refusing a compliance with their own proposition; and if you are satisfied that this offer was made, and a willingness shown to carry it into effect, the plaintiffs had no right to turn this into a total loss. You are alone proper to decide how this fact was; and, having satisfied yourselves respecting it, you will find no difficulty in applying the law to it, as the court has stated it to you.

The next question is purely a point of law. Had the plaintiffs an insurable interest, before or at the time when the loss happened, as stated by one of the counsel; or, had the risk then commenced, as it is put by another? There is no difference between them. Risk is the subject of the contract of insurance. If there be no risk, there can be no contract. Until the risk commences, the contract does not attach. If the insured cannot or will not commence the risk, he has no claim to indemnity, and the underwriters cannot retain the premium. In an interest policy, there can be no risk, if there be no interest. The risk, then, can only commence when the interest commences—which leads to the question, when does an inchoate right to freight commence? The answer is, when the goods are put on board. This is the general rule, as laid down in the case of Tonge v. Watts [2 Strange, 1251], which, I believe, has never been questioned. It is true, that if the policy be valued, the right to indemnity attaches, if only a part of the cargo is taken on board, and then a loss happens; because, in such a case, it is only necessary to prove some interest, to entitle the insured to recover the whole sum insured. So, likewise, if the insured, in virtue of a contract with a third party, has an inchoate right to freight, as soon as the voyage commences, though before the cargo is taken on board; the risk commences, and the policy attaches, in virtue of the contract, as soon as the voyage is commenced. This is the case of Thompson v. Taylor [6 Durn. & E. (6 Term R.) 478.] But the general rule is as before stated. But although, in this case, the plaintiffs had not an insurable interest before the cargo was taken on board, it may be asked, had they not a right to insure expected profits, although they were dependent upon no contract with third persons? The answer is, that if the defendants agreed to insure in this way, they are liable, in case of a loss from any of the perils insured against, and not otherwise. The difficulty is, was this the understanding of the parties? We have had two opinions upon the point, and therefore state our present impression with some diffidence. But when we consider all the circumstances of this case—that the defendants knew that the cargo was to be taken on board at Wilmington—that they insured the vessel and freight at the same premium, and stipulated, in the memorandum to the policy, that the vessel was insured, in and out of port, during the whole voyage, we are of opinion, that the risk in respect to the freight, was understood to commence as soon as the voyage commenced; that is, that the profit expected to be made by the freight of the vessel, should not be prevented by any of the perils insured against.

The jury, after having been out some time, returned into court, and asked the opinion of the court, whether, if the brig had been repaired, so as to fit her for the voyage, either by Myers, in consequence of Granberry's letter to him, or by Williamson, who was sent on board for the purpose, the underwriters would have been liable for the whole expense, provided it exceeded the amount insured? The answer given was, that if the repairs had been made by Williamson, under the orders of Granberry, the agent of the defendants, the defendants would have been liable for the whole expense, though it had exceeded the amount insured. But if the repairs had been made by Myers, they must have been upon the terms of Granberry's letter, which did not bind the defendants further than the law bound them, and that would not have been to an amount exceeding the sum insured.

Verdict for defendants.

Case No. 6,151.

HART et al. v. The ENTERPRISE.

[3 Wkly. Notes Cas. 172.]

District Court, E. D. Pennsylvania. 1876.

JURISDICTION IN ADMIRALTY — SHIPS AND SHIPPING—MARITIME CONTRACTS — LIEN ON VESSEL FOR CREW'S WAGES—CONTRACT BY CHARTERER—WHAT ARE MARITIME SERVICES.

[1. Services by seamen upon a vessel sailing between Philadelphia and ports on the Chesapeake Bay are maritime services, and within the jurisdiction of a court of admiralty, even if the evidence shows that the libellants were employed as laborers to obtain a cargo of oysters for the purpose of conveying them to a field in Delaware Bay through an inland route.]

[2. It is no bar to a lien for seamen's wages to answer that the charterer had agreed with the owners to pay them, when the libel expressly sets forth a contract with the master.]

[Cited in The International, 30 Fed. 376.]

[See The Artisan, Case No. 568.]

Hearing on libel and answer. Suit for seamen's wages. The libel alleged that the vessel being at the port of Philadelphia and bound on a voyage thence to ports on Chesapeake Bay and elsewhere, and return, the master, by himself or his agent, hired the libellants to serve as seaman during the said voyage; that no shipping articles were signed, and that libellants had duly performed the voyage, and were justly entitled to their wages, etc. The answer of the master set forth that before the alleged hiring the vessel had been duly chartered by the owners, and that the charterer agreed to pay for its use and all expenses of the voyage, including the wages of respondent; that the charterer was on board from the beginning of the voyage, all the time, and had full control over the vessel; respondent, as navigator, merely having authority to dismiss any of the crew who misbehaved; that libellants had not been hired by the owners nor by their agent, but by the charterer; that they knew that the vessel was chartered, and were notified that they must look for their wages to the charterer and not to the respondent; that the vessel, moreover, was not chartered for any maritime adventure or voyage, but

that libellants were employed as laborers, to go on the vessel through the Delaware Canal, to obtain a cargo of oysters, and not to transport them to any maritime port, but to convey them to Jones Creek, on Delaware Bay, and there plant them, and that the vessel had been so engaged in the business of planting oysters.

Rich & Driver, for libellants.

Mr. Flanders, contra, argued that the vessel was not liable, because no one but the master could create a lien, and the contract in this case was made by libellants with the charterer; and that the court had no jurisdiction because the services were not maritime.

THE COURT, (CADWALADER, District Judge) was of opinion that the vessel was charged with the debt, and that the services performed were maritime services. Decree for libellants, with costs.

Case No. 6,152.

HART v. GRAY.

[3 Sumn. 339.] [1]

Circuit Court D. Rhode Island. June Term, 1838.

GUARDIAN—APPOINTMENT OF — NOTICE IN RHODE ISLAND.

1. The act of Rhode Island (Digest 1822, p. 246, § 3) provides, "That no guardian shall be appointed or removed under this act, unless all persons interested shall have had reasonable notice in writing, signed by the clerk" (of the probate court), "and served by the town sergeant or constable, that he, she, or they may appear, to object to the same." *Held*, that a notice, by reading the order of the court, is not a notice in writing in the sense of the statute, and that the appointment of a guardian, with such notice only, was a nullity.

[Cited in Mathewson v. Sprague, Case No. 9,278.]

[Cited in Hamilton v. Colwell, 10 R. I. 40.]

2. Courts of limited jurisdiction can only exercise their powers in the cases and in the mode prescribed by the legislature.

[Cited in Mathewson v. Sprague, Case No. 9,278.]

[Cited in U. S. v. Hall (N. M.) 21 Pac. 86.]

Assumpsit upon the money counts. Plea, the general issue. At the trial, it appeared, that the defendant [Asa Gray] had been appointed, by the town council of Tiverton, guardian of the plaintiff [Hannah Hart], who was at the time a pauper of the town of Tiverton; and the defendant had, as such guardian, received the sum of $480, on account of the plaintiff, as a pensioner of the United States. The plaintiff had since removed into Massachusetts; and now claimed the said sum of $480 from the defendant, upon the ground that she had never been lawfully put under guardianship. The ground upon which she was put under guardianship was her incompetency from the imbecility resulting from her extreme old age. The proceedings of the town council (as a court of probate) were read in evidence, to establish the guardianship. It appeared from these proceedings, that a petition was filed for the guardianship in the town council on the 15th of September, 1836. An order was passed by the court on the same day of notice to appear and answer the petition on the 22d of the same month, at two o'clock, p. m. The order of notice was served by the proper officer, by reading it to the plaintiff, and no written notice was left with or delivered to her. On the 22d of the same month, no person appeared to contest the guardianship, though a letter was addressed to the town council, by a person acting as the friend of the plaintiff, requesting delay; which, however, was not attended to; and the guardianship was accordingly, on the same day, committed to the defendant.

Mr. Pratt, for plaintiff, contended that the notice ought to have been in writing, instead of service by reading the order to the plaintiff; and that, for the want of this, the guardianship was utterly void; and he cited the Digest of the Laws of Rhode Island of 1822, p. 246, § 3.

Turner & Pearce, for defendant, contended e contra; and that if there was any error, the proper remedy was by an appeal of the supreme court of the state as an appellate court of probate.

STORY, Circuit Justice. The act of Rhode Island (Digest 1822, p. 246, § 3) provides, "That no guardian shall be appointed or removed under this act, unless all persons interested shall have had reasonable notice in writing, signed by the clerk" (of the probate court), "and served by the town sergeant or constable, that he, she, or they may appear, to object to the same." This appointment is a special authority conferred on the court of probate (the town council), a court of limited jurisdiction; and, therefore, its jurisdiction can be rightfully exercised only in the cases and in the mode prescribed by the legislature. If the mode prescribed for the exercise of the authority is not complied with, the appointment is utterly void. Admitting, that there might be an appeal to the superior tribunal in such a case; still, if the proceeding is a nullity in law, the exception to the jurisdiction and that nullity may be insisted on in an action like the present. The question is, therefore, reduced to the mere consideration, whether the notice, given in the present case, was within the statute. The argument is, that a notice by reading of the order of the court by the officer is a notice in writing in the sense of the statute. I think otherwise. I understand, that the notice must be a notice in writing; that the officer must leave with the party a written notice, an original from the clerk, or at least a certified copy in writing thereof. In no

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

just sense can a notice by reading be deemed a notice by writing; and yet this is the extent of the argument. The legislature was wise in making such a provision; for the written notice might be important in assisting the party to make the proper defence or resistance to the petition. No instance, I believe, can be produced, where a notice, required to be served and given in writing, has been held valid, unless the service has been by the delivery of the paper itself or a copy in writing. It seems to me, therefore, that the guardian was not lawfully appointed; and that the decree of appointment is a mere nullity, and the plaintiff is entitled to recover. I wish to throw out another suggestion for consideration. The ground of the petition is a supposed mental incapacity of the plaintiff. Now, under such circumstances, it seems to me, that the court were bound to proceed with very great caution; and it would have been fit to have appointed some person, as a guardian ad litem, to represent the interests of the party, and to make a defence before the decree appointing a general guardian was passed. What defence could a non compos make, without the assistance of some friend under such circumstances? However, it is sufficient to say, that, for the reasons which I have stated, in which the district judge concurs, the appointment of the guardian was a mere nullity, and, therefore, the plaintiff is entitled to recover. Verdict for the plaintiff, $480, and interest.

Case No. 6,153.

HART v. The LITTLEJOHN.

[1 Pet. Adm. 115.] [1]

District Court, D. Pennsylvania. 1800.

WAGES OF SEAMEN—CAPTURE OF VESSEL—DEDUCTION OF SALVAGE.

An American ship delivered her cargo at Liverpool; and on her return to the United States, was captured by a French cruizer, recaptured by an English frigate, and restored, on payment of salvage. The libellant, a mariner, having been taken on board the French cruizer, was carried into France, and there released.—Wages for the whole voyage of the Littlejohn claimed, and allowed, deducting a proportion of salvage.

[Cited in Bordman v. The Elizabeth, Case No. 1,657; Walton v. The Neptune, Id. 17,135; Watson v. The Rose, Id. 17,288; Emerson v. Howland, Id. 4,441; Brown v. The Independence, Id. 2,014; Fuller v. Colby, Id. 5,149; U. S. v. New Bedford Bridge, Id. 15,867; The Atlantic, Id. 620; The Ocean Spray, Id. 10,412; Highland v. The Harriet C. Kerlin, 41 Fed. 223.]

In admiralty.

PETERS, District Judge. Joseph Hart, in July, one thousand seven hundred and ninety-nine, shipped, as a mariner, on board of the American ship Littlejohn, at Edenton, in North Carolina, on a voyage from thence, to Liverpool, in England, and back to Edenton. The ship went to Liverpool, and delivered her cargo. On her return, she was captured by a French cruizer, in the possession of which she remained about eight days. She was recaptured, by an English frigate, and carried into Lisbon; where she was restored, on payment of salvage, and arrived, from Lisbon, at Philadelphia, where the mariners, who came in her, were discharged. The libellant was taken on board the French cruizer, and carried into France, a prisoner. Being there released, he worked his passage home. The question made, in this cause, is, "Whether this mariner, who was forcibly taken from the ship, in which he was engaged for the voyage, shall be paid, pro rata, to the time of capture, or shall have his full wages for the voyage?" Without entering into the facts, as to the voyage being ended at Philadelphia, or not; the cause was put on the question stated—to it, therefore, I shall confine myself.

I have, heretofore, in many instances, decreed, that seamen, under like circumstances, with the libellant, should be paid their full wages for the voyage. I have always supposed, that if the ship, owing to the absence of one, or, more mariners, thus forcibly taken away, was at the expense of hiring others, this extra expense was chargeable as an average loss; [2] or, in an account, for spoliations on our neutral commerce, if the capture was made by the subjects of a power in amity with us, and was finally adjudged unlawful; yet, having only the right to determine the question of wages, I have not given my opinion, as to consequences, or entered into collateral enquiries.[3] I had grounded my opinion, in cases like the present, and those of sailors falling sick, during the voyage, on the authorities cited by the libellant's counsel, and some others. Vide Consolato del Mare, c. 179, § 202; Sea Laws, 130; Laws Oleron, art. 7, p. 140, note; Emerig. Ins. pp. 635, 637, 638; 1 Valin's Ord. France, pp. 75, 748; Pothier Louage de Matelots; Laws Wisby, art. 45, p. 203. These authorities, or several of them shew, among other things,

[1] [Reported by Richard Peters, Jr., Esq.]

[2] If it can be charged at all, as average, it must be as what is called petty average; as a disbursement, the master was bound, necessarily, to furnish, for the benefit and safety of both ship, and cargo.

[3] This case was determined, at a time, when arrests of our ships, by others than the French, were, for the purpose of adjudication, for breaches of neutrality: and when, in Europe, some attention was paid to the laws of nations, and special conventions, by the courts of the belligerents. The payment of salvage was decreed by the British courts, and submitted to under no positive regulation. It was said, by them, to be an affair of comity, in treating our ships on the same footing with those of their own nation. The fact is, that no salvage is due, in common cases, where neutrals were taken out of the possession of a belligerent, and bona fide carrying in, for examination, by a competent and impartial tribunal. But between the French, and the United States, there then existed partial hostility. See a note to the case of Clayton v. The Harmony [Case No. 2,871].

that if a mariner is sent out of the ship, on a special service, and is taken, and made a slave, falls sick, &c. his ransom, cure, and expenses, are to be paid by the master, or owner, as well as his full wages for the voyage. It is certain, that those authorities which mention the case of a special mission, are most clear, on the point of ransom; though it is often said, in addition, "that the ransom shall be paid, without prejudice to wages." There is also, in 1 Valin, 748, a distinction taken, between the case of one sent from the ship, and that of one taken in the ship, with the rest of the crew.[4] In this latter case, the ransom of no one is to be paid. If the vessel is made prize, and lost to the owners, no doubt, neither ransom or wages can legally, or justly be claimed. There is a special obligation, however, on the owner or master, to indemnify a sailor, sent on extra duty, and exposed thereby to uncommon risk. But in these authorities, whenever wages are mentioned, they are not designated as due, merely on account of the misfortune occurring on the particular exigency, but on the general principle—"because he (the mariner), is not in fault;" and it is added, "the defect of service is no more to be imputed to him, than if he had fallen sick on the voyage, in which case, his wages are due without deduction." 1 Valin, p. 748.[5] Thus, placing his capture, even on special service, as it respects wages, on the same footing with his falling sick on the voyage. Now it is clear, that in case of sickness preventing a performance of duty, if the malady be not occasioned by the mariner's mal-conduct, the full wages are payable, whatever expense, or loss, the ship may incur, on this account; and I see no reasonable distinction between this case and that. If a sailor dies on the voyage, his heirs shall have his full wages. If killed in battle, they shall also have a share of all prizes. See Valin; Emerig. Ins. 633, 637, 638; Laws Oleron, art. 7; 1 Esp. 114. If it were relevant to this point for me to shew, that the loss should be charged as an average loss, I might cite from the 3d edition of Malyne's Lex Mercat., p. 62, of his "Collection of all Sea Laws," the 18th chapter, where it is declared, that when goods are taken by a pirate out of a ship, though not as contribution for the rest, yet the loss shall be common to all concerned.[6] The chance of the seaman carried off, while others are permitted to remain, should not be worse than that of the owner of the particular goods, taken at the pleasure of the pirate. Mal. Lex Merc. 109. But I do not much rely on this analogy, or authority; my opinion is founded on the general principle—"That, where a mariner is prevented by force, when he is not in fault, from performing his voyage, he is to be paid his full wages." Consulato del Mare. But if, during the time the voyage continues, he earns wages in other service, these shall be deducted from his claim. I have uniformly, in such instances, ordered this to be done.

The general principle which has influenced my judgment, is established in the Curia Philippica, 472, 36, where it is laid down, that "if a master of a ship discharge a mariner, before the end of the voyage; or if, by a fortuitous circumstance, he ceases to serve, yet he shall have his wages, for the time past, as well as for that to come." But all wages, earned during the time he was in another service, are to be deducted. In the Roman Digest (pages 514, 515) the like general principle is established, in the cases of servants, an amanuensis, and in that of an advocate, who is not obliged to return his fee, if it was not his fault that he did not try a cause. See, also, Godol. Adm. Laws, pp. 177, 178, note and text. It is true, that this general principle cannot be carried into all cases. In the British law books, we find it held by respectable judges, "that a seaman impressed, or one of the crew of a ship ransomed, shall only be paid pro rata." But the impressment of seamen, is deemed, in England, a lawful act, and encouraged by the policy of that country; and the seaman receives,

[4] Where any peculiar benefits are appropriated to one sent on a special mission, they are allowed, to induce and reward the risks and sufferings, by casualties, to which those in the ship are not exposed, the undertaking being most commonly voluntary, and not any part of the terms of the general contract. It differs from the case of one forcibly taken out of the ship, who participates in the fate of the ship; and receives, or not, his wages, according to circumstances operating on freight. One taken by force out of the ship may, in some instances, be individually wronged; and separated from his contract, by a lawless and unjustifiable act of violence, merely personal as to him, and not part of the transaction by which the whole crew are affected. No general position can be formed, to embrace every occurrence.

[5] Commentaries on the laws and ordinances of France. It is difficult to determine which most to admire, the laws of Louis the fourteenth, on which these commentaries were written, or the talents, acuteness, learning, and judicious observation of the commentator. From these highly celebrated laws, and their masterly commentator, the knowledge of maritime contracts, assurances, and other branches of this subject, displayed on the British bench, by some of their most eminent judges, is said to have been acquired. This may, or may not, have originated in partiality for the laws, and the country of their origin. But neither the laws, or their commentator, required this additional testimony. They bear within themselves their own eulogy.

[6] In some of the books (Molloy, 249), a distinction is taken where goods are taken by pirates to spare the rest, this being beneficial to all, contribution must be paid by all. But where part are taken by violence, under no agreement to spare the rest, but as an independent spoliation, the residue is not subject to average. It is on this principle, to be found in other cases, that I have considered a seaman taken by force (not as part of the transaction in which a ship, and her crew, were generally involved,) when others of the crew were suffered to proceed on the voyage with the ship, to be individually wronged, and not entitled to wages for the voyage.

on his change of employment, what by their laws, are established as competent wages. The ransom of ships captured, is the purchase of the property from the enemy, after it is lost, and the ransomers hold it, in some measure by a new title. Capture, involves the loss of wages. The ransom of ships is not encouraged by the British government, but their laws particularly favour recaptures, and in such cases, extend the jus postliminii farther, than those of most other nations. Whatever the opinion of common law judges may be, I am bound to follow the rules of the civil and maritime law. When the ship and cargo are restored, on recapture, and payment of salvage, the owner recovers his freight; and this is the parent of wages. It is only where freight is recovered, that I have applied this general principle, to the claims of seamen. They contribute, out of their wages, their proportion of salvage. That no adjudged case be found in the books, exactly like this under consideration, is, perhaps, true. It may never have been disputed. But, as such cases frequently occur, this point is of considerable importance, both to our merchants, and mariners. I do not wish it to rest on my judgment alone. Whenever the sum claimed, is sufficient, in amount,[7] to warrant an appeal, I shall recommend the cause to be carried up to a superior court. In the mean time, I cannot see any good cause to alter my opinion, and I therefore, adhere to the principles of my former decisions: And do adjudge, order, and decree, that the said Joseph Hart, have, and recover, in full satisfaction of his wages, the sum of one hundred and fifty-three dollars, and eighty-three cents, being the balance of his full wages for the voyage. Out of this sum, are to be deducted any sums, received by him, and also his proportion of salvage, paid on the restoration of the ship, and cargo. And I do further adjudge, order, and decree, that the said ship Littlejohn, together with her tackle, apparel, and furniture, or so much thereof, as may be necessary, be condemned and sold, for the payment of the sum of money, herein before decreed, to the said Joseph Hart, and of the costs and charges, accruing in the premises.

Case No. 6,154.

HART et al. v. The OTIS.

[Crabbe, 52.][1]

District Court, E. D. Pennsylvania. Nov. 25, 1836.

WAGES OF SEAMEN—FORFEITURE—DESERTION.

1. Where there is no entry, in the log-book, of the absence of a seaman without leave, and he is received on board again, his wages cannot be forfeited under the act of 20th July, 1790 [1 Stat. 131].

2. There can be no specific forfeiture or deduction for misconduct which is not specially charged in the answer.

3. If seamen leave the vessel, against orders, to go before the consul and complain of their treatment, it is not desertion.

4. Such conduct will not justify their imprisonment, nor the deduction, from their wages, of the amount paid other hands in their places while so imprisoned.

5. If mariners do not desert, their intention so to do does not bring them within the act of 20th July, 1790.

This was a libel for wages. The libellants [George Hart and John Gilman] shipped on board the brig Otis, on the 6th September, 1836, and sailed from Philadelphia to Havana. On their arrival at the latter port, wishing to complain of the captain's treatment of them, they were forbidden to quit the vessel. They did so, however, and went before the American consul, where the captain [Joseph L. Noble] found them. The consul refused to listen to their complaint, and they left his office. They were then apprehended, imprisoned in the jail, chained, and set to breaking stone. A few days before the brig sailed they were brought on board, and performed their regular duty during the voyage home. These transactions did not appear to have been entered in the log-book. It also was shown that there had been some disagreement between the libellants and the mate, which was not alluded to in the respondent's answer. The brig arrived at Philadelphia on the 29th October, 1836, when the libellants' wages were refused them, and this suit was commenced, on the 11th November, 1836, for their wages during the time of service, at the rate of sixteen dollars per month, with certain credits for payments made.

Mr. Gilpin, for libellants.

Mr. Fallon, for respondent. The libellants forfeited their wages, under the act of 20th July, 1790, by leaving the brig at Havana; and the respondent was entitled to deduct from their wages the amount paid to other hands, engaged in their places, during their imprisonment. Thorne v. White [Case No. 13,989]; Whiteman v. The Neptune [Id. 17,569].

HOPKINSON, District Judge. Whiteman v. The Neptune [supra] was a case of voluntary absence, and not one where the mariner was taken away by a force which he could not resist. The transactions between the men and the mate are not a part of the case, except under the general charge of misconduct, and there can be no specific forfeiture or deduction on this account. As to what the libellants said, it is only explanatory of what they did, but what they did is the point of inquiry. Did they desert? Their intention was nothing if they did not. It was not such a desertion as to forfeit their wages, for there

[7] When this decision was given, no appeal was permitted in cases where the amount claimed did not exceed three hundred dollars, but a late act of congress, allows appeals from the district, to the circuit, court, in all cases where the sum in dispute exceeds fifty dollars.

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

was no entry of the fact on the log-book, and they were again received on board. The imprisonment at Havana was most unjustifiable. They went to the consul to complain. The captain had made no complaint of them, but they went to complain of him. Was this desertion? Was any desertion pretended? Was it such a desertion as authorized the imprisonment? It was, at most, disobedience of orders. But the captain found them at the consul's, and the offence seems to have been, not desertion, but that they had dared to complain of him. Finding they would not be heard, they left a tribunal in which they, justly, had no confidence; and when the consul and captain issued their warrant of arrest, they did not know or inquire whether the men had not returned to the vessel. In truth, some of them had done so.

Decree for libellants for the full amount of wages claimed, and costs.

Case No. 6,154a.

HART v. ROSE.

[Hempst. 238.] [1]

Superior Court, Territory of Arkansas. Feb., 1834.

CONTRACT—DELIVERY — CONDITION PRECEDENT—EFFECT OF DEMURRER.

1. Where R. covenanted to build H. a flat-boat by a certain time, the latter to furnish the plank, and to be delivered at either of two places, this is a condition precedent, to be performed by H., before any liability arises against R.; and the averment as to the delivery of the plank must be certain and positive, as to place, otherwise the declaration will be demurrable.

2. A demurrer puts in issue the sufficiency of all previous pleadings, and judgment will be given against him who committed the first fault.

Appeal from Pope circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. This case comes up by appeal from the circuit court of Pope county, and the only ground relied upon for reversing the judgment is, that the court below erred in sustaining the demurrer to a replication filed by the plaintiff. The pleadings in this cause show that [John] Hart, the plaintiff, brought an action of covenant on a writing obligatory, by which, in his declaration, he alleges that [Isaiah D.] Rose, the defendant, covenanted and bound himself, on his part, to build a flat-boat, of a certain description, and have the same completed on, or before the 5th of October, 1832, and that he, the said plaintiff, on his part, was bound to find and furnish to said Rose the plank for the building said boat, to be delivered at the lower plank landing on Shoal creek, or near the river above James Patterson's field. He then avers, that within a convenient and proper time after making said agreement, mentioned in said writing obligatory, he did, according to the tenor and effect thereof, furnish to the said Rose the plank necessary for the building of said boat, at the place or places aforesaid, mentioned in said writing obligatory, according to the tenor and effect thereof. The declaration concludes by protesting that the said Rose did not perform fully and keep any thing in said writing obligatory contained, &c. The defendant plead performance, to which there was a demurrer filed and overruled by the court. The replication to the plea of performance was also demurred to by the defendant, which demurrer was sustained, upon the ground that the declaration was defective. It has been urged in argument that the court cannot go back to the declaration on a demurrer to the replication. This position, we think, cannot be sustained. The rule is, that on a demurrer the court will consider the whole record, and give judgment for the party who appears to be entitled to it. 4 East, 502. In the course of the pleadings every demurrer puts the sufficiency of all the previous pleadings in issue. Steph. Pl. 162; 1 Saund. Pl. & Ev. 432. It was not necessary, therefore, in the case before us, that the replication should have been bad, as a defect in the declaration was sufficient to justify the court in sustaining the demurrer. The stipulation on the part of the plaintiff to furnish the plank necessary for building the boat, at one or the other of two landings, must be regarded as a condition precedent, without the performance of which, no liability would be incurred by Rose on the agreement. The averments, therefore, ought to have been certain and positive as to the place where the plank was furnished, as it constituted a material and traversable fact. In the averment, as made, no issue could have been safely taken by the defendant. The subsequent pleadings in the cause did not cure this defect in the declaration, and the circuit court very properly, in our opinion, sustained the demurrer to the replication, if there had been no other cause. It may be proper to state, that the replication itself is bad in several respects. First, on the ground that it is double; second, that the obligation as to the sufficiency of plank furnished, is not positive and certain; and lastly, that the conclusion is to the country, where it should have been with a verification. We are not prepared to say that the plea of performance is good. We do not deem it necessary, however, to express any opinion on that subject. Judgment affirmed.

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

Case No. 6,155.

HART v. SHAW.

[1 Cliff. 358.] [1]

Circuit Court, D. Massachusetts. Oct Term, 1859.

CHARTER-PARTY — PERFORMANCE — FREIGHT FOR LOST CARGO—AMBIGUOUS CONTRACT—INTENTION OF PARTIES.

1. In its nature the contract for conveyance of merchandise for a round sum is an entire contract, and unless it be completely performed by the delivery of all the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended in the partial performance; but if the owner of the cargo is the cause of its not being transported to the port of destination, full freight may be recovered.

2. Whenever the language of a contract is ambiguous, the intention of the parties is the primary rule of construction; and in order to understand the sense in which language was employed, it is necessary to examine attending circumstances, and weigh terms in connection with the subject-matter to which they were applied. [Cited in Melcher v. Ocean Ins. Co., 59 Me. 220.]

3. In this case, a guaranty of eight feet of water "at the place of loading" was construed to mean eight feet, or at least a sufficient depth to enable the vessel to perform her voyage at the place of loading and thence to the open sea.

[Appeal from the district court of the United States for the district of Massachusetts.] The libellant [Thomas Shaw], master of the schooner B. F. Reeves, chartered her to respondent [George Hart], to bring a quantity of cedar spars from Thoroughfare Island, in North river, N. C., for the round sum of one thousand dollars as freight; the cargo to be delivered by respondent within reach of the vessel's tackles, by whom also eight feet of water at the place of loading was guaranteed. It appeared that the place of loading was somewhat more than one hundred miles from the open sea, and while the water was more than eight feet deep at the place of loading, the vessel in proceeding to the sea would have to pass through Hatteras Inlet, and over a bar at the mouth of the river, on which were only seven feet of water. When two thirds of the cargo was taken on board, at the place of loading, it was found the vessel drew seven feet, and the libellant and the agent of the respondent agreed in the opinion that she could not safely undertake to carry any more through the inlet or over the bar. The remainder of the spars were thereupon formed into a raft, and the libellant gave bills of lading, stating the number of spars under and on deck and in the raft, which was to be towed through Hatteras Inlet and there taken on deck, and undertaking to deliver the whole to respondents, "dangers of the seas excepted." After passing the bar at the mouth of North river, the vessel encountered a sharp chopping sea, and the raft was broken up and lost, with the exception of a few spars picked up by the crew. The vessel proceeded on her voyage and delivered all the spars taken on board, and the libel was brought to recover the entire sum agreed upon as freight. The decree of the district court was for the whole sum stipulated in the charter. From this decree the respondent appealed.

John C. Dodge, for libellant.

The undertaking of the libellant was necessarily dependent upon the respondent's guaranty. The parties surely did not intend that the vessel should be placed in a hole twenty miles from deep water and loaded there, whence she could never come with her load. Libellant had the right to come home with what spars he could bring, and is entitled to his full charter-money. Clarke v. Crabtree [Case No. 2,847]; Giles v. The Cynthia [Id. 5,424]; Kleine v. Catara [Id. 7,869]. The spars were lost by perils of the sea. Bullard v. Roger Williams Ins. Co. [Id. 2,122].

F. C. Loring, for appellant.

The only stipulation the parties deemed it necessary to make was, that the water was eight feet in depth at the place of loading. The charter-party required that the spars should be brought all the way on board the vessel. The burden of proof is on the libellant to show that the spars were lost by the dangers of the seas. Story, Bailm. § 529; Ang. Carr. § 61. Performance of an entire service was by the terms of the contract a condition precedent to the earning of freight. 3 Kent, Comm. 296; Cook v. Jennings, 7 Term R. 381; Clarke v. Gurnell, 1 Bulst. 167; Barker v. Cheviot, 2 Johns. 352; Scott v. Libby, Id. 336; Penoyer v. Hallett, 15 Johns. 332; Towle v. Kettell, 5 Cush. 18.

CLIFFORD, Circuit Justice. It is not controverted that the libellant, when the vessel reached the island mentioned in the charter-party, gave notice of her arrival to Heman S. Hinds, as therein stipulated to be done, and proceeded to take in the spars furnished by him. He was the correspondent of the charterer, and beyond question was his agent to furnish the spars and deliver them to the master of the vessel. To that extent he is clearly recognized as the agent of the respondent by the terms of the charter-party. Cargo was to be furnished as fast as the vessel could take it, and in case of default in that behalf, either on the part of the charterer or of his agent, the former was to pay demurrage, at the rate of twenty dollars per day for every day the vessel was so detained. Reference was made in the charter-party to Heman S. Hinds, and to no other person, and the whole evidence shows that he procured the spars for the respondent, furnished them to the libellant at the place of loading, and was in point of fact interested in the profits to be made by the adventure. When about two thirds of the spars were loaded, it was dis-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

covered that the vessel drew seven feet of water, and the agent of the charterer for shipping the spars and the master of the vessel both agreed in opinion, that the vessel could not safely undertake to carry any more over the bar at the mouth of the river, or through the inlet mentioned in the pleadings. Five witnesses examined by the libellant, including the mate of the vessel, and four of the crew, testify to this fact; and although there is some testimony introduced by the respondent, tending to contradict their statements, that the agent of the charterer concurred in this opinion, yet it is not of a character to affect their credit. That opinion was given, upon the assumption that a vessel drawing more than seven feet of water could not pass over the bar, or at least that the navigation would be dangerous. He was well acquainted with the navigation, and being interested at least to a certain extent that the whole of the spars should be taken, it is not reasonable to suppose that he would under estimate the depth of water, or magnify the danger of overloading the vessel. As appears from the evidence, the island mentioned in the charter-party is some twenty-five miles up the river from its mouth; and to reach the river from the open sea it is necessary to pass Hatteras Inlet, and thence through the Sound, a distance of some seventy-five or eighty miles. By the terms of the charter-party, the charterer stipulated and guaranteed that there was eight feet of water at the place of loading. It appears from the evidence that the respondent examined the vessel, and had the opportunity of ascertaining what depth of water would be required to enable her to accomplish the voyage. He had previously been at the place of loading, and seen the spars on the landing, and was well acquainted with the character of the river. On the other hand, the libellant had never sailed up the river, or been at the place of loading, and had no means of knowing the depth of the water in the river, or at the inlet, or on the bars. At the place where the spars were shipped the water is eight feet deep or more; but the weight of the evidence clearly shows that it is not more than seven, or at most more than seven and a half, feet deep on the bar at the mouth of the river or on the bar at the inlet. Testimony was introduced by the respondent, tending to show that the depth of water is greater, but the circumstances disclosed in the case lead to the conclusion that his witnesses are mistaken. Some seventy-five spars or more remained, when it was ascertained that the vessel could take no more. Both the master and the agent of the charterer who furnished the spars were anxious that the whole should be transported; but they agreed that the vessel was fully loaded for the passage down the river, and to the open sea. Those remaining on the bank were rolled into the river and rafted, and in that manner taken in tow by the vessel. That course was adopted with the expectation that the vessel, after passing the lower bar at the inlet, would come to anchor, and that the master and crew would then be able to take them on board. Accordingly, they were formed into a raft constructed in three parts, arranged one after the other, and fastened together with a large hawser, with cross-lashings to each part made of manilla rigging, to prevent the spars from separating. Much conflict exists in the testimony as to who first suggested the expediency of making the raft. All things considered, the better opinion from the evidence is that it was suggested by the person representing the charterer. At all events, he consented that it should be made, superintended its construction, and pronounced it sufficient after it was done. His statement that he objected to that mode of transporting the remainder of the spars, or that he suggested that the master should wait till the depth of water on the bar was increased by a change in the wind, needs further confirmation. Both he and the master agreed that the vessel could take no more at the landing, or until she reached the open sea; and they both went to work and constructed the raft, using the best materials they had for the purpose. After the raft was constructed it was fastened to the vessel by a hawser, and the vessel sailed for the inlet with the raft in tow. She was so deeply laden, or the water was so shoal, that she once grounded going down the river, dragged badly nearly all the way, and struck three times on the bar at the mouth of the river. All of the witnesses for the libellant agree substantially that they did not find the depth of water in the river but seven feet and five inches, and only seven feet on the bar. Just before the vessel reached the bar the wind increased, and after passing over it she encountered a sharp chopping sea, which chafed and broke the lashings of the raft, causing the spars to go adrift, and most of them were lost. Some eight or ten were picked up by the crew, which, together with all those on board, were safely transported and duly delivered according to contract. It is insisted by the respondent that the libellant is not entitled to recover, because, as he contends, the contract was to pay a round sum for an entire service, and consequently that the performance of the service was by the terms of the contract a condition precedent to the earning of freight. As a general rule, undoubtedly, the delivery of the goods at the place of destination, according to the terms of the charter-party, is necessary to entitle the owner of the vessel to the stipulated compensation. 3 Kent, Comm. (9th Ed.) 298; Cook v. Jennings, 7 Term R. 381; Bright v. Cowper, 1 Brownlow & G. 21; Towle v. Kettell, 5 Cush. 18; Coffin v. Storer, 5 Mass. 252; Barker v. Cheviot, 2 Johns. 352; Blanchard v. Buckman, 3 Me. 1. Right delivery is as essential to the performance of such a contract, and consequently to the right of the carrier to recover compensa-

tion, as safe custody and due transport. To this also may be added, that entire contracts of this nature cannot in general be apportioned, so that if a party undertake for a round sum to transport a specified quantity of merchandise from one place to another before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion of the undertaking was prevented by accident. Chit. Cont. 736. In its nature the contract for conveyance of merchandise is an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended on the partial conveyance. Courts of justice, however, have recognized certain equitable exceptions to this general rule, and those exceptions are as well known and fully established by decided cases as the rule itself. Of these one only need be noticed at the present time. If the owner of the cargo is the cause of its not being transported to the port of destination, full freight may be recovered. Bork v. Norton [Case No. 1,659]; Clarke v. Crabtree [Id. 2,847]; Giles v. The Cynthia [Id. 5,424]; Kleine v. Catara [Id. 7,869]; The Nathaniel Hooper [Id. 10,032]; Clendaniel v. Tuckerman, 17 Barb. 184. On the part of the libellant, it is insisted that he was prevented from transporting the remainder of the spars solely by the fact that the depth of water in the river, and on the route to the open sea, was not sufficient to justify him in taking the remainder on board. He admits that the water was eight feet deep or more at the place where the spars were shipped; but insists that, by the true construction of the charter-party, the guaranty of eight feet of water applies as well to the bar at the mouth of the river, and all the way to the open sea, as to the place where the spars were furnished by the agent of the charterer. That proposition is denied by the respondent, who contends that the guaranty only applies to the place where the vessel lay when she received her cargo. Like other commercial instruments, charter-parties ought to receive a liberal construction, agreeable to the intentions of the parties, and conformably to the usage of trade, and of the particular trade to which the contract relates. Whenever the language of a contract is ambiguous, the intention of the parties is the primary rule of construction; and, in order to ascertain the true sense in which the language was employed, it is not only allowable, but often necessary, to examine the attending circumstances, and to weigh the language in connection with the subject-matter to which it was applied. Tested by this rule, there can be no doubt as to what was the real purpose and object of the guaranty. Confining the investigation within the strictest limits, it still appears that the respondent wanted a quantity of spars transported from the banks of a certain river in the state of North Carolina to certain ports in the state of Massachusetts. He made proposals to charter the vessel of the libellant to transport the spars. At the time the proposals were made, the charterer knew, or had the means of knowing, what depth of water would be required to enable the vessel to perform the required service; but the libellant had never been at the place of loading, and had no means of obtaining knowledge upon the subject. Inquiry would have been useless, as there were no charts, and seafaring men know little of the river, and were unacquainted with the navigation. Want of knowledge and the means of information would naturally suggest doubts in the mind of the libellant whether the service could safely be performed by the vessel. To remove those doubts, and to protect himself against loss in case they should prove to be well founded, he required the guaranty. He must have known that a sufficient depth of water at the landing would be of little use, if the vessel could not get out of the river after the cargo was laden on board. To suppose that the guaranty went no further than to require eight feet of water at the landing, would be to impute a want of ordinary intelligence or prudence to the libellant, and a course of conduct on the part of the respondent little better than an actual fraud. Such a construction would be both unjust and unreasonable, and therefore cannot be sustained: In view of the attending circumstances, there can be no doubt that the guaranty required that there should be eight feet of water, or at least a sufficient depth to enable the vessel to perform the voyage from the place where the spars were to be shipped to the open sea. That guaranty was a condition precedent to the right of the respondent to claim performance on the part of the libellant. When the libellant had taken on board as many spars as the depth of water in the river and on the bar would enable the vessel to carry, he might well, under the circumstances of this case, have returned to the port of destination and claimed full freight. His contract would then have been performed as far as it was in his power to perform it, and to the extent that there was a failure of performance, that failure would have been caused by the respondent. But he did not do so, and the only remaining question of any importance is, whether his subsequent acts have the effect to vary or defeat his right to recover. All that he did in rafting or assisting to raft the remainder of the spars was done by the consent and with the concurrence of the agent of the shipper. They were voluntary acts, performed without compensation or the promise of compensation. Nothing can be plainer than the proposition that the charter-party made no such requirement and contemplated no such mode of transportation. Whether the rigging used for lashings was suitable or not, it was the best the master had; and the raft, when it was completed, was pronounced sufficient by the

agent of the shipper who superintended its construction. Every effort in his power was made by the master to tow the spars in safety to the inlet; and when the lashings broke and they went adrift, both he and the crew did all that could be done to save them. For the want of a sufficient depth of water the vessel was delayed in her passage down the river, and before she reached the bar the wind increased. After passing the bar, the lashings of the raft were broken by the force of the waves. Some few of the spars were saved, but the larger portion were lost. Under these circumstances, I am of opinion that the spars were lost by a peril of the sea, and that the acts of the master in relation to the raft do not defeat or impair his right to recover on the original contract. Certain other defences are set up by the respondent which will be briefly noticed. In the second place he insists that the master should have employed lighters to carry down the remaining spars to his vessel after she had passed the bar at the mouth of the inlet. That proposition is based upon certain evidence in the case tending to show that such was the usage on that river. Two answers may be given to the proposition, either of which is conclusive against it. Allowing due weight to the evidence, it is not sufficient to prove any such general usage. But suppose the fact to be proved, as assumed by the respondent, still it cannot have the effect to vary the written contract. By the express terms of the charter-party, the delivery of the spars for the purpose of loading was to be made within reach of the vessel's tackles, so that, if any lightering was required, it was to be done by the agent of the respondent, and not by the libellant. When the language of the contract is ambiguous, parol evidence of the usage is generally admissible to enable the court to arrive at the real intention of the parties; but it is not admissible to vary, contradict, or defeat express stipulations or provisions restricting or enlarging the customary right. Add. Cont. (Ed. 1857) 851; Abb. Shipp. 350; 3 Kent, Comm. (9th Ed.) 345; Palmer v. Blackburn, 1 Bing. 61; The Reeside [Case No. 11,657]; Trueman v. Loder, 11 Adol. & E. 589; Donnell v. Columbian Ins. Co. [Case No. 3,987].

It is also insisted by the respondent that the master should have shipped the whole of the spars, and waited with his vessel at some point above the bar, at the mouth of the river, until, by a change of the wind, the depth of the water on the bar had been sufficiently increased to have enabled the vessel to pass over it and proceed on her voyage. That proposition assumes, contrary to the weight of the evidence, that the depth of the water down to the bar, at the mouth of the river, was already sufficient; and in addition to that it also assumes, what is not satisfactorily proved, that a change of the wind would have had the effect to increase the depth of the water to such an extent, not only on the bar at the mouth of the river, but also on the bar at the inlet at the same time, that the vessel could have proceeded to the open sea. No such requirement as the one assumed in the proposition is found in the terms of the charter-party, and the weight of the evidence clearly shows that nothing of the kind was ever suggested by the agent of the shipper. On the contrary, he first suggested that the vessel could take no more of the spars at the landing, and if he did not first propose the making of the raft, he very readily consented to the suggestion, and superintended its construction. His relative wrote the bills of lading, and he admits that he sent one of them to the respondent to enable him to effect an insurance.

Some of the spars were shipped directly from the bank, and were put on board through the ports of the vessel. One of the ports was cut deeper and enlarged for that purpose as much as possible without damaging the vessel, but, notwithstanding this enlargement, it was still too small to receive the butts of some of the largest spars. To remedy that difficulty the butts were hewn or scarfed, so that they could be put on board in that way. All of that work, however, was done by the agent of the shipper, and not by the libellant, as appears by his own testimony. In view of the whole case, I am of the opinion that the decision of the district court was correct, and the decree in the case must therefore be affirmed with costs.

HART (SHAW v.). See Case No. 12,720.

HART (UNITED STATES v.). See Case No. 15,316.

Case No. 6,156.

HART, B. & M. MANUF'G CO. v. SARGEANT et al.

[3 Ban. & A. 263;[1] 14 O. G. 45.]

Circuit Court, D. Connecticut. April, 1878.

PATENTS—PRIORITY—SPECIFICATIONS—MACHINERY FOR GRADUATING CARPENTERS' SQUARES.

1. The 3d claim of reissued letters patent No. 5,408, granted to plaintiffs as assignees of Horace K. Jones, May 13th, 1873, for improvements in machinery for graduating carpenters' squares, which claim is for "the construction of the tool and socket so that the edge of the tool fits into a V-shaped recess, the angle of which is in line with the working point of the tool, substantially as and for the purpose herein described," *held*, not to be anticipated by prior patents in which the V-shaped grooves were not so arranged as to take hold of the cutting edge of the tool, as it is essential to the claim that the angle of the V be in line with the working-point of the tool.

2. Nor is the 6th claim of said patent, which is for "the clamping device for holding squares of varying tapers to be graduated, consisting of the fixed jaw P, the rocking adjustable jaw

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

M, and the cam N, in combination, substantially as described," anticipated by prior patents for improved hand-vices which have no relevancy to a clamp which shall uniformly hold in proper position an article to be graduated by machinery.

3. The gist of the 5th claim of the said patent, "In a machine for cutting graduations on squares, etc., the combination of the gravers I and their holders H with cams G and springs d, for throwing the gravers out of action at predetermined periods of time during the stroke of the same to cut graduation-marks of varying lengths, substantially as described," is the "flying cut" as it termed in the specification, and is infringed by a machine in which there is but one graver, and in which the square is moved along by an intermittent feed, the mode of operation by which the cutting of the graduating-marks is effected being the same in both machines. *Held*, also, that this claim was not anticipated by a machine not having the "flying cut."

[In equity. Bill by the Hart, Bliven & Mead Manufacturing Company against Sargeant & Co. and Joseph B. Sargeant for an injunction and account.]

Charles E. Mitchell and Benjamin F. Thurston, for complainants.

Charles F. Blake and John S. Beach, for defendants.

SHIPMAN, District Judge. This is a bill in equity, founded upon the alleged infringement by the defendants of reissued letters patent [No. 5,408], dated May 13th, 1873, and granted to the plaintiffs, as assignees of Horace K. Jones, for improvements in machinery for graduating carpenters' squares. The original patent [No. 93,449] to the plaintiffs, then known as "The Hart Manufacturing Company," was dated August 10th, 1869.

The following were alleged to be the peculiar features of the invention:

First. The cutting of the graduation marks or lines commenced at the measuring-edge and from thence extended inward, instead of commencing at or near the centre of the square, whereby a clear and not a ragged cut was made at the measuring-edge, and danger of deviation from the proper point at the edge was avoided. This peculiarity had been anticipated by the invention of Herman Whipple, which was patented March 17th, 1857.

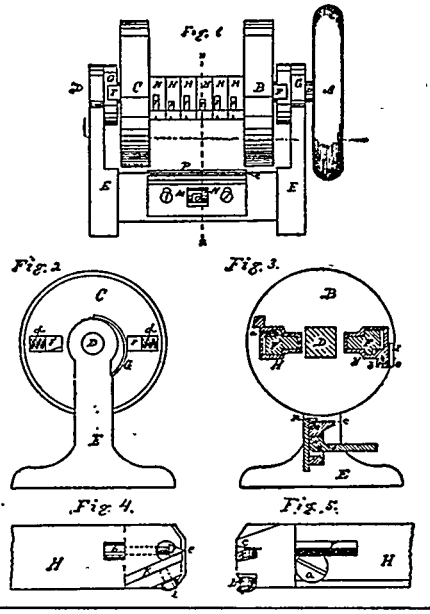
Second. The lengths of the lines graved were regulated by arresting the cutting action of the graver when in motion, and allowing it to continue its forward movement without cutting the square, making what is called a "flying cut." This peculiarity is thus further described in the specification: "The gravers . . . are operated in such a manner, by means of cams and springs, that the said gravers can be alternately thrown into and out of action during their stroke, and remain in action for a predetermined period of time to cut graduation-marks of varying lengths." The advantages of this mode of operation are that the lines are made of uniform depths, and that the inner end of the mark terminates abruptly, and that the chip is lifted from the line by the onward movement of the graver.

Third. The tool rests in the holder in a groove of the exact inclination of its sides, into which it fits, and is pressed into its position by a set-screw. This insures the tool always being reinserted in the same position when removed from the machine for sharpening.

Fourth. A new clamping device is used which holds firmly squares of varying tapers. The device is thus described in the specification: "P is a fixed jaw for holding the square to be graduated. This jaw is rigidly secured to the frame of the machine, so that its under face is parallel to the axis of the shaft D, or, in other words, parallel to that longitudinal line upon which the points of the series of gravers act. M is the movable jaw of the vice, which is held in place by screws passing through slots in the jaw M into the frame, so that said jaw is free to play up and down at either or both ends; and it is pressed up against the fixed jaw P (or against any object placed between said jaws) by means of the cam N, operated by the treadle O, to bear upon the jaw M near the middle of its length."

The gravers of plaintiffs' machine are arranged in sets, mounted on horizontal bars supported by two vertical revolving disks. There is a separate graver and separate tool-holder for each mark, so that, to graduate a square twenty-four inches long to sixteenths of an inch, three hundred and twenty-three gravers and tool-holders are required. One machine of this kind was in use at the factory of the plaintiffs for about eighteen

[Drawings of reissued patent No. 5,408 published from the records of the United States patent office.]



months. During this time, Charles S. Bement, a workman in their employ, undertook to make, and did make for them, an improved machine which had but one graver and one tool-holder, and in which the square passed under the tool by means of an intermittent feed. A patent for this machine, which the defendants are now using, was granted to Mr. Bement on June 14th, 1870.

The plaintiffs claimed upon the trial that the Bement machine infringed the 2d, 3d, 5th, and 6th claims of their patent. It is unnecessary to examine the question of infringement of the 2d claim, as it was conceded that it was anticipated by the Whipple invention. The three remaining claims are as follows: "3. The construction of the tool and socket so that the edge of the tool fits into a V-shaped recess, the angle of which is in line with the working-point of the tool, substantially as and for the purpose herein described. 5. In a machine for cutting graduations on squares, etc., the combination of the gravers I and their holders H with cams G and springs d, for throwing the gravers out of action at predetermined periods of time during the stroke of the same to cut graduation-marks of varying lengths, substantially as described. 6. The clamping device for holding squares of varying tapers to be graduated, consisting of the fixed jaw P, the rocking adjustable jaw M, and the cam N, in combination, substantially as described."

There is no question of infringement in regard to the 3d and 6th claims. The only question upon this part of the case is that of novelty. The defendants insist that the V-shaped recess of the third claim was anticipated by the patent of Millington and George, dated August 8th, 1854, and by the patent of Horace K. Jones, of January 31st, 1865, but in neither of these patents are the V-shaped grooves so arranged as, in the language of the plaintiffs' expert, to "take hold of the cutting-edge of the tool. They are not so arranged as to be invariably in the plane in which the tool makes its stroke." The essence of this claim is that the angle of the V is in line with the working-point of the tool. In the Millington and George patent the groove is on the upper side of the cutter, and in the Jones patent of 1865 the tool was held by the back and one side. The result was that in these two machines the cutting-edges were not necessarily placed accurately, and required frequent adjustment.

The defendants insist that the device which is mentioned in the 6th claim was anticipated by patents to Louis Tilliers, dated April 16th, 1861, and to Jeremy W. Bliss, dated November 30th, 1852. These were improved hand-vices, and have no relevancy to a clamp which shall uniformly hold in proper position an article to be graduated by machinery. Such a clamp must be so made that the square shall be necessarily placed in the position which is requisite to insure accuracy. In the plaintiffs' machine, the square was secured by a movable clamp from below the surface. This clamp pressed the square against a shelf, so that the fall of the square was parallel to the plane of action of the graver.

The defendants deny both infringement of the fifth claim and its novelty. The gist of the fifth claim is "the flying cut," as it is termed in the specification. This peculiarity is described in the claim to be the combination "for throwing the gravers out of action at predetermined periods of time during the stroke of the same to cut graduation-marks of varying lengths." The motion of the graver continues after cutting action has ceased.

The plaintiffs' machine contains an entire set of gravers. These revolve in a true circle, and the square remains stationary. The defendants' machine has but one graver, and the square is moved along by an intermittent feed. The graver returns to its work, after one mark has been made, in a flattened circle. The form of the two machines is necessarily very different, but the mode of operation by which the cutting of the graduating-marks is effected is the same. Each machine has a "flying cut." In each the cutting commences at the edge of the square, and the cutters are thrown out of their work during the stroke by the action of a spring and cam at a predetermined point, when cutting ceases and the forward motion of the cutters is continued. The differences in the mode of operation are formal and not substantial.

The defendants' machine is what it would naturally be from its early history. It was designed to be simply an improvement upon the plaintiffs' structure. It was made with the elder machine before the eye of the inventor. The leading features of the elder machine are retained, while a single graver was ingeniously substituted to do the work of a set of gravers.

Upon the question of novelty, the defendants rely upon the Whipple machine. It is only necessary to say that this machine does not have the flying cut. There is no progressive movement of the graver after it has ceased to cut. "The mark is terminated by arresting the forward motion of the carriage upon which the gravers are mounted." Differences of construction between the Whipple and plaintiffs' machines are pointed out by the plaintiffs, which it is not necessary to examine.

Let there be a decree for an injunction and an accounting in respect to the 3d, 5th, and 6th claims.

HART, The STEPHEN. See Cases Nos. 13,363 and 13,364.

Case No. 6,157.

In re HARTEL.

[7 N. B. R. 559.] [1]

District Court, W. D. Missouri. 1873.

BANKRUPTCY—DEED OF TRUST AS SECURITY—HUSBAND AND WIFE—REALTY.

1. Security for the payment of a note, by way of a deed of trust, given on the property of the wife, by the husband and wife jointly, is security within the meaning of the bankrupt act [of 1867 (14 Stat. 517)], and such claim should be allowed as a secured demand, although the wife may have died leaving heirs.

[Cited in Post v. Losey, 111 Ind. 80, 12 N. E. 12.]

2. The court will, on proper motion, attend to the application of the security, and to the interests of the assignees in the realty.

[In bankruptcy. In the matter of J. Hartel.]

By JOHN K. CRAVENS, Register:

On the 25th day of July, 1872, Sarah Teed filed her deposition in proof of claim against the estate of said bankrupt, setting up a security by way of deed of trust upon certain real estate. The deposition does not state whether the real estate was the property of the bankrupt at the date of the deed of trust, or who now claims it. The deed of trust is attached to the proof, and is filed as an exhibit. The grantors in the deed of trust are, "Susanna Hartel and Jacob Hartel, her husband;" the same priority is observed in the signatures to the deed. The certificate of acknowledgment is in the peculiar form required by the statutes of Missouri, for the conveyance of the real estate of a married woman; and being a printed certificate, the words relinquishing dower are erased. The whole instrument is such as to suggest a conveyance of Mrs. Hartel's property, and not that of the bankrupt. By an examination of the inventory filed by the bankrupt, it appears that the property described in the deed of trust is inventoried as follows: "My wife is dead. We have children. She was the owner of lot 263 Old Town, Kansas City, Mo., and in which, I suppose, I have a courtesy estate. In January, 1871, this lot was conveyed by my wife and me, to David O. Smart, trustee, to secure a note held by one Teed, and executed by me and wife." The inventory of the bankrupt thus shows that the real estate belonged to his wife. It is stated by the attorneys for Mrs. Teed, in their statement and exceptions, that "Susan Hartel was the owner, in her own right," of the said property. The deed of trust was then given upon the property of Mrs. Hartel, and not upon property which belonged to the bankrupt. At the time the deed was executed, Mrs. Hartel being still in life, Hartel had no courtesy, nor could he have any until this deed of trust is discharged. Nor can he then have, unless there shall be a surplus after the debt thereby secured has been fully paid. The claimant by her deed of trust can have no lien upon any surplus which may remain. It is unnecessary now to decide what rights the assignee may have in any surplus. The only liens and incumbrances which are to be foreclosed in the court of bankruptcy are those which attach to the estate of the bankrupt on the date at which the petition is filed and which estate passed to the assignee. Unless there was an estate in the property which passed to the assignee there can be no allowance of a claim secured to be paid out of the bankrupt's estate. The estate of Mrs. Hartel's heirs cannot be sold by order of the bankrupt court; their estate is not in its custody nor can it be. So far as this claim is concerned, it matters not whether the property will or will not produce a surplus, after the payment of the Teed debt. According to the deed of trust, that which, if anything, by any possibility, can come to the assignee, will come discharged of the lien created by this deed of trust. For these reasons the security was rejected as not within the jurisdiction of the court of bankruptcy to foreclose.

TREAT, District Judge. The claim should be allowed as a secured demand, for the husband joined in the note, and there is security for its payment. The court will, then, on proper motion, attend to the application of the security, and to the interests of the assignee in the realty. Exceptions sustained.

[1] [Reprinted by permission.]

HARTELL (TILGHMAN v.). See Cases Nos. 14,039 and 14,040.

Case No. 6,158.

HARTELL et al. v. VINEY et al.

[2 Wkly. Notes Cas. 602.]

Circuit Court, E. D. Pennsylvania. April 25, 1876.

TRADE-MARK—WORD "CENTENNIAL."

The word "Centennial" is general property, and cannot be used for a trade-mark.

[See Alleghany Fertilizer Co. v. Woodside, Case No. 206, note.]

Sur bill, answer, and proofs. The bill set forth that the plaintiffs [Hartell and Letchworth] were the original inventors of certain designs for medals, for which letters patent were granted them in November, 1874, consisting of perspective views of the Centennial Building; that the defendants are making and selling medals embodying the same designs as those described in said letters patent. Also, that the plaintiffs had registered in the patent office in May, 1873, a trade-mark, "the word 'Centennial' applied in any suitable manner to medals of any shape made of hard rubber or metal or plaster, either stamped, moulded, cast or engraved;" that the defendants have used said trade-mark upon large

quantities of medals in violation of complainants' rights; that letters patent were granted to John H. Shreiner, one of the defendants, in May, 1875, for a design for medals the same as that whereof the plaintiffs are the original inventors and patentees, and that this wrongful issue results to their irreparable injury. The bill prayed a decree that defendants' letters patent be declared void; an account; and an injunction restraining the defendants from making and selling said patented designs. The answer denied the use of the plaintiffs' trade-mark in any way in connection with medals, excepting that defendants have used the word "Centennial" upon lids of paper boxes containing wooden medals, and averred that the trade-mark registered by plaintiffs is limited to medals of metal, hard rubber, or plaster, and has no application whatever to articles or medals made of wood, and averred that the word "Centennial," as a trade-mark is invalid. It also denied infringement, on the ground that plaintiffs' design was for a perspective view, while defendants' was an elevation of the Exhibition Building.

M. Daniel Connolly, for complainants. Our trade-mark goes back to May, 1873, and we have letters patent for designs for medals for the Art Gallery and Main Exhibition Building.

CADWALADER, District Judge. Your claim is to monopoly in the subject, not alone in the trade-mark?

Yes, as applied to medals.

CADWALADER, District Judge. You contend that the word "Centennial" is good as a trade-mark for medals generally. Under the act of 1871 [Laws Pa. p. 131], it seems to me the world at large are entitled to be competitors at the exhibition, and that the word "Centennial" is common property.

Nearly all trade-marks are words in use as common property, but in our case there is no name of a person, and hence we are not within the statutory prohibitions. A word used as a trade-mark must not be generic, or a mere geographical designation, as was the case of the word "Lackawanna." Delaware & Hudson Canal Co. v. Clark [13 Wall. (80 U. S.) 311]. But there is no objection to a trade-mark as merely suggestive. We claim an exclusive property in medals of this mark.

CADWALADER, District Judge. If you have a property, you should assert it at law, so as to ascertain whether you could get damages. In equity there is no appropriate remedy where the question of law is doubtful. This is a question of damages, and it is extremely doubtful whether a court of equity would not say the case is too doubtful for an injunction. Make out a title, if you can, at law.

We claim under act of congress of July 8, 1870, § 71 [16 Stat. 209], we first applied the design, and are entitled broadly to its application, and, on the principle of Gorham's Manuf'g Co. v. White [Case No. 5,627], there is an infringement.

E. K. Nichols, contra.

Bill dismissed. No opinion.

HARTER (POMROY v.). See Case No. 11,263.

Case No. 6,158a.

HARTFIELD v. PATTON et al.

[Hempst. 268.] [1]

Superior Court, Territory of Arkansas. July, 1835.

CONTRACT OF DELIVERY—AVERMENTS IN DECLARATION—AWARD OF REPLEADER.

1. By an agreement H. was to deliver salt at any place on the banks of Red river, below the mouth of Little river and above Long prairie, which might be designated by B. and P. *Held*, that the omission of the latter to do so did not prevent H. from delivering the salt at any convenient place he might select, between the two points, in discharge of his agreement.

2. In an action of covenant brought by B. and P. for the failure of H. to deliver the salt, the declaration need not aver that a place was designated, nor that notice of a place for the delivery of the salt was given, as the place was designated by the agreement itself; and an issue formed as to such notice is immaterial.

3. A repleader is never awarded in favor of him who commits the first fault in pleading, nor where there is one material issue in the cause.

In error to Sevier circuit court.

At law.

Before JOHNSON and YELL, JJ.

JOHNSON, J. This is an action of covenant, brought by Clark and Patton against Hartfield, on the following covenant:—"Arkansas Territory, Sevier County. Articles of agreement made and entered into between John Clark and Benjamin Patton, of the first part, and Asa Hartfield, of the second part, witnesseth: that the party of the first part hath this day bargained, sold, and delivered to the party of the second part all their right, claim, interest, and possession of the salt on Little river, known as the Little River Saline, together with the salt kettles, also the farm attached to said premises; and it is understood that if the party of the second part should be dispossessed of the aforesaid premises by any law of congress passed at the last session thereof previous to the time any one of the payments which are to be made in manner hereinafter described, then and in that case the party of the first part doth declare all such payments to be null and void. In consideration of which, the said party of the second part is to pay the party of the first part the sum of $4,500, as follows: $1,350, which is paid in advance; $1,500 in salt, as follows, namely, $1,200 to be paid at any place or places on the bank

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

of Red river, below the mouth of Little river and not below the Long prairie, which may be designated by the party of the first part, at the rate of $1.50 per bushel, and required to pay $300 at the aforesaid Saline at one dollar per bushel, and if not required there, to pay at the same time and places of the aforesaid, $1,200 in salt, at $1.50 per bushel, on the first day of December, 1831, if the water will admit of its being taken at that time, if not, at the first sufficient rise thereafter; the other payment of $1,500 to be made on the 1st December, 1832, on the same conditions and at the same places as the foregoing payments; also 150 bushels of salt, at the aforesaid salt-works, in the course of next winter, spring, and summer, as required, when he may have salt on hand."

The above agreement was signed and sealed by the parties on the 16th of September, 1830. The plaintiffs, Clark and Patton, in their declaration averred the failure of the defendant Hartfield to deliver the salt at the times and places specified in the articles of agreement aforesaid, and claim damages therefor. The defendant demurred to the declaration, which demurrer was overruled by the court, and afterwards he filed two pleas; the first a plea of set-off, and the second that the plaintiffs did not give notice to the defendant of the place for the payment and delivery of the salt, on which issues were joined. On the trial before the court below, a jury having been dispensed with by consent, a judgment was rendered in favor of the plaintiffs, from which this writ of error is prosecuted.

The first point relied upon for the plaintiff in error is, that the declaration is fatally defective in not averring notice of the place for the delivery of the salt. By the terms of the contract, the salt was to be delivered at any place or places on the banks of Red river, below the mouth of Little river and not below Long prairie, which might be designated by Clark and Patton. There can be no doubt that Hartfield might have performed his contract by delivering the salt at any place on the banks of Red river, below the mouth of Little river and above Long prairie, in the event of the failure or omission of Clark and Patton to designate a place between those points. Clark and Patton might or might not designate a particular place, and their omission to do so did not prevent Hartfield from delivering the salt at any convenient point he might select between the places specified. There was then no necessity for the averment of notice of a place for the payment and delivery of the salt, as a place was designated by the contract itself. The declaration, in our opinion, is not defective in omitting to aver notice before the times specified for the delivery of the salt. The other objection to the declaration in relation to the dispossession of Hartfield by any law of congress passed at the last session thereof before the date of the writing obligatory, is so clearly untenable, that it is unnecessary to remark upon it. The cause was tried upon the pleas of set-off and the failure of Clark and Patton to give notice of a place for the payment and delivery of the several quantities of salt in the agreement specified. The issue formed upon this latter plea was clearly immaterial, and a question arises whether a repleader ought not to have been awarded. The doctrine is well settled, that a repleader is never awarded in favor of him who commits the first fault in pleading. 3 Bibb, 84, 226. Nor is it ever awarded where one issue is material, though other issues are immaterial; and (Id. 168), on both of these grounds, a repleader should not have been awarded. 2 Tidd, Pr. 830; Willes, 532; 1 Ld. Raym. 170; 1 Doug. 396. Judgment affirmed.

HARTFORD, The (CRAIG v.). See Case No. 3,333.

Case No. 6,159.

HARTFORD & N. H. R. CO. v. GRANT.

[9 Blatchf. 542.] [1]

Circuit Court, D. Connecticut. April 23, 1872.[2]

INCOME TAX—CORPORATIONS—PROFITS—CONSTRUCTION OF NEW BRIDGE.

1. Under section 122 of the act of June 30, 1864 (13 Stat. 284), moneys used by a railroad company to replace an old and worn out bridge, by another of like materials and dimensions, are not "profits used for construction," and, as such, liable to a tax of five per cent.

[See note at end of case.]

2. But, where a wooden bridge is replaced by a much more costly stone bridge, the earnings adequate to pay for the latter, beyond the expense of building anew a like wooden bridge, are to be deemed "profits used for construction."

[See note at end of case.]

3. Where, however, the cost of such stone bridge is charged to the expense account of the company, and the whole amount of such account for the year, including such cost, is not more than a proper percentage of the gross receipts of the company to cover all proper, ordinary, current expenses, and the depreciation of its entire property, such cost is not to be deemed "profits used for construction."

[See note at end of case.]

This suit was brought to recover back money which the plaintiffs [the Hartford & New Haven Railroad Company] alleged that the defendant [Henry A. Grant], as collector of internal revenue for the First collection district of Connecticut, had illegally exacted of them, and was submitted to the court on an agreed statement of facts. The following were the material facts agreed upon by the parties: (1) Early in the year 1866, the plaintiffs commenced building a new bridge at the point where their track crosses the Farmington river, in the town of Windsor, in

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

[2] [Affirmed in 93 U. S. 225.]

this state. They continued work on this bridge until after the 31st of August, 1866, the day of the close of their fiscal year, at an expense of $31,269 35, which they charged in their expense account, for repairs, &c. During the fiscal year of 1867, and up to its close, on the 31st day of August of that year, they expended the additional sum of $24,442 95, which was charged to the same account, making a total, for the two fiscal years, ending August 31st, 1867, of $55,712 30. (2) On the 13th of January, 1868, the assessor for the district made a special assessment on this sum of $55,712 60, "as profits, used in construction," at the rate of five per cent., under section 122 of the act of June 30, 1864 (15 Stat. 264); and, on the 11th of February, 1868, the defendant, as collector, required the plaintiffs to pay the same, amounting to $2,785 61, together with $139 28, as penalty for non-payment within the time prescribed by law. These two sums, making $2,924 89, the plaintiffs paid, under protest and duress, to avoid distraint of their property. (3) The bridge constructed at the point in question at the time the road was built, many years ago, was a wooden structure, on stone piers and abutments. A few years later, this was burned by sparks from a locomotive, and was replaced by another wooden bridge upon the same foundations. In 1854, an unusual freshet in the Farmington river greatly endangered the bridge then in use, the water rising against the floor and upper sides thereof, and it was saved from destruction only by the active exertions of the officers of the company, with a large force of men. A highway bridge, belonging to the town of Windsor, across the same river, a few hundred feet below, was carried away, and a suit was commenced by the town against the railroad company, to recover damages for the destruction of the town bridge, on the ground that the railroad company had so narrowed the waterway of the river by its embankments and abutments, as to send the water with increased velocity and volume against the town bridge, and had thus caused its destruction. This suit was tried three several times, in a series of years, resulting, each time, in a failure of the jury to render a verdict, and was finally settled by compromise. In 1864, it became apparent to the company, that the bridge in question must soon be rebuilt, or replaced by some other structure. It was temporarily strengthened, in various ways, for the time being, and the subject of replacing it by some other structure was carefully considered by the officers of the company; and, finally, in view of the danger of the destruction of a wooden bridge by fire, the necessity of additional waterway, demonstrated by the experience of previous years, the great loss to the company, and inconvenience to the public, which would result from the destruction of the bridge—a loss to the company which would have exceeded the entire cost of the present bridge—it was decided to proceed gradually with the construction of a bridge composed of continuous stone arches. The bridge was commenced, as already stated, in 1866, and was finished in 1868, at a total cost of $78,987 75. It consists of seven stone arches, each 54 feet span, affording a waterway of 378 feet, being 88 feet more than that furnished by the old bridge. (4) Until the year 1871, the fiscal year of the company has terminated on the 31st of August of each year. The expenditures on this bridge, in each of the fiscal years 1866, 1867, and 1868, were charged to the current expenses of repairs of roads and bridges, as they were, in each fiscal year, made. (5) The total expenditure of the company during the fiscal years 1866 and 1867, (which, in the latter year, was 59 per cent. of the gross earnings), for repairs of track, bridges, and equipments, including renewal of bridges, equipment, and structures, and all other current and incidental charges for operating the road, except state and national taxes, was not more than a proper percentage of the gross receipts to cover all proper, ordinary, current expenses, and the depreciation of the entire property. (6) During the years in question, the company earned a large surplus over their expenses, a portion of which was paid to their stockholders in dividends, and the balance was carried to a contingent fund, upon each and all of which the company paid the taxes required by the laws of the United States. (7) The cost of replacing the old wooden bridge by another of the same materials and dimensions, would have been $15,000. The value of the materials of the old bridge was $1,500.

Henry C. Robinson and Richard D. Hubbard, for plaintiffs.

Calvin G. Child, for defendant.

SHIPMAN, District Judge. The disputed assessment in this case was made under that portion of the internal revenue act of June 30th, 1864, which relates to the tax on income. Section 122 of that act (13 Stat. 284) provides, among other things, that, "any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money, due and payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable."

The principal question presented by this controversy, for determination, is, whether the $55,712 30 expended by the plaintiffs during the fiscal years 1866 and 1867, on this

bridge, were "profits used for construction," and, therefore, subject to tax. It is obvious, at a glance at the agreed facts, that the whole of that sum was not liable to the tax imposed, whatever may be the fact in regard to the larger part of it. The bridge in question needed to be replaced by a new one. The safety of the travelling public demanded this; and, whatever sum was necessary to replace the old and worn-out structure by a new one of the same materials and dimensions, would, in no sense, be deemed profits used in construction. An amount necessary to effect this object could not properly be called "profits," for any purpose. The replacing of the old bridge by such a new one was strictly within the meaning of the word "repairs," and the cost of it was properly chargeable to the ordinary expense account of the company, and was to be deducted from the gross receipts before any proper balance of profit could be ascertained. It is agreed, that the cost of thus replacing the old bridge would have been $15,000. From this sum the value of the materials of the old bridge would have to be deducted. It is agreed that they were worth only $1,500. Thus, $13,500, which the plaintiffs were clearly entitled to deduct, as a part of their necessary expenses, from their gross earnings, before any profits or income would accrue, was included in the amount upon which the tax was assessed and collected. As well might the assessor have assessed a tax on the wages of the engineers, or on the coal used in driving the engines, as on this sum, which is conceded to have been necessary to keep this bridge in a safe condition for public travel. To the extent, therefore, of $13,500, or, rather, to the extent of 5 per cent. on that sum, the tax was improperly levied, and its collection was illegal.

But, the plaintiffs claim, still further, that none of the expenditure on this new bridge during the years 1866 and 1867 was "profits used for construction." On the contrary, they insist, that, though they reconstructed the bridge on a new plan, with an increased water-way, and with different and non-combustible and comparatively indestructible materials, still, as the new structure was simply a bridge for crossing this stream, with no more tracks, or facilities for business or earnings, than the old one furnished, the expenditure devoted to this object should be deemed, not profits used for construction, but a part of their current expenses, necessarily devoted to the repair and preservation of their property. But, if this question were to be determined exclusively on the naked facts pertaining to this new structure, as compared with the old one, unaffected by any other consideration, I should hesitate to adopt this view of it. This stone bridge was not only a new structure, but it was a different and much more valuable one, not merely to the public, in the way of safety, but to the company, as a security against loss by accidents to their trains, and loss by fire, to which the former wooden structure was exposed, and to which a new wooden bridge would be equally exposed, and by a great saving in future repairs or renewals, provided against effectually by the solid and permanent materials of which it is composed. In this view of the matter merely, the new bridge was an original and independent improvement of the property of the company, which added to the value of their whole estate beyond what any mere repairs on the old bridge, or the substitution of a new one of similar construction, would have done. It would seem that earnings adequate to pay for such an improvement must be deemed profits. Otherwise, a railroad company might, after keeping their tracks and bridges in ordinary repair, such as they had been for twenty years, by a current expenditure for that purpose, devote a part or the whole of their surplus earnings to the erection of stone or iron bridges and stone causeways, and any other more permanent and durable structures, in place of old ones, one after another, and thus increase the value of their entire line of road to the extent of millions, and yet pay no tax on the income by means of which they had been able to accomplish such a result.

But this is not the case presented by the agreed statement of facts submitted. The expenditure on this bridge in 1866 and 1867 was charged by the company in their expense account for the current years, respectively; and it is expressly agreed, that the whole amount expended on the line, including that devoted to this bridge, was not more than a proper per centage of the gross receipts to cover all proper, ordinary, current expenses and the depreciation of the entire property. Now, a deduction of such a per centage must always be made, before the amount of profits can be ascertained. There can be no profits, in any just and proper sense, until a sum necessary to keep the line in good repair and protect the whole property from depreciation by wear and time, has been expended, or set apart, for that purpose. Profits consist of the balance that remains after this is done. The obvious and irresistible inference which follows from the fact agreed to, which I am now considering, is, that, whatever sum was expended on this new bridge in 1866 and 1867, beyond what was necessary to repair the old one, or replace it with one similar in materials and dimensions, was withheld from some other part of the line needing repairs, to keep it in its original condition. In other words, a portion of the earnings which might properly have been devoted to the repair and preservation of the whole line of road and its equipment, was, during these two years, accumulated and expended upon this bridge. Withholding proper expenditure from one portion of the line and devoting it to another, where the amount thus expended does not enhance the value of the property as a whole, does not constitute that expenditure profits. It is a mere mode of administering or distrib-

uting the outlay of the fund proper to be applied to repairs—a fund that must always be deducted before the question of profits is reached. Judgment must therefore be entered for the plaintiffs, to recover the whole tax exacted.

[NOTE. From this judgment the collector sued out a writ of error, upon which the supreme court affirmed the judgment, in an opinion by Mr. Justice Bradley, holding that "the object of the law was to impose a tax on net income or profits only; and that cannot be regarded as net income or profits which is required and expended to keep the property up in its usual condition, proper for operation." The court intimated that, had the assessment been made upon the excess value of the new bridge, considered as a betterment, the case would have admitted of a different consideration. 93 U. S. 225.]

HARTFORD CARPET CO. (LOWELL MANUFACTURING CO. v.). See Case No. 8,569.

HARTFORD CITY GASLIGHT CO. (STAPLES v.). See Case No. 13,302.

Case No. 6,160.

HARTFORD FIRE INS. CO. v. DOYLE.

[6 Biss 461;[1] 5 Ins. Law J. 37; 3 Cent. Law J. 41.]

Circuit Court, W. D. Wisconsin. Sept. 28, 1875.

WISCONSIN STATUTE PROHIBITING NON-RESIDENT CORPORATIONS FROM REMOVING SUIT INTO FEDERAL COURTS — JURISDICTION OF UNITED STATES CIRCUIT COURT.

1. The Wisconsin statute of March 14, 1870 [Laws Wis. p. 87, c. 56], that no non-resident corporation should remove a suit from the state to the federal courts, having been declared unconstitutional by the United States supreme court, the provision of the statute of April 5, 1872 [Laws, p. 67], requiring the secretary of state to revoke the license of any such corporation applying for such removal, falls with it.

2. The United States circuit court can in such case grant an injunction restraining the secretary of state from attempting to forfeit the license.

This was a bill filed by the Hartford Fire Insurance Company of the state of Connecticut against Peter Doyle, as secretary of state, for an injunction restraining him from proceeding to revoke and recall the license or certificate of authority granted by the state to such company to transact business in this state. The bill shows that the state granted a license in January, 1875, to continue in force one year, in consideration of the covenants and conditions contained therein, among which was one to not remove or cause to be removed any suit commenced against the company in this state, into the federal courts for trial, which provision was inserted in compliance with the terms of section 22, c. 56, Laws 1870. The legislature subsequently, in order to more effectually secure an observance of such provision, by an act approved April 5, 1872, declared that if any company should make an application to remove a case commenced against it into the United States circuit court for trial, contrary to the provisions of the laws of the state, or of their agreement made under the provision of the section of the act of 1870, above mentioned, that it should be the imperative duty of the secretary of state to revoke and recall the license of such company to transact business in this state. [The act further declares that after such revocation, no new license shall be granted for the period of three years to such company, and that from that time, it should be excluded and prohibited from transacting any business in the state until again duly licensed.][2] The bill shows that an agent of the company, having charge of its business in this state, did take steps to remove a case commenced against it in the circuit court of Winnebago county, to the United States circuit court for the Eastern district, for trial; that such action was taken without consultation with the home office, and that upon notice of it, the case was by stipulation offered to be remanded to the state court for trial; but that, notwithstanding such stipulation to re-transfer, an application had been made to the secretary of state to vacate and recall their license; [that the company has a large amount of property insured in this state, and is now doing an extensive and profitable business under its license, and that a cancellation of their authority by the secretary would work great and irreparable injury to their interests. This is the substance of the bill upon which an order was granted, in June last, that the defendant, the secretary of state, show cause why an injunction should not be granted restraining him from vacating or revoking the complainant's license to transact business in this state. No answer has been filed to the bill, nor any affidavits or denials of the facts set up in it. The attorney general of the state has entered his appearance for the defendant, and appeared for him on the argument and hearing of this motion for an injunction. On the argument no question was made as to the power of this court to grant the relief asked, if the facts stated in the bill were deemed sufficient by the court to authorize it to interfere.][2] The secretary now has the application pending before him, and states that he deems the duty imposed by the act upon him imperative. And the bill alleges that the complainant believes that, unless restrained by some court of competent authority from so doing, he will cancel their license; and that thereby irreparable injury will be done to complainant's business.

Sloan, Stevens & Morris, for complainant.
A. Scott Sloan, Atty. Gen., for defendant.

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

[2] [From 3 Cent. Law J. 41.]

HOPKINS, District Judge. The only matter discussed on the hearing before me was the constitutionality of the statutes on the subject. There is a conflict upon the question of the constitutionality of this act between the state and federal courts.

The supreme court of this state in Morse v. Home Ins. Co., 30 Wis. 496, decided that the provisions of the act of 1870, requiring the agreement not to remove to the federal court for trial, constitutional, but the supreme court of the United States, in same case on error, 20 Wall. [87 U. S.] 445, reversed that decision, and held the act of the legislature requiring such restriction unconstitutional and void, and that the company could remove, notwithstanding their agreement not to do so, entered into under that act. So if the question presented here is substantially the same as that presented in that case, that decision is decisive of this motion.

The attorney general on the hearing claimed that the question was different; that the state had a right to impose such terms as it might deem just on admitting foreign corporations to transact business here, and no court could inquire into the reasonableness of such terms; that the state could also provide that a forfeiture of the right to continue to do business should follow a breach of any conditions or restrictions they might exact or impose; in other words, that the state had the right to say when and for what cause or causes the license might be revoked, and that no court had the right to say that the cause or causes were insufficient. If this were the theory of the state, as manifested by this legislation, it might present a somewhat difficult question. But I am not prepared, however, in view of the authorities on the subject, to concede that such arbitrary and unlimited power resides in the states.

In Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404, it is held that the consent may be upon such condition as the state may see fit to impose, "provided they are not repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity" for defense. And in Ducat v. Chicago, 10 Wall. [77 U. S.] 415, it is said as to "the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations upon her sovereignty as may be found in the fundamental law of the Union."

"Parties cannot by any agreements confer jurisdiction when it is not given by an act of congress. When so given, they cannot oust the courts of the United States of the jurisdiction conferred upon them." Hobbs v. Manhattan Ins. Co., 56 Me. 421. [If parties cannot do so, upon what principle can it be maintained that the state legislature can? If repugnant to fundamental authority, any attempt to enforce them should be restrained.][2] Cobb v. New England Ins. Co., 6 Gray, 192; 6 Gray, 596; 6 Gray, 174; Davis v. Packard, 6 Pet. [31 U. S.] 41; Id., 7 Pet. [32 U. S.] 276.

But in deciding this motion, in view of the decision of Morse v. Home Ins. Co., supra, it must be assumed that the power of the state to pass a law prohibiting a foreign corporation from removing a case for trial into a federal court, does not exist; and that all obligations and restrictions of that character imposed upon foreign corporations by the act of 1870, are not binding, but are absolutely void. Now, does the law of 1872, based upon that act, and directing certain proceedings for a violation of the provisions of that law, fall, also? Or, may the state rightfully pass acts imposing penalties for a violation of that act, which are obligatory upon the state officers, after the law requiring the company to perform them is held void?

If this is a part of the scheme intended by the legislature to enforce the law, and the power to establish this condition is held not to exist, it seems to me that all the penalties, remedies and proceedings predicated upon its non-observance would fall with the power itself.

It would be unreasonable to suppose that the legislature would pass an act requiring the secretary of state to cancel the license for want of compliance with a requirement that they had not the power to impose.

Chief Justice Marshall, in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, says: "It is a general rule that what cannot be done directly from defect of power cannot be done indirectly." And Chief Justice Dixon, in Morse v. Home Ins. Co., supra, says: "It may be conceded that any state legislation intended or calculated of itself or by its own mere force to defeat or prevent the exercise of the right of removal when it exists, is unconstitutional and void."

The supreme court of the United States has decided that the right of removal does exist here, so that it follows, according to Judge Dixon's opinion, that this legislation, so far as it was "intended or calculated" to "defeat or prevent" the exercise of the right of removal, is void.

The provision of both acts are to be construed together; the last founded upon the first, declaring the consequences or penalty of a violation of the first, and making the secretary of state the instrument to enforce the penalty for a violation of the first. The title of the last act shows this. It is entitled "an act to provide for the enforcement of the laws in certain cases," and those laws, so far as applicable to this case, having been held null and void, all laws providing for their enforcement must be inoperative, and

[2] [From 3 Cent. Law J. 41.]

no court or officer can enforce any penalty or forfeiture for their non-observance.

If I am right in this view, this case does not call for a decision on the general doctrine contended for by the attorney general. For it is plain to my mind that our legislature did not intend to forfeit the license of foreign companies, except for a violation of what they deemed a valid requirement or condition of law. There is no reason for supposing that the state intended or wished to annul a license, or to exclude a company from doing business here, except for a breach of a legal duty, and when it is settled that this company has not violated any legal duty, the power to vacate the license vested in the secretary of state, terminates.

I have not deemed it necessary to consider the general question of the constitutional right of the complainant to a removal. That is settled and does not admit of or require any argument in its support. The provision in the act of 1870, requiring the agreement not to remove, having been declared unconstitutional, that part of the act of 1872, directing the secretary of state to vacate a license in case of removal, is inoperative, and he has no authority under it to revoke or vacate the complainant's license to transact business for that cause.

I, therefore, order and direct that an injunction issue against the defendant, restraining him from so doing, as prayed in the bill.

HARTFORD FIRE INS. CO. (CRAY v.). See Cases Nos. 3,374 and 3,375.

HARTFORD FIRE INS. CO. (HOWELL v.). See Cases Nos. 6,779 and 6,780.

HARTFORD FIRE INS. CO. (HUMPHRY v.). See Cases Nos. 6,874 and 6,875.

HARTFORD INS. CO. (BROWN v.). See Case No. 2,009.

HARTFORD INS. CO. (SPRATLEY v.). See Case No. 13,256.

HARTFORD, P. & F. R. CO. (BARNARD v.). See Case No. 1,003.

Case No. 6,161.

In re HARTHILL.

[4 Ben. 448;[1] 4 N. B. R. 392 (Quarto, 131).]

District Court, S. D. New York. Jan., 1871.

CONVEYANCE BY BANKRUPT—FORM OF WARRANT—POWER OF THE COURT—PARTY.

1. In a proceeding in involuntary bankruptcy, a warrant was issued, commanding the marshal to take possession provisionally of all the property and effects of the bankrupt, and "of all the goods, assets and property lately conveyed, whether by bill of sale or otherwise, by the said Alexander Harthill to Joseph Henry." Under this warrant, the marshal took possession of certain property conveyed by the bankrupt to said Henry before the filing of the petition. Henry applied by petition to the court, for an order that the property be restored to him, alleging that the transfer to him was a bona fide purchase, and obtained an order restraining the marshal from any removal of the said property. A reference was ordered to take proof as to the validity and bona fides of the purchase made by Henry from the bankrupt, pending which the property which had been taken by the marshal was sold as perishable. On the evidence as reported, Henry moved for an order directing the delivery to him of the proceeds in the hands of the marshal. *Held*, that the warrant, in so far as it commanded the marshal to take possession of the property which had been conveyed by the bankrupt to Henry, transcended the power conferred on the court by the 40th section of the Bankruptcy act [of 1867 (14 Stat. 536)]. It should have stopped with commanding the marshal to take possession of the property of the debtor.

[Cited in Doyle v. Sharp, 74 N. Y. 157.]

2. Henry had only appeared in the matter for the purpose of obtaining relief against such warrant, he was not a party to the bankruptcy proceedings; the title of Henry to the property conveyed to him could only be tested in affirmative proceedings, instituted by the assignee in bankruptcy; and Henry was entitled to the proceeds of the property.

In this case, which was a proceeding in involuntary bankruptcy, a petition was filed on the 17th day of June, 1868. It stated, as an act of bankruptcy, a conveyance by the bankrupt of certain property to one Joseph Henry, which was alleged to have been fraudulent. On this petition, a warrant was issued, directing the marshal forthwith to "take possession provisionally of all the property and effects of the said Alexander Harthill, and of all the goods, assets and property lately conveyed, whether by bill of sale or otherwise, by the said Alexander Harthill to Joseph Henry, in said petition named." Under this warrant, the marshal took possession of certain property then in the possession of Henry. Henry applied at once to the court, on petition, alleging that the conveyance to him was a bona fide purchase by him of such property, and praying that the order of the court, requiring the marshal to take possession of the property conveyed to him by the bankrupt, might be vacated, and the marshal be restrained from removing the said property, or any portion thereof. On this petition, the court, on the 24th of June, 1868, granted an order to show cause why the petition should not be granted, and issued a temporary injunction forbidding the marshal from removing any of the property. Thereafter, a reference was ordered as to the bona fides of the purchase by Henry, pending which, the property was sold as perishable. Harthill was adjudicated a bankrupt, and an assignee was appointed, while the reference was still pending. On the coming in of the proofs taken under the order of reference, the matter came on to be heard on the petition of Henry.

F. N. Bangs, for Henry.

J. S. Ritterband and Gleason & Babcock, for assignee.

BLATCHFORD, District Judge. Irrespective of any determination of the question of

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

fact as to the validity and bona fides of the purchase made by Henry from the bankrupt, I am entirely satisfied that the warrant issued to the marshal, in so far as it commanded him to take possession of the property which had been conveyed by the bankrupt to Henry, transcended the power conferred on this court by the 40th section of the act. It should have stopped with commanding the marshal to take possession of the property of the debtor. The warrant was issued on the 17th of June, 1868. The marshal having, under the warrant, taken the property from Henry's possession, Henry came into this court promptly by a petition, on the 24th of June, 1868, and asked, by its prayer, that so much of the warrant as required the marshal to take possession of the property conveyed by the bankrupt to Henry, might be set aside. Such prayer must be granted, and the property so taken, or its proceeds, must be restored to Henry. He was no party to the proceedings wherein the warrant was issued, and, by presenting his petition for relief from the operation of the warrant, he does not make himself a party to the proceedings, or submit himself to the jurisdiction of the court, any further than is necessary to obtain the specific relief he asks. He is entitled to such relief, and to depart having obtained it, leaving the assignee in bankruptcy to take such affirmative proceedings against him, both in respect to the property which the marshal seized, and to the other property which was conveyed by the bankrupt to Henry, and to the proceeds of all such property, as may be proper. No such affirmative proceedings are before the court, instituted by the assignee. It is only as the result of them that he can have the relief which he now seeks by motion. Such proceedings must be taken by a pleading, making proper averments, and calling for an answer, on which an issue raised can be tried, leading to a determination which the aggrieved party can have reviewed. The proceeds of the property seized by the marshal from the possession of Henry, if they are in this court, are not in it as belonging to the estate of the bankrupt, nor can they be in it to be awarded according to the merits of the case, as between the bankrupt's creditors and Henry, unless they are rightfully in it. They are not rightfully in it. For all the purposes of Henry's petition, which is the only matter before the court, the property taken from Henry must be regarded as still in the possession of the marshal, it having been sold only because it was perishable, and the proceeds having been paid into court for safe keeping. The marshal's possession of the property having been taken under a warrant which was improperly issued against such property, the property must be released from the marshal's possession, and must revert to the possession of Henry, so far as any disposition of it on Henry's petition is concerned. Its proceeds must take the same course.

Case No. 6,162.

In re HARTHORN.

[4 N. B. R. 103 (Quarto, 27).] [1]

District Court. D. Maine. Aug. 24, 1870.

BANKRUPTCY—PREFERRED CLAIM—MINOR—SERVICES OF.

Upon proof of claim made by the father of a minor son, for the labor of such son, as an operative in the employment of the bankrupt within the six months next preceding the first publication of the notice of proceedings in bankruptcy, *Held*, that the father is entitled to be preferred, to an amount not exceeding fifty dollars, according to section 28 [of the act of 1867 (14 Stat. 530)].

In bankruptcy.

By the Register:

I, Charles Hamlin, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the opposing parties, to wit: Mr. Ephraim Cunningham, creditor of said bankrupt, and Mr. William C. Crosby, assignee of said bankrupt's estate, viz.: said Ephraim Cunningham offers for proof a claim against said estate, amounting to the sum of one hundred and eight dollars, of which amount the sum of ninety-six dollars is for the labor of his minor son, Freeman Cunningham, performed as an operative in the employment of the bankrupt in the six months next preceding the first publication of the notice of proceedings in this bankruptcy. Deponent claims the amount due for his minor son's labor belongs to himself as the father of the minor, and that fifty dollars thereof is preferred to himself under the provisions of section 28 of the bankrupt act. The assignee makes no objection to the amount claimed, nor to the same being allowed to deponent, as the father of the minor; but denies the right of the father to a preference under section 28, as above, on the ground that it can only be allowed to the minor himself in those cases where the minor makes the proof in his own behalf. I am of the opinion that, upon the strength of the authority of the case of Thayer v. Mann, 2 Cush. 371, deponent is entitled to the preference he claims. And the said parties requested that the same should be certified to the judge for his opinion thereon.

FOX, District Judge. Ordered, that fifty dollars of the claim proved by Ephraim Cunningham, for services of his minor son, Freeman Cunningham, be allowed and paid as a preferred claim.

HARTLAND (SOCIETY FOR THE PROPAGATION OF THE GOSPEL v.). See Case No. 13,155.

HARTLEY (BROWN v.). See Case No. 2,009a.

[1] [Reprinted by permission.]

HARTLEY (TALBOTT v.). See Case No. 13,732.

HARTLEY v. UNITED STATES. See Case No. 1,581.

Case No. 6,163.

HARTMAN v. The WILL.

[4 Pa. Law J. Rep. (1872) 350; 2 Am. Law J. (N. S.) 111.]

District Court, E. D. Pennsylvania.

SALE OF VESSEL BY MASTER—TITLE UNDER SUCH SALE.

1. It is well settled that the sale of a ship by the master, to be sustained by a court of admiralty, must be enjoined by a policy so clear as to be equivalent to a moral necessity.

[Cited in The Raleigh, 37 Fed. 126.]

2. One who accepts title under a captain's sale must see that his title is without taint or just cause of suspicion.

3. The captain is an agent from necessity and his conduct will be closely scanned.

4. On the question of the integrity of the sale, the captain's evidence is vital to the claimant's case.

In admiralty.

G. M. Wharton and R. R. Smith, for libellants.

Ed. Waln, for respondent.

KANE, District Judge. The brig Will, belonging to the libellant [John Hartman], and employed for the time as a transport in the service of the United States, was driven upon the beach near Sacrificios in the Gulf of Mexico, by the "norther" of the 20th March, 1847. The part of the shore on which she lay was within the lines of the American army, to which Vera Cruz surrendered on the 29th of the same month. On the first of April she was surveyed by two shipmasters at the captain's request, and on their recommendation she was sold on the same day by an auctioneer, who derived his commission from the commander-in-chief of the forces. The hull sold for $180, and the rigging, &c., for $135. The purchaser succeeded in getting her off, and conducted her to New Orleans, where she was repaired, and a new register having been obtained for her from the custom house,—by what authority is not in proof,—she was transferred by formal bill of sale to Messrs. Andrews and Dewey, the present claimants, for the sum of $2750. Having subsequently prosecuted a voyage to Philadelphia, she was arrested here on the 20th of July last, at the instance of the former owners, who now seek to recover possession of her.

The sale, it is conceded, is to be regarded as a sale by the captain, and the claimants are purchasers with notice, whose title is of course identical with that of their vendors. If the proceedings at Vera Cruz did not divest the ownership of the libellant, he is entitled to a decree. The law is fully settled that the sale of a ship by the master, passes no right whatever, unless it is enjoined by policy so clear and obvious as to be equivalent to a moral necessity, and unless it has been conducted in entire good faith. The existence of this necessity is an element of the purchaser's title, not a circumstance to be presumed from the integrity of the transaction, but to be proved as an independent fact. The bona fides of the sale is of course an equally important element; but this under ordinary circumstances will be presumed; or to speak more accurately, the law will not impute mala fides, where there is no evidence of imposition or collusion, or of such want of care as implies a disregard of the owner's interests. Yet it is the business of him who accepts title under a captain's sale, to look carefully into the fairness of the whole dealings, for a very little matter may devolve on him the necessity of sustaining it by proof. He must see to it, not merely that his bargain will pass the ordinary inspection of the market, without being condemned as tainted, but that it is without reproach or just suspicion. He buys of one to whom the owner has not delegated the power of sale, and who derives his authority from a combination of facts, some of them indeed notorious, but the extent and force of others known for the time only to the party selling.

The captain in passing away the owners' title to a ship is an agent constituted by necessity. If he has the means of reserving his vessel, he has no right to sell her. If he has opportunity of communicating with his owners, or their agent, without periling the property in the mean time, he has no right to anticipate their instructions. He knows, or ought to know, better than any one else what is the condition of his vessel, what injuries she has sustained, and to what extent she may be further injured by continued exposure, what means of rescue are at his command, what is the efficiency of his crew and the goodness of his tackle, what moneys he has, and what moneys he can procure, with which to engage assistance from others, where his owners live, and who are their nearest correspondents. The purchaser therefore relies even for the evidence of that necessity, which is the basis of his title, upon the perfect good faith of the master. And rightfully shipowners have no security for the return of their property from the "remote regions of the sea," but in that principle of the universal law maritime, which looks to the muniments of their title, when verified by national authority, as controlling notice of ownership to all the world. In the absence of express sanction from the owner it must be a clear necessity that justifies even the hypothecation of a ship for the purpose of enabling her to complete her voyage; a necessity even more stringent must be invoked to vindicate the abandonment of the voyage and the unauthorized alienation of

the ship together, to give validity to either transaction, the most perfect good faith should preside over it, in its inception and throughout its progress.

In the case before me, the libellant denies both the necessity of the sale and the good faith of the master; and he has adduced proof on both points, by depositions which passed publication several months before the hearing. The claimants on the other hand have examined numerous witnesses to show that the sale was perfectly fair, that the necessity for it could not be averted by the means at the captain's command, and that it would have been hazardous to postpone it. I have examined these voluminous proofs since the very able arguments which were made upon them by the counsel on both sides before me; and if they included all the evidence of which the case is susceptible, or which the court has the right to ask for, I confess that the inclination of my mind would be toward sustaining the sale. But there is wanting to the case of the claimants, as now presented, a very important item, in the absence of which, unexplained, I cannot decide in their favor. It is the evidence of the captain himself.

I have already indicated the circumstances, indispensable to the establishment of the claimants' title, which are best known to the captain only. Besides these, the depositions show that he is in possession of the surveyors' report, which recommended the sale; the general recollections of one of the surveyors, testified to after the lapse of eight months, do not adequately supply the want of this document. Not that the report itself would be primary evidence to support the sale; but as a record made by a witness at the time of the transaction, it would serve to refresh or to correct his memory, and increase greatly the value of his testimony. But above all, on the question of the integrity of the sale directly put in issue by the libellant, the captain's evidence is vital to the claimants' case. I can scarcely imagine a state of circumstances in which the rights of a litigant party being absolutely dependent on the good faith of a third person, that good faith can be regarded as adequately vindicated against assault, without an appeal to his conscience, if he be alive and accessible. I therefore sustain the libel; and regarding the claimants as affected by the want of good faith in the sale at Vera Cruz, I am indisposed to recognize a credit in their favor for the amount expended by them in the salvage or melioration of the vessel. This question, however, not having been fully discussed at the hearing, I will, if the proctor for the claimants desires it, entertain a motion for a rehearing of this branch of the case. I adjudicate against his clients with the less reluctance; inasmuch as being now advised of what I esteem the defects of their case, they will be enabled to supply them so far as the truth shall warrant, should they see proper to invoke the revisory action of the circuit court. Decree for libellant.

NOTE. Vide Robinson v. Commonwealth Ins. Co. [Case No. 11,949]; Pope v. Nickerson [Id. 11,274]; The Lucinda Snow [Id. 8,591]; Scull v. Briddle [Id. 12,569]; Skrine v. The Hope [Id. 12,927]; The Tilton [Id. 14,054].

HARTNELL (UNITED STATES v.). See Case No. 15,317.

Case No. 6,164.

In re HARTOUGH.

[3 N. B. R. 422 (Quarto, 107).] [1]

District Court, S. D. New York. Jan. 7, 1870.

BANKRUPTCY—COPARTNERSHIP.

A copartnership existing between H. and R. was terminated by R. assigning and transferring all his interest as copartner to a third party. H. subsequently filed petition that the firm, and each of its members, be adjudged bankrupt. *Held*, the prayer of the petition must be denied as to the firm and as to R., inasmuch as the case is not within the provisions of section 36 of the act [of 1867 (14 Stat. 534)], and H. and R. were not copartners, and no property of the said copartnership, as such, existed, at the time said petition was filed. Order of adjudication entered as to H.

[Cited in Hunt v. Pooke, Case No. 6,896; Re Redmond, Id. 11,632; Hopkins v. Carpenter, Id. 6,686.]

[In the matter of the petition of Peter C. Hartough for an adjudication of bankruptcy against himself and James C. Hayden and William Reed, trading as P. C. Hartough & Co.]

J. A. Welch, for P. C. Hartough.

Marsh, Coe & Wallis, for Hayden.

Barney, Butler & Parsons, for William Reed.

BLATCHFORD, District Judge. On the facts proved in this case, it is established that James C. Hayden never was a copartner with Peter C. Hartough and William Reed. The copartnership which was formed between Hartough and Reed on the 1st of June, 1867, continued until the 9th of November, 1868, and no longer, and was dissolved on that day, by the instrument of assignment executed on that day by Reed to Samuel H. Reed. Inasmuch as that instrument assigned and transferred to Samuel H. Reed all the right, interest, property and claim of William Reed in and to the partnership and business of the firm, and in and to all property owned and held by William Reed as tenant in common with Hartough or as partner in the firm, there ceased at that time to be any joint stock or property of Hartough and William Reed as partners in trade, or of the firm as composed of those persons as partners in trade, The case is, therefore, not one within

[1] [Reprinted by permission.]

the provisions of section 36 of the bankruptcy act, because Hartough and William Reed were not partners in trade when the petition of Hartough was filed, on the 4th of May, 1869, and because there was not then any joint stock or property of the copartnership which existed down to the 9th of November, 1868, composed of Hartough and William Reed; that is, joint stock or property belonging to such two persons as having been partners in such copartnership. Aside from the provisions of section 36, it is not claimed that William Reed can be adjudged a bankrupt on this petition of Hartough. He does not himself petition to be so adjudged. On the contrary, he resists the granting of the prayer of the petition of Hartough, which is that Hartough and William Reed and Hayden may each of them be adjudged by a decree of the court to be a bankrupt, and that the firm of P. C. Hartough & Co., composed of such three persons, may be so adjudged. The prayer of the petition is denied as to Hayden and William Reed, and an order of adjudication will be entered as to Hartough.

HARTSHORN (BRAY v.). See Case No. 1,820.

HARTSHORN (DAY v.). See Case No. 3,683.

Case No. 6,165.

HARTSHORN et al. v. ALLISON et al.

[1 Cranch. C. C. 199.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

CHANCERY—ATTACHMENT.

The garnishee may answer after bill taken for confessed at the rules.

[This was a bill in equity by Hartshorn and Taylor against Amos Allison and Jacob Geiger and others, garnishees.]

Bill taken for confessed in the office. Geiger, one of the garnishees, moved for leave to file answer. Granted.

Case No. 6,166.

HARTSHORN v. ALMY et al.

[Holmes, 493; 2 Ban. & A. 46; 8 O. G. 94.] [2]

Circuit Court, D. Massachusetts. April, 1875.

PATENT—INFRINGEMENT—SPRING-FIXTURES FOR SHADES.

The claim of the reissue patent for improvement in spring-fixtures for shades, granted Stewart Hartshorn, Aug. 27, 1867, construed with reference to the actual invention of the patentee, is not limited to the peculiarly shaped pawl and ratchet described in the specification and mentioned in the claim. The claim is infringed by any arrangement of a pawl and ratchet such that they will engage on checking the upward movement of the shade, and the shade thus be retained at any desired height, by simple manipulation of the shade itself.

[Cited in Hartshorn v. Shorey, Case No. 6,167; Hartshorn v. Eagle Shade Roller Co., 18 Fed. 90.]

[This was a bill in equity by Stewart Hartshorn against James F. Almy and others for the alleged infringement of reissued patent No. 2,756, granted August 27, 1867. The original patent, No. 44,624, was granted to complainant October 11, 1864.]

S. D. Law, for complainant.

J. E. Maynadier, for defendants.

SHEPLEY, Circuit Judge. The bill in this case is brought for alleged infringement of reissued letters-patent No. 2,756, dated Aug. 27, 1867, granted to Stewart Hartshorn for improvement in spring-fixtures for shades.

The claim is for the application to a shade-roller, provided with a spiral spring for automatically raising or rolling up the shade, of a pawl and ratchet, or notched hub, so arranged that the former will engage with the latter at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth.

Upon the construction of this claim depends the question of infringement in this case. Defendants contend for a construction which will limit the claim to the peculiarly shaped pawl and the peculiarly shaped ratchet described in the specification of the patent. Complainant contends for a construction which will embrace, in combination with the other elements, any pawl and ratchet, or notched hub, so arranged that the former will engage with the latter at any point or height of the shade by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth.

The state of the art before the invention of Hartshorn was this: A roller was used having within it a coiled spring, one end fixed to the roller and the other end to a loose journal of the roller; a pawl and ratchet were so applied to the roller that the pawl would hold the roller against turning under the action of the spring, but allow the roller to be turned against the action of the spring. The ratchet lifted and disengaged the pawl from the ratchet in a downward pull of the curtain. These rollers were adapted, like the Hartshorn, to be hung in brackets. In the form of spring-fixtures for shades which was known as "the Coach fixture," and in use prior to Hartshorn's invention, a cord was used to lift the pawl and disengage it from the ratchet when it was desired to allow the curtain to roll up under the action of the spring. Hartshorn's invention differed from those which had preceded it in that it dispensed

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

[2] [Reported by Jabez S. Holmes, Esq.; reprinted in 2 Ban. & A. 46, and here republished by permission.]

with the cord used to disengage the pawl from the ratchet when the curtain is to be rolled up, and operated the fixture wholly by means of the shade or curtain. The operation of Hartshorn's fixture, so far as concerns winding up the curtain and stopping it at any desired height, is as follows: A pawl is attached by a pivot to one of the brackets in which the shade-roller is hung. The end of the pawl opposite the pivoted end has a tendency to fall by gravity on a hub attached to one end of the roller. Two notches are made in the periphery of this hub. The width of these notches is but slightly in excess of the width of the toe of the pawl. The ratchet supports the pawl for the full extent of its periphery, except as to the slight difference in excess between the width of the ratchet notch and the width of the toe of the pawl. Should the roller be revolving rapidly, the width of the ratchet notch will pass under the width of the toe of the pawl before the toe of the pawl has had sufficient time to gravitate into the ratchet notch. This space of time is very short, for it is only while the excess of width between the width of the notch and the width of the toe of the pawl is passing under the toe of the pawl. This only allows the pawl toe to gravitate into and engage with the ratchet notch under a slow movement of the roller. Under a quick revolution of the roller the pawl toe will not be unsupported by the periphery of the ratchet for a space of time sufficiently long to allow it to gravitate a sufficient distance into the ratchet notch to become engaged with it while the ratchet notch is passing under it. The patentee also states that, if desired, the pawl may be placed underneath or at one side of the hub instead of over it, as represented, and a spring be made to bear against it, in order that its projection may engage with the notches.

It will thus be seen that the invention of Hartshorn consisted (so far as concerned the spring-roller shade-fixture) in dispensing with the weights, counterpoises, and pulleys, which had been previously employed, and also with the cord which had been employed to operate the pawl and disengage it from the ratchet notch, and so arranging the pawl and ratchet that the shade may be stopped and retained at any desired point within the scope of its movement by a simple manipulation of the shade itself; the arrangement of the pawl and ratchet being such that the former will engage with the latter at any point by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring.

In the fixture of the defendants the pawl or pin engages with the notch by the force of gravity acting on the pin. This mode of engagement is like that in the Hartshorn fixture. In the Hartshorn fixture the pawl is kept away from its engagement in the ratchet notch by being raised by the periphery of the hub, and kept up by portions of the periphery of the hub until the notch is under it, and it is raised so high by the non-holding wall of the notch, that, when the roller is rotating freely under the action of the spring, it will not have time to fall far enough to engage with the holding wall of the notch during the time the notch is passing under it. In the defendants' fixture the pin or pawl is kept from engagement in the ratchet by centrifugal force. It is not supported by the periphery of the hub, or raised by the non-holding wall of the ratchet, or knocked up slightly by the blow of the holding wall of the ratchet as in Hartshorn's fixture. In the Almy roller there is a thimble with a side aperture surrounding the hub, forming a closed chamber when covered by the end cap of the roller. In this chamber is placed a little roller or pin lying horizontally, and allowed to revolve loosely, and in the rapid revolution of the roller to be thrown above the periphery of the notched hub by centrifugal force; but when the roller is revolved slowly, or its motion is arrested, the loose pin, roller, or pawl falls on to the hub and into the notch, and in rolling up the curtain it is caught between that part of the notch which is at right angles with the axis of the hub and the shoulder formed in the thimble at the pin chamber. In this respect the pawl and ratchet in the defendants' may be properly said to have a different operation from the pawl and ratchet in the Hartshorn fixture. In a similar sense the pawl and ratchet in the Hartshorn patent operates in a different manner when actuated by a spring in one of the modes described in the patent and when left to engage by the pawl falling into the ratchet notch by gravitation, as in the mode stated as the preferable mode in that patent. In both the Hartshorn and the Almy roller the pawl and ratchet are so arranged that the one will engage with the other, at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade, under the influence of the spring, by simply manipulating the shade; dispensing with counterpoises, or the usual cord for operating the roller, or the cord for holding the pawl disengaged. In this respect, wherein Hartshorn differed from all that had preceded him, the mode of operation is the same; and even if Almy's fixture has some advantages over Hartshorn's, it clearly embraces what was his invention, and is secured by the claim of his patent, and is an infringement. As stated by Judge Blatchford in the case of Hartshorn v. Tripp [Case No. 6,168], in the circuit court for the Southern district of New York, "there is no difference between these two modes of operation in the withholding from engagement, so far as regards the real invention of the plaintiff and the scope of the claim of his patent." Decree for injunction and account.

[For other cases involving this patent, see Hartshorn v. Shorey, Case No. 6,167; Hartshorn v. Eagle Shade Roller Co., 18 Fed. 90.]

Case No. 6,167.

HARTSHORN v. SHOREY et al.

[2 Ban. & A. 233;[1] 9 O. G. 595.]

Circuit Court, D. Massachusetts. Feb. 17, 1876.

PATENT—INFRINGEMENT—SPRING FIXTURES FOR SHADES.

Upon the construction given by the court to the claim of complainant's patent for improvement in spring fixtures for shades, in the case of Hartshorn v. Almy [Case No. 6,166], the defendants adjudged to infringe said patent.

[Bill by Stewart Hartshorn against John Shorey and others for infringement of a patent.]

S. D. Law, for complainant.

A. K. P. Joy, for defendants.

SHEPLEY, Circuit Judge. This bill is for an alleged infringement of letters patent, reissue No. 2,756, dated August 27, 1867, granted to Stewart Hartshorn for improvement in spring fixtures for shades. These are the same letters patent which were the subject-matter of litigation in Hartshorn v. Almy [Case No. 6,166], and Hartshorn v. Tripp [Id. 6,168].

Defendants rely upon two grounds of defense: First, that the alleged invention of Hartshorn was not new and patentable at the date of his original letters patent. Second, that the devices made use of by the defendants are no infringement of the plaintiff's invention.

To sustain the defense of want of novelty, the defendants rely upon evidence of the prior existence of what is well known as the "coach fixture," in which a cord is used to lift the pawl and disengage it from the ratchet when it is desirable to allow the curtain to roll up under the action of the spring. This defense is fully met and answered in the two cases above cited, to which it is only necessary to refer to dispose of this branch of the defense.

The fixture manufactured by the defendants has a spindle which rests in the bracket, and is extended for a short distance into one end of the curtain-roller, which end revolves around that portion of the fixed spindle which is projected into the roller, while the other end of the roller is provided with a journal, upon which it revolves freely in the supporting bracket. This spindle is provided with a cam-shaped recess, on one side of it, within the roller, and a chamber of sufficient size to receive a small sphere or buckshot in such a position as to be directly over the recess in the spindle when the roller is revolved. The small ball or buckshot is introduced into this chamber. One edge of the recess in the spindle is so constructed that when the ball falls into the recess it will be forced against the side of the chamber, and operate as a detent to stop the revolution of the roller when it is turning one way. The other edge of the recess is so formed that when the roller is turned in the opposite direction the ball is thrown up into the chamber, where, when the roller is rapidly revolved, the ball is held by centrifugal force.

It will be seen, by a comparison of this contrivance with the one described in the Hartshorn patent, that it effects the same result by means of the ball operating as a detent, as is effected in the Hartshorn contrivance by the pawl and ratchet. In Hartshorn's, the pawl has a tendency to fall by gravitation into the notches made in the periphery of the hub, or, when affixed below the hub, in one of the modes described in the patent, it is actuated by a spring which tends to engage it in the notch. The ball operates as a detent, catch, or pawl, to engage with the notch or ratchet whenever the rotation of the roller, and the upward movement of the curtain under the influence of the spring, are checked by the manipulation of the curtain or shade itself. In Hartshorn's, when the roller is revolved rapidly, the ratchet has not time to fall by gravitation into the notch while the ratchet-notch is passing under the toe of the pawl. In Shorey's, while the roller is being rapidly revolved, the ball is kept by centrifugal force from engaging as a detent between the side of the chamber in the roller and the edge of the recess in the spindle.

The construction of the claim in the Hartshorn patent was fully given in the case of Hartshorn v. Almy [supra]. It was there shown to embrace, in combination with a spring-roller, such an arrangement of pawl and ratchet, with the varying speed of the revolution of the roller mutually acting with each other through the manipulation of the roller, that the pawl would engage with the ratchet by checking the rotation of the roller and the upward movement of the curtain by the simple manipulation of the shade, merely varying the speed of the rotation of the roller. It is equally within the scope of this invention, whether the force which determines the fact of the engagement or non-engagement of the pawl or detent with the notch or ratchet be that of a spring, or force of gravity, or centrifugal force.

Improvements may be made in the spring or the roller, the shade, or the form of the pawl or detent, and these improvements may be patentable; but so long as the combination embraces, as in the case of the device of these defendants, every element of Hartshorn's invention, operating substantially in the same manner to produce the same result, it must be treated as an infringement. Decree for complainant, for injunction and account.

[For other cases involving this patent, see note to Hartshorn v. Almy, Case No. 6,166.]

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

Case No. 6,168.

HARTSHORN v. TRIPP et al.

[7 Blatchf. 120.] [1]

Circuit Court, S. D. New York. Jan. 15, 1870.

PATENT—INFRINGEMENT—NOVELTY.—SPRING FIXTURE FOR SHADE ROLLER.

1. The claim of the reissued patent granted to Stewart Hartshorn, August 27th, 1867, on the surrender of the original patent to him, of October 11th, 1864, for an "improved shade fixture," namely, "the application to a shade roller, provided with a spiral spring for automatically raising or rolling up the shade, of a pawl and a ratchet, or notched hub, so arranged that the former will engage with the latter, at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth," is infringed by a shade fixture which has such a spiral spring in a roller, and a scroll hub with a notch or rebate fixed to the bracket, and a pin or bolt sliding in a socket on the end of the roller.

[Cited in Hartshorn v. Shorey, Case No. 6,167; Hartshorn v. Eagle Shade Roller Co., 18 Fed. 90.]

2. The patent sustained, in respect to the novelty of the invention, as against a pre-existing shade fixture which, only when out of order, operated like the patented fixture, and was not accessible to the public, and passed out of existence, and was unknown to the patentee.

[Cited in Hartshorn v. Almy, Case No. 6,166; Wilson v. Coon, 6 Fed. 627; Davis v. Brown, 9 Fed. 656.]

In equity. [Bill by Stewart Hartshorn against Lemon A. Tripp and Samuel M. Boyd.] This was a final hearing, on pleadings and proofs.

Stephen D. Law, for plaintiff.

Charles M. Keller, for defendants.

BLATCHFORD, District Judge. The bill in this case is founded on reissued letters patent of the United States granted to the plaintiff, August 27th, 1867, for an "improved shade fixture," on the surrender of letters patent granted to him, as inventor, October 11th, 1864. The specification of the reissue, which is signed by the inventor, says: "This invention relates to an improvement in that class of shade fixtures in which the shade roller is provided with a spiral spring for the purpose of automatically winding up the shade. The invention consists in the application of a pawl and ratchet or notched hub, arranged in such a manner that the shade may be stopped and retained at any desired height or point, within the scope of its movement, by a simple manipulation of the shade, as hereinafter fully shown and described, the usual cord for operating or turning the shade roller being dispensed with entirely, as well as counterpoises, which have in some instances been employed, in connection with spring rollers, for holding the shade at any desired point." The roller on which the window shade is wound has fitted within a spiral spring, which is arranged in such a manner that it will have a tendency to turn the roller and wind up the shade. This feature of a spring within a shade roller, for the purpose of winding or rolling up the shade, is stated, in the specification, not to be new. To one of the brackets in which the shade roller is hung, there is attached, by a pivot, a pawl. The pivot passes through one end of the pawl. The opposite end of the pawl has a tendency to drop, by its own gravity, on a hub, attached concentrically to a plate, which is secured to one end of the roller. The pawl is provided with a projection, which, when the pawl drops, engages with either one or two notches in the hub, and holds the roller, preventing the shade from being wound upon it. Such projection is made rather oblique or inclined at one side, so as to admit of being forced out of the notch, when the shade is pulled down. The other side of the projection is made at right angles with the bottom of the pawl, so as to catch firmly against the front edge of the notch, and prevent the spring from forcing the projection out therefrom, and winding up the shade. But, by pulling down the shade, so that the projection on the pawl will be forced out of the notch in which it is fitted, and then allowing the spring to turn the roller briskly back, the projection will slip over the notches, or the notches will pass under the projection, without catching, and the shade may be wound up to the desired height by the spring, the projection on the pawl catching into a notch as soon as the motion of the roller is checked. The patentee says, in his specification, that, if desired, the pawl may be placed underneath or at one side of the hub, instead of over it, as represented, and a spring be made to bear against it, in order that the projection on the pawl may engage with the notches, but that he prefers the former method. The claim is as follows: "The application to a shade roller, provided with a spiral spring for automatically raising or rolling up the shade, of a pawl and a ratchet, or notched hub, so arranged that the former will engage with the latter, at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth."

In the shade fixture of the defendants, there is a roller, provided with a coiled or spiral spring, secured within it. Instead of the plaintiff's hub, with two notches on the roller, the defendants have a scroll hub, with one notch, or rebate, fixed to the bracket; and, in place of the pivoted pawl of the plaintiff, the defendants have a pin or bolt, sliding in a socket, on the end of the roller. When the defendant's roller is revolving rapidly, carrying the socket and pin, the pin, which is wholly within the socket at that time, will not drop out of it by gravity, because the force of the centrifugal action,

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

which tends to make the pin hug the walls of its socket, is sufficient to overcome the tendency of the pin to fall out by the force of gravity and engage with the notch in the scroll hub. But, when the motion of the roller is checked sufficiently to allow the force of gravity to predominate, in respect to the pin, over the centrifugal action, the pin drops out of its socket, and engages with the notch, and the rotation of the roller is arrested. Having transferred from the bracket to the roller the instrument that engages with the notch, and having transferred the notch from the roller to the bracket, the defendants contend that the mode of operation of such instrument, in connection with the notch, to permit and arrest the rotation of the roller, is, in their shade fixture, so different from what it is in the plaintiff's, as to relieve them from the charge of infringement. It is contended by the defendants, that, in the plaintiff's fixture, the pawl is kicked or thrown up by the passage of the hub and notches under the pawl, when the roller is moving fast, and is by that means prevented from engaging with a notch; but that, in the defendants' fixture, the pin is not kicked or thrown up, but, when it has once dropped, by gravity, into its socket, is kept there, and prevented from dropping out, so as to engage with the notch, by the centrifugal force generated by the rapid rotation of the roller. It is contended that there is a difference in principle in the two operations. But, the defendants' fixture has a roller provided with a spiral spring, for the purpose of automatically winding up the shade. It has, in substance, a pawl and a notched hub, arranged in such a manner that the shade may be stopped and retained at any desired height or point, within the scope of its movement, by a simple manipulation of the shade, the usual cord for operating or turning the roller being entirely dispensed with, as well as counterpoises. The pawl and notched hub are so arranged, that the former will engage with the latter, at any point or height of the shade, by simply checking the rotation of the roller, and the upward movement of the shade, under the influence of the spring. In the plaintiff's fixture, the pawl engages with the notch by the force of gravity acting on the pawl. In the defendants' fixture, the pin engages with the notch, by the force of gravity acting on the pin. The mode of operation in engaging, in the two, is, therefore, alike. The withholding from engagement is effected, in the plaintiff's fixture, by the rapid passage of the hub and its notches under the projection on the pawl, the hub and notches throwing up the pawl, and not allowing the force of gravity to effect the engagement of the projection with a notch, until the rotation of the roller has become so slow as to permit the force of gravity to overcome the force with which the pawl is thrown up by the rotation of the hub and notches. The withholding from engagement is effected, in the defendants' fixture, by the rapid rotation of the pin over the notch, the centrifugal action on the pin not allowing the force of gravity to effect the engagement of the pin with the notch, until the rotation of the roller has become so slow as to permit the force of gravity to overcome the force of such centrifugal action. There is no difference between these two modes of operation, in the withholding from engagement, so far as regards the real invention of the plaintiff, and the scope of the claim of his patent. In both fixtures, the withholding from engagement is effected by so arranging, in connection with each other, a pawl and a notch in a hub, the pawl being non-rotating when the notch is rotating, or the notch being non-rotating when the pawl is rotating, that, when the roller rotates with sufficient rapidity, the pawl and the notch will pass by each other without engagement. Whether the failure to engage is due to the thrusting away of the pawl by the direct application of force to it, or by the application to it of sufficient centrifugal action generated by its own rotation, is subsidiary to, and outside of, the mode of operation embraced in the scope of the invention and claim of the plaintiff. It may be that there is something in the defendants' arrangement that is patentable, as an improvement on the form of construction found in the plaintiff's description and drawings, but that gives no right to the defendants to use such improvement without the license of the plaintiff, so long as the fixture embodying such improvement contains, as it does, the invention patented by the plaintiff. The infringement by the defendants is, therefore, established.

It is shown, by the evidence, that a witness, named Franklin N. Willard, saw in Boston, more than thirty-five years ago, a shade fixture on the window of a carriage, which fixture had been originally constructed with a pawl and a ratchet wheel, the pawl being kept in the teeth of the wheel by a spring, so that, in order to allow the coiled spring in the roller of the fixture to act to roll up the shade, it was necessary to pull and keep the pawl out of the ratchet by means of a cord attached to the pawl. The teeth in the wheel had become so worn, from long use, that, when the shade was allowed to run up with a certain rapidity, the pawl would slip over the teeth and not be caught in any one of them, the force of the spring that bore on the pawl being too great. When the shade was allowed to run up slowly, the pawl would engage properly with the teeth. The witness never saw, prior to the plaintiff's invention, any other fixture operating like this carriage fixture, and never made one like it. Such fixture was on a carriage that was brought for general repairs to a carriage shop in which the witness was employed as a workman at the time. In view of the facts, that the fixture referred to was not con-

structed or designed for the purpose of being used to roll up the shade without the employment of the cord to pull and keep the pawl out of the teeth of the ratchet wheel, and that every person who looked at the fixture would see that such was its construction, and that no one would see, from looking at it, even in its worn condition, that it could be operated to roll up the shade without so employing such cord, and that it is not shown to have been so operated and used in a manner fairly accessible to the public, and that, for aught that appears, it passed out of the memory of the witness until recalled to it by the controversy in this suit, and gave birth to no progeny, but passed out of existence, giving no hint to any one at the time, even to the witness who now recalls it, that it was of any use in its worn and abnormal condition, and that the plaintiff never had any knowledge of it, it cannot be set up to invalidate the plaintiff's patent. Gayler v. Wilder, 10 How. [51 U. S.] 477; Cahoon v. Ring [Case No. 2,292]. Indeed, the learned counsel for the defendants did not so contend, on the hearing.

There must be a decree for the plaintiff, for a perpetual injunction and an account of profits, with costs.

[For other cases involving this patent, see note to Hartshorn v. Almy, Case No. 6,166.]

Case No. 6,168a.

HARTSHORN et al. v. TWENTY-FIVE CASES SILK.

[2 Betts, D. C. MS. 73.]

District Court, S. D. New York. Nov. 20, 1841.

SALVAGE—AMOUNT OF—DERELICT—POSSESSION OF GOODS SALVED—SERVICES OF SALVORS.

[1. A schooner of 64 tons burthen, loaded within six inches of the water's edge with a cargo of coal, and navigated by four persons, on her way out of Egg Harbor for New York, fell in with floating cases and boxes four or five miles from shore, and, by means of her yawl, in three hours picked up enough to load the schooner to her full capacity. *Held*, that the salvage service was not one of extraordinary merit, and an allowance should be made of one-fourth of the gross proceeds,—amounting to $12,583,—one-third of which to the schooner.]

[2. Salvors have a right to the possession of the salved property until their claims are legally adjusted.]

[3. A vessel which has picked up derelict goods at sea does not forfeit her salvage compensation by refusing to deliver them to the owner's agent at a small port into which she put because of adverse winds, and by carrying them to her port of destination, near by, where there was a better market.]

[This was a libel in rem by Robert H. Hartshorn and others against 25 cases of silks, for salvage. The Mutual Insurance Company appeared as claimant.]

BETTS, District Judge. A salvage service is never adjusted upon the mere consideration of a quantum meruit. Rowe v. The Brig [Case No. 12,093]; Coulon v. The Neptune [Id. 3,273]. The principles most essentially controlling the estimates of compensation awarded by admiralty courts are the broad interests of navigation and commerce subserved by salvors; the gallantry and good conduct of the party; the hazard he incurs; the peril from which the salved property is rescued, and the value of such property and degree of exposure and value of the vessel and her cargo employed in making the salvage. [Hobart v. Drogan] 10 Pet. [35 U. S.] 108; Tyson v. Prior [Case No. 14,319]; Rowe v. The Brig [supra]; Warder v. La Belle Creole [Case No. 17,165]; Clayton v. The Harmony [Id. 2,871]; Breevoor v. The Fair American [Id. 1,847]; Coulon v. The Neptune [supra]; 2 Hagg. Adm. 90; Holt, Shipp. c. 9. A scale of allowance advancing or receding through the influence of so many particulars, cannot be expected to supply any definite rule by which compensation can be measured with exactness or even uniformity, upon given state of facts. Two cases rarely arise with like ingredients throughout; and the court is constantly called upon to weigh and estimate the effect of circumstances existing distinct and separate from each other or combined particularly and in varying degrees and to judge how far the presence of some or one may still demand and appropriate the benefits of salvage service even of the most eminent degree. And it is generally found that the lesser in number the salvage qualities in the transaction, the greater is the tendency to influence and exaggerate those which it does present. To avoid the necessity of scrutinizing the qualities of the service minutely in each individual case, the courts have arrived at generalizing the allowance in cases of derelict,—those being of the most frequent occurrence,—and have been disposed to grant at first a third and more recently a moiety as the ordinary rate of allowance. Bond v. The Cora [Case No. 1,620]; Rowe v. The Brig [supra]; The Henry Ewbank [Case No. 6,376]. In some instances either becomes an extravagant compensation, in others a most trifling one; yet it is regarded on the whole as being better adapted to the objects in view than to have the matter without limitation and at the mere discretion of the court. A discretion that cannot be often applied with just discernment and discrimination, as it is to be exercised on proofs given by parties who are to receive according to the merits they ascribe to themselves and in respect to transactions foreign from the experience of the judge who is to decide upon them. Although, then, a third or a moiety be the amount more usually awarded for salvage in cases of derelict, it is manifest that the rate will rarely be adapted justly to any particular case, and it is accordingly sanctioned by the authorities, if not affording in a general view a reasonable approximation to the point, as at least supplying some degree of uniformity

of decision, and thus avoiding an incessant appeal to the courts in salvage cases. It has been the prevailing course of this court to allow a moiety in case of derelict, and only to increase it when the services have been eminently meritorious and the proceeds of the rescued property small, or to lessen it if the property saved was large in amount and the services of no extraordinary merit.

In this case the libellants consider themselves entitled to at least two-thirds of the property saved, and urge that the allowance should be rated upon its gross proceeds. It does not strike me that they have succeeded in showing themselves entitled to such extraordinary reward, for such it would become by means of the value of the property saved. The representations of the state of the sea and the wind, if taken literally, no doubt make the enterprize a most hazardous and gallant one on their part, but, without collating all the proofs on this point, the facts, upon the libellants' own testimony, satisfy me that at the time and place their opinion of these particulars must have been far short of their representations of them. They were in a small schooner of 64 tons burthen, loaded to within 6 inches of the water's edge with a cargo of coal, and navigated by four persons. She put out from Egg Harbor, and was endeavoring to make her way to New York. She fell in with floating cases and boxes four or five miles from the shore, let down her boat, and was about three hours in picking up the goods. Two men were all the time absent with the boat, and once three, leaving but one with the vessel. During this period the schooner's sails were not lowered or altered, and the boat used was the common yawl of like vessels and, the boxes got on board weighed, some of them, 200 pounds. The facts demonstrate, to my judgment, that the state of the weather and of the sea could not have been of that boisterous and perilous character now represented; for, had it been so, the transaction throughout would have been one of most reckless rashness and desperation, and could scarcely fail, without miraculous protection, incurring the loss of the boat or schooner, if not both. I do not regard it as such. The libellants must be considered as acting under the expectation in view of circumstances as then existing that they could rescue the property without wanton exposure of themselves, and I am not disposed to believe they continued their efforts to save this property with any feeling or apprehension that their hazard was an extreme one, because, in the end, it does not appear they relinquished the adventure for any other cause than that they had laden the schooner to the extreme of her capacity. There is, then, in my opinion, nothing shown on the part of the libellants which could justify advancing the allowance in this case beyond a moiety.

Does the case made out by the claimants show that the allowance ought to be reduced below that rate? The answer meets the claim to salvage on two grounds of defence: First, that the goods were picked up without danger or loss to the libellants, and with but little labor and delay; and, second, that they were brought into New York and there concealed by the libellants under circumstances taking away all equity to a salvage compensation. I think the claimants fail proving the alleged concealment. Upon all the testimony, I am satisfied the libellants conducted with good faith and with proper diligence and dispatch in having their claims adjusted after the goods were brought here, and that there was no concealment or misrepresentation with respect to them. Proofs were offered to establish improper conduct by the salvors at Egg Harbor after the goods were picked up; a refusal to deliver over or account for the goods to an agent of the master of the wrecked vessel, and a wrongful evasion to enter the goods there when requested by a custom-house officer. It is to be remarked, in respect to these matters of defence, that none of them are set up by the answer, and that the claimants have not therefore placed this branch of the case so before the court, that it can properly be taken cognizance of and adjudicated. I am not, however, inclined to consider this ground of defence of much weight, if the pleadings justified the admission of the proofs, and I should not accordingly delay the cause to allow adequate amendments for that purpose.

In so far as Willetts, the agent, sought for possession of the goods, it is manifest that the salvors were not bound to regard his demand. The law vested them with the right of possession until their salvage claims should be legally adjusted. He was allowed to take an account of all the goods on deck, and says Hartshorn told him these were all that were saved; but he did not ask to go below. Had he requested that privilege, and been refused, the circumstance might have been more strongly unfavorable to the salvors, and justified the demand of a clear explanation from them to avoid the implication of a fraudulent concealment of the property. It is evident that the salvors intended to avoid being detained at Absecon. Willetts was told, as soon as he came on board, that the property would be taken to New York, and the proper steps in regard to it be pursued there, and I do not think his testimony shows any improper interference or impediment on the part of Hartshorn to his obtaining an account of the goods on board the vessel, had that been declared as his sole object.

Whether the master of the Cephun was bound in law to enter his vessel at Egg Harbor is not a question arising in this enquiry. He may have violated his duty under the revenue laws in that respect without affecting any way his good faith in respect to the disposition of the saved property. It is to be borne in mind that when the goods were picked up the vessel was on her way

to New York, and made the harbor only as a shelter, and because she could not make way against a head wind. Egg Harbor was not a port she entered for the purpose of unlading any portion of her cargo, or even refitting. Advantage was taken of it solely as a shelter from stress of weather. Willetts was no officer of that district, and the collector's office was twelve miles distant, and no imputation of fraudulent motive on the part of the salvors can be justly derived from their not seeking the collector or placing the goods under his authority. A reasonable excuse for not doing it is shown by the facts, and accordingly the failure to do it, if involving any consequence, will be that only of violating the revenue laws, and not that of acting with a wrongful purpose, in bringing the goods on to the port of destination of the vessel; that port being so directly in the vicinity, and better calculated as a place of sale to secure to the owners a fair value for the property. The courts would not sanction a wide deviation in a salvor vessel to seek a favorite port for the disposition of the salved property, but it would certainly not, as a presumption of law, impute a fraudulent motive in continuing and completing a voyage near its termination, although a nearer port might be at command of the vessel in which she could enter with the goods saved. I shall accordingly hold upon these proofs that the salvors did not, by bringing the property to the port of New York for adjudication, compromise their rights to a salvage compensation.

The remarks before made indicate the opinion of the court that the salvage service in this case was not one of great peril or difficulty, and that the essential merit consists in the value of the property saved. Not the usual peril attendant upon such transactions occurs here. The salvors did not visit the wreck for the purpose of rescuing life or the vessel itself. They merely picked up light articles floating upon the surface of the sea, and which accidentally fell across their path, without requiring any deviation or prolonged delay in their voyage. The service was valuable in the extreme to the owners, because the condition of the property was such as to ensure its immediate destruction but for the acts of the libellants, and for that reason the claimants of the property ought to make a liberal reward to those who rescued it. It produced in the whole $12,583.06. There seems to have been 51 cases of silk delivered by the salvors, and only 50 accounted for in the proceeds, and, as it will hardly be requisite to subject the case to an accounting at large before the clerk in respect to proceeds and charges, I shall assume the gross proceeds as the basis of the decree amounting to $12,583.06, without subjecting them to any abatement or account of charges. In 10 Pet. the court sanctioned the allowance of one-third of about $15,000 for salvage because the vessel was rescued, and great hardships and exposures were incurred, and because it was not the habit of the court to vary on appeal the allowances made by the court below, except in flagrant cases of overvaluation of services. The reasoning of the court, however, very pointedly indicates that as an original adjustment a less sum could possibly have been adopted even in that case. In respect to the services performed, this case is greatly inferior to that, and essentially so in this, that the vessel is not saved, or any risk encountered in an effort to save her, or even to approach her when she foundered.

I shall accordingly decree the one-fourth part of the gross proceeds, being $3,145.76, for salvage in this case, and order costs to be paid out of the remaining three-fourths. The distribution of the salvage allowance to be:

To the schooner or her owners, one-third	$1,048 58
Out of the residue, $2,097.18:	
One-third to Lee, the master	699 06
One-third to Hartshorn, the agent, &c.	699 06
One-sixth to Alfred Willetts	349 53
One-sixth to Arthur Lee	349 53
	$3,145 76

Robert H. Hartshorn is named agent in the process, but it is evident on all the pleadings that he had efficiently the command of the vessel, and the responsibility of her employment, and he is therefore placed on equal footing with the nominal master. The schooner is allowed to take the full rate usually allotted salving vessels, because the essential risk run in the adventure was the exposure and that of her cargo. The reward to the vessel for the degree of exposure incurred, and where there need be no forfeiture of her insurance, and the compensation for the very short period employed by her crew in this service, it seems to me, is thus made amply sufficient to subserve all those general principles conducing to the formation of salvage allowances, and also to be a meet contribution out of the large fund saved to the valuable and meritorious services which rescued and restored it to its owners. Decree accordingly.

Case No. 6,169.

HARTSHORN et al. v. WRIGHT et al.

[Pet. C. C. 64.][1]

Circuit Court, D. New Jersey. April Term, 1813.

EJECTMENT — EVIDENCE — SHERIFF'S DEED—ADMINISTRATOR'S DEED — BOUNDARY — WATER COURSE—ACTS OF AGENT—RATIFICATION—NEW TRIAL—JURISDICTION OF CIRCUIT COURT.

1. A sheriff's deed cannot be given in evidence, without producing the judgment and execution under which the sale was made; these documents being necessary to shew that the sheriff had authority to sell.

[Quoted in Armstrong v. Jackson, 1 Blackf. 212. Cited in Crowell v. Meconkey, 5 Pa. St. 172.]

[1] [Reported by Richard Peters, Jr., Esq.]

2. A deed executed by administrators, under an order of the orphan's court, cannot be read in evidence, without producing the order of the court.

3. The proprietor of adjoining lands, who is also owner of the bed of a creek, may grant and convey the bed of the creek, separate from the land which bounds it.

4. A water course is the safest boundary of real estate, as it is a natural boundary.

[Cited in Baltimore & P. R. Co. v. Magruder, 34 Md. 82.]

5. Quaere, if a purchaser from the assignees of a bankrupt, must, in an ejectment for the property purchased, prove the petitioning creditor's debt, and the proceedings under the commissioners of bankruptcy?

6. The unauthorized acts of an attorney or agent, are not so absolutely void, as that the constituents cannot ratify and give them validity.

7. At the request of the parties to a cause, the jury may express an opinion distinct from their verdict.

8. If evidence has been given on the trial, that the value of the land in dispute exceeds five hundred dollars, although the jury in their verdict did not find that fact, the court will not grant a new trial; evidence after verdict, by witnesses on affidavit, would be sufficient to fix the jurisdiction of the circuit court.

[Cited in Smith v. Jackson, Case No. 13,065; Greene v. Bateman, Id. 5,762; Kanouse v. Martin, 15 How. (56 U. S.) 208; Crawford v. Burnham, Case No. 3,366; Sharon v. Terry, 36 Fed. 349.]

Ejectment [against Wright and Dill] for a saw-mill, and ten acres of land, covered with water, &c. Two of the counts were on the demise of [Pattison] Hartshorn and others, and two upon the demise of Robert Waln.

Plaintiff's Title.—A resurvey dated in 1714, to Mahlon Stacey, for 800 acres of land, lying on each side of Assanpink creek, including the mouth, where it empties itself into the Delaware. Mahlon Stacey, the son and heir of the grantee, conveyed the above land to William Trent; whose son and heir, James Trent, in 1729, conveyed to William Morris 300 acres of the above land, lying on the south side of the creek, and bounded by certain courses and distances to the Delaware, and crossing over at the mouth, to the north side of the creek, and so up the courses of the creek, until a south course will strike the place of beginning, on the south side. Hooper, to whom the right to this land had come by regular conveyances, conveyed 29 acres of it by deed, in 1765, to Robert Waln; bounded by the corner of the creek on both sides, from the mouth up to a certain point, considerably above the place in dispute. The daughter of Robert Waln, being entitled to this 29 acres of land, by devise from her father, intermarried with Gideon H. Wells, in 1791. In January, 1803, a commission of bankruptcy was taken out against Wells, who was declared a bankrupt, and all his estate conveyed, by the commissioners, to certain assignees, who advertised the same to be sold at public auction; in which advertisement, a grist-mill, belonging to this tract of 29 acres, and lying on the creek, about one hundred and fifty yards above the property in dispute, is particularly mentioned, but not the creek running from thence to the Delaware. The whole of the 29 acres, for the life of Wells, was struck off to Robert Waln, Jun. as the highest bidder; to whom a conveyance, dated 30th May, 1803, was made by the assignees; in which deed, the bankruptcy, commission, and the assignment are recited. On the 3d May, 1803, Wells and his wife, mortgaged to Robert Waln, Jun. the above 29 acres of land, for securing the repayment of the money which Waln had paid for the life estate; and, on the 1st of June, 1804, Waln conveyed all the above land, except a few lots adjoining the creek, to the lessors of the plaintiff, Hartshorn and others; in trust to receive and pay over the profits to the wife of Wells, or to permit her, otherwise, to receive them to her separate use, during her life. Possession of this property, was fully proved to have accompanied this title for more than fifty years.

The defendant, who had purchased the land adjoining the creek on the north and south sides, about one hundred and fifty yards below the grist-mill, and the same distance above the mouth of the creek; built a saw-mill on the north side, which the plaintiff insisted was wholly or in part on the bed of the creek; and that the forebay, as well as the greater part of the dam, which extended from the north to the south bank of the creek, were also in the bed of the creek. In respect to the ancient course of the creek, and the position of the mill, the forebay and the wheel; a number of witnesses were examined, and a great deal of contradictory testimony given. The water of this creek is fresh, innavigable, and without tide.

The defendant, to prove his title to the land adjoining the creek, whereon he contended the mill was built; offered in evidence, a deed from the sheriff to M. Thompson, which recited a judgment and execution against Stacy Thomas, for a certain sum, which was levied on this land, and sold to Thompson, as the highest bidder; and also a deed from the administrators of M. Thompson to A. Woodruff, and a deed from Woodruff to the defendants. These deeds were objected to; the first, because the judgment and execution produced in evidence, were for a very different sum from that mentioned in the deed; and the second, because the order of the orphan's court, directing the administrators of Thompson to make the deed, in fulfilment of a contract of sale made by the intestate with Woodruff, in his life time, under the act of assembly, which authorises that court to make such an order, was not produced.

THE COURT decided, that the sheriff's deed could not be given in evidence, without producing the judgment and execution under which he made the sale; these documents being necessary to shew that he had authority to sell. If so, a judgment and execution, differing entirely from that recited in the deed, is the same thing as if no judgment

were produced. As to the second point; it is most clear, that, without producing the order of the orphan's court, authorising the administrators to make the deed, they could convey no title; and consequently the deed ought not to be read. The order was afterwards produced, and the deed of course was read.

The objections, made by Richard Stockton and Horace Stockton for defendants, to the plaintiff's right of recovery, were the following:

First. That the bed of a creek or fresh water stream, is so inseparably connected with the adjoining land on the bank, that it cannot be separated, but will belong one half, to the owner of the adjoining land on one side, and the other, to the owner of the adjoining land on the other side. Davis, 155, Harg. Law Tracts, 5; 12 Mod. 510; 1 Swift, 341; Co. Litt. 152a; Noy's Maxims, 13, 14.

Second. The uncertainty in the description of the land, in the deed from Trent to Morris; the courses of a creek being too indefinite a boundary; and, in this case, no plot of the land has been produced, to shew the beginning and course of the western line.

Third. The plaintiff cannot recover under the demise of the trustees, without proving the debt of the petitioning creditor, which has not been done; for without this, it does not appear that the commissioners had any authority to declare Wells a bankrupt, or to assign his property to the assignees, under whose title the trustees claim. Coke, Bankr. Law, 312; Doug. 205; Cas. Temp. Hardw. 136, 176. If it had not been for the 34th section of the bankrupt law [of 1800 (2 Stat. 30)], the bankrupt, in a suit against him by his creditors, could not protect himself, without proving the regularity of the proceedings against him; and this and the 56th section, providing specially for inferior evidence in the specified cases, proves the general principle of law. The provisions are similar, in the 34th section, to those in the English bankrupt law. 1 Coke Bankr. Law, 336. In suits against other persons than the bankrupt, every thing must be proved; and particularly the petitioning creditors' debt, which is the foundation of the commissioners' authority. 5 Term R. 655; 3 Esp. Cas. 219. The 56th section has been decided to apply, strictly, to suits brought by the assignees against a debtor of the bankrupt. 1 Mass. 67; 5 Mass. 303; 1 Bin. 263; 2 H. Bl. 444. If the plaintiff cannot recover on the title of the assignees, he cannot upon the title derived under the mortgage to Robert Waln; because Waln, by the indenture from the assignees, having admitted that Wells had regularly been declared a bankrupt, is estopped from denying it; and of course Wells had no right to convey to Waln. By impeaching the title derived under the assignees, it does not follow that the title remained in Wells; but merely that the plaintiff, in making out his case, has not produced the necessary evidence to support it.

Fourth. If the third objection should not be sufficient, then the deed from the assignees is void; because this property was not described in the advertisement.

Fifth. It was contended, that the weight of evidence, to prove that no part of the saw-mill is in the bed of the creek, is in favour of the defendants.

Griffith and Williamson for the plaintiff; in answer to the first objection, cited a case from 2 Strange, to prove that though a right of way or fishery may exist in the public, yet the right of soil may be in A, who may maintain an ejectment.

WASHINGTON, Circuit Justice (charging jury). This is an ejectment, the object of which is to recover the saw-mill, built by the defendants, and the land covered by the dam and pond. It is necessary for the plaintiff to prove a title in himself, and also possession in the defendant. The plaintiff has produced a regular paper title from the proprietors of New Jersey, down to the lessors of the plaintiff; unless the objections made to that title, or some one of them, should be deemed sufficient. Upon the question of title, therefore, it will be only necessary to examine those objections.

The first is, that the bed of a creek, cannot be separated from the adjoining land, and granted to a person not owning the adjoining land. This objection, at the first view of it, appears to be highly unreasonable. Whilst the title remains with the grantor, it is admitted, that it is equally valid in respect to the bed of the creek, as to the adjoining land; and may be used by the owner for all the purposes to which water may be applied, and for which it is peculiarly valuable; and yet, it is said to be a species of property, which cannot be granted away by him, who has full dominion over and property in it. It would follow from this, that if a man, owning land on each side of a stream, should grant the bed of the creek to another, for the purpose of erecting water works or otherwise; that he might, nevertheless, against his own grant, claim the thing granted, as an appendage to his adjoining land; which would be a strange anomaly in the law. In support of this doctrine (and, before it can be admitted, it should be made out by clear authorities) Harg. Law Tracts, p. 5, has been relied upon. In my apprehension, this authority is against the defendants. "Prima facie," the writer says, "the owner of the adjoining land is entitled to go to the middle of the stream;" and this is very reasonable, where his grant does not expressly bind him by the margin of the stream. In England, the original grants of lands are seldom to be found, and, immemorial use, or prescription, must, in most instances, be resorted to, for the purpose of establishing boundaries. In cases, therefore, of land lying on a fresh water stream, where no precise boundaries can be proved, the presumption (to use the expres-

sion of the author) is, that it extends to the middle of the stream; or that the whole stream is included, if he owns the adjoining lands on each side. But the same author proceeds to say, that the stream may be separated from the adjoining land by prescription; so that one man may own the bed of the stream, and another the adjoining lands. Now, this is conclusive upon the point, because if they may be separated by prescription, they may by grant; the former always pre-supposing the existence of the latter, at some past period of time, but which has since been lost, or destroyed.

As to the second objection. This objection, if intended to impeach the validity of the deed, for uncertainty in the description of the thing granted, is entirely without foundation. The place of beginning, and all the other corners, are precisely mentioned and described by course and distance to a tree on the north side of the creek, and thence up the courses of the creek to a spot from whence a south course will strike the beginning. This spot, though not marked by any visible object, is susceptible of precise location by aid of the compass, as there could be but one spot on the margin of the creek, whence a due south course would strike the beginning. As to the boundary on the north side, I have always supposed a water course to be the safest, because it is a natural boundary. It is possible, that in process of time, the stream may in some measure change its course; but this is no objection to the description, though it may become difficult to prove the ancient course. As to the want of a diagram, to point out to the jury, the beginning of the land described in the deed to Morris, it is clear that such evidence is unnecessary. It is obvious upon the face of the papers, that the land in dispute is within the boundaries of the 300 acres, since it appears that it is only about 150 yards from the mouth of the creek, and the beginning is upwards of half a mile.

Third. It is unnecessary to give any opinion upon the title derived under the assignees. That the assignees, in actions brought by them, (except in those brought by them against the debtors of the bankrupt under the fifty-sixth section,) must prove the debt of the petitioning creditor, is fully established by the authorities; as also, that this section only extends to such actions for debts, duties or demands. Whether the principle applies to a purchaser under the assignees, is not decided in the cases cited; and no opinion is intended to be given by this court, because I am clearly of opinion, that if the plaintiff cannot make out his title under the assignees, he can rely upon the title derived under the mortgage deed from Wells and wife to Robert Waln. Why is the title of the assignees disputed? The answer is, because it does not appear that the persons, upon whose petition the commission issued, were creditors of the bankrupt, no evidence having been offered on this trial, that any debt was in fact due to the petitioner; and of course the commission, which is the foundation of the whole proceedings, does not appear to have issued legally, the proceedings of persons acting under a special authority, not being evidence, in themselves, of the proper exercise of the authority. If so, then the commission improvidently issued; because, what does not appear, and what is not, are in law the same thing. The court must take it for granted, that there was no petitioning creditor, within the meaning of the law; and, if so, all is void. The estate of Wells, therefore, never passed out of him to the assignees; and, of course, he had a right to mortgage his life estate to Robert Waln. If the plaintiff had counted upon the demise of Wells and wife, and the defendants had wished to set up the title of the assignees in order to nonsuit him, they must have given the very evidence which the plaintiff is required to give in this case; and, failing to do so, the same conclusion must have resulted, viz. that the commission had not regularly issued. The recital in the deed from the assignees, that Wells was regularly declared a bankrupt, cannot bind the plaintiff to admit the fact, in order to defeat him upon the title set up under Wells; and also to enable the defendants, to defeat him under the title set up under the assignees:—That is to say, to put it in the power of the defendants to blow hot and cold, and assert that the assignment was regular and not regular; which is the amount of the objection.

Fourth. This objection is put out of the way, if the title under the mortgage is relied upon. But there is nothing in it, or nothing of which the defendants can avail themselves. If the assignees proceeded improperly, so as to affect the interests of the creditors, they might complain, and might perhaps set aside the sale, if the circumstances were strong enough for the purpose. But, even the unauthorised act of an attorney, is not so absolutely void, that the constituents may not ratify and give it validity.

The second question, for the consideration of the jury, is, whether the defendants have been proved to be in possession of the property claimed by the declaration, or any part of it. As to the mill, the evidence being entirely contradictory, in relation to this part of the property; some of the witnesses testifying, that, in their opinion, no part of the mill or wheel is in the ancient bed of the creek, others, that the wheel and forebay are part of the mill, and others again, that a part only of the wheel and forebay is; the court leaves this question to the jury, who are alone competent to judge of the credibility of the witnesses, and to weigh their testimony. As to the dam, or at least a part of it, there is no dispute but that it is in the bed of the creek; and consequently such part, and the land covered by the water of the pond, belong to the plaintiffs. If so, the verdict must

be for the plaintiffs. At the request of the parties, and for the regulation of their conduct in relation to the mill and its appendages, the jury may express an opinion distinct from their verdict.

The jury found for the plaintiff, and the foreman stated, that the jury were of opinion, that half of the forebay and wheel to the south were in the ancient bed of the creek.

NOTE. In the above cause, the defendants moved in arrest of judgment, that the jury had not found that the value of the land exceeded 500 dollars.

WASHINGTON, Circuit Justice. It would be sufficient to fix the jurisdiction, if the value were now proved by witnesses or on affidavit; and, as the evidence given of the value of the tract, proved it to exceed, very far, the sum of 500 dollars, the court cannot grant a rule to show cause why the judgment should not be arrested. (The value was stated in the declaration.)

HARTSHORNE (GRANON v.). See Case No. 5,689.

Case No. 6,170.

HARTSHORNE et al. v. INGLE.

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

Circuit Court, District of Columbia. April Term, 1802.

VARIANCE—PLEA IN ABATEMENT—OFFICE JUDGMENT.

Variance between the capias and declaration cannot be pleaded to set aside an office judgment.

[This was a suit by Hartshorne and Sons against Ingle.] The declaration was in debt upon an award. The capias was in case. There had been an office judgment and writ of inquiry; to set aside which E. J. Lee, for defendant, offered to plead a variance between the writ and declaration, in abatement. But THE COURT refused.

Case No. 6,171.

HARTSHORNE v. McIVER.

[1 Cranch, C. C. 421.] [1]

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

COLLATERAL SECURITY—RIGHTS OF HOLDER.

If a creditor has obtained judgment at law upon the notes of a third person, assigned to him by his debtor as collateral security, his right to resort to that security is not taken away by judgment against his debtor and judgment on scire facias against the bail and arrest and discharge of that bail on a capias ad satisfaciendum.

Issue directed by chancery to try the question whether Hartshorne, as receiver [of Mandeville's estate], be a creditor of the estate of Gillis, and to what amount. Moorehouse & Company were indebted to Mandeville, and gave him William Armstead & Company's notes as collateral security. James Gillis, the bankrupt, was one of the house of Armstead & Company. Moorehouse was taken in Philadelphia, and gave Charles Young as special bail. There was judgment against Moorehouse & Company, and a capias ad satisfaciendum returned non est; sci. fa. and ca. sa. against the bail, upon which the bail was taken and discharged out of custody by order of Mandeville.

Taylor & Youngs, for defendant [Gillis's assignee], contended that the arrest and discharge of Charles Young, discharged the debt of Moorehouse & Company, for which he was liable as bail; and that therefore the notes of Armstead & Company ought to be returned to Moorehouse & Company; and cited the act of Virginia, p. 160; Cro. Eliz. 851; Williams v. Cutteris, Cro. Jac. 136, 143; 10 Vin. Abr. 579; Esp. N. P. 196; Vigers v. Aldrich, 4 Burrows, 2482; Jaques v. Withy, 1 Term R. 557; 1 Call, 18, 21; Higgen's Case, Cro. Jac. 320; Higgins v. Sommerland, 2 Bulst. 68.

C. Lee, contra, cited Hayling v. Mullhall, 2 W. Bl. 1235; Freeman v. Freeman, Cro. Jac. 548; 1 Com. Dig. 502; 1 Sid. 107; 2 Bulst. 68; 3 Com. Dig. 311; 1 Vent. 315; 10 Vin. Abr. 578, tit. "Execution"; T. Raym. 73; 1 Lev. 95.

PER CURIAM (DUCKETT, Circuit Judge, absent). The question really is, whether Gillis's estate is liable to Mandeville or to Moorehouse. Gillis is a mere stakeholder. Moorehouse claims the notes of Gillis, because his own bail has been imprisoned and discharged by Mandeville, although neither he himself, nor his bail, have paid the debt for which Gillis's notes were pledged. This, therefore, must be a most ungracious claim, a claim founded upon no principle of equity. Mandeville has a judgment at law upon the notes, and if the bankruptcy of Gillis had not intervened, must have been left to pursue his remedy at law. Without deciding whether the release of the bail, discharges the principal, nothing is more clear than that the discharge of Moorehouse, without an equitable satisfaction, cannot prevent Mandeville, or his representative, from pursuing his legal remedy against Gillis. Mandeville has a clear title at law under the judgment, and it would be inequitable that Mandeville should be obliged to give up the security until his debt is paid.

THE COURT was also of opinion that Mandeville was not bound to pursue his remedy against the bail of Moorehouse, to enable him to resort to the other collateral security, the notes of Gillis.

HARTSHORNE v. SANFORD. See Case No. 11,739.

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

Case No. 6,172.

HARTUPEE v. THE COAL BLUFF NO. 2.

[26 Pittsb. Leg. J. 145.]

District Court, W. D. Pennsylvania. 1879.

IDENTITY OF BOATS OR VESSELS.

A boat with an entirely new hull with parts of the machinery and upper works of an old boat,—the old boat having been abandoned or dismantled before the said parts were used in the new—in such a case the boat is a new one in law, and may bear a new name.

[This was a proceeding in admiralty by A. Hartupee against the steam tug Coal Bluff No. 2.] Thos. M. McFarland, Esq., as commissioner, recently filed an opinion in the above case in which a number of questions were passed upon, the most interesting probably, being on the question of identity of boats or vessels, which is given in full, as follows:

The most difficult question involved in this case is that of the identity of boats or vessels; should the liens against the former boat, "Coal Bluff," be allowed to participate in the fund arising from the sale of "Coal Bluff No. 2"? I have made a diligent search of the authorities on this question, and given the same due consideration. My views and conclusions are as follows:

In Ben. Adm. p. 125, it is stated that "a ship is always the same although the original materials of which it was composed may, by successive repairs and alterations, have been in the course of time entirely changed." A ship would undoubtedly remain and continue to be the same ship, however extensively or frequently repaired; and even if at last all her original materials had disappeared. 1 Pars. Mar. Law, p. 72. Emerigon observes in one of his works, that a ship is always presumed to be the same though all the materials which at first had given it existence have been successively changed. History records the fact that the Athenians preserved the galley of Salamis during more than a thousand years; they were at great pains to replace the old with new planks, and hence arose a great dispute among the philosophers of the time, namely, whether this vessel, of which there did not remain a single original piece, was the same that conveyed Theseus in returning from the Isle of Crete. Molloy, summing up all the old authorities on this point says: "If a ship be ript up in parts and repaired in parts, and taken asunder in parts, yet she remains the same vessel and not another; nay, though she has been so often repaired that there remains not one stick of the original fabric." It appears that there are but few cases reported on this question of identity of vessels, but we have found another decision in which this question is involved. We refer to the opinion of the Hon. Judge Woods, of the Fifth judicial circuit. Smith v. The Royal George [Case No. 13,102]. In this case, a new hull was built; the boilers of the steamer called the "George" were used, and her pilot house and roof were removed to, and put on the new hull, and when thus completed, the boat was considered a new boat, and called the "Royal George." Although the question that was decided in this case was, that a contract for labor or materials furnished to build a vessel, is not a maritime contract,—the reconstructed boat is recognized throughout the opinion, as a new boat. The changes made in connection with the said steamer George, correspond to the changes made in connection with the said steamer Coal Bluff, and this decision is, therefore, germane to the point under consideration. Desty on Shipping and Admiralty says: "Where the frame of the hull is not broken up in rebuilding, the vessel retains its name and identity; it is regarded as the same vessel in law; but where each timber is first dislocated before being used in the new vessel, though the model be preserved, it is regarded as a new vessel, and the name may be changed." This latter view is based upon the decision referred to in U. S. v. The Grace Meade [Id. 15,243], and that decision is the best authority I have been able to find after an exhaustive research of the various decisions on this question.

The opinion of the commissioner is, in conclusion, where the absolutely essential portions of an old vessel, as the frame of the hull, is preserved intact, in reconstruction, the vessel is considered the same in law, but when not so preserved, and the absolutely essential portion new, as the hull, then the vessel is a new one, and may bear a new name. When first considering the question at what point transformation from the old to the new takes place, it is somewhat perplexing, and a satisfactory decision is not easily arrived at. But is it not owing to the fact that there is a liability to confuse the idea of repairs, or successive repairs, with that of constructing anew, although a small part of the old may be introduced into the new? To arrive at a proper conclusion, I consider it necessary not to overlook the fact that dismemberment, or abandonment of the old, is material in disposing of this question. As illustrative: if a building were almost, or entirely changed by continuous repairs, that building would be considered the same, or an old building; but if it were abandoned and a new one erected and before completion a few parts of the old were placed in the new, it would in law, in my opinion, be held as a new building. This is at present, we learn, the general doctrine adopted by the government of the United States in its laws of registration as to names of vessels. But when we carefully scrutinize the above doctrine as laid down by ancient writers, and also in our text books on admiralty, it will be observed a vessel is considered to remain the same in case of successive changes, or changes from time to time, until it may be there remains not one plank of the original fabric, but the question we are required to dispose of is, we apprehend, different. In this case repairs were not made by degrees until the boat was almost, or wholly

changed, but an entirely new hull was built, as stated in the testimony, hereto attached, and the boat was named and registered "Coal Bluff No. 2." An entirely new hull having been built, does this become a new boat although the old cabin and machinery were used? The strongest and most pertinent decision I have found is U. S. v. The Grace Meade [supra]. The facts in this case were briefly and substantially as follows: The steam tug Agnes was greatly damaged, her boiler having exploded. During her reconstruction, the old shaft, wheel and engine frame, and a few other parts of the old vessel were used. A new keel was built, although a few feet of the old keel was attached, or added to the new; all the old timbers put into the new vessel made up an aggregate of 1,200 feet, the whole number of feet of timber used in the new vessel, 30,000, and the name "Agnes" changed to that of "Grace Meade." When application was made for the registration of the Grace Meade, or the so-called new vessel, the question then arose as to the identity of vessels, or whether in point of law the Grace Meade was a new vessel, or the old vessel Agnes rebuilt. The Honorable Judge Hewes, in rendering his decision says, inter alia, "True, one-twentieth or one-thirtieth of the timber of the Agnes was used in constructing the Grace Meade; but it would be idle to pretend that in point of fact the use of so small a portion of the material of one vessel made the new one the same as the old. The fact of the machinery being in great part the same in the two vessels, has no bearing upon the question of identity." Reasoning from analogy, we find that as to the boat Coal Bluff there were no repairs, gradual or successive; but, a new hull having been constructed and but comparatively little of the timber of the old boat entering into the new, we are of the opinion that the Coal Bluff No. 2 is a new boat. So would it be true, under the same conditions, of a boat or vessel. When this distinction is made, I think the difficulties first encountered will be overcome and the question more readily solved. All claims against the old boat Coal Bluff are consequently disallowed to participate in the fund for distribution arising from the sale of the new boat Coal Bluff No. 2.

[In Case No. 8,687 a claim of the builders of the new hull was disallowed by the commissioner, and the libel dismissed for want of federal jurisdiction.]

Case No. 6,173.

In re HARTWELL.

[1 Lowell, 536; 5 Am. Law Rev. 562.] [1]

Circuit Court, D. Massachusetts. Jan., 1871.

HABEAS CORPUS.

A sentence to the jail in Lenox, in the county of Berkshire, under a conviction for a crime against the United States, authorizes the keeper of that jail to hold the prisoner in Pittsfield, the jail which was kept at Lenox at the time of the sentence having been lawfully removed to Pittsfield by authority of the legislature of the state.

[Cited in Ex parte Brooks, 29 Fed. 85.]

[Cited in State v. Peters, 43 Ohio St. 649, 4 N. E. 81.]

The relator [J. F. Hartwell] was convicted in the circuit court of the United States of a crime, and was sentenced on 28th June, 1870, "to pay a fine of one hundred thousand dollars, and to be imprisoned and confined in our state's jail at Lenox in the county of Berkshire in this district for the term of five years, and to stand committed till this sentence be performed." The warrant or mittimus was directed to the marshal and the keeper of the jail at Lenox, and commands the marshal to deliver the body of the petitioner to the keeper of our said jail, and the keeper to receive the petitioner into his custody in our said jail, and him there safely keep until the sentence is performed, or he is otherwise discharged in due course of law. By virtue of certain acts of the legislature of Massachusetts, the jail for the county of Berkshire, formerly situated at Lenox, has, since the sentence was passed and begun to be executed, been removed to Pittsfield in the same county, and the petitioner, together with the other prisoners, all of whom are held under authority of the state, are now confined in the new jail at Pittsfield by the respondent, who, as sheriff of the county, is keeper of its jail.

H. W. Paine and R. M. Morse, Jr., for relator, cited statute of June 30, 1834 (4 Stat. 739); joint resolution, 23 Sept., 1789 (1 Stat. 96); and the following statutes of Massachusetts: St. 1789, c. 42; St. 1813, c. 97; Rev. St. c. 143, § 1; Id., c. 144, § 30; Gen. St. c. 178, §§ 1, 2, 48, 49; Id., c. 179, § 1.

D. H. Mason, Dist. Atty., and F. W. Hurd, Asst. Dist. Atty., for the United States.

LOWELL, District Judge. The able and learned argument for the petitioner, in which all the statutes bearing upon the subject, and such decisions as seem applicable, have been carefully collected, is that the further execution of the sentence has become impossible, by the lawful discontinuance of the jail in which the petitioner was directed to be confined; that neither the sentence nor the execution thereof can now be varied, because the power of the court over the case was gone when the mittimus was served, or at latest, when the term ended at which the sentence was passed; and the authority of the marshal was exhausted when he delivered the relator to the state officer; and as a consequence of these premises, that he must now be discharged.

I am inclined to think that neither the court nor the marshal has any further control over this sentence. When the petitioner was committed to the keeper of the jail, the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 5 Am. Law Rev. 562, contains only a partial report.]

marshal had fully executed his warrant, and thenceforward the respondent alone became responsible for the safe-keeping of the prisoner (Randolph v. Donaldson, 9 Cranch [13 U. S.] 76); and the court cannot perhaps now reform or change the sentence (Com. v. Weymouth, 2 Allen, 144).

The sentence is in the form long used in the circuit court. In the district court it has been usual to name the jail simply, without adding the county; as, "the jail at Dedham in said district." I do not, however, see any difference in their legal meaning. The sentence is to imprisonment in a certain jail, whether the county be named or not. Now the argument is, that a sentence to one jail cannot be executed in another. The commitment, indeed, as was well argued by the district attorney, is to the keeper of the jail. Rex v. Fell, 1 Ld. Raym. 424. The mere fact, however, that the keeper of that jail, happens to be keeper of other jails, would not of itself give him the right to keep the prisoner in any of his jails, at his discretion. The decision of this case must depend on the sentence rather than on the commitment, and the sentence was to the jail at Lenox. Has then the further execution of the sentence become impossible by the act of the legislature of Massachusetts? I think not. The law of the state necessarily controls all matters pertaining to the care, custody, and safe-keeping of the prisoners. When the statutes of Massachusetts authorize the removal of prisoners in case of disease, contagion, or fire, as in Gen. St. c. 26, § 25, and chapter 178, §§ 48, 49, or to remove prisoners from one jail to another within the same county, as in chapter 178, § 2, it would seem that the sentence of the federal court must be construed as including that power and authority, and that it would not need an act of congress to ratify a removal of a prisoner of the United States when the occasion should arise. The state, indeed, cannot regulate the term of imprisonment directly or indirectly, as by laws for discharging poor convicts detained for fines only, or shortening terms for good behavior, and the like; but so far as the keeping is concerned, the laws of the state are to govern. It is somewhat doubtful whether a general act of congress could confer authority on a state or its officers to remove prisoners in certain contingencies. If not, there must be a special act of congress in each case, or an authority to some federal officer to act in concurrence with the authorities of the state. I suppose the sheriff, as keeper of the jail, has power, at common law, to remove prisoners to another jail, in case of fire, contagion, or other necessity. See, as to persons committed for trial, Bac. Abr. "Gaol" and "Gaoler" (C).

Another of the incidental powers conferred on the keeper of the jail and implied in the sentence is, that if the jail is lawfully removed, he shall remove the prisoners with it. The sentence need not recite that the keeper is to hold the prisoner at the jail in Lenox, unless and until there shall be some lawful occasion or necessity to remove him therefrom. All this is implied. I do not consider a sentence to the jail in Lenox to be different in legal intendment from one to the jail of the county of Berkshire, situated at Lenox. If there had been two jails in that county, a designation of one in particular would have been necessary, or at least convenient, but the legal effect would have been the same. It was not intended to point out a particular building, but a particular jail, and the argument would be equally strong for the petitioner if a new jail had been built at Lenox. The jail has been removed by the only authority that could remove it, and under statutes already passed when this sentence was pronounced. All the prisoners were lawfully removed with the jail, though the statute of Massachusetts says nothing about them. 1 Whart. 439, 445.

The prisoner must be remanded for three reasons: 1. The jail to which he was sentenced is the same in which he is now confined, though the building is different. 2. If not, and that jail has been destroyed, the keeper of the jail has a right to confine his prisoner in a substituted jail. 3. The state has a right to regulate the custody of prisoners within the state, including their removal from one jail to another, when necessary, and of this necessity the state, acting by its legislature, is the sole judge. The first point is entirely clear to my mind, and sufficient for the decision of the case. Prisoner remanded.

HARTWELL (SMITH v.). See Case No. 13,054.

HARTWELL (UNITED STATES v.). See Cases Nos. 15,318 and 15,319.

Case No. 6,173a.

HARTWELL v. VINEY.

[See Case No. 6,158.]

Case No. 6,174.

Ex parte HARTZ et al.

[1 N. Y. Leg. Obs. 39.]

District Court, S. D. New York. 1842.

BANKRUPTCY—DISSOLUTION OF PARTNERSHIP—JOINDER IN APPLICATION.

1. Parties cannot apply jointly for a decree in bankruptcy after a dissolution of their partnership.

2. A decree in bankruptcy cannot be rendered against a firm on a voluntary application therefor, unless the whole of the partners unite therein.

[Cited in Re Crockett, Case No. 3,402; Re Sheppard, Id. 12,753.]

This was an application by the petitioners [Mark Hartz and Hirst Pinner], on their joint and several petition, for a decree in bankruptcy. Objections were filed by various classes of their creditors. It appeared that the petitioners, several years ago, carried on business as bankers in copartnership in Germany, and there contracted the joint debts from which they sought to relieve themselves; it also appeared that they dissolved partnership abroad, and had at different periods left Germany and emigrated to this country. The petitioners set forth in their schedule the partnership debts and assets, and also their separate debts and property, and they prayed for a discharge in their partnership character, and also, each respectively for himself. It was insisted that the petitioners were incompetent to take the benefit of the act, on three grounds: (1) That they had not furnished a true inventory of their assets or scheduled debts; (2) that their partnership was not entered into in this country, and that their debts were contracted abroad; and (3) that the application, being joint, could not be sustained, inasmuch as they had dissolved partnership prior to the petitioning.

Mr. Edwards, for creditors.
Brady & Maurice, for Pinner.
Mark Hartz, in pro. per.

BETTS, District Judge. The statute having made a special provision for the case of partners, and these parties applying in that capacity, the relief administered must be the one appropriate to them in that character. In discussing their right to such relief, I shall lay out of view the particular most pressed on the argument, that this was a foreign partnership between aliens, that all its debts were contracted in a foreign country, to aliens, and without reference to the United States, or the expectation of any parties interested, that the co-partners would ever transact business here, or become residents themselves in this country.[1]

The question, then, is, can persons who have been partners and become insolvent apply, after the dissolution of the partnership and the entire cessation of the partnership connection, for a common discharge under the bankrupt act? The general inquiry is presented in its strongest aspect in this case, because the partnership relation between the petitioners terminated many years since, and there is no partnership property represented to be within the jurisdiction of our laws to be acted on by the proceedings. The whole authority for proceedings by or against partners, as such, is contained in the fourteenth section [of the act of 1841 (5 Stat. 448)], and, notwithstanding some ambiguity or confusion of language in the initiatory clause of that section, it is to be remarked that every provision of the section is adapted to the case of coercive bankruptcy, much more than to that of a voluntary application by copartners to be declared bankrupts upon the ordinary footing of such decrees. The construction of the section, in some of its bearings, came before the circuit court in the case of In re Paulson [Case No. 10,849], at the last term.

The court, however, went no further than to decide that a decree of bankruptcy rendered on the petition of a member of a firm praying such a decree in his own behalf individually and as one of a copartnership, did not affect the partnership estate, and operated no further than a voluntary transfer of his interest therein, or an assignment thereof by operation of law. This is consonant to general principles. [Harrison v. Sterry] 5 Cranch [9 U. S.] 289; 2 P. Wms. 23, note a; Doug. 627. The spirit of the decision is that a single partner, under such voluntary application, does not maintain his proceedings under the fourteenth section, but under the authority of the first, and he is to be regarded and dealt with as though his interests and indebtedness were separate and individual. 3 P. Wms. 24, note a. The same principle would govern the application of any number of partners less than the whole. It is clear, therefore, that a decree of bankruptcy against a firm cannot be rendered on the voluntary petition of partners unless all unite; and a careful scrutiny of the fourteenth section leaves it at least questionable whether it was intended to apply at all to voluntary applications, and is not to be limited to coercive proceedings, authorized to be taken by the whole or a portion of them or their creditors. The two closing numbers of the section indicate that congress had compulsory proceedings only in view, and the arrangement and distribution of the assets, as if the partnership had been dissolved without any bankruptcy, looks to that species of action in respect to partners which forces a dissolution of the connection and places their property in sequestration. The first section limits to creditors the right to institute proceedings in compulsory bankruptcy; the fourteenth section declares the order may be made on the petition of the partners, or any of them, or of any creditor of the partners; and the law, by thus increasing the class entitled to sue, could, without any special provision to that effect, impart every power and privilege before granted to creditors to their new associates. This is allowing partners to do directly what, by the English law, is done circuitously and by consent, for, although the proceedings there are wholly compulsory, in point of form they may be invoked and carried through at the instance of the bankrupt himself. 2 Chit. Pl. 559; Eden, Bankr. 49.

It is enough now to say that all the terms of the fourteenth section may be satisfied by restricting its operation to cases of involun-

[1] [See Zarega's Case, Case No. 18,204.]

tary bankruptcy, the seeming incongruity of authorizing parties to take coercive proceedings against themselves being recompensed, if not obviated, by the consideration that this method will place the partnership estate under the administration of the bankrupt law, and will enable parties to retrace a hasty step of preference granted to portions of their creditors, and secure in return a common allotment of their property to all. In this point of view, it could hardly be maintained that partners would act in repugnance to good faith, or be obnoxious to injurious imputations, who should represent that they had "willingly procured themselves to be arrested," or "their goods to be taken in execution" in favor of a friendly creditor; or "had removed the partnership goods, chattels and effects to prevent their being levied on or taken in execution" by one hostile creditor to the prejudice of all others, and pray to be deemed bankrupts therefor. The section manifestly contemplates the security of the common creditors of a partnership out of the estate of the bankrupt firm, and it would seem every way befitting the object in view that the debtor partners might be the voluntary instruments of that general good, even against antecedent acts of their own having a contrary bearing and purpose. But if the fourteenth section also empowers partners to become voluntary applicants in the same way as individual bankrupts, it appears to me, clearly, that they can be so only in the case of a copartnership then actually existing. First. The language of the section that, "where two or more persons are partners in trade," they or any of them may petition, would seem to limit the capacity to act jointly, and as partners, to the time in which they continue to be partners. Such would be the natural reading and acceptation of the expression. That construction is rendered more certain by other numbers of the section, "for them," and thus the idea of a subsisting copartnership between the applicants as the basis of their proceeding is continued and reinforced with stronger emphasis. It is unnecessary, in this connection, to consider whether the same limitation attaches to "creditors," or whether or not the partnership relation as to them may not subsist in intendment of law, without regard to the fact of its continuance between the partners. The law upholds rights and remedies to creditors upon such intendment in numerous instances when the parties charged would be estopped from claiming a partnership relationship in respect to each other. The clause already adverted to, importing that the proceedings under the fourteenth section, establishing the bankruptcy, thereby dissolve the partnership, gives additional indication that congress legislated in this section with a view to partnerships in force, when the proceedings are taken.

The result of my opinion is that parties cannot proceed by voluntary petition as partners unless they are partners at the time their application is made; and that accordingly the petition in this case, as a joint one, cannot be upheld. The petition also sets forth individual indebtedness of each petitioner, and he prays to have the benefit of the act in relation to his joint and separate debts; and it is urged that the application may be taken distributively, and decrees be rendered thereon conformably to the rights of the respective parties. It is a cardinal principle, in courts alike of common and civil law jurisdiction, to deny suitors the privilege of prosecuting their individual and separate rights in a common action. Unless their rights are joint, or arising out of the same matter of fact or law, or the remedy sought is one and the same, each suitor is put to present himself before the tribunals upon his separate rights, and to receive individually the judgment appropriate to his particular case. There is equal reason for applying this principle to proceedings in bankruptcy. Indeed, infinite confusion and perplexity would result from attempting to consolidate in one petition the application of parties who are not bound to any common order of proof, who need not be opposed by any defence applicable to all, and who cannot take a common decree.

The joint petition is accordingly dismissed, with costs, but if the petition can be so amended, without varying its essential structure and statements, as to be made applicable to either one of the petitioners solely, the parties may so amend it, and, at their election between themselves, leave it to stand for one only. Notice, however, of the election and of the amendments intended to be made to be given five days previously to the attorneys of the creditors who have filed objections to their proceedings in their present shape.

Case No. 6,175.

The HARVEST.

[Olc. 271.] [1]

District Court, S. D. New York. Feb., 1846.

SERVICES AND COMPENSATION OF SHIP-KEEPER.

1. Services rendered in taking care of a ship in port are, under the statutes of the state, protected by a lien upon the ship, in cases where the sum of fifty dollars is due for such service.

2. A ship-keeper, by night or day, is not obliged, without an engagement to that end, to pump the ship, wash her decks, &c. His sleeping on board nights, unless specially stipulated, does not impart a right to extra compensation therefor.

3. No abatement of wages will be made for occasional absence from the ship, if no objection is made thereto until the whole period of service has expired.

[1] [Reported by Edward R. Olcott, Esq.]

In admiralty.

W. Mulock, for libellant.
W. M. Pritchard, for claimant.

BETTS, District Judge. This case comes up on exception to the report of the commissioners, allowing the libellant $96. The libel demands $133.39, the balance of wages for keeping the ship in this port fifty days and forty-nine nights, at $1.25 per day and $1.50 per night, and also some small disbursements for fastenings to the vessel, and gives credit for $5 cash paid. The libellant acted as ship-keeper fifty days, and during the time slept on board the vessel. When engaged for the service he was told he would receive from $1 to $1.25 per day, and expressed himself gratified with the job at that rate of compensation. After the service was completed, some complaint was made by the owners of his want of attention to the ship, but he was told he could have $1 per day, and he stated his readiness to accept what they would give, and seemed satisfied with the sum proposed. The money was not paid or tendered to him at the time his services ended, and immediately after he demanded, through his lawyer, the whole sum of $133.39, and payment to that amount being refused, this action was instituted. The demand will be regarded a lien on the vessel, created by the Revised Statutes of this state (2 Rev. St. p. 408, § 1), unless the claimants have shown that less than $50 was due, and in that case the question may arise, whether it can be enforced in this court as a maritime lien.

It seems to me no just ground is laid in the proofs for an allowance to the libellant as night-watch, beyond the daily pay for which he contracted. He does not show any agreement for such compensation, and he must, therefore, put his claim upon the quantum meruit of remaining on board over night. There is no evidence that his sleeping on board was a burthen imposed on him, or a service beneficial to the ship-owners; it may have been a private privilege or advantage allowed him. The court cannot consider the naked fact sufficient to raise, against the vessel or owners, an obligation to pay for it. Nor does the evidence disclose any circumstance from which it may be implied that this particular was regarded at the time between the parties as extra service. The commissioner reports $1 per night to be the proper compensation for each night-watch. I think this is not authorized by any evidence in the case. It does not appear that the libellant actually performed the duty of a night-watch for the time, nor can it be supposed physically possible for him to have done so. I understand, on the testimony, that a night-watch is to be constantly on deck, or so about the vessel as to have watchful guard over her throughout the night, and it cannot be assumed that a man can endure that service continuously fifty days and forty-nine nights. I shall accordingly allow the exception to this part of the report. Had the owners tendered the libellant the $1 per day at the time of settlement, or when his demand was made with a view to this suit, I should have held that to be an acquittance of their liability to him. But by not following up their admission of indebtedness by a tender of the amount, they subject themselves to all the consequences of a suit presented upon a contested demand. They have, by their answer and proofs, attempted to show that the libellant was not entitled even to $1 per day, because of unfaithfulness to his charge, or for not rendering services to the vessel required of him. That portion of the defence permits him also to urge an extra compensation for services during the day, which are not, in an equitable point of view, strictly within his duty, nor satisfied by the per diem pay.

I think the occasional absences of the libellant from the vessel given in proof, do not entitle the claimants to any deduction from his wages; it is to be presumed, under the circumstances, that they were aware of the facts before the termination of his hiring; and the reasonable inference also is from their making no objection, that he was absent in their service, or with their permission; nor is it shown that he ought, as part of his duty, to have pumped the ship, or kept her decks washed down. These services would not fall appropriately within the duty of ship-keeping. To render him liable for their value, the claimants must prove an undertaking on his part to do the work. He gives evidence of extra care and attention in keeping a time account of the men employed about the vessel, and in view of the whole case, I think he ought to receive for his employment on board, at the rate of $1.25 per day, the highest sum intimated to him by the owners at the time of his engagement. He is also entitled to be paid for locks, fastenings, &c., necessary to the vessel, and supplied her by him. The account, adjusted upon these principles, would leave due him $62.50 for wages, and $2.39 for materials, &c., supplied, from which deducting $5 paid him, the balance, $59.89, would be the sum he is entitled to recover.

This being above $50, renders it unnecessary to consider whether a remedy could be had in this court for it, upon the principles of the maritime law alone. The court enforces liens on domestic vessels under the local law, when they partake of the character of maritime liens. The Robert Fulton [Case No. 11,890]; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; Phillips v. The Thomas Scattergood [Case No. 11,106]; Davis v. A New Brig [Id. 3,643]. There must be deducted from the report of the commissioners $34.11, and a decree entered for $59.89, and costs.

Case No. 6,176.

The HARVEST.

[1 Spr. 537.] [1]

District Court, D. Massachusetts. March, 1848.

SALVAGE—SEAMEN—COMPENSATION.

Where seamen belonging to a ship of war of the United States, were discharged therefrom at sea, in order that they might go on board of a whaling ship, which had received damage, and was short-handed, to render assistance, and they did so, and aided in bringing her safely into port, *held*, that their compensation was not to be limited to the then highest rate of seamen's wages, but that they might recover as for a salvage service.

[This was a libel in rem against the whale ship Harvest for salvage.]

E. D. Sohier and D. H. Dustin, for libellants.

A. H. Fiske, for respondent.

SPRAGUE, District Judge. The whale ship Harvest, of 360 tons, sailed from Nantucket, for the Pacific Ocean, on the 20th day of October, 1844. On the night of the 14th of November, she shipped a sea, which carried away her mizzen mast, bulwarks, all her boats, injured the wheel, swept the deck, sweeping overboard the whole of the watch on deck, consisting of the second mate and eight seamen, who were all lost. A few days afterwards, another man was lost from the bowsprit. The ship's company then consisted of the captain, first and third mates, one colored boat-steerer, the carpenter, cook, steward, and six seamen, five of whom had never before been to sea, and none except the captain and mates were able seamen. In this condition, the captain abandoned his voyage, and put away for a port in the West Indies, availing himself of the trade wind. On the 20th day of December, in lat. 28°, and long. 62°, the Harvest fell in with the United States ship Decatur, Captain Mayo, bound for Norfolk, from the coast of Africa. The Decatur took the Harvest in tow, and supplied her with a boat, a spar for a mizzen mast, and aided in raising and rigging it. The Decatur then cast off, and proceeded on her voyage. The Harvest hove to, and clewed up her topsails, which the Decatur took to be a signal of distress. The captain of the Harvest had previously made a request for five or six men, to aid in navigating his ship, which had not been complied with. The captain of the Decatur, upon seeing the signal, asked for volunteers to go on board of the Harvest. Some twenty or thirty seamen offered their services; the four libellants were selected; their wages were paid up to that time; their discharges from the service of the United States made out, and they were sent, under the charge of a sailing-master, to the Harvest, by whom the discharges were delivered to the captain of that ship, with directions that, if the men performed their duty to his satisfaction, the discharges should be delivered to them, on arriving in the United States, otherwise, they should be sent to the nearest navy-yard. This was on the 21st December. The Harvest arrived at Edgartown on the 8th of January following, when the libellants were set on shore, and their discharges delivered to them, they having performed their duty, as able seamen, to the entire satisfaction of the captain. They proceeded immediately to Boston, and on the 20th day of January filed this libel. The respondent admits that the libellants were entitled to wages, at the highest rate given at that time to seamen, but denies that they are entitled to salvage, or other compensation than such wages; and insists that the claim in the libel does not embrace wages. After setting forth the facts, the libel asks for salvage, "and to so much as has been, and is actually allotted by this court, to persons doing and performing the like services, and for such other relief as shall to law and justice appertain." This sufficiently embraces a claim for compensation. Captain Coffin testifies that, after the other aid rendered by the Decatur, he thinks he could have reached the United States, without the assistance of the libellants, and that he did not make any signal of distress, but hove his ship to, and clewed up the topsails, that he might get some sleep, having been without rest for more than twenty-four hours. He must have known, however, that the Decatur being several miles from him, had taken it for a signal of distress, and had turned back and run down to him, and sent these men on board, solely in consequence of that signal. And when the libellants came on board of his vessel, he said nothing to them, or to the sailing-master, to undeceive them, when he must have seen that they were acting from the conviction, that he had made a signal of distress for the want of men. I am satisfied that the compensation to which the libellants are entitled, is not to be restricted to the rate of seamen's wages. They left a ship of war of the United States, in good condition, abundantly supplied with men, bound for Norfolk, with most favorable prospects, and voluntarily went on board of the Harvest, with a feeble and disheartened crew, exhausted officers, exposed for the want of proper bulwarks, her wheel injured, with such a mizzen mast as had been rigged at sea; and although it proved, in the event, that her hull had not suffered, yet, at the time, that could not have been certainly known. This was on the 21st of December. The ship was bound to Nantucket, at that inclement and boisterous season. They were on board eighteen days. The only fact which tends to diminish their compensation is, that the libellants all belonged to the North, and probably reached their homes earlier, and at less expense, than they could have done from

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

Norfolk. Under all the circumstances, I think that the libellants are entitled to the sum of $35 each.

Decree accordingly.

Case No. 6,176a.

The HARVEST QUEEN.

[See Case No. 91.]

Case No. 6,177.

HARVEY v. ALLEN et al.

[16 Blatchf. 29;[1] 2 Browne, Nat. Bank Cas. 439; 25 Int. Rev. Rec. 95.]

Circuit Court, S. D. New York. Feb. 19, 1879.

ATTACHMENT—NATIONAL BANKS—STATE COURTS—RECEIVERS—PARTIES—COSTS.

1. After a circulating note of a national bank, which it had failed to redeem in lawful money, had been protested, under section 46 of the act of June 3, 1864 (13 Stat. 113), an attachment from a state court was levied on moneys of said bank on deposit in another national bank, to secure a debt from it to A. Subsequently, a receiver of the bank was appointed, under section 50 of said act. *Held*, that, under section 52 of said act, said levy was void.

[Cited in Roberts v. Hill, 24 Fed. 572.]

2. The receiver, having applied to the state court to dissolve such attachment, without becoming a party to the suit in the state court, and such motion being denied, and he having then immediately brought this suit against A., and the bank in which the moneys were on deposit, and the sheriff who levied the attachment, to assert his title to such moneys. *Held*, that he was entitled to such relief.

3. A. having, after process in this suit was served on the defendants, obtained a judgment in his suit in the state court, and collected it by execution against the moneys so attached, this court decreed that A. should pay directly to the plaintiff the money he had so collected, and the bank in which the moneys had been on deposit should pay such money if, and only if, it could not be collected from A.; that such bank should pay costs to the plaintiff; that such bank should not have costs against A.; that A. should pay costs to the plaintiff; that the sheriff should not have costs against the plaintiff; that the plaintiff should recover from A. the costs of making the sheriff a party, and the costs of the sheriff's defence, the latter costs to be paid over to the sheriff by the plaintiff, when collected; and that the bank in which the moneys had been on deposit should respond to the plaintiff for them, with interest from the time when process in this suit was served on it, subject to the said decree as to payment by A. of what he had received of such moneys.

[This was a bill in equity by Joel D. Harvey, receiver of the Scandinavian National Bank of Chicago, against Benjamin F. Allen and others.]

George Bliss, for plaintiff.

Michael H. Cardozo, for Allen, Stephens & Co.

Aaron J. Vanderpoel and J. Sterling Smith, for the Broadway Bank and the sheriff.

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

BLATCHFORD, Circuit Judge. The Scandinavian National Bank of Chicago was a bank organized under the national banking act, and subject to its provisions. It was located at Chicago, Illinois. On the 10th of December, 1872, it failed to redeem a circulating note of the denomination of $5, issued by it, when payment thereof was legally demanded at its office in Chicago, during the usual hours of business. On the same day a notary public duly protested said note for non-payment, and served a written notice of the protest on the president of the bank, and it stopped doing business, and a United States bank examiner took possession of all of its books and assets. Section 46 of the act of June 3, 1864 (13 Stat. 113), provides that, if any national bank shall fail to redeem in lawful money any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at its office, they may be protested by a notary public. The notary is required to give notice of the protest to the president or cashier of the bank, and to forward notice of the protest to the comptroller of the currency. Section 50 authorizes the comptroller, on becoming satisfied, as above specified, that any bank has so refused to pay its circulating notes and is in default, to forthwith appoint a receiver, who, under the direction of the comptroller, shall take possession of the books, records and assets of the bank, and collect its debts. Provision is made for the receiver to turn the assets into money and pay such money to the treasurer of the United States, and for the comptroller to distribute such money pro rata among the creditors of the bank. Section 52 is in these words: "All transfer of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." On the 18th of December, 1872, the comptroller, by an instrument in writing reciting the necessary preliminary facts, appointed the plaintiff in this suit to be receiver of said bank, with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of said act. At the time the Scandinavian Bank failed, the National Broadway Bank, another national bank, located in the city of New York, and one of the defendants in this suit, had on deposit moneys belonging to the Scandinavian Bank, subject to its draft.

On the 9th of December, 1872, the defendants Allen, Stephens and Blennerhassett, composing the firm of Allen, Stephens & Co., held a sight draft drawn by the Scandinavian Bank on the Broadway Bank, for $650. On that day they presented the same for payment to the latter bank, but it was not paid, and thereupon it was duly protested and notice given to the former bank. On the 12th of December, a warrant of attachment was issued out of the supreme court of New York, on the application of Allen, Stephens & Co., in an action in said court by them against the Scandinavian Bank, to recover $650, with interest from December 9th, and on the ground that said bank was a foreign corporation organized under said act of 1864, commanding the sheriff of the city and county of New York to attach and safely keep all the property of said bank within his county, or so much thereof as might be sufficient to satisfy the said demand, together with costs and expenses. On the 13th of December, this attachment was levied by the defendant Brennan, as such sheriff, on the moneys of the Scandinavian Bank in the possession of the Broadway Bank. A summons was issued in said action, dated December 12th, demanding judgment for $650, with interest from December 9th, and costs. A complaint, setting forth the cause of action, was verified December 18th. On the 19th of December, in accordance with the state practice, an order was made by the state court, that the summons be served by publication in two newspapers, and that a copy of the summons and complaint be deposited in the post-office, directed to the Scandinavian Bank, as defendant. On the same day the summons and complaint were filed in the state court. On the 8th of February, 1873, the attorney of the United States for this district caused an affidavit to be made by Mr. Tremain, entitled in the suit in the state court, reciting the proceedings therein, and setting forth that the Scandinavian Bank had suspended and become insolvent December 9th, 1872; that Mr. Harvey had been appointed its receiver, by the comptroller, under said act; that he, said attorney, had "been instrucfed to act for said receiver in and about the matters and proceedings appertaining to the claim of" Allen, Stephens & Co.; and that, upon the facts so stated, and all the proceedings in said suit, and, upon the ground, among others, that the state court had no jurisdiction, and that the continuance of the proceedings in said action, and of said attachment, was in violation of said act of congress, and that said attachment was issued after the commission of an act of insolvency by the Scandinavian Bank, and with a view to prevent the application of its assets, as prescribed in said act, and to prefer Allen, Stephens & Co., by securing to them their claim in full from such assets in preference to other creditors, or the ratable proportion of said assets that might be found due to them under said act, the said attorney desired to move, in behalf of the defendant, to vacate said order of publication and warrant of attachment, and to stay the proceedings in said action. On said affidavits, and on an affidavit by said attorney, that one of the circulating notes of the bank was protested on December 10th, for non-payment and non-redemption, and that such fact was duly certified to the comptroller of the currency, a motion to the above effect was made before the state court, on the part of the defendant, by counsel who appeared for it for the purpose of the motion. The court, on the 5th of March, 1873, denied the motion, at special term, holding, that, so far as the defendant was concerned, the attachment was properly granted, and that, in accordance with the decision of the court of appeals of New York, in Tracy v. First National Bank, 37 N. Y. 523, it must be held, that the receiver had no status in the action to make a motion to vacate the attachment, but must assert his title in some other manner. The point of the decision in the Tracy Case was, that the receiver, not being a party to the suit, could not make any motion in it. The Scandinavian Bank, then, by the said attorney, who appeared for it for that purpose, took an appeal to the general term of the state court, from the order denying such motion. On the 16th of May, 1873, the general term affirmed the order appealed from. The receiver did not make himself a party to the suit in the state court, but, in May, 1873, he filed the bill in this suit. An amended bill was filed in June, 1873. It sets forth the substance of the matters above stated. It alleges, that, when the Scandinavian Bank became insolvent, the Broadway Bank had in its possession "certain assets" of the former bank, "and, among the same, the sum of about fifteen hundred dollars, more or less, in currency, or otherwise," which the plaintiff, as receiver, and in behalf of himself and said comptroller, was entitled to demand and receive from the latter bank, and that the same has been demanded, but the latter bank has refused to deliver the same to the plaintiff or to said comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the treasury of the United States. It alleges that the claim made under said attachment is contrary to law. It prays that an injunction may be issued, restraining the Broadway Bank from paying over said moneys to any one but the plaintiff; that Allen, Stephens & Co. and said sheriff be enjoined from proceeding on said attachment, or entering any judgment or order in said suit, or on their said claim, save in the way of presenting the same to the plaintiff as receiver, as claims entitled to no preference over those of the general creditors of the Scandinavian Bank; that the Broadway Bank pay to the plaintiff, to be by him paid into the treasury of the United States, the said sum of

$1,500, "be the same more or less," with interest; and that a receiver of said moneys, during the pendency of this suit, be appointed.

Allen, Stephens & Co. answered, in October, 1873, setting up their claim, and said attachment and the proceedings in said suit in the state court. Their answer also set forth, that, on the 13th of September, 1873, a judgment was recovered in said suit, against the Scandinavian Bank, for $829.84; that, on the same day, an execution was issued on said judgment, to said sheriff; that said sheriff collected on said execution, and under said attachment, from said Broadway Bank, and paid to Allen, Stephens & Co., on the 20th of September, 1873, $820, in full satisfaction of said judgment and of all claim of theirs under said attachment; and that Allen, Stephens & Co. claim no interest in any indebtedness of the Broadway Bank to the Scandinavian Bank or in any of the assets of the latter bank.

The sheriff answered, in October, 1873, setting up the proceedings in the suit in the state court and the attachment and its levy and the judgment and execution, and the collection of the money and of fees and expenses from the attached property.

The Broadway Bank answered, in October, 1873, setting up the attachment and the proceedings in the suit in the state court, and the judgment and execution, and the taking by the sheriff from the attached moneys in the hands of the Broadway Bank, of sufficient to satisfy the execution; that said bank has in its possession $568.51 of said deposits of the Scandinavian Bank, and no more, subject to the order of the bank, or its legal representatives or assigns; and that said bank has not refused to pay any of said deposits to the plaintiff, except such as were so attached by the sheriff, amounting to $876.94.

On the 9th of January, 1873, the plaintiff directed the Broadway Bank to credit itself in account with $153.20, for a collection made by the Scandinavian Bank. On the 17th of January, 1873, the plaintiff wrote to the Broadway Bank as follows: "Your favor of 14th inst., enclosing acc't current, received. I have had it compared with the books of this bank and find it correct. You will please send me your check for balance, less amount of the two attachments and sufficient to cover costs, say about $100 in each case. The U. S. Dist. Atty. in New York has been instructed from Washington to defend these suits, and, until decided, of course you will retain sufficient to indemnify you." On the 18th of January, 1873, the comptroller of the currency wrote to the Broadway Bank as follows: "I am informed that you have on deposit, to the credit of the Scandinavian National Bank of Chicago, $2,669.35 in gold, and $2,461.14 in currency, and that suits of attachment have been brought against the bank—one for $650 and the other for $441.95. This bank having been placed in the hands of a receiver, you will, on the receipt of this letter, forward the balance due the Scandinavian National Bank, less the amount which has been attached, to this office, which amount will be deposited with the treasurer, in trust, subject to my order, for the benefit of its creditors, as provided by the national currency act." On the 21st of January, 1873, the comptroller wrote to the Broadway Bank as follows: "I have received your letter of the 20th, enclosing your certificate of deposit for $2,664.35 gold, being balance of coin account of the Scandinavian National Bank; also your certificate of deposit for $1,015.69, being balance of currency account, less the sum of $1,445.45, retained to abide the result of two attachments and probable costs thereon. Please inform me of the amount of those attachments and the amount retained for costs." The $1,445.45 was the balance of account made up with interest to December 9th, 1872, but not later. The amount paid to the sheriff by the Broadway Bank, September 20th, 1873, was $876.94. The second attachment referred to in the correspondence was one by McKim, Brothers & Co. The record does not show how it was disposed of, but it is not set up by any of the defendants. McKim, Brothers & Co. were originally made parties defendant to this suit, but the suit was discontinued as to them. The Broadway Bank and the sheriff appeared in this suit on the 5th of July, 1873, and Allen, Stephens & Co. appeared on the 7th of July, 1873. A motion was made, on notice to all the defendants, for an injunction to restrain the Broadway Bank from paying over to any person but the plaintiff the moneys mentioned in the bill, and for the appointment of a receiver to hold said moneys until the final determination of this suit, and for an injunction to restrain all the defendants from interfering with such disposition of said moneys pending the determination of this suit, but such motion was denied by this court by an order filed September 18th, 1873.

The case has now been brought to final hearing on pleadings and proofs. It is contended for the Broadway Bank, that the proceedings in the suit in the state court are binding on the plaintiff, and are a bar to the relief asked by the bill in this suit; that the state court had jurisdiction of the suit brought in it, and properly issued the attachment; that the bringing of this suit did not divest the state court of the jurisdiction it so acquired; that that court had authority to proceed in such action, and render and enforce judgment therein, so long as no defence was interposed, and so long as the insolvency of the Scandinavian Bank was not brought to the knowledge of that court in any manner of which it could take cognizance; that the plaintiff, on motion to the state court, could have been substituted as defendant in such action, and could then

have moved to vacate the attachment, or could have defended the action; that, as the plaintiff did not intervene in that action, but allowed it to proceed to judgment, and allowed the judgment to be enforced against the attached property, he cannot maintain this suit and obtain relief which could have been obtained by him in that action, especially when the effect of such relief will be to nullify the judgment in that action and the proceedings under it; that the sheriff was required by the state law to execute the attachment and the execution; and that the Broadway Bank could not resist the processes.

The argument on behalf of Allen, Stephens & Co. is addressed principally to a questioning of the correctness of the decision of this court in Cadle v. Tracy [Case No. 2,279], to the effect, that a state court has no jurisdiction of a suit against a national bank, where the bank is not located in such state, such jurisdiction being forbidden by section 57 of the act of June 3, 1864 (13 Stat. 116, 117). It is also contended for them, that, if the state court had jurisdiction to render the judgment which it did render, this court cannot, in this suit, re-examine the matters settled by that judgment.

The decision of the supreme court of the United States in National Bank v. Colby, 21 Wall. [88 U. S.] 609, disposes of the main question in this case. In the Colby Case, the First National Bank of Selma refused payment, on the 15th of April, of a treasury draft of the United States. The bank did not open for business on the 16th, and on that day the military authorities of the United States, under instructions from the secretary of the treasury, took possession of the property of the bank. On the 17th its president absconded. On that day Colby sued out an attachment, in a state court of Alabama, against the bank, on a contract debt, which was levied on its property. An examination into the affairs of the bank, on that day, showed a deficiency in its cash account, of $200,000, and, on the 30th of April a receiver of the bank was appointed by the comptroller of the currency. On the 22d of May, Colby filed a declaration in the suit. On the 1st of June, the bank was dissolved by a decree of the district court of the United States. In March, 1869, the suit in the state court was tried. The receiver did not make himself a party on the record to that suit, but he appeared by counsel, on the trial, and was allowed, without objection, to make proof of said facts, and to produce his appointment as receiver and the decree of dissolution. He thereupon moved the state court to dissolve the attachment and discharge the levy and that the suit abate. The motion was overruled. The receiver then, without objection, offered the same evidence to the jury, and requested the court to 'nstruct them, that, if they believed the evidence, the suit could not be maintained, and they must find for the defendant. The instruction was refused, and there was a verdict for the plaintiff and a judgment for $5,632.33 and costs. The case was then taken by appeal to the supreme court of Alabama, and it (46 Ala. 435) affirmed the judgment. It is stated in the opinion of that court, that "the record does not show that the defendant, said bank, pleaded any plea in defence of said action." A part of the judgment which was affirmed authorized the issue of a venditioni exponas, to sell the property levied on under the attachment. The supreme court of Alabama held that the insolvency of the bank did not dissolve its liability to be sued by attachment. The case was then taken by a writ of error to the supreme court of the United States, and is the case so reported in 21 Wall. [88 U. S.] 609 [supra]. That court reversed the judgment and remanded the cause to the state court, with directions to discharge the attachment levied on the property of the bank. The supreme court held that the suit in the state court abated by the decree dissolving the bank. But it further held, that the property of a national bank, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property, of the receiver of the bank, subsequently appointed. In the opinion of the court, comment is made on sections 50 and 52 of the act of June 3, 1864, and it is said, that they manifest a clear design, on the part of congress, to secure the assets of the insolvent bank for ratable distribution among its general creditors, and that no preference in the application of its assets can be obtained by adversary proceedings, so as to defeat such design. It is further said, that all objection to the right of the receiver to appear in the state court and move for the discharge of the attachment and the abatement of the suit, or to contest the case at the trial, was waived, because such right was not objected to at the time. The court add: "But, independently of this consideration, we are of opinion, that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him and the production of his appointment and the decree dissolving the injunction. Invested with the rights of the bank to the possession of the property, by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and, in our judgment, it was error for the court to refuse to discharge it on his application."

In the present case, the receiver applied to the state court to vacate the attachment, and his application was refused, on the ground that he had no status in the action, to make such an application. He was told that he must assert his title in some other manner.

Two ways were open. One was to be made a party defendant to the suit, in place of the bank. The other was to bring this suit. He brought this suit promptly, the bill being filed five days after the order of the general term was made, affirming the order denying the motion to vacate the attachment. In the Colby Case, the receiver was treated by the state court and by the supreme court of the United States as if he were a party to the suit, and his rights as against those of the attaching creditor were adjudicated directly in the suit brought by the attaching creditor. In the present case, the receiver, before anything of substance had been done in the suit in the state court, towards a judgment, except to issue and serve the attachment and publish the summons, filed the bill in this suit, making all parties interested defendants, setting up all the facts, and praying proper relief. The bill seeks a determination of the conflicting claims. It presents a case of equitable cognizance. On the facts set forth, the plaintiff was entitled, on final decree, to the relief prayed, except in respect of the injunctions asked for. It must be assumed, that the application for a preliminary injunction and for a receiver was refused because it was not shown that the fund was in peril, as respected the Broadway Bank, and because the court felt itself restrained by positive statute from enjoining the proceedings of Allen, Stephens & Co. in the state court. The answers do not set up that there is a plain, adequate and complete remedy at law. The plaintiff was not a party to the suit in the state court. The answers do not set up the pendency of the suit in the state court in bar of this suit. The rights of the plaintiff must be adjudicated as they stood when this suit was brought. The defendants, when served with process in this suit, were notified of the plaintiff's claim. Such process was served on Allen, Stephens & Co. and the Broadway Bank on the 22d of May, 1873. The original bill contained, in substance, the allegations found in the amended bill, except that it did not contain a prayer for an injunction against the Broadway Bank, nor any prayer for the appointment of a receiver. The amended bill prays "that the conflicting claim to said moneys, set up by the several defendants herein, may be forever foreclosed and determined by the decree herein, and that complainant may be adjudged entitled to said moneys, to the use of his said office." That prayer in that form is not found in the original bill. The original bill made McKim, Brothers & Co. parties, with proper averments as to their attachment, but the amended bill drops them as parties and omits such averments.

The plaintiff did not, in any manner, submit himself to the jurisdiction of the state court, in such wise as to be bound by the judgment in the attachment suit, nor did he submit his rights to the adjudication of that court. When he applied to that court to vacate the attachment he was told that he had no standing to so apply, and that he must make himself a party to the suit, and submit his rights to adjudication therein, before he could be heard therein. He then came into this forum, before anything more was done in the suit in the state court, and brought into this court all the parties to the controversy. He took the proper step to establish his trust as respected the fund in the hands of the Broadway Bank, by coming into this court of equity. The principle of the case of Eyster v. Gaff, 91 U. S. 521, has no application to a case like the present. The attachment levy being void as against the receiver's claim to the fund, and the state court having erroneously refused, on his application, to vacate the attachment, and having refused to adopt views such as are asserted in National Bank v. Colby [21 Wall. (88 U. S.) 609], the receiver was under no obligation to become a party to the suit in the state court, even though he might ultimately have the adverse judgment of the highest state court reversed by the supreme court of the United States, as was done in National Bank v. Colby. The moment he came into this court with the other parties to the controversy, there could no longer be any pretence that anything afterwards done in the suit in the state court could affect his rights. From that time the defendants went on at their peril, in disposing of the fund in the Broadway Bank, and the plaintiff is entitled to an adjudication of his rights here, as of the time he brought the defendants into this court, even though there was no preliminary injunction granted nor any receiver appointed.

It is contended, for the Broadway Bank, that, if it be held that the plaintiff is entitled to the relief he asks for in this suit, the court should proceed and adjust the equities between that bank and Allen, Stephens & Co., and that such adjustment should be an adjustment of all matters contained in the pleadings and the testimony, without regard to whether such matters occurred before or after the commencement of this suit; that the proceedings which were subsequent to the commencement of this suit are set forth in the three answers, and there is no dispute about those facts; that the defendants cannot object to an adjudication being had upon facts which they themselves plead; that, at the commencement of this suit, the Broadway Bank was a mere stakeholder; that the payment to the sheriff was made under the pressure of legal process, and cannot be deemed a voluntary payment; that, if the court should decide in favor of the plaintiff, it should decree that Allen, Stephens & Co. pay to the plaintiff the amount which the Broadway Bank paid to the sheriff, and that the Broadway Bank pay to the plaintiff the $568.51, or, if a decree be given against the Broadway Bank for the full amount in its hands at the commencement of this suit,

there should also be a decree in favor of said bank against Allen, Stephens & Co. for the $876.94; and that the satisfaction of the judgment of Allen, Stephens & Co. against the Scandinavian Bank should be cancelled, and the plaintiff, as receiver, be ordered to pay the proper dividend on such judgment to Allen, Stephens & Co. or to the Broadway Bank, whichever may appear, according to the other provisions of the decree to be entitled to such dividend.

On behalf of Allen, Stephens & Co. it is contended, that no decree can be made in this suit compelling Allen, Stephens & Co. to refund any part of the money which was paid to them under the judgment; that the identical money attached did not belong to the Scandinavian Bank; that the co-defendants of Allen, Stephens & Co. do not, in their answers, make any claim for affirmative relief against Allen, Stephens & Co.; that, if the Broadway Bank was merely a stakeholder, it could have gone into a court of equity, have filed a bill of interpleader, have paid the money into court, and thus have relieved itself from all liability in the matter; that, having failed to do so, it cannot now, as against Allen, Stephens & Co., and to their prejudice, claim any relief; and that the payment to the sheriff by the Broadway Bank was a voluntary payment, made without protest or objection, and, at most, under a mistake of law and not of fact.

The bill in this case sets forth a case of equitable cognizance arising out of trust. It alleges that the comptroller of the currency, on the insolvency of the Scandinavian Bank, and the seizure of its assets, and the protest of its circulating note, became vested in trust with such assets, for the creditors and others interested under the provisions of the act of congress, and as an officer of the United States, and has continued so vested and has exercised charge and trust over and in all such assets and property, and lawfully has been entitled to the actual custody and possession of the same, and, through the plaintiff, to demand and collect the same under the provisions of the act of congress. It sets out, that, at the time the Scandinavian Bank became insolvent, the Broadway Bank had in its possession certain assets of the former bank, namely, said moneys, which the plaintiff, as receiver, and in behalf of himself and said comptroller was entitled to demand, and receive manual custody of, from the Broadway Bank, but the latter bank refuses to deliver the same to the plaintiff or to the comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the treasury of the United States, which his duty in the premises, and a proper performance of the trusts aforesaid, requires to be done. It then sets forth, that Allen, Stephens & Co. claim a part of said funds, under their attachment. It prays that the moneys, assets of the Scandinavian Bank, in the hands of the Broadway Bank, be paid to the plaintiff, in aid of and to enforce the discharge of said trust, in behalf of himself and the said comptroller. The attachment issued was an attachment against the property of the Scandinavian Bank. It is set up as such in the answer of Allen, Stephens & Co. Although, as between the Broadway Bank and the Scandinavian Bank, the former was a debtor to the latter for the moneys on deposit, yet, before the attachment of Allen, Stephens & Co. was levied, a trust had, under the act of congress, become impressed upon the moneys on deposit in the Broadway Bank, and such trust remained impressed upon them at all times afterwards, and followed such of them as were paid by that bank to Allen, Stephens & Co. Allen, Stephens & Co. did not take them as bona fide purchasers without notice, but took them with full knowledge of all the facts and of this suit. The forms of proceeding in a court of equity are flexible, to suit the different postures of cases. It may model the remedy, so as to suit it to controlling equities and the real and substantial rights of all the parties. It can adapt its decree to all the varieties of circumstances which may arise, and adjust it to all the peculiar rights of all the parties in interest. 1 Story, Eq. Jur. § 28. In adapting its decree to the special circumstances of a case, a court of equity will adjust all cross equities, when all the parties in interest are before the court, so as to prevent multiplicity of suits. Id. § 437. Allen, Stephens & Co. having taken the $876.94 from the Broadway Bank, pending this suit, wrongfully, as against such bank and the plaintiff, without any title to it, and under a levy which was void as against the plaintiff's claim to the money, must be compelled to restore the money to the condition in which it was when this suit was brought, so that the Broadway Bank may respond for it to the plaintiff. It does not lie with Allen, Stephens & Co. to claim any advantage from their unlawful exaction from the Broadway Bank, or to complain that said bank paid the money to them and did not file a bill of interpleader and bring such money thereon into court. All parties had been brought into this court by this suit, and their rights placed sub judice, and Allen, Stephens & Co. cannot be heard to say that the Broadway Bank should have brought another suit. It is, therefore, proper that there should be a decree that Allen, Stephens & Co. respond to the plaintiff directly, in the first instance, for the money they received, and that the Broadway Bank should not be called upon to pay such money until there has been a failure to collect it on execution from Allen, Stephens & Co. The Broadway Bank might have brought the whole money into this court, in this suit, before paying any part of it to Allen, Stephens & Co., and, therefore, as respects the plaintiff, who did not assent to the disposition made of the money paid to Allen, Stephens & Co., the Broadway Bank should

respond to him for the money it paid to Allen, Stephens & Co., if such money cannot be collected, on execution, from Allen, Stephens & Co.

The Broadway Bank claims that it should not be charged with costs, on the ground that what money it did not pay over it retained with the assent of the plaintiff or of the comptroller, and that the plaintiff made no demand for the money which the McKim attachment covered. Whatever assent was given before this suit was brought, to the retaining by the Broadway Bank of enough money to cover the two attachments, the bringing of this suit was a withdrawal of such assent, and was a sufficient demand for all the money. As against the plaintiff, the Broadway Bank might have brought the money into this court, in this suit, or, knowing, as it did, of the plaintiff's claim and of the conflicting claim of Allen, Stephens & Co., it might have brought a proper proceeding of interpleader, in a proper court, before this suit was brought. It made no effort to obtain relief from the state court in the suit brought by Allen, Stephens & Co. It is shown, by the order filed September 18th, 1873, to have opposed the granting of an injunction against itself by this court, from paying over the moneys to any one but the plaintiff, and to have opposed the appointment of a receiver of those moneys. It asserts, in its answer, the invalidity of the plaintiff's claim, as against that of Allen, Stephens & Co., to such moneys. Under these circumstances, it ought to pay costs to the plaintiff.

The Broadway Bank claims, that, if it is not awarded costs against the plaintiff, it should have costs against Allen, Stephens & Co. The court cannot award the costs of the Broadway Bank against Allen, Stephens & Co., as that would be, in effect, a decree between co-defendants. 2 Daniell, Ch. Prac. (4th Am. Ed.) 1406, 1407. If the Broadway Bank had put itself in a position to be relieved from paying costs to the plaintiff, then, as Allen, Stephens & Co. have, by their conduct, occasioned this suit, the court might deem it proper to order the plaintiff to pay costs to the Broadway Bank, and then allow him to receive such costs again from Allen, Stephens & Co. Id. But, the considerations before adverted to, on the question of costs, as between the plaintiff and the Broadway Bank, indicate that the costs of the Broadway Bank ought not to be paid by Allen, Stephens & Co.

Allen, Stephens & Co. claim that they should have costs from the plaintiff, on the ground that the plaintiff in his bill asks no relief against them except an injunction and a receiver pendente lite. This is a mistake. The bill asks for a perpetual injunction against Allen, Stephens & Co., both as originally filed, and as amended, from further proceeding on their attachment and from obtaining any judgment or order in their suit. This court is inhibited from granting such relief. Act March 2, 1793 (1 Stat. 334, § 5, now § 720, Rev. St.) But, the bill sets out the illegality of the claim of Allen, Stephens & Co., and the wrong and injury to the plaintiff by what Allen, Stephens & Co. had done, and prays for a decree determining the conflicting claims to the moneys, and for an adjudication that the plaintiff is entitled to said moneys to the use of his office, and for such other or further relief as may be proper, and for costs against all the defendants. Clearly, Allen, Stephens & Co. ought not to have costs from the plaintiff, but ought to pay costs to him.

The sheriff was a proper party to the suit, as a claimant to the money. He ought not to have costs against the successful plaintiff. Nor ought he ultimately to pay the costs of the plaintiff, yet the plaintiff ought to have the costs of making the sheriff a party. But, as the sheriff was merely a ministerial officer, and as the wrongful conduct of Allen, Stephens & Co. made it necessary to bring in the sheriff as a party, the proper cause is for the plaintiff to recover against Allen, Stephens & Co. his costs of making the sheriff a party, and also the costs of the sheriff's defence, the latter costs to be paid over to the sheriff by the plaintiff, when collected. Such is the practice laid down by Daniell, as above cited.

A decree will be entered establishing the plaintiff's rights, as set forth in the bill, as against the claim of Allen, Stephens & Co. and their suit and attachment and judgment, to the $1,445.45, with interest from May 22d, 1873, the time when process on the original bill was served on the Broadway Bank. The correspondence between that bank and the comptroller, and that bank and the receiver, relieves it from interest prior to the bringing of this suit. The decree will provide that the Broadway Bank is liable to the plaintiff for such sum and such interest; that, towards paying it, Allen, Stephens & Co. are liable to the plaintiff for $876.94, with interest from September 20th, 1873; that execution issue against Allen, Stephens & Co. for that amount, and against the Broadway Bank for the residue; and that execution against the Broadway Bank for any amount except such residue be stayed until such execution against Allen, Stephens & Co. is returned unsatisfied, or until it otherwise appears that the plaintiff is unable to collect from Allen, Stephens & Co. the amount for which they are so decreed to be liable. In regard to costs, the decree will provide as above directed. The parties will be heard on the question as to a provision for a dividend on the claim of Allen, Stephens & Co.

Case No. 6,178.

HARVEY v. CRANE.

[2 Biss. 496;[1] 5 N. B. R. 218; 3 Chi. Leg. News, 341.]

Circuit Court, N. D. Illinois. March, 1871.

CHATTEL MORTGAGE—WHEN INVALID—IF INFORMAL, NOT CURED BY SUBSEQUENT POSSESSION—WHEN VOID AS A PREFERENCE—IF IRREGULAR, NOT CURED BY RECORD.

1. A chattel mortgage, not valid as against creditors, under the state law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is invalid as against the assignee in bankruptcy.

[Cited in Johnson v. Patterson, Case No. 7,403; Re Gurney, Id. 5,873; Re Foster, Id. 4,964.]

2. Though the mortgage be good as between the parties, and given to secure a bona fide debt, yet not having been acknowledged and recorded as required by statute, the mortgagee, having retained it until the insolvency of the debtor, cannot, by then taking possession, be remitted to his rights as of the date of the mortgage.

[Cited in Re Foster, Case No. 4,964.]

3. Though possession was taken before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, yet, being within the time limited by the bankrupt act [of 1867 (14 Stat. 516)], it operated as a preference, void as against creditors, and equally void as against the assignee.

[Cited in Re Foster, Case No. 4,964; Re Oliver, Id. 10,492.]

[Cited in Seaver v. Spink, 65 Ill. 444.]

[See In re Ballou, Case No. 818.]

4. In Illinois, recording a chattel mortgage in which material changes had been made since its acknowledgment gives it no additional validity.

The bankrupt, W. G. Parr, a merchant at Normal, McLean county, Illinois, borrowed of the defendant, a resident of Chicago, four thousand dollars, in March, 1869, for which he gave a note payable April 1st, 1870, and a chattel mortgage on the goods in his store, purporting in terms to include such goods, wares and merchandise as the mortgagor should add to the stock during the time the debt was maturing. The mortgagor was to keep possession, but the mortgagee was authorized to take possession and sell the property before the maturity of the note in several contingencies, and, among others, provided the mortgagor should attempt to sell any part of the goods, except in the usual course of business, without giving notice to the mortgagee.

Under the Illinois statute (Gross' St. 1871, p. 67, § 1), it is provided: "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to, and remain with the mortgagee, or the said mortgage be acknowledged and recorded, as hereinafter directed." By section 2; A mortgage of personal property must be acknowledged before a justice of the peace in the district where the mortgagor resides, and the justice shall certify the same. By section 3: A mortgage so certified, shall be admitted to record in the county where the mortgagor resides at the time the same was made, acknowledged and recorded; "and shall thereupon, if bona fide, be good and valid from the time it is so recorded for a space of time not exceeding two years, notwithstanding the property mortgaged, or conveyed by deed of trust, may be left in possession of the mortgagor: provided, That such conveyance shall provide for the possession of the property so to remain with the mortgagor." The mortgage was executed and duly acknowledged March 20, 1869, and afterwards some material changes were made by consent of parties, but it was never re-acknowledged. It was forwarded to and received by the mortgagee, and retained by him until the 4th of March, 1870, when he went to Normal, and on the 5th of March filed the mortgage for record in the proper office. In the meantime the mortgagor had been in possession, had made additional purchases, and had been selling the goods as usual. On the 7th of March the defendant, by his agent, took possession of all the goods in the store. At this time, to the knowledge of the defendant, Parr was insolvent. On the 30th of March a petition in bankruptcy was filed against him, upon which he was adjudicated a bankrupt, and the plaintiff, his assignee, afterwards brought this action to recover the value of the goods taken by the mortgagee under his mortgage. The jury gave a verdict for the plaintiff. Motion for new trial.

Tenney, McClellan & Tenney, for plaintiff.

John Borden and G. F. Baily, for defendant.

DRUMMOND, Circuit Judge. It has not been claimed that the mortgage was valid under the statute as against creditors. In fact, it not only was never acknowledged as it now stands, but it included after-purchased goods, and seemed to permit the mortgagor to go on and sell in the usual course of business. Davis v. Ransom, 18 Ill. 396.

It is not disputed but that the mortgagee had a right, under a clause of the mortgage, to take possession. The record of the mortgage may be left out of the case, as it must be conceded that it gave no additional validity. There is no doubt that the mortgage was given for a bona fide loan.

The case then presents this question: Whether, conceding its validity between the parties, the defendant could retain the mortgage until the mortgagor became insolvent, and his creditors were pressing their claims, by suit and otherwise, and then could take possession, and, unaffected by the altered condition of the parties, be remitted to his rights as they stood at the date of the mort-

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

gage, and thus obtain a preference over other creditors.

As between the mortgagor and mortgagee, it was immaterial whether or not the mortgage was recorded, or whether the mortgage provided for the possession by the mortgagor, or for after-acquired property. Neither was it material whether the mortgagor sold the whole or any part of the property. All these things might be done, or omitted, as they agreed. It is only where the interests of other parties are affected by these stipulations that their validity can be questioned. If a mortgage had been duly acknowledged and recorded at the time the loan was made, then it would, under the 14th section of the bankrupt law, have become a lien, provided it was valid under the laws of this state.

But in this case it is claimed that a mortgage not valid as against creditors under the laws of this state, has ripened into an effectual lien or transfer by virtue of the possession taken on the 7th of March, because, though the mortgagor was then insolvent and the mortgagee knew it, proceedings in bankruptcy were not commenced till the 30th of March, and the assignee took as a purchaser, with notice of all equities. But there was nothing operative as against creditors until the defendant took possession. As against them, until then, the defendant had no security for his loan. Can creditors keep their papers and supposed securities in their pockets, and permit their debtors to go on and do business as owners of the property, and as soon as trouble threatens, watch their opportunity and sweep away all, simply by taking possession?

There are authorities which appear to hold that if the mortgage is bona fide when made, and good between the parties, it is good against the assignee. In re Dalby [Case No. 3,540]. If it be true that the assignee takes as a purchaser and subject to all equities, and that a secret transfer is an equity, then it can make no difference whether the creditor take possession before or after the commencement of the proceedings in bankruptcy, because if the possession relates back to the date of the secret transfer and overrides all intermediate acts, then it would seem to follow that the assignee could not touch the property, unless at the time of the supposed transfer there was some other objection than its secrecy. But we think it will hardly be contended that an unrecorded chattel mortgage in the pocket of the mortgagee at the commencement of bankruptcy proceedings, would be valid against the assignee, though it might be against the mortgagor. In re Wynne [Id. 18,117].

The possession, after proceedings in bankruptcy were commenced, under an unacknowledged, unrecorded chattel mortgage, should have no different effect. And if this be so, the reason is because, after the pretended security was given, a fact has occurred (e. g. the filing of a petition in bankruptcy) which gives a different aspect to the case, and it must be judged under the light of that fact.

The principle would seem to be the same in the case of a chattel mortgage, even though recorded, if void as against creditors under the law of the state. In each instance there would have to be something in addition to render it valid, as by recording or taking possession before proceedings in bankruptcy were commenced.

A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law. Bean v. Brookmire [Case. No. 1,168]. But the possession must be obtained by a complete act within the limitation. Here the mortgage did not create the preference as against creditors—that was invalid; neither did the record. It was still, when recorded, an invalid mortgage as against creditors, under the law of the state—among other reasons, because as it stood it was an unacknowledged mortgage. That which operated against creditors, if anything, was the taking possession on the seventh of March. It is true it was authorized by the mortgage, and it was in that sense the joint act of the mortgagor and the mortgagee, possession being the consummation of the act. The assignee represents the creditors, and any claimed lien which would be void as against creditors generally, would also be void as against the assignee.

In this case the defendant cannot rely upon the mortgage, because it is invalid as to creditors under the law of the state. He cannot rely on the possession, because it was taken under authority from an invalid mortgage, and because, further, the mortgage was wrongfully used by the defendant to obtain possession, he at the time knowing the insolvency of the mortgagor. The motion for a new trial must be overruled, and judgment be entered upon the verdict.

NOTE. The Illinois supreme court also holds that a proper acknowledgment and record of a chattel mortgage are indispensable to its validity. Gregg v. Sanford, 24 Ill. 17; Forest v. Tinkham, 29 Ill. 141; Henderson v. Morgan, 26 Ill. 431. Nor will actual notice protect the mortgagee. Porter v. Dement, 35 Ill. 478; Sage v. Browning, 51 Ill. 217. The effect of omission to record until the four months, an instrument executed and delivered prior to the four months has recently been considered by the Illinois supreme court, in Seaver v. Spink [65 Ill. 441]. The court holds that a deed made by a bankrupt more than four months prior to the commencement of bankruptcy proceedings, which is valid without being recorded as between grantor or grantee and against purchasers with notice, cannot be avoided by the assignee because not filed for record until within the four months; that the fact that the deed was not acknowledged made no difference under the bankrupt act, the acknowledgment not being essential to its validity. The distinction is to be borne in mind, however, that the above was a deed of real estate under the laws of Illinois, whereas a chattel mortgage in the same state is void as to creditors even with notice, unless acknowledged and recorded in conformity with the statute.

HARVEY (DEAN v.). See Case No. 3,708.

Case No. 6,179.

HARVEY v. EVANSVILLE, ETC., STEAM PACKET CO.

[8 Biss. 99.] [1]

Circuit Court, D. Indiana. Oct. 1877.

EXPERT TESTIMONY—COMPENSATION.

The fact that an expert requires payment for his opinions as such, should not discredit him before the jury, as he is not bound to come into court and testify for ordinary witness fees.

[This was an action at law by John B. Harvey against the Evansville, Cairo & Memphis Steam Packet Company.]

Azro Dyer and James M. Shakelford, for plaintiff.

Denby & Kumler, for defendant.

GRESHAM, District Judge (charging jury). Much has been said about the testimony of the witness Hill, who testified solely as an expert. He was brought here by the defendant, and he admitted that he was to be paid for his time and opinions. You heard him testify in chief and under cross-examination. The mere fact that an expert requires pay for the opinions which he gives to the jury does not of itself discredit him. The jury have a right to know what relation he sustains to the parties, and the subject matter of controversy. It is for them to say, from all the evidence, whether he is biased in favor of one side or the other.

Men who have informed themselves by long and patient study and observation in any particular department of art or science cannot be compelled to come into court and give their opinions as experts on controverted questions for the ordinary witness fees. They have the same right to charge for their advice and opinions as other professional men.

If, therefore, you believe that Mr. Hill had special knowledge on the subject of steam, machinery, boilers and boiler explosions, and that he gave his opinions honestly and without bias, you will give his testimony such credit as his skill and knowledge entitles it to. If, on the other hand, you think that he was influenced by bias or prejudice, you will know how to weigh his opinions.

Case No. 6,180.

HARVEY v. GRAND TRUNK RY. CO.

[2 Hask. 124.] [2]

Circuit Court, D. Maine. Dec.; 1876.

CARRIERS—OVERCHARGES—MEASURE OF DAMAGES—EVIDENCE.

1. The measure of damages for the refusal of a carrier to transport freight at an agreed price, is the difference in value of the same at the ports of shipment and delivery, less the agreed freight and other necessary charges of transportation.

2. A carrier, in the absence of special contract, may demand and recover a reasonable sum as freight for the transportation of merchandise and no more.

3. Evidence, showing the charges of a carrier for freight two years previous to the charges in controversy for like freight, is competent upon the question of the reasonableness of the charges demanded, when the costs of transportation meantime have not increased.

Assumpsit for the breach of a special contract to transport merchandise at an agreed price, and to recover exorbitant charges exacted for the transportation of merchandise and paid by compulsion in order to obtain the same from the carrier. The case was tried upon the general issue, and the verdict was for plaintiff [William Harvey], whereupon the defendant moved for a new trial for misdirection by the court.

Orville D. Baker and Joseph Baker, for plaintiff.

John Rand, for defendant.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. In November, 1871, the defendants, by their written contract, agreed with the plaintiff to transport for him over their road from Warwick, in Canada, to Portland, at certain agreed rates per car, various kinds of timber, including posts, for the period of one year.

Relying on this contract, the plaintiff hauled to the line of the road, in the winter of 1871–72, 10,000 cedar posts, and in the spring repeatedly notified the proper agents of the defendant that he wanted these posts taken to Portland under the contract; but the company refused so to do; and as there was no other means of transporting them from Warwick than the railroad of the defendant, they became almost worthless, as there was no market for them at Warwick. Some few were sold for small sums, but little or nothing was realized from the lot, and they became nearly a total loss. So far as appeared in evidence, this breach of contract by the defendant was wanton and without excuse.

The jury upon this portion of the case were instructed as follows: That the damages were to be estimated at Warwick, and so far as the market value of the posts was involved, their value at Warwick should be taken by the jury; that this value would be their value at that place, if the company had performed its contract and not broken the same by refusing transportation of the posts; that in ascertaining their value, they might take into consideration the market value of the posts at Portland, what could have been realized from them sold as posts by plaintiff, deducting the freight and other

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

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

charges of transportation from Warwick to Portland, and that from their value thus found at Warwick should also be deducted whatever sums were realized by plaintiff from sale of the posts, and also whatever might have been realized by him from their sales by due care and diligence as a prudent man having charge of the property; that the net sum, thus found by the jury, after these deductions, they would be authorized to find as the damages if they saw fit, and add interest thereto.

The defendant now moves for a new trial on the ground that this ruling was erroneous. It is insisted that the damages were to be found as at Warwick, as the defendant there broke his agreement by not having commenced the transportation of the goods from that place, the breach being there and at that time. It is said the damages were there sustained and should be there estimated. This view was adopted at the trial by the presiding judge, as in the commencement of the charge on this point, the jury were told that the damages were to be estimated at Warwick, and the value of the posts, so far as their value was involved, was their value at Warwick.

No objection is now urged to this portion of the charge; but it is said that the residue of the instructions is entirely inconsistent with what preceded it, and that the jury were afterwards instructed to find the value of the posts at Portland, and then estimate the damages; but we fail to discern this inconsistency. The jury were told that the value of the posts would be their value at Warwick, if the defendant had performed its contract and not broken the same by refusing transportation; that in ascertaining this value, they might take into consideration their market value at Portland, what could have been realized from them, sold as posts, deducting expenses of transportation; that from this value, whatever was or could have been realized by due care, etc., from their sale, should be deducted and the net sum thus found, they would be authorized to fix as damage if they saw fit.

There being no sale for these posts at Warwick, and no means of transporting them from there, of course there was no means of ascertaining their market value at that place, except by determining what they could have been sold for at other places, and deducting the expenses which would be incurred in carrying them to such places.

There was no evidence before the jury to show that in any place, nearer than Portland, a market could have been found for so large a quantity of this material; and under the circumstances, as the jury were compelled to go elsewhere than Warwick to find a market for these articles, we think they were at liberty to take into consideration the value of these goods at Portland, and what would have been received from them there if they had been carried there by the defendant; and that as elements in determining the damages at Warwick, all those matters presented in the charge were proper subjects for the consideration of the jury on the question of damages. The whole was submitted to them to act upon and adopt, so far as they were in accord with the judgment of the jury, in order to determine, after all, what was the actual damage the plaintiff had suffered at Warwick by the defendant's not complying with his contract.

The plaintiff was entitled to exact an indemnity from the defendant. Relying upon this written agreement, he had placed upon the line of the railroad this large amount of property, trusting to its being taken to Portland. Where it then was, it was comparatively of but little worth; if taken to the place stipulated, when there, it at once became of great value; and this additional value was given it entirely by reason of its change of locality. By giving as damages the difference in value between these two places, less cost of transportation, has the plaintiff received anything more than the goods were worth to him at Warwick, as they were piled at the roadside?

By reason of the defendant's contract with plaintiff to carry this particular parcel of posts, they became at once of much greater value than any similar parcel belonging to other parties, which could neither be sold at Warwick nor removed from there for want of an agreement with the railroad thus to transport them. There is nothing of uncertainty in adopting this basis for arriving at the damages sustained by plaintiff through the defendant's misconduct, but it is a matter of absolute demonstration; and if the plaintiff had been desirous of disposing of the posts at Warwick, he would have claimed as their fair real value to him what he would have obtained for them if he could have forwarded them to Portland under defendant's agreement, less the stipulated freight; and he would have been fully warranted in so doing.

In Marshall v. New York Cent. R. Co., 45 Barb. 508, an action for not transporting certain apples from Buffalo to New York, the defendant having carried them as far as Albany and there delivered them to another carrier to take to New York, the court says: "The question is, assuming that the damages should have been assessed at the value, or depreciation of the apples at Albany, whether proof of such value and depreciation in the New York market was inadmissible and error. I think it was not, and that it was an element or species of evidence on the question of damages, and probably the best the case afforded. It furnished a pretty clear and satisfactory basis upon which the jury could estimate the damof the plaintiffs at Albany; * * * and for aught I can see in the case, I think it would have been entirely proper for the circuit

judge to have instructed the jury that they might find the value of these apples to be their value as proved at New York, deducting the freight on them from Albany to New York, and making any other allowances which they thought proper for the difference in value between the two places. This would be a fair method of estimating their value, and I cannot see why it would not be a proper mode or rule for estimating damages in all such cases." This rule is also approved in Richmond v. Bronson, 5 Denio, 55.

If the defendant's views are correct that the damages were to be estimated at Warwick, we are of opinion that he has no reason to complain of the instructions which were given to the jury; but, from an examination of the authorities, it is by no means certain that a different rule should not be adopted in an action of this description, when the carrier has actually received the article and failed to transport and deliver it at the place of destination, and when having contracted to receive and carry it, he refused so to do, or to take any measures for its transportation. The distinction between the two cases, which was recognized at the trial by the judge, does not appear to have been approved by other tribunals; and although good reasons may be assigned in its behalf, it is directly in conflict with the following authorities: Bracket v. McNair, 14 Johns. 170; O'Conner v. Forster, 10 Watts, 418; Bridgman v. The Emily, 18 Iowa, 511; Cowley v. Davidson, 13 Minn. 93 [Gil. 86]; Nourse v. Snow, 6 Me. 208.

In each of these cases the defendant failed to receive and carry the merchandise as he had agreed; and in all of them, the measure of damages was held to be the difference between the value of the articles at the place of intended shipment, and their value at place of destination, less the freight and other expenses; and the same rule is approved in Laurent v. Vaughn, 30 Vt. 90, and Galena & C. U. R. Co. v. Rae, 18 Ill. 488.

If the instruction given the jury is fairly susceptible of the construction put upon it by the defendant, it is sustained by all these authorities; none are adduced in opposition thereto, and the court is well satisfied, that in no aspect of the case, can the defendant have suffered any detriment by the directions given as to the rule of damages.

Another claim made by the writ is for the recovery of a large sum paid by plaintiff in excess of what was reasonable freight, in order to obtain possession of some railroad ties brought by defendant as a carrier from Warwick to Portland in November, 1872. The ties having arrived at Portland, the defendant insisted on payment of $60 per car in gold as freight, claiming that the plaintiff had agreed to pay this sum, which was denied by him as a witness, and he further testified, that no rate was ever fixed upon between them, and that $37 per car was all that he ever had paid, and all that the company was entitled to.

In the course of the trial the plaintiff was asked what he paid defendant in 1870 freight per car on ties and lumber from Warwick to Portland. This was objected to, but admitted; and as we hold, rightfully, as bearing on what was a reasonable sum for like services in 1872. If there had been no contract between the parties as to the rate to be paid, the defendant was only entitled to demand a reasonable amount therefor. The evidence showed that the defendant declined bringing ties from Warwick to Portland in 1872, though some were brought in 1871–72, for Seaman & Co. at $40 per car.

In order therefore to determine whether $60 was or not reasonable, evidence of what the defendant had charged previously for like services was admissible if confined within proper limits as to time; and we think that two years was not beyond what was a proper subject of inquiry, it appearing that the cost to the road of transportation did not increase during this time, the value of lumber and risk attending its carriage on the road being shown to be greater than that of ties. If the plaintiff was willing to accept as a criterion the charges made by the defendant for transporting a car of lumber, the defendant was not injured thereby.

But another answer to this objection is, that the defendant, in a subsequent stage of the cause, introduced the same evidence, and proved by its own witnesses what it had received per car in 1870 for hauling ties and lumber from Warwick to Portland, thus waiving its objection, if it had been of any validity.

It is further urged that the verdict is not sustained by the evidence. We have examined the testimony and do not find that preponderance against the verdict which would authorize us for this cause to order a new trial. Motion overruled. Judgment on the verdict.

Case No. 6,181.

HARVEY v. GRAND TRUNK RY. CO.

[2 Hask. 250.] [1]

Circuit Court, D. Maine. Sept., 1878.

MEASURE OF DAMAGES—"LUMBER"—CARRIERS.

The measure of damages for not transporting unmanufactured lumber from a foreign country into the United States, intended for specific manufacture here by the owner, is the price that the same would bring at the place of delivery when so manufactured, less its cost including transportation, with interest from the time of the refusal to so transport the lumber.

Assumpsit for breach of a written contract by a carrier to transport lumber from Canada to the United States at a stipulated freight.

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

Tried upon the general issue. The verdict was for plaintiff [William Harvey] for $11,000. The case is now heard upon a motion by defendant for a new trial and that the verdict be set aside because the damages assessed are excessive.

Orville D. Baker, for plaintiff.
John Rand, for defendant.

FOX, District Judge. The defendant moves for a new trial on the ground that the damages are excessive. The writ presents two distinct causes of action. In one, the plaintiff claims to recover for breach of a written contract, made by him with defendant November 1, 1871, by which it contracted to convey for him lumber, posts, &c., from Arthabasca to Portland, from that date till May 1, 1872, at $34, gold, per car, and from May 1 to November 1, 1872, for $33 per car.

Relying upon this contract, the plaintiff purchased a large quantity of posts, about 15,000, and placed them along the line of the railroad at and near to Arthabasca station in the winter of 1871–72; and repeatedly afterwards demanded of the agent of the defendant to provide cars for the transportation of the posts to Portland, which were never furnished, the reply being "that the company would not allow them to carry cedar for posts, as they wanted all the cedar themselves." These posts were never transported to Portland, and nearly the whole value was lost to plaintiff, as he realized but two or three hundred dollars therefor. Upon this issue, the jury at the present term assessed the plaintiff's damages at $4,192.50.

The other claim presented by plaintiff in this suit was for a breach of duty by the defendant as a common carrier in not transporting 40,000 cedar posts from Lennoxville to Portland in the winter of 1873. The plaintiff in previous years had large quantities of posts and ties carried for him by defendant from Lennoxville to Portland, and relying on its continuing so to do, he procured the posts in 1872–73, many of which were hauled to the depot and vicinity, while some were turned into the Stary brook and River St. Francis, near by, and other lots were piled by the side of the highway leading to the depot. The aggregate of all the lots was in the vicinity of 40,000. It was a matter of controversy whether the whole were so placed as to have been tendered for transportation at Lennoxville; and from the finding of the jury, I conclude that in their view, not more than 25,000 were actually delivered in a suitable place for transportation by the road, so as to devolve upon the company the duty to carry the same to Portland. Upon this issue, the jury awarded as damages the sum of $6,807.50. The entire damages awarded amounted in the aggregate to $11,000.

The breach of both contracts having occurred in 1872 and 1873, the jury were at liberty to add to the damages sustained interest from the time of the breach; and the court may well infer, under all the circumstances, that they adopted this course, as by not doing so, they would not afford the plaintiff a full indemnity. To determine the grounds of the verdict, a discount of the interest, therefore, should be made from the amounts returned by the jury, which, if reckoned for the space of five years, would reduce the damages on the Arthabasca contract to $3,225, and on the Lennoxville claim to $5,225, or thereabouts. These sums are nearly in the proportion of three to five, and this may aid us in determining the number of posts, which, in the opinion of the jury, the defendant failed to transport under its obligations to the plaintiff.

There can be but little question that there were 15,000 delivered under the Arthabasca contract; not all landed directly at the station, but so near to the station, and at points along the road, which, by the practice and usage of the company has always been understood as the equivalent of Arthabasca, that the court can not hesitate to conclude that the jury held the defendants responsible for neglecting to transport this 15,000 from Arthabasca to Portland, under their written agreement so to do. 15,000 being the number, therefore, for which the damages were assessed at $3,225, in the same ratio, from the damages of $5,225, assessed on the Lennoxville claims, the jury probably estimated the number then tendered for transportation to have been about 25,000, excluding from their allowance, those at Stary brook and the St. Francis, as well as all upon the line of the highway.

I have adopted this theory, as I do not find any evidence to distinguish as to the damages sustained by the failure to transport from the one place or the other, excepting by the number of posts which were not forwarded. The loss on a car load, to be taken from either place, so far as appears, would be substantially the same, if not forwarded.

The entire damages for non-transportation being $8,460 without interest, it would appear that the jury estimated the plaintiff's loss, by the defendants' breach of contract, at a little over twenty-one cents per post. They must have found that he would have realized that sum as profit on each post delivered at Portland; and the question for the court to determine on this motion is, whether, upon the whole testimony, this sum is so much beyond what ought to have been allowed the plaintiff as to require the court, under the rules regulating motions for new trials, to set aside the verdict as excessive.

In considering this question, it is to be remembered that while the article to be taken to Portland was cedar posts and not manufactured ties, they were still posts intended for railroad ties, subject to duty, if imported as manufactured lumber; but which could be imported duty free if unmanufactured. The large quantity in connection with the size and

quality, as well as the testimony of every witness, proves conclusively that the purpose of the plaintiff was to obtain a market in this country for these articles where they would realize to him their full value when prepared for the use for which they were designed.

The evidence is, that all of the 15,000 at Arthabasca measured seven inches in diameter, as well as a large proportion of those at Lennoxville. The plaintiff testifies, that when manufactured into ties, he could have sold them at Portland at an average of fifty-five cents per tie. He gives as their cost, ten cents on the cars, and less than fourteen cents the cost of transportation. The expense of siding a post on two sides at the mill in Canada is stated by Wm. Harvey at four to five cents; but the slabs were claimed to be worth much more than that sum, as they could be made into pickets.

The jury were instructed to estimate the damages for the non-delivery of the posts at Portland; but that, as an element in determining this amount, they might consider the purpose for which the posts were to be brought here, their original cost with expense of transportation as well as what it would have cost to make them into ties here, and the amount for which they could have been sold as ties in this place.

Lorenzo Taylor, a witness of large experience in this branch of business in Portland, testified that in 1872–73, the market price of ties in Portland was thirty cents for those under five inch face; forty cents for five inch face; fifty cents for six inch face; sixty cents for seven inch face. That posts were a very different article from ties, and bore a very different price, and were worth in those years three and one-half cents an inch; that a man who got out a post suitable for a tie would make a tie of it because they were worth twice the money or nearly that; that posts suitable for ties are not to be bought; that a cedar post suitable for a tie would be made into a tie before it came here; that the men who sell posts are usually too sharp to send posts suitable for ties; that when he speaks of posts at three and one-half cents the inch, he refers to fence posts; that posts suitable for seven inch sleepers would be sold at same rate.

From this testimony, it is strongly urged that if these posts had been taken to Portland, the plaintiff could not have sold them for more than three and one-half cents per inch, and, therefore, if all had been seven inches in diameter, he would have received less than twenty-five cents per post; but in the opinion of the court, this testimony must be weighed in connection with all the other evidence in the cause, and especially with the evidence showing the very large number of the posts which the plaintiff intended to make into ties, and not to sell as posts.

In this lot there was a market value far beyond that which would attach to a small number of the same dimensions, as by the expenditure of a small sum, a post could be readily changed into a tie, in which state, as Taylor says, it would be worth nearly double what it was as a post. Such a lot of posts would never have been sold by a party in that condition in this market; but having received them free of duty, the owner could at once have taken measures to make them into ties, which was the undisputed purpose of the plaintiff. This capability of being so easily made available and productive of so large a sum, the plaintiff certainly was entitled to have the jury consider in fixing upon his loss, as it is clearly shown the plaintiff intended so to do; and from the conduct of the defendant, the court can not but conclude that it well understood that such was the intent of the plaintiff if he had received the posts at their place of destination. The plaintiff has clearly lost exactly what he could have gained if the defendant had performed its obligations which it had assumed, and this loss may well be ascertained by determining what, beyond question, he would have received for the article, if it had been delivered to him at Portland, and he had been permitted to deal with it as he intended to do, deducting therefrom all expenses which he would have incurred.

If the ties would have averaged fifty-five cents, as the plaintiff testifies, and which is supported by the testimony of Taylor, and we deduct therefrom their cost when delivered in Portland, twenty-four cents gold, there would remain thirty-one cents from which a further deduction should be made of sawing the slabs off the two sides to change them into ties. The cost of this change, from all the testimony, I judge would not have exceeded six or seven cents over and beyond the value of the slabs for pickets, and there would remain a profit of more than twenty-one cents, which the jury allowed the plaintiff.

Upon a careful examination of the whole case, I am satisfied that the jury have not allowed the plaintiff, by their verdict, more than he would in all probability have gained if the defendant had delivered the posts in Portland, as upon the evidence it was bound to do. Motion overruled. Judgment on the verdict.

Case No. 6,182.

HARVEY v. RICHARDS.

[2 Gall. 216.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

PROBATE COURTS — NATURE AND SCOPE OF A DECREE — PARTIES — APPEALS — REVERSALS AS A BAR TO SUBSEQUENT SUITS.

1. Of the nature and effect of a decree in a court of probate, and as to the parties whom it binds.

[1] [Reported by John Gallison, Esq.]

2. Of an appeal to the supreme court, and the effect of a remitter of the cause.

3. If a decree of the supreme court of probate reverse that of the inferior court decreeing distribution, such reversal is no bar to a subsequent suit by the parties claiming as heirs or legal representatives. A fortiori, it is no bar to a bill in equity. See Harvey v. Richards [Case No. 6,184], and authorities cited; 1 Story, Eq. Jur. § 589, and authorities there cited.

[Cited in Sarchet v. The General Isaac Davis, Case No. 12,357; Aurora v. West, 7 Wall. (74 U. S.) 93.]

[Cited in Uppfalt v. Woermann, 30 Neb. 189, 46 N. W. 421; Viles v. Moulton, 13 Vt. 514.]

This was a bill in equity [by Mary Harvey against John Richards], in which the complainant sought from the defendant, who was administrator with the will annexed, of James Murray, alias Mowry, a discovery and distribution of the undevised estate of the testator, of whom she asserted herself to be heir at law. The defendant pleaded in bar, that before the exhibition of the bill, viz. on the 31st day of August, A. D. 1807, he filed before the judge of probate of the county of Suffolk, in this district, a copy of the will of James Murray, late of Calcutta, in the province of Bengal, deceased, and of the probate thereof, and, in due course of law, procured letters of administration, with the will of said Murray annexed, and afterwards, as administrator, possessed himself of sundry sums of money, being the personal estate of said James Murray within the commonwealth of Massachusetts; that afterwards, on the 30th day of November, 1812, the complainant, and one John Mowry, representing themselves to be the brother and sister, and heirs at law, of said deceased, preferred their petition to said judge, praying him to order a distribution to them of the property of said deceased not bequeathed by him; that on the 15th of February, 1813, at a probate court held at Boston, he, the defendant, presented for allowance his account as administrator, and the said complainant, and John Mowry, then prayed a decree of distribution to and among them, as heirs at law; that the defendant then and there denied, that they were next of kin, and, also, that if they were next of kin, they were entitled to distribution; that the said judge allowed the administrator's account, and decreed distribution of the balance, as prayed for; that on the 16th day of February, he, the defendant, appealed from said decree to the supreme court of probate, next to be held at Boston, and suggested the following reasons of appeal, viz.: "(1) That the said John Mowry and Mary Harvey, who claim as brother and sister of the said James Murray deceased, are not his next of kin, because, as this appellant humbly apprehends, the said James Murray was not born in lawful wedlock, and, therefore, could not have any lawful heirs, but such as should be his lineal descendants. (2) That this court has not power and authority to distribute the undevised surplus of the said James Murray's estate among his next of kin; but that all the goods and chattels collected in this commonwealth by the said administrator, after paying thereout the debts due in this commonwealth and the charges of administration, ought to be transmitted to the executors of the last will and testament of the said James Murray, in Bengal, to be there accounted for, appropriated, and distributed, according to the will of said deceased, and the laws in force in Bengal. (3) That if the said petitioners are next of kin of the said deceased, and, as such, entitled to the residue of his goods and estate, they can only claim the residue thereof, after the payment of all debts and legacies, and charges of administering his goods and estate, both in Bengal and in this commonwealth; and the said petitioners ought, therefore, to make it appear, that the said executor's account has been settled and allowed by the tribunal, having jurisdiction in the case at Bengal, and that nothing is now due in that country, for debts and legacies, and charges of administration there; or to show, otherwise, that the executors have a sufficient sum in that country, to pay all such debts, legacies, and charges; but no such evidence has been offered. (4) That the goods and estate of said deceased, which have come to the hands of his said executors, in Bengal, are not, as this appellant doth aver and verily believe, sufficient to pay the legacies given in and by said will, and the charges of administering his said estate in Bengal, but that they are insufficient for this purpose by the sum of fourteen thousand dollars and upwards, exclusive of interest. (5) That the residue of said deceased's estate ought to be paid over and distributed according to the laws in force in Bengal; and it doth not appear, whether, by those laws, the said residue would be paid over to the next of kin of said deceased, or be retained by the said executors to their own use, or appropriated and distributed in any other manner; and no evidence was offered on that point, and the said appellant doth suggest and aver, that, by the said laws in force in Bengal, all the said residue ought to be retained by the said executors to their own use." The defendant further averred, that he prosecuted his appeal, and that, at the supreme court of probate, held on the second Tuesday of March, A. D. 1814, it was decreed, that the said decree of distribution to the said John Mowry and the complainant was wrong and erroneous, and that the same be reversed; and the said supreme court of probate, then and there, further ordered the said cause to be remitted to the said judge of probate, that he might proceed therein, as to law and justice should appertain; and that the claim of the said Mowry and the complainant, in said court of probate, to be admitted as the next of kin of said Murray deceased, and, as such, to be entitled to distribution, was the same identical claim now

made in the complainant's bill, in which she represents herself as the only next of kin of said deceased. The defendant further averred, that the said Mowry and the complainant became parties, of their own accord, to the proceeding in said probate court, and that the said court of probate, and the said supreme court of probate, were courts of competent jurisdiction to determine, whether the said Mowry, and the complainant, were heirs at law of said deceased, and as such, entitled to the distribution of his estate. To this plea there was a demurrer and joinder in demurrer.

Mr. Selfridge, for complainant.

This court has concurrent jurisdiction with the courts of probate, in all cases of intestacy and legacies, if the complainant be an alien or citizen of another state. This is not denied by the defendant; but it is alleged, that, the matter, for which relief is now sought, has already been decided by a competent tribunal. No sentence, even of a court of competent jurisdiction, is conclusive upon other courts having concurrent jurisdiction, unless the matter was directly the subject of adjudication. In this case, the defendant's answer merely shows, that a decree of the court of probate was reversed on appeal, and that the cause was remitted for further proceedings. No fact whatever is decided by the decree. The cause must, therefore, be considered as still open to investigation. Robin's Case, 2 Wils. 118; Duchess of Kingston's Case, 20 State Tr. 355; Cross v. Salter, 3 Term R. 639; Boston v. Boylston, 4 Mass. 325.

Mr. Hubbard, for defendant.

Does the decree of the supreme court conclude the complainant as to the merits of her claim? Or does it merely relieve the case from the decree of the judge of probate, and thus leave it where it would have been, if no decree had been made in either court? The reversal was of a decree of the judge of probate ordering distribution. If the effect of such reversal were merely to open the cause, and restore it to the same state as before any decree, it would be competent for the judge of probate to proceed, and again order distribution. The appeal would thus be nugatory, and the administrator would be bound by his bond to pay over to such person, as the judge of probate should appoint. 1 Mass. Laws, 128, 246; Prov. Laws, 230; Parker v. Harris, 1 Salk. 262. And its being a will of foreign probate would not alter the case. If the judge of probate has now no power to decree distribution, then the decree of reversal has all the effect, for which the defendant contends, viz. that the present petitioner is not entitled to a distributive share. The simple reversal of the judge's decree was, therefore, all that was required to give full operation to the sentence of the supreme court. But, admitting that, by the reversal, the parties are, in all respects, restored to their former situation, is this court now competent to decide on their rights, when, by so doing, they oust of its jurisdiction a court, before which the cause is regularly pending? The effect of a re-opening of the cause can be no other, than to authorize the court of probate to go on and decide, in the same manner as if nothing had been done. It would follow, that the complainant is still a party to the proceedings in that court, and the pendency of those proceedings is a good plea in bar to the proceedings here. Gregory v. Molesworth, 3 Atk. 627. The complainant, having elected her remedy in a court of the state, cannot now abandon it, and compel the administrator to answer in a court of the United States. At any rate, she should have removed her cause before a trial in the probate court. But it is contended, that the decree of the supreme court is conclusive upon the complainant, as to her claim here. That decree must have proceeded upon some of the reasons of appeal, or upon all of them together. It decided, that the complainant and John Mowry were not next of kin, or, if next of kin, that they were not entitled to distribution. This, it is true, might have been either because they did not show, that there were no debts or legacies to be paid in Calcutta, or because they were not entitled by the laws of Bengal, or because the jurisdiction belonged to some foreign court. But, of these causes, it is only that of debts and legacies to be paid, which can be considered as dilatory. And when one of the reasons is, that the parties are not next of kin, and, the decree being general, no specification is requested by the parties, it must be presumed to have been founded on such of the reasons as are permanent and conclusive, or else on all of them taken together. The effect, therefore, is the same, as if the reason had been asked, and it had been stated to be, that the parties were not next of kin. 2 Rolle, Abr. 219; Eccl. Ley. Pl. 2. A court of competent jurisdiction having decided a fact directly put in issue before it, the party is estopped from trying that fact again. 8 Rep. Pref. 27; Cro. Eliz. 668; Sparry's Case, 5 Reporter [Coke] 61; Kitchen v. Campbell, 3 Wils. 304; 2 W. Bl. 830; Putt v Rawsterne, Poll. 634; Seddon v. Tutop, 6 Term R. 607; Marriot v. Hampton, 7 Term R. 269; Outram v. Morewood, 3 East, 346; Fitzp. Abr. "Estoppel," pl. 20; Bunting v. Lepingwell, 4 Reporter [Coke] 29; 2 Vent. 44; Kenn's Case, 7 Reporter [Coke] 42b; 5 Reporter [Coke] 7a; Jones v. Bow, Carth. 225; Da Costa v. Real, 2 Strange, 961; Burrows v. Jemino, Id. 733; Rex v. Rhodes, Id. 703; Rex v. Vincent, 1 Strange, 481; Blackham's Case, 1 Salk. 290; Clues v. Bathurst, Hardw. Cas. Temp. 11; Noell v. Wells, 1 Lev. 235; Collins v. Jessot, 6 Mod. 155; Rex v. New College in Oxford, 2 Lev. 15; Meadows v. Duchess of Kingston, Amb. 761; Baxter v. New England Ins. Co., 6 Mass. 286. Now, in this case, the same allegations are made,

and the same facts will be in issue, in this court, as in the court of probate. The maxim of law is "Nemo debet bis vexari, si constet curiae quod sit pro una et eadem causa." It is said (4 Vin. Abr. tit. "Chancery" [R], p. 391) that chancery shall not relieve against a maxim of law upon a matter of equity, by which the maxim shall be crossed, for this is to make a new law.

STORY, Circuit Justice: Have you any case, in which a judgment of a court of competent jurisdiction having been reversed, the party is precluded from a new action?

The reversal is conclusive as to the error, for which the judgment is reversed. If it be for mere form, the party is not concluded upon the merits. But there is a difference between this case and cases at common law, in which a new suit may be brought after reversal. This is a proceeding in rem; a party comes in and claims to be entitled. On appeal to another court, it is decided that his claim is not good, and the cause is sent back for the administrator to proceed, as he would have done, if no such interference had taken place. The effect is only to discharge the cause of the difficulty arising from this claim, leaving the other proceedings in full force. Otherwise, it would be necessary to pursue, de novo, all the steps of the administration.

Mr. Otis, on the same side.

The question presented by the complainant's bill has already been decided by a court of competent jurisdiction, and one of her own election. The principles both of law and equity, therefore, forbid its being again revived. The jurisdiction of matters relating to estates and wills belongs, originally, to the probate court, and no court, with similar powers, or for similar purposes, has yet been instituted by the United States. The probate court must, at least, have the exclusive cognizance, so far as to settle the administration account, and to determine what sum remains to be distributed. It was optional with the complainant to make her claim before that court, or to omit it, and, if the doctrine contended for on the other side be true, she might have proceeded originally here. She has made her election, and obtained a decree, from which the respondent appealed for reasons, any one of which is conclusive. Upon these reasons the supreme court has decided, and the question is, what effect is to be given to its decree? To ascertain whether it be conclusive, it is only necessary to consider what the judge of probate could have done after the reversal. If the reversal was founded upon some only of the reasons of appeal, then, as to the others, it was competent for him to proceed anew. But could he, afterwards, upon application of the parties, try the fact of James Murray's legitimacy? Certainly he could not. He must consider the question as settled by the court, to which the cause was carried by appeal. But, even if the decree were not conclusive upon him, the cause would be still in the probate court, where the complainant has elected to proceed. This election she ought not now to be permitted to waive, for the purpose of convening the administrator before another court. Had the supreme court affirmed, instead of reversing, the decree of the judge of probate, the administrator would have been concluded. He could have had no remedy in a court of the United States. Having, then, been brought by the complainant into a situation, in which the judgment of the court was binding both upon him and the executor in India, it would be unjust, that after a decree in his favor, he should be drawn from that tribunal to answer before another.

The court will not, in this case, be anxious to extend its jurisdiction, to remedy even a defect of justice in another tribunal. For, though a citizen of another state may obtain relief in the chancery court, yet, to a citizen of Massachusetts, there will be no remedy, after an appeal to the supreme court of probate. In addition to this inequality of remedy, where the rights are the same, numberless inconveniences must arise from the frequent clashing of the jurisdictions. It would also be in the power of any stranger to put a stop to the proceedings of the probate court, and the object of the law in permitting foreign executors to collect the debts and effects lying within our territory might be entirely defeated. This inconvenience is strongly exemplified in the present case. The complainant has arrested property, which was going to the executor in a foreign country. She has detained it here several years, and now that a decision has been pronounced against her, she comes into a court of chancery, to begin de novo, and still further to embarrass the proceedings of the defendant and executor.

On writs of error it is not unusual for the court to go on and decide every question of law, in order to prevent future litigation. This has often been done in the supreme court of the United States. This court will be governed by the same equitable maxims, and will, therefore, refuse to sustain the petition of a party, who has already elected to proceed in another jurisdiction.

Mr. Dexter, in reply.

There is no reason to apprehend such clashing of jurisdiction, as has been suggested on the other side. But even if there were, it is a sufficient answer to the objection, that the constitution and laws have made it the duty of this court to hear and decide the present complaint, as a part of its general jurisdiction, extending to all controversies between citizens of different states. However it might have been in a case, in which there

were in one state many heirs, and but one in another, such is not the present case. Here there is but one complainant, who claims as sole heir. It being then clear, as a general position, that the court has jurisdiction, an attempt is made to show, that its jurisdiction cannot be exercised, because the plaintiff has made her election to proceed in a state court, and because the defendant appealed from a decree of the judge of probate to the supreme court of probate, where a reversal was had, which it is contended must be conclusive as to all the reasons of appeal, in their nature final and not dilatory. It will not be denied, that the complainant is concluded, if she has proceeded to a final judgment, definitively settling her rights; but if there has been no such judgment, it cannot be pretended, that her election to proceed in a state court has taken away her right of resorting to a court of the United States.

(Upon this point, Dexter was stopped by the court.)

It is next contended, that, as the law requires reasons of appeal, the judgment must be taken to be conclusive as to all the reasons assigned. But the reasons of appeal are merely formal. They resemble an assignment of errors. The court will permit other reasons to be argued, and, on writs of error, will reverse the judgment, if other errors than those assigned are apparent on the record. It never was pretended, that the party is limited to the errors assigned. No greater effect is given by the statute to the reasons of appeal. But even if the court were restricted to the reasons of appeal, the consequences contended for would not follow. That sufficient cause is found for reversal, which would be the case if one reason out of ten were allowed, affords no ground for supposing that the other nine are also well founded. There is, in this case, nothing, from which it can be inferred, that the court proceeded upon one reason more than another. The decree of reversal may be right, and yet the complainant may have good ground to maintain her present bill. The reversed decree admitted Mary Harvey as coheiress with John Mowry. It is now alleged, that Mary Harvey is sole heiress. Surely, the commencing of an action by mistake jointly with another in a state court, cannot preclude the party from suing alone in a court of the United States.

It is further contended for the defendant, that the original cause is now reinstated. But in truth there is now no cause in the probate court. There were two plaintiffs, who obtained a decree of distribution. This decree, on appeal, has been generally reversed. The case is to be governed by the same principles, as if there had been two plaintiffs in assumpsit. It is said, however, the cause was remitted. But why was it remitted? Evidently for no other purpose, than to enable the judge of probate to go on and settle the administrator's account. The controversy between these parties never could have been remitted. There is, at this moment, no suit pending, in any court of this state, at the promotion of the complainant, either alone or jointly with John Mowry. And even if a suit were pending, she has the right, at any time, to discontinue and abandon it, and she has done all in her power to effect such discontinuance. It is, indeed, provided by a state law, that an heir before he brings any action for his share, shall have it settled and ascertained by the probate court; but this applies solely to the courts of law, there being no chancery court in Massachusetts.

Mr. Otis, for defendant.

When an action is brought by two, and the judgment is reversed, though one of them has good cause of action, that one, it is true, may afterwards sue alone. But the reason is, that the court cannot sever, and order the cause to proceed as to one of the parties. It is otherwise in the present case. The court might sever, and either decree the whole to Mary Harvey, or send the cause back to the inferior court for an inquiry into her rights.

STORY, Circuit Justice (after stating the pleadings). The question is, whether this plea, as pleaded, is a good bar to the present bill. It is argued on the part of the defendant in the affirmative on various grounds, which I will, in the course of this opinion, distinctly consider. It is to be recollected, that the proceedings before the probate court were not between the same parties, as in the present; there was a joinder of John Mowry with the present plaintiff, and unless in probate proceedings the parties are considered as prosecuting severally and for their several interests, as well as jointly, according to the course of the civil law, there would be a difficulty in sustaining the conclusiveness of the decree of the probate court upon technical principles, even supposing such decree to purport all that the defendant now contends for; for such a decree in general, would not only bind parties and privies, and the present case would not be between the same parties. But waiving all controversy on this point, let us now proceed to the consideration of the legal effect of the decree, supposing it in fact to have been made between the same parties. The decree of the supreme court of probate purports, on the face of it, to be, a simple reversal of the decree of the inferior court, and a remitter of the cause to that court for further proceedings. It does not therefore assume to make any conclusive or final decision on any rights or interests of the parties, but leaves those rights and interests precisely as they were before the original decree was made, unless by intendment of law a different result is to be attributed to such a

decree. At common law, if a plaintiff obtain a judgment in an inferior tribunal, which is reversed in the appellate court, it is very clear, that the reversal operates no further, than to nullify the original judgment. In other respects, the parties are precisely in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. If this case then were to be tried by the common law, the defendant's counsel could not sustain their objection. Upon what principles is a simple reversal of a probate decree to be held to have a more extensive operation?

It is argued, that the reversal in this case must have been upon the merits of the controversy between the parties, for all or some of the reasons assigned in the reasons of appeal, and therefore conclusive upon the parties, as the sentence of a court of competent jurisdiction upon the identical questions now before this court. It is difficult to perceive on what principles of law this argument is founded, and no authority in point has been adduced. The general doctrine is laid down with admirable clearness in the Duchess of Kingston's Case, 20 State Tr. 355, Hale, Hist. C. Law, by Runnington, note C, p. 39, by the lord chief justice of the common pleas, in delivering the opinion of all the judges. He says: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true:—First, that the judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." See Hibshman v. Dulleban, 4 Watts, 183, per Gibson, C. J.; Arnold v. Arnold, 17 Pick. 7–14; 1 Phil. Ev. (Am. Ed. 1839), p. 321, note 557.

Now in the probate decree before the court, there is no decision of the court directly upon any point of fact or of law; and upon what grounds the decree itself was founded is no where stated, and cannot be collected by argument or inference; and even if it could, we are informed from the highest authority, that it would not be conclusive in another suit. The argument too proceeds upon a supposition, that in probate appeals the court are confined to the reasons of appeal, and cannot decree aliunde. But the statute of Massachusetts of the 12th of March, 1784, c. 46 (1 Mass. Laws, 155), contains no such limitation; and therefore, upon general principles, applicable to appeals according to the course of the civil and ecclesiastical law, the whole cause stands de novo in the appellate court, and may be decided upon, unaffected by the preceding sentence. But if it were otherwise, the case would present intrinsic difficulty, for it would still be uncertain, what was the particular reason, upon which the reversal proceeded; and some at least of the reasons would seem in the nature only of temporary bars. Besides, there may be errors on the face of the decree, or the proceedings, untouched in the reasons of appeal, which may well authorize a simple reversal; yet the argument assumes, that the court were bound to adjudge between the parties, as to the merits of the appeal, in the manner by them stated, notwithstanding the most unquestionable errors.

Another fatal objection to the argument is, that it attributes to a mere reversal of a decree all the legal efficacy of a subsisting decree upon the merits. It is in general true, that a judgment or decree upon the merits of any cause of action is conclusive as to the rights of the same parties, while the judgment or decree remains in force; and if the same judgment or decree find any particular fact or issue directly, the same operates by way of estoppel conclusively upon the parties, while the record is in force. But a reversal, with few exceptions, affirms nothing but its own correctness. It simply nullifies the former judgment or decree, and declares that it shall henceforth be deemed void. It decides nothing upon the rights of the parties; but confines itself to the adjudication, that what has been done shall have no legal effect. To give it a more extensive operation, either as a bar or as an estoppel, it is necessary to show, that it directly affirms or denies some distinct fact in issue. There is no pretence, that the present decree, on the face of it, does either. It is further argued, that if the reversal be not a conclusive bar by its intrinsic force, it operates so indirectly, inasmuch as the plaintiff is estopped, by her election to proceed in the probate court, from pursuing any remedy elsewhere. I know of no such estoppel in this case. In general, the pursuit of a remedy at law, which has become fruitless, is no bar to the pursuit of a remedy in equity for the same subject matter. So far from it, that in many instances, the whole equity grows out of the incompetency of the law to afford any adequate relief. Much less is it true, that an election to proceed in one court of competent jurisdiction, either of law or equity, where the suit is abandoned, operates as an estoppel to another suit in any other competent court. It is further argued, that the present bill ought not to be sustained, because the original suit is still pending in the probate court and unde-

termined, and to assume jurisdiction would be to oust that court of its concurrent cognizance of the cause. Admitting that on a demurrer to a plea in bar like the present, such a consideration could properly arise (which in point of law cannot be conceded), the objection cannot be sustained, for there is no allegation of the actual pendency of such a suit; and if there were, it could not be pleaded in bar, but simply in abatement of the present bill. But in point of fact, upon the remitter of the cause from the supreme court of probate, I take it to be clear, that the cause could not again depend in the inferior court, until the parties had done some act, by which the authority of that court was called again into exercise.

An argument ab inconvenienti has also been drawn from the supposed conflict of jurisdictions, which may ensue, if this court should sustain its jurisdiction over this cause. To arguments of this sort, in proper cases, this court will be disposed to listen with all possible deference. We shall not incline to encroach on the state authorities, or seek to withdraw causes from their proper forum. But when a suit is instituted by competent parties, on a subject matter cognizable by the court, I know of no authority that will justify us in declining the jurisdiction. We are not at liberty to shrink from the discharge of duties imposed upon us by the law, or to violate the rights of parties regularly before us, merely because the cause may occasion personal or public inconvenience. Such considerations belong to another tribunal. On the whole, I am very clear, that the plea in bar is insufficient, and must be overruled.

[For further proceedings, see Cases Nos. 6,183 and 6,184.]

Case No. 6,183.

HARVEY v. RICHARDS.

[2 Gall. 555.] [1]

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

ISSUE OUT OF CHANCERY—LEGITIMACY.

Issue out of chancery [in the suit of Mary Harvey against John Richards, administrator cum testamento annexo of James Mowry].

At the last term of this court [Case No. 6,182], an order was made directing the parties in this cause to proceed to trial at law, upon the following points, viz.: "Whether the said Mary Harvey is the sister and sole next of kin of the said James Mowry, otherwise called Murray, or not?" The trial to be had by a jury for that purpose to be duly impanneled, and after the trial had, the parties to resort to the equity side of the court for such further orders, as should be necessary and proper. By consent of the parties, a special jury was impanneled to try this issue,[2] who returned their verdict as follows:

"The jury, having maturely considered the evidence produced, find that the said James Murray, alias James Mowry, was the legitimate son of Joshua Mowry, and Hope, his wife, and that one John Mowry, his brother, now living, and Mary Harvey, the complainant, his sister, are his sole next of kin and heirs at law."

[1] [Reported by John Gallison, Esq.]

Case No. 6,184.

HARVEY v. RICHARDS.

[1 Mason, 381.] [1]

Circuit Court, D. Massachusetts. May Term, 1818.

COURTS OF EQUITY — ADMINISTRATORS — ACCOUNT AND DISTRIBUTION OF THE ESTATE OF A DECEASED PERSON DOMICILED ABROAD.

1. A court of equity has jurisdiction to decree an account and distribution, according to the lex domicilii, of the estate of a deceased person domiciled abroad, wihch has been collected under an administration granted here.

[Approved in Union Bank of Georgetown v. Smith, Case No. 14,362. Cited in The Boston, Id. 1,669; Perry Manuf'g Co. v. Brown, Id. 11,015; Walker v. Beal, Id. 17,065; Swatzel v. Arnold, Id. 13,682; Walker v. Beal, 9 Wall. (76 U. S.) 755.]

[Cited in Childress v. Bennett, 10 Ala. 751; Tyler v. Thompson, 44 Tex. 497; Cooper v. Beers, 143 Ill. 27, 33 N. E. 61; Saunders v. Williams, 5 N. H. 214; Heydock's Appeal, 7 N. H. 503; Goodall v. Marshall, 11 N. H. 93; Dent's Appeal, 22 Pa. St. 517; Despard v. Churchhill, 53 N. Y. 199; Churchill v. Boyden, 17 Vt. 321; High's Appeal, 2 Doug. (Mich.) 522.]

[See Van Reimsdyke v. Kane, Case No. 16,871.]

2. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case.

[Cited in Mothland v. Wireman, 3 Pen. & W. 188; Gravillon v. Richard, 13 La. 293; Goodall v. Marshall, 11 N. H. 93; Lawrence v. Kitteridge, 21 Conn. 582–585; Olney v. Angell, 5 R. I. 200; Noonan v. Kemp, 34 Md. 75; Re Apple, 66 Cal. 432, 6 Pac. 9; Graveley v. Graveley, 25 S. C. 1; Welch v. Adams, 152 Mass. 77, 25 N. E. 34; Cross v. United States Trust Co., 131 N. Y. 347, 30 N. E. 129; Irving v. McLean, 4 Blackf. 53; Swearingen v. Morris, 14 Ohio St. 431; Parker's Appeal, 61 Pa. St. 482; Williams v. Welton, 28 Ohio St. 466; Re Hughes, 95 N. Y. 60, 61.]

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

[2] The practice of summoning special juries appears, from the records of our courts, to have been early prevalent in Massachusetts; [3] but it has been long disused, and there is now no power, in any state court of this state, to proceed otherwise, than by a jury returned and selected, according to statute provision, by drawing their names from a box kept for that purpose by the selectmen of each town.

[3] MS. Records. Court of Assistants, Suffolk County, March, 1691. Andrew Belcher v. James Lloyd. Appeal from the county court in an action on a charter-party. The appellant desired a special jury of merchants, which was accordingly granted. There are many like cases.

This was a bill in equity [by Mary Harvey] to compel the defendant [John Richards] who was administrator with the will annexed of James Murray, late of Calcutta, in the province of Bengal, deceased, to a distribution of the undevised estate of the testator in this country, among the next of kin residing here. The executors appointed by the will of the testator, resided in Calcutta, and the defendant was appointed by them an administrator for the purpose of collecting the testator's effects here. The same parties had been heard in court, at two former terms on other points. [See Cases Nos. 6,182, 6,183.] The question that now came up was, whether the defendant should be ordered to distribute the effects in his hands among the next of kin in this country, or should send it to Calcutta to be distributed by the executors there.

Mr. Aylwin, for plaintiff.

The first question is, whether this court has authority to distribute the undevised surplus among the next of kin, according to the law of the testator's domicile? It is averred in the answer, "that this court has no authority to distribute the undevised surplus, but it ought to be transmitted to Bengal." This principle we wholly deny. The law of the testator's domicile must be the rule; and it will be our duty to show, that this court can apply that rule. To decide this question, it may be useful to consider, whether this is substantially an original administration, or merely auxiliary to the principal one of the executors in India. If it be the former, there can be little doubt in relation to the authority of the court.

As to the facts, it is assumed, that there are no debts abroad, nor any specific trusts under the will to be executed. The testator by his will evidently intended to die intestate, as it regards this property. He says, "the property now going to America, I do not consider as belonging to any person." And he then constitutes a mercantile partnership to be his executors. The next of kin are citizens of the United States. Now, from the decisions in England it is evident, that the appointment of an executor in India, is considered as merely constituting him an agent. In Chetham v. Lord Audley, 4 Ves. 72, the lord chancellor says, "I think the appointment of an executor in India, no legacy being given to him, is the appointment of an agent for the management of the estate. They give him the character of executor." The same doctrine is affirmed in De Mazar v. Pybus, Id. 648, as it regards the appointment of a partnership to be executors. The place, where the will was made and proved, does not necessarily draw to the courts of that place the exclusive administration of the estate. In both these cases, although the wills were proved in India, the court of chancery in England undertook to direct the settlement of the estates; and upon the principle of these cases we may safely rely, that this is, in reality, an original administration. But whether so or not, still on the grounds of public law and universal justice the complaint is well founded in asking relief from this court. A court of chancery being one of general jurisdiction, appears to be peculiarly fitted for the administration of foreign laws, when they affect property within its jurisdiction. It is a remark of Lord Kaimes (2 Pr. Eq. pp. 312–315, 318, 326; Id. b. 3, pp. 336–340, c. 8) that "it is of great importance to every nation, that justice have a free course everywhere; and to this end it is necessary, that in every country there be an extraordinary jurisdiction for foreign matters, as far as justice is concerned." And under this title of "foreign matters," he discusses the question as to the distribution of moveables, and lays down the position, that every question in relation to them must be determined by the judge of the place; but it must be according to the law, which governed the owner of them. Lord Hardwicke, 1 Atk. 19, asserts, that though foreigners are subject to the authority of the court of chancery only while in England, yet their property in England is under its control. 2 Coop. Eq. Pl. pp. 123, 124. And Lord Ellenborough states, in Potter v. Brown, 5 East, 124, "that it is every day's experience to recognize the laws of foreign countries as binding on personal property, as in the succession to personal property by will or intestacy of the subjects of foreign countries." In conformity with this rule, a variety of decisions have taken place in Scotland and England. Bruce v. Bruce, in notes to Marsh v. Hutchinson, 2 Bos. & P. 229, is a case of distribution by the courts of Scotland, according to the law of England. Balfour v. Scott, 6 Brown, Parl. Cas. 550 (St. Distrib. 1793), was a decree of a Scotch court for distribution according to the law of England of personal estate in England; and it was affirmed in Dom. Proc. as to distribution. Hog v. Lashley, 6 Brown, Parl. Cas. 577 (St. Distrib. 1792), was the case of a Scotchman making his will in England, which was there proved. Distribution was according to the law of Scotland. Kilpatrick v. Kilpatrick, cited 6 Brown, Parl. Cas. 584 (1781), distribution by Lord Kenyon (master of the rolls) according to the law of Scotland of a legacy given by an Englishman to a Scotchman, which had not been received in the life-time of the latter. Drummond v. Drummond, 6 Brown, Parl. Cas. 601 (1799), is also a case, where the Scotch court decided on the distribution of property by the law of England, where the administration was originally granted in England. In Bempde v. Johnstone (1796) 3 Ves. 198 (The Marquis of Annandale's Case), one of the bills filed was by Lady Graham for a distribution according to the Scotch law. The lord chancellor heard the arguments on the question of domicile, but finding it fixed in England, her bill was dismissed; and a de-

cree according to the prayer of the other. Somerville v. Lord Somerville, 5 Ves. 791, is a case of distribution by the court of chancery, according to the Scotch law, "the distribution arising from the place, where the property is situated." From what may be gathered in the case of Bowaman v. Reeve, Finch, Prec. 577, it appears that the testator, executor, and legatee were natives of Holland, and there settled; nevertheless a bill brought by the legatee against the executor (who had proved the will in England) for a recompense out of the personal estate in lieu of a specific legacy taken by a creditor in Holland, was sustained by the lord chancellor. Tourton v. Flower, 3 P. Wms. 369, 2 Eq. Cas. Abr. 78, pl. 9, was a case where Tourton, a banker at Paris, made his will, and gave a legacy to one Theluson, which had been set aside in France in favor of the next of kin. The French executor being dead, administration with the will annexed was granted by the Archbishop of Canterbury, and a bill was brought by the mothers, who had taken administration in France on the estate of the next of kin, against the administrator with the will annexed for a discovery and account. The defendants demurred, because there was no representative of the deceased Tourton in England, and the executor of the will might have left an executor. The lord chancellor said: "The administration being taken out here, I will look upon the same to be good." But on demurrer ore tenus, because the mothers had not taken out administration to their sons in England, the bill was dismissed for want of proper parties.

These are the cases in England. In our own country similar decisions have taken place. The case of Desesbats v. Berquier, 1 Bin. 336, was that of a will executed according to the forms of the law, where the property was, but not in conformity with the law of the testator's domicile; and it was held by the supreme court of Pennsylvania to be invalid. And from that case it is to be inferred, that the administrator was directed to distribute the property according to the laws of the testator's domicile. However that may be, in the case cited in the note (Guier v. O'Daniel, Id. 349) it was expressly decreed in Pennsylvania, that distribution should be made according to the law of Delaware. In the case of Selectmen of Boston v. Boylston, 2 Mass. 386, upon an interrogatory, as to what amount of property was received by the administrator in England, it was held, that he was not bound to answer. The counsel for the administrator in the course of their argument, to show the impropriety of accounting here, ask, how can our judges, if they undertake to distribute here, know the laws of foreign countries? Sedgwick, J., replies, the same difficulty must arise in every administration of a foreigner's estate originally taken here. The judge must distribute according to the laws of the intestate's country. Thus it appears, that courts of justice will take cognizance of foreign laws affecting property within its jurisdiction, and deliver it to the party, to whom of right it appertains in cases of original administration. Still it is supposed by some mystical virtue, belonging to the species of administration, under which the defendant in this case acts, that the application of a different rule is required. That because this is an ancillary administration, the rights of the parties cannot be here established, and the court must turn a deaf ear to their application. Although this administration in form is auxiliary to the principal one, yet in substance it is not. The property here is not required for the execution of any trust confided to the executor under the will; for the testator, in relation to this property, never reposed in him. Let it, however, be considered as an ancillary administration.

It is denied, that there is any general rule of public or municipal law, which requires that parties entitled to a foreigner's property shall seek their rights only in the courts of his domicile. From Pipon v. Pipon, Amb. 25, and a class of cases somewhat resembling it, it will no doubt be attempted to derive such a rule. The party, who applied for the distribution of the bond debt found in London, was not entitled by the law of the intestate's domicile, to a distributive share. That alone was sufficient to cause a dismissal of the bill. Lord Hardwicke declines going into the general question; but states his opinion, as it regards the rule of distribution, that the property follows the person, and becomes distributable according to the law or custom of the place, where the intestate lived. This principle cannot be questioned. And his other remarks can only apply to a case, where the party having a right to the debt, ought not to call for a partial account, because the statute requires a distribution of the whole residue, &c. He however says, that that case differs from where a specific part consists of chattels here in England. The whole argument turned on the point, whether the taking out of an administration in England altered the course of descent. See Sill v. Worswick, 1 H. Bl. 690, Lord Loughborough's opinion.

The next case in order of time is Thorne v. Watkins, 2 Ves. Sr. 35. Here the defendant was one of the executors of Richard Watkins, who resided in Scotland, died there, and left his estates among his nephews and nieces, of whom the defendant was one; and he was also administrator, and one of the next of kin of William Watkins, who was entitled to a share in Richard's personal property, and who resided in England, and died there intestate. It was held, that William's share in his estate should be distributed according to the law of England. Lord Hardwicke puts a case, "If a man dies here, and administration is taken out here, where he has left personal estate, and he has

debts abroad in France, Holland, or the plantations, which cannot be recovered abroad by virtue of the prerogative administration taken out here, the administrator must invest himself with some right from the proper courts in that country, as administration must be from the governor of the plantation, if it arise there, which must be for form; and it is generally granted on the foundation of the administration granted here, and then it must be distributed as here." The reason of the decision in Pipon v. Pipon, was, that, it called for a distribution of a part. Neither of these cases, and they turn upon their particular circumstances, establish the pretended rule. Still less support will it derive from the case of Burn v. Cole, Amb. 415. The marginal note, in fact, states the reverse of this proposition. "One dies intestate having personal property in England and abroad; distribution must be according to the law of that country, where he was resident when he died."

The case of Jauncy v. Sealey, 1 Vern. 397, can have but little bearing in favor of the defendant. The plaintiff as administrator of T. S. deceased brought a bill for discovery. The defendant pleaded a nuncupative will made by the deceased according to the law of Naples, where he resided; by which he was appointed executor, and denied that he left any estate but what was at Naples. The court allowed the plea. No English authorities, it is believed, can be adduced, which maintain this general proposition. But it will be said, that in this state decisions have taken place, which go to this length. The cases of Richards v. Dutch, 8 Mass. 514, and of Dawes v. Boylston, 9 Mass. 355, will be pressed unquestionably on the court, as decisive of this point. The first case arose upon a motion for a new trial. There it was contended, that parol evidence ought not to have been admitted to give a construction to a clause in the will, under which the defendant claimed to hold the property; and if it had been properly admitted, still a legatee had no right to take a legacy without the assent of the executor. Upon the first ground, no lawyer could entertain a doubt; and on the second, as little: for no proposition is more clear, than that the bequest of a legacy transfers only an inchoate property to the legatee. Toll. Ex'rs, p. 306. The decision of the court is stated in a very few words, and what is added by the reporter is extra-judicial. "That legatees, who claim only from the bounty of the testator, must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim." It does not appear however from the report, that this point was discussed. The case of Dawes v. Boylston, certainly affirms the position; and although, under the particular circumstances of the case, it may have been correct, yet it is limited to a claim of residuary legatees, for those were the only persons calling for the aid of the court; and what was the residuum could be better ascertained by the prerogative court of Canterbury, than by our courts. It is the decision of one judge only, and indeed a very respectable one; but it is apprehended, that its force is much weakened by a careful examination of the statute, and a subsequent decision of the whole court of Massachusetts. The statute provides for filing and recording wills proved out of the government; and enacts (1 St. 1785, p. 246, c. 12) "that the judge may thereupon proceed to take bonds of the executor, or grant administration of the said testator's estate lying in this government (with the will annexed) and settle the said estate in the same way and manner, as by law he may or can, upon the estates of testators, whose wills may have been duly proved before him." How this power, delegated to the judge of probate, was deemed inadequate for the purposes specified, it is difficult to imagine. To say, that these terms do not mean, what they evidently import, is rather to exercise the power of legislation, than of exposition. It is admitted by the judge, that the probate bond given here might be enforced to procure an inventory and an account from the administrators. Still to what beneficial purpose could this tend? The administrator is resident here. The process of the courts of England could not reach him; and no bond is there required of an executor or administrator with the will annexed; all that is exacted from him, is an oath to render an account. Even the bond of an administrator in England does not require him to do more; it does not afford security for the payment of the distributive shares of the next of kin. If the principle of the decision of the courts of Massachusetts be correct, the administrator might remain here with the property he has collected under the authority of our courts, and set at defiance the claims and rights of our citizens, unless these citizens were creditors. Such consequences, without doubt, led that court to qualify its decision, and to adjudge in the case of Stevens v. Gaylord, 11 Mass. 264, that "if it appeared that the deceased had his home in Connecticut, they should cause the balance remaining in the hands of the administrator here to be distributed according to the laws of Connecticut, or transmitted there for distribution by their courts." The decision, therefore, leaves the question in this state still open; and in every case, which may arise, the discretion of the court in relation to its particular circumstances, will, as it undoubtedly ought, be freely exercised.

What principle of national justice can require our courts to send its citizens into foreign countries, there to establish those rights, which may be here ascertained? The same end can alone be effected abroad, which will be attained here. It is in effect to cause an

useless expense and unnecessary delay, without any reasonable motive. 4 Mass. 324. Courts of chancery do not adopt such narrow rules for their government. In the language of the lord keeper, 2 Ch. Cas. 200, "when it can determine the matter, it will not be an handmaid to other courts, nor beget a suit to be ended elsewhere." And accordingly in the case of Alexander v. Alexander, 2 Ch. R. 37, where a bill was brought against an executor to discover assets and for satisfaction; and it was said for the defendant, that the plaintiff "ought not to have relief in chancery, for he had a proper remedy at law." 1 Vern. 429. But the court being possessed of the cause, and the same being as proper for this court as at law, it was decreed to avoid a circuity of action, that the defendant should account and make the plaintiff satisfaction. If, then, in England, a party will not be turned out of a court of equity, because he can have redress in a court of law, is there not greater reason for not sending our own citizens to a foreign tribunal to vindicate their rights? Further, the administrator in this case being the agent of the executor, he ought to be considered like his principal, the trustee of the next of kin. And upon chancery principles he need not be a party; for he who takes a trust estate, takes it subject to the trust, and is directly responsible to the cestui que trust. A trustee to another's use made a letter of attorney to T. S. (Pollard v. Downes, 2 Ch. Cas. 121; 1 Eq. Cas. Abr. 6), to manage and receive the rents and profits of the trust estate, who did so, and accounted to the trustee; and now being sued by cestui que trust, insisted that the trustee, and not he, was to account; and that he, having already accounted, might be quiet as to the plaintiff, but he was decreed to account to the plaintiff. Where there was a demurrer to a bill for a legacy, Nicholson v. Sherman, 1 Ch. Cas. 57, because one of the defendants was not the executor, the court declared, that as he had got the estate, the demurrer should be overruled. The estate ought to be liable to legacies in whosesoever hands it may be found. Where there are two executors, and one is beyond the sea and the other in England, and a bill is brought against him that is in England, he having assets in his hands to answer the demand, it is held, that the other executor need not be made a party in such a case. 2 Eq. Cas. Abr. 464. The rule appears to be, that whosoever is in possession of the trust property, may be alone sued. But where the creditor, legatee, or next of kin, seeks an account against the debtor of the deceased, it cannot be done without joining the legal representative, and charging collusion. The principle is fully stated by Lord Hardwicke, in Newland v. Champion, 1 Ves. Sr. 105. The same is held in Doran v. Simpson, 4 Ves. 665.

Thus it appears evident, that a court of chancery will dispose of property, without requiring all parties to be brought before them, who may be affected. When it is necessary, however, as in the case of Wilde v. Holtzmeyer, 5 Ves. 813, it will always afford time to parties abroad to come in and state their rights. This bill has been pending several years; the original executor has had an opportunity of becoming a party, if he chose. As he is out of the reach of the court, we could not compel him to join. What will be the consequence, should the court decree upon the principle contended for by the defendant? It appears, that M'Clintoch is not in India. If the property be remitted there, we have no redress; for the English law does not compel the executor to give security, and, according to the defendant's rule, we have no other forum than that of Bengal to resort to. If we run a race after him in England and Ireland, through the medium of the high court of chancery; and if that court should not adopt the rule contended for by the defendant; and if M'Clintoch should not then be bankrupt, that court will award to us nothing more than what we ask at the hands of this tribunal. Whether then this administration be considered as an original one, or merely ancillary to that of the executor; or whether this cause be regarded in relation to its own peculiar circumstances, we feel confident, that the plaintiff is entitled to a decree of the court, as prayed for in the bill.

Prescott & Hubbard, for respondent.

There are two questions which arise out of this case. 1st. Is the residue of this estate to be distributed according to the law of the country, where the deceased was domiciled? 2dly. Is the administrator, appointed to collect the effects in this country, to remit the balance in his hands to the general administrator in India, or is he bound to make distribution of it here, if called upon so to do by persons rightfully entitled to it?

The first of these questions is already well settled by authorities. 2 Hub. Praelect. lib. 1, tit. 3, § 18; Voet, Com. b. 38, tit. 17, § 34; Bruce v. Bruce, 2 Bos. & P. 229. And the counsel for the plaintiff appear willing to concede that the law of the country, where the deceased was domiciled, is to regulate the distribution of his estate. We come then at once to the second question; and if upon this subject no precedents are to be found, the court will adopt such a rule as will prove most generally convenient.

The interests of all who are in any way concerned in the estate of deceased persons, either as creditors, debtors, legatees or heirs, require, that such estate should be brought to a final settlement with as little delay, and as much after the manner, in which they would have been conducted by the deceased themselves, had they continued to live, as possible. This can only be effected by appointing some one to represent the deceased, to whom authority shall be given to arrange and settle the estate; to carry into effect the

engagements the deceased was under at the time of his death; to compel others to the performance of their engagements towards him; and to distribute the remaining property among those, who have a legal title to it. We find accordingly, that in all civilized countries such persons are appointed. The representative enters into an obligation to the government under whose authority he acts, to execute the trust committed to him with fidelity and diligence; and the better to ensure this, he is called upon, at stated periods, to render an account of his doings to the proper authority, and explain the situation of the estate. How can these duties be performed with more justice to the debtors, creditors, and legatees; more beneficially to the estate; or more conveniently to all parties interested; than by having the funds collected together in one place, and put into the hands and at the disposal of one person. There will then be one general account rendered of all the estate by the same person, and the balance be distributed according to the laws, which are to regulate the distribution, in that place, where those laws are best known and most easily applied. We contend, therefore, that the administration in this country is merely ancillary to that in India. The administrator there must either come to this country himself to collect the effects here, or some person must be employed to do this for him. This state, influenced by the comity, which exists between different countries on this subject, invests the person pointed out by the original administrator with authority to collect these effects; and, in return for this indulgence, requires that the debts due to its own citizens shall be paid before these funds are withdrawn, either ratably or fully, according to the laws of that country. And it may be considered, perhaps, but reasonable, that as the administrator out of comity and favor is authorized to demand and collect the debts due from our own citizens to the estate, he should likewise be held to discharge out of the same fund such debts as are due from that estate to our citizens, although this may occasion some inconvenience and delay. But this reasoning can by no means apply to such persons, as claim from the bounty of the deceased merely; and the adoption of such a rule with regard to them, might, in some cases, become an insurmountable obstacle to the settlement of the estate. Supposing the estate of the deceased to be scattered in small portions throughout the whole of the United States, and the administrator in each state considered as an original and general administrator, liable to the demands of all the creditors, legatees, and heirs. What endless confusion would here be created! What a variety of accounts! What opportunities for fraud and embezzlement! In such case the administrator abroad, instead of calling in to himself the accounts of these numerous administrators, and collecting together the property thus dispersed, would be first obliged to render an account to each of them; and it would be necessary, too, that such an account should include in it the separate accounts of every other individual administrator; add to this, each of these administrators is to make himself acquainted with the laws of the country, in which the deceased was domiciled, in relation to this subject, and to distribute the property in his hands as that law prescribes. It seems hardly possible to conceive, how the difficulties, which would inevitably arise in such a state of things, could be surmounted at all; and if they could, it would certainly be at the expense of much time, and a great expenditure of the property. It seems to us but little consonant with justice, that such injury to the estate, and such difficulty to those who administer it, should be created by persons claiming merely from the bounty of the deceased. But we do not press the adoption of the rule, which we think the most proper and beneficial one in this case, merely on the ground of its greater convenience. We contend that it is already expressly laid down by some authorities; that it is fairly to be inferred from others; and will not be found to be contradicted by any. Whereas the rule contended for by the plaintiff is in no instance clearly recognized.

In the cases cited by the plaintiff's counsel, where a surplus has been distributed, it will be found, that the general administrator was before the court, and had submitted to the jurisdiction. The cases may be classed under two heads: 1st. Of applications to chancery. 2dly. Of appeals to the house of lords. Among the cases cited by the plaintiff, under the first class, are Bowaman v. Reeve, Finch, Prec. 577. Here a Dutch subject made his will; gave a part of his estate in charities, and the residue to his executor. The executor refused to prove the will in Holland, but proved it in England. The property given was taken for debts, and the legatees applied for relief. In this case the executor (who was a party in interest) and the property, were both in England under the jurisdiction of the court. Tourton v. Flower, 3 P. Wms. 369. This was a bill in chancery, brought by the administrators of the next of kin to the testator, against the administrator of the testator's executor. The defendants demurred, because there was no representative of the testator before the court; for it did not appear that the executor of the testator had not made a will and left an executor, in which case the administration granted to one of the defendants would have been void; and the case was decided in favor of the defendants. But there is nothing to show, that if it had been decided in favor of the plaintiffs, distribution would have been ordered in England. Kilpatrick v. Kilpatrick, 6 Brown, Parl. Cas. 584, is a case in which the executor was before the court.

In these cases, which come under the class of appeals, the whole case was brought before the court by the appeal. The cases found in Ambler, we think, support our position. In Burn v. Cole, Amb. 415, administration had been granted in England, and Lord Mansfield held, that the judge in Jamaica was bound by the administration in England to grant the administration in Jamaica to the same person. So in the case cited in the note, administration had been granted to the widow in England and to the sister in Jamaica; the court of appeals reversed the administration to the sister, and held, that the widow appointed in England was entitled to the administration in Jamaica. The effect of this was to transfer the whole estate to one person. The administration in the plantation was ancillary only. Why is the administration granted to the same person in the colony as in the mother country, unless it be for the purpose of having one account only? The same reason would apply to an administration in an independent nation. Comity will effect with an independent nation, what the power of the appellate court compelled the colony to do. In Pipon v. Pipon, Amb. 25, the domicile of the deceased was in Jersey, and administration on his estate granted there. Administration was also taken out in England, for the purpose of collecting a bond debt of 500l.; the application was for a distribution of this sum according to the English law. The chancellor refused to order a distribution, because it ought to be distributed according to the laws of the deceased's domicile, in which case the plaintiffs would not be entitled; and also because this was but a part of the deceased's estate, which remained to be distributed, and the general administrator not being before the court, the court could not direct an account of the whole. The same reason will apply for not granting the application of the plaintiff in this case. The general administrator is not before the court, therefore the court cannot compel an account of the whole estate; and they will not grant an application for an account and distribution of a part only. In Somerville v. Lord Somerville, 5 Ves. 791, the chancellor seems very clearly to suppose, that the property was to be transferred to the place of the domicile.

Three cases have arisen in our own state court, in two of which the rule we contend for was expressly laid down, and in the oth er it was unnecessary to consider it. In Richards v. Dutch, 8 Mass. 506, it is expressly stated, that those who claim from the bounty of the testator must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed. This case arose from the claim of a legatee under the will, and was very fully argued and considered. In the case of Dawes v. Boylston, 9 Mass. 337, in which this was the principal question, the court say, that the personal effects are to be accounted for, and finally administered in the place, where the deceased was domiciled, wheresoever they may have been collected. That the administration in this country was justly entitled ancillary, in respect to the administration in the jurisdiction of the prerogative court. That the defendant had an authority to collect and pay debts, and was liable for the contracts and duties of the testator, which were recoverable and might be enforced within this jurisdiction; but that he was not liable in the court of probate to a decree, either of payment or of distribution, whether to a legatee or heir, upon any partial account to be there rendered and adjusted.

It is made a question by the plaintiff's counsel, whether the administration in India can be called the original or principal administration, in contradistinction to the administration in this country; and they assert, that in England the India administrators or executors are considered as agents merely. This is so, because India is a province of Great Britain; and the Englishmen residing there usually remit their estates to England. Two sets of executors are appointed, one for England and one for India. The executor in England may then well be called the principal, because the effects are there. The probate, which establishes the will, is the foundation of all the administrations afterwards granted.

Mr. Webster, in reply.

This argument proceeds on the ground, that no debts or legacies remain unsatisfied in India; and that the executor there has no beneficial interest under the will. The case is presumed to be such, that if the plaintiff were before the proper court in Bengal, with this bill, such court would be bound to decree distribution. It is no answer to the plaintiff, that her bill calls on the court to apply the laws of another country. Courts apply those laws in many cases. The sessions did this in Bruce v. Bruce. The master of the rolls did the same in Kilpatrick v. Kilpatrick. The court of Pennsylvania applied the law of Delaware in Guier v. O'Daniel, 1 Bin. 349. So far there can be no difficulty or doubt in the case. A decree for the plaintiff must be resisted, if it can be resisted at all, on the ground, that there being an existing administration, in loco domicilii, the effects collected elsewhere, must, in all cases, be remitted to the hands of the administrator or executor there, to be by him distributed. This is contended for as a universal rule; subject, however, to one exception, which is, that creditors here have a right to be paid here, out of the funds. Is there any such universal and inflexible rule? The plaintiff contends there is not. The law on this subject may be considered as of modern origin. It arises from comity, and from the regard, which courts of one country pay to the pri-

vate rights of the citizens or subjects of another country. But a rule, in the extent contended for, is not required by any of the reasons, in which the general doctrine or general practice is founded. The property is to be remitted, when any purpose of substantial justice requires it. But if the rightful owner be here, why should it be sent abroad for no reason, but to send him after it? The case under discussion supposes the plaintiff entitled to this property, and that if sent to India, and she were to follow it thither, it could not be refused to her. If the fund were wanted in India for any purpose of the will; or if any person there had rights in it, or claims upon it, the case would be different. But as the fund is here, and as the plaintiff, a citizen of this country, is entitled to it; and as this court is competent to distribute it, comity cannot require from this court the compliment of deferring the cause to the jurisdiction of the court in India. This is not required by that regard to the rights of individuals, subjects of other countries, which has governed the decisions of courts in these cases. And, that regard to these rights, is the foundation, upon which courts proceed in such cases, is proved perhaps by the circumstance, that no case is mentioned, probably none exists, in which the government of one country claims property in another, as escheating to itself. The courts of this country would remit this property to England or to India, to answer the claims of legatees or next of kin there. But they would not remit it for the benefit of the British exchequer, if there were no legatees or next of kin.

If, then, the question be not a technical one about the jurisdiction of the court, but of justice and private right, should it not appear, that some purpose of right or justice is to be answered by remitting the property to India? If there is no known and fixed principle, requiring the rule to be carried to the extent mentioned, the court will look to the consequences of adopting it in that extent. Many cases of inconveniences have been stated on the other side, which might happen, if the court should distribute personal property, found here, and belonging to one dying abroad. And no doubt there are cases, in which convenience, as well as justice would require the fund to be remitted. But the question is, whether this must be done, and in all cases? Or, on the other hand, whether the court may not do that, in each case, which the justice of that case shall require? A man might die in India, domiciled there, leaving the bulk of his property, and all his creditors, next of kin, and legatees, here. There may be nothing to be done in India, but collect debts due to the estate. Those may be here, who are entitled to the whole. Shall it all, nevertheless, be sent to India? If not, then there is no such universal rule as has been supposed. There are many cases, in which decisions have been made inconsistent with the existence of any such rule. One is, where persons dying abroad leave executors, both abroad and in England. The executor in England is bound to distribute what comes to his hands. He is not merely to collect the effects, and remit them to the executor acting in loco domicilii. Brooks v. Oliver, Amb. 406, appears to be a case of this sort. So is Chetham v. Lord Audley, 4 Ves. 72. Another case is, where the will is proved in both countries. Nisbett v. Murray, 5 Ves. 149. Cooper says, "The municipal courts of this country will also, by a principle of the law of nations, in the case of strangers leaving property here, distribute that property, in the case of death, by the laws of their own country, provided such stranger is not domiciled here." Coop. Eq. Pl. 121. He makes no exception for the case of there being another administrator or executor in loco domicilii. All these cases and opinions seem to be wrong, if the law be, as stated in one of the cases relied on by the other side (Dawes v. Boylston, 9 Mass. 355); viz. that all effects and choses in action, wherever collected, must be accounted for and finally administered in the country, where the deceased had his domicile. The rule is not laid down to that extent, in any other case, or by any writer. The administration in loco domicilii may be, and in cases arising in the East and West Indies, very often is, considered as a mere agency. In Chetham v. Lord Audley, Lord Loughborough says: "I think the appointment of an executor in India, no legacy being given to him, is the appointment of an agent for the management of the estate. They give them the character of executors." In such a case, the creditors and legatees, or next of kin being in another country, the India administration should, from the nature of the case, be considered as auxiliary to the uses of the property and the interest of those concerned. It should be accessory to that administration, which exists, where those are, who have a right to the property.

In Jauncy v. Sealey, 1 Vern. 397, there seems to be no objection to calling the administrator loci domicilii to account to the administrator in England, provided there had been effects in England. Tourton v. Flower is to the same point. These cases are incompatible with the existence of a rule, which renders the administration in loco domicilii in all cases the leading one, and treats the other as entirely subordinate. Indeed there will hardly be found to be any such rule, as that where there are two administrations on one estate, existing in different independent countries, one must be considered in all cases as principal, and the other as merely auxiliary and subordinate. Strictly speaking, no such relation can exist between authorities derived from different sources. Each administration is independent of the other; the power of administering issues from different and independent origins. Courts of law and equity will compel admin-

istrators, who act in an official capacity, so to act as to answer the ends of justice; and for this purpose they will, if necessary, hold an administrator in one country to be trustee of an executor or administrator in another country. But then a case must be made out, in which justice and equity require this. There may be administrations with equal claims to be considered single and independent. Suppose a man domiciled in England, to make his will there, leaving property both there and here. He may give a legacy to a person here, charged on the property here, and a legacy to a person in England, charged on the property there; and he may appoint executors in both countries. Should the legatee here be referred in such case to England for payment? Or suppose that there were, in such case, only the English executor, and he should come here, prove the will, and obtain the property by the aid of the laws of this country, could he not then be compelled to pay the legacy here? If we go one step further and suppose, that instead of coming with the will, he should send it, and it should be proved, and administration granted, at his request, to some one, with the will annexed, and then suppose further, that instead of a legatee applying for a legacy, the next of kin apply here for a surplus, we have the present case. A will might be made abroad, which could be only executed here. It might charge annuities or the maintenance of infants or relatives on the funds in this country, and be made payable on contingencies, which could be known and ascertained nowhere else. It might direct property to be invested in stock here, for the purposes of the will. A testator in England, having property here, might bequeath it to charitable purposes here. Such a trust must be enforced here or nowhere; because the English court of chancery has declined to enforce the execution of a charity in favor of objects existing under a foreign government. Attorney-General v. City of London, 3 Brown, Ch. 171.

A principal case relied on by the counsel for the defendant is Pipon v. Pipon. As to that case, it may be remarked 1st. That the plaintiff there had clearly no right. 2dly. That the plaintiff did not ask for distribution according to the laws of Jersey. Lord Hardwicke seemed to think something remained to be done in Jersey. Nothing can be proved by that case, except that the succession is to be governed by the law of the domicile. It has been said, that from an expression of the master of the rolls in Somerville v. Lord Somerville, it may be inferred, that he would remit the funds for distribution to the court of the domicile, instead of distributing them himself. "The country," he says, "in which the property is, would not let it go out of that, until it knew by what rule it is to be distributed." But this expression cannot warrant the inference drawn from it. And in the very cases in which it was used, the master of the rolls appears to have decreed distribution according to the laws of Scotland. In Dawes v. Boylston it is said, that creditors here are to be paid before the fund is to be remitted. This is stated without qualification, and without reference to the case of other creditors existing abroad. This exception opens a door to all the inconveniences, which have been stated, and to great injustice in many cases; because the greater part of the property might be here, while the greater amount of debts might be abroad, and the whole estate insufficient to pay all. And it is not easy to see, why the next of kin, there being no debts, have not as well founded a right to the property, as creditors, where there are debts. So also of legatees. It is not matter of favor, in courts of equity, to compel the payment of legacies, or to decree distribution; nor have they any broader discretion in such cases than in the payment of debts. It is difficult to perceive the reason, why debts are to be paid, and legacies not paid, or the surplus not distributed. By the law of England assets are to be marshalled, and judgments and bond debts are to be paid before debts by simple contract. If a simple contract creditor be found here, his debts having been contracted in India, and with reference to the laws of that country, may he obtain satisfaction out of the funds here, and leave judgment creditors and bond creditors unpaid in India? It would seem at least to be equitable, that debts contracted in India should be paid according to the laws of India, wherever the fund might be found. A general rule, that all debts asserted here, wherever contracted, should in all cases be paid out of the funds here, would seem to be as objectionable, as the supposed rule, that legatees and next of kin must, in all cases, resort to the forum of the domicile. It is possible, that the judges in Dawes v. Boylston might have felt themselves restrained by the nature of the jurisdiction, which they were exercising. They might not consider themselves as possessed of all the power of a court of equity. If there were no inconvenience of that sort, and if the merits of the case had required it, I am not able to see, why a decree might not have been made in that case in favor of the inhabitants of Boston. A conclusive reason in favor of such decree would seem to be, that if the will of the testator could not be enforced in that particular, by the court here, it could not be enforced at all, and the testator's object would be wholly defeated. In the subsequent case of Stevens v. Gaylord, the same court appear not to have considered any rule established in Dawes v. Boylston. The court in that case says: "If it should appear upon due examination in our probate court, that Tilbalds had his home in Connecticut, we should cause the balance, remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribu-

tion by the administrator in Connecticut, under the decree of the court there." This language is not consistent with the supposition, that the court had either found or made a rule, requiring a transmission of the fund in all cases. I consider, therefore, that the decisions in the supreme court of this state, taken together, have established no such rule as the defendant contends for.

If no settled rule has been shown, by which the plaintiff must be referred to India for distribution, there is no principle of equity opposed to granting her relief here. The defendant professes to be trustee for the executors in India, and the case is such, that if the executors in India shall receive the money, they will be trustees for the plaintiff. Then why may not the plaintiff treat the defendant as her trustee, and claim the money directly from him? There is no question about sufficient parties. The executors in India have had notice of this suit, and the defendant represents them in it. A decree here will protect him against them. He has collected this fund through the assistance of the judicial tribunals of this country; and if he shall now distribute under their decree, he cannot be made further answerable to any body.

STORY, Circuit Justice. The question, which has now been argued, lies at the very foundation of the plaintiff's suit, and is of great importance and no inconsiderable difficulty. I have taken time to consider it; and after a full consideration of all the authorities, commented on with so much learning and ability by the counsel, I am now to pronounce the result of my own judgment on the case. For the purposes of the argument, it is assumed or conceded, that the testator (dying intestate as to the residue of his estate, of which distribution is now sought) was at his decease domiciled at Calcutta, in the East Indies; that his will has been duly proved, and administration there taken upon his estate by his executor; that the defendant has under the directions of that executor taken administration of the testator's estate in Massachusetts, and in virtue thereof has received a large sum of money, which now remains in his hands; that no part of this money is wanted at Calcutta for the payment of any debts or legacies under the will; and that the plaintiff is a citizen of Rhode Island, and domiciled there; and, as one of the next of kin of the testator, is entitled to a moiety of the undevised residue of the testator's estate. The question then is, whether, under these circumstances, this court as a court of equity can proceed to decree an account and distribution of the property so in the hands of the defendant; or is bound to order it to be remitted to Calcutta, to be distributed by the proper tribunal there.

There are some points involved in the argument, which may be disposed of in a few words. In the first place the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicile. This, although once a question vexed with much ingenuity and learning in courts of law, is now so completely settled by a series of well considered decisions that it cannot be brought into judicial doubt. Vatt. b. 2, c. 8, § 110; Denizart, voce "Domicil," §§ 3, 4; Voet, lib. 38, tit. 17, § 34; Vinn. Sel. Quest. lib. 2, c. 19; Van Leeouen, Censura Forensis, lib. 3, c. 12; Hub. par. 1, lib. 3, tit. 13, § 20, sub finem; Id. par. 2, lib. 1, tit. 3, § 15; Bynkershoek, Quest. Priv. Juris, lib, 1, c. 16, pp. (Ed. 1767, folio) 334, 335; Kaimes, Pr. Eq. b. 3, c. 8, § 4; Ersk. Inst. b. 3, tit. 9, § 4; Pipon v. Pipon, Amb. 25; Burn v. Cole, Id. 415; Thorne v. Watkins, 2 Ves. Sr. 35; Bruce v. Bruce, 2 Bos. & P. 229, note; 6 Brown, Parl. Cas. 566; Balfour v. Scott, Id. 550; Bempde v. Johnstone, 3 Ves. 198; Sill v. Worswick, 1 H. Bl. 690; Hog v. Lashley, 6 Brown, Parl. Cas. 577; Drummond v. Drummond, Id. 601; Phillips v. Hunter, 2 H. Bl. 402; Hunter v. Potts, 4 Term R. 182; Somerville v. Lord Somerville, 5 Ves. 750; Dixon's Ex'rs v. Ramsay's Ex'rs, 3 Cranch [7 U. S.] 319; Goodwin v. Jones, 3 Mass. 514; Richards v. Dutch, 8 Mass. 506; Dawes v. Boylston, 9 Mass. 337; Desesbats v. Berquier, 1 Bin. 336; Guier v. O'Daniel, Id. 349, note; Potter v. Brown, 5 East, 124. In the present case, the law of Calcutta, or rather of the province of Bengal, is, as I apprehend, the law of England; and as that is the same as the law of Massachusetts, the distribution would be the same, as if the testator had died domiciled here. In the next place, the court of chancery has an ancient and settled jurisdiction to decree an account and distribution of a testator's and an intestate's estate, on the application of the legatees or next of kin (Matthews v. Newby, 1 Vern. 133; Howard v. Howard, Id. 134; Goodwin v. Ramsden, Id. 200; Winchelsea v. Norcloffe, 2 Ch. R. 367; Mitf. Pl. Ch. 114; Coop. Eq. Pl. 39, 127); and supposing this to be a fit case for the application of its authority, the present suit would fall completely within that jurisdiction. In the next place, the equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the court of chancery. The present is a suit between citizens of different states, over whom this court has an unquestionable right to entertain jurisdiction; and it will follow of course, that the plaintiff is entitled to the relief she prays for, if it be competent and proper for any court of equity to grant it.

Having disposed of these preliminary points, we may now return to the consideration of the great question in controversy. Stated in broad terms it comes to this, whether a court of equity here has competent authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domi-

ciled abroad, and the distribution being to be made according to the law of his foreign domicile. The counsel for the defendant deny such authority under any circumstances; the counsel for the plaintiff as strenuously assert it.

This is a question involving the doctrines of national comity, or, what may be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists, why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice, which it is in its own power to administer without injustice to any other person? I say without injustice, because it may be admitted, that a court of equity ought not to be the instrument of injustice; and that if in the given case such would be the effect of its interposition, it ought to withhold its arm. This, however, would be an objection, not to the general authority, but to the exercise of it under particular circumstances. The argument, however, goes the length of denying the existence of that authority, whatever may be the circumstances of the case. Yet cases may be readily imagined, in which it might not be inequitable to interfere, nay, in which there might be very cogent reasons for interference. Suppose there are no debts abroad, and no heirs or legatees abroad, but all are here, and apply to the court for a decree of distribution; is the court bound to remit for the vain purpose of putting the legatees or distributees to great expense and delay in seeking their rights in a foreign tribunal? Suppose two executors are appointed by the testator, one abroad and one here (and such cases are not uncommon)—Chetham v. Lord Audley, 4 Ves. 72; De Mazar v. Pybus, Id. 644,—and the bulk of the property is collected here, and all the legatees are here; shall the court direct the domestic executor to remit the whole property to the foreign executor, because it is to be distributed according to the law of the foreign domicile? Suppose further, the executor here is himself the residuary legatee, or, in case of intestacy, the administrator here is the next of kin, and entitled to the surplus; shall he be required to remit the property abroad, that he may be there decreed to receive it again? Suppose legacies, payable out of particular funds here, or a specific legacy of property here, shall not the legatee be entitled to recover of the administrator or executor here, because the testator was domiciled in a foreign country? Suppose a legacy to charitable uses in this country, good by our law, but which, from motives of policy, the courts of the foreign country decline to enforce; shall it be said, that our courts are bound to enforce, by remitting the property there, a policy, by which they are injured? Whatever may be thought of the last case, there can be no doubt, that the others present circumstances, where equity would strongly persuade us, that it would be the duty of our courts to entertain jurisdiction, and decide on the rights of the parties. There are many other cases, in which it would seem fit to vindicate and assert the proper rights of our citizens and our own laws. This very case, under one aspect, would have presented a question, of which our own tribunals might as justly have claimed an exclusive cognizance, and which, I trust, they would have decided with as much impartiality, as the tribunals of the testator's domicile. Major Murray was an American citizen, born in Rhode Island; and if he left no lawful heirs (as has been argued in a former part of this case), his property here, supposing he had acquired no foreign domicile, would have undoubtedly fallen as an escheat to that state; and it would deserve consideration, whether the change of domicile would work any alteration in that respect. Under such circumstances, would it be proper to send the state of Rhode Island to solicit its rights from a foreign tribunal in the East Indies?

One objection urged against the exercise of the authority of the court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires, that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connexion with the preceding proposition. The rule, that distribution shall be according to the law of the domicile of the deceased, is not founded merely upon the notion, that moveables have no situs, and therefore follow the person of the proprietor; even interpreting that maxim in its true sense, that personal property is subject to that law, which governs the person of the owner. Sill v. Worswick, 1 H. Bl. 690. Nor is it, perhaps, founded upon the presumed intention of the deceased, that all his property should be distributed according to the law of the place of his domicile, with which he is supposed to be best acquainted and satisfied; for the rule will prevail even against the express intention of the deceased, unless the mode in which that intention is expressed, would give it legal validity as a will. Desesbats v. Berquier, 1 Bin. 366; 2 Hub. b. 1, tit. 3, § 4. It seems, indeed, to have had its origin in a more enlarged policy, founded upon the general convenience and necessities of mankind; and in this view the maxim above stated flows from, rather than guides, the application of that policy. The only reason, why any nation gives effect to foreign laws within its own territory, is the endless embarrassment, which would otherwise be introduced in its own intercourse with foreign nations. The rights of its own citizens would be materially impaired, and, in many instances, totally extinguished by a refusal to recognise and sustain the doctrines of for-

eign law. The case now under consideration is an illustration of the perfect justice and wisdom of this general practice of nations. A person may have moveable property and debts in various countries, each of which may have a different system of succession. If the law rei sitae were generally to prevail, it would be utterly impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every country, in which it might then happen to be. He would be under the same embarrassment, if he attempted to dispose of his property by a testament; for he could never foresee, where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicile, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is this all. The nation itself, to which the deceased belonged, might be seriously affected by the loss of his wealth, from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils, pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit, that dictated judicial obedience to the foreign commissions of the admiralty. "Sub mutuae vicissitudinis obtentu, damus petimusque vicissim," is the language of the civilized world on this subject. There can be no pretence, that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country, where they are situate. Cases have been already stated, in which great inconvenience would attend the establishment of any rule, excluding such distribution. It may be admitted also, that there are cases, in which it would be highly convenient to decline the jurisdiction, and to remit the parties to the forum domicilii. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt, that a court of equity would direct the remittance of the property upon the application of any competent party. The correct result of these considerations upon principle would seem to be, that whether the court here ought to decree distribution, or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject; but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities.

It is farther objected, that a rule, which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction, since there are an infinite variety of cases, in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. In many of these, the difficulty is intrinsic in the subject matter; and where a general rule cannot easily be extracted, each case must, and indeed ought to, rest on its own particular circumstances. The uncertainty, therefore, is neither more nor less than what belongs to many other complicated transactions of human life, where the law administers relief ex aequo et bono.

Another objection, addressed more pointedly to a class of cases, like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are sperate, what desperate, and, finally, ascertaining what is the residue to be distributed, and who are the next of kin entitled to share. And to add to our embarrassment, we are told, that we cannot compel the foreign executor to render any account in our courts. I agree at once, that this cannot be done, if he is not here. But I utterly deny, that the administrator here cannot be compelled to account to any competent court for all the assets, which he has received under the authority of our laws. And if the foreign executor chooses to lie by, and refuses to render any account of the foreign funds in his hands, so far as to enable the court here to ascertain, whether the funds are wanted abroad for the payment of debts or legacies or not, he has no right to complain, if the court refuses to remit the assets, and distributes them among those, who may legally claim them. And as to settling the estate, or ascertaining who are the distributees, there is no more difficulty than often falls to our lot in many cases arising under the ordinary probate proceedings.

All these objections are, in fact, reasons for declining to exercise the jurisdiction in particular cases, rather than reasons against the existence of the jurisdiction itself. It seems, indeed, admitted by the learned counsel for the defendant, that if there be no foreign administration, it would be the duty of the court to grant relief upon an administration taken here. Yet every objection, already urged, would apply with as much force in that as in the present case. The property would be to be distributed according to the

foreign law of the deceased's domicile. The same difficulty would exist, as to ascertaining the debts and legacies, and the assets and distributees entitled to share. But it is said, that in the case now put, the administration here would be the principal administration, whereas in the case at bar, it is only an auxiliary or ancillary administration. I have no objection to the use of the terms principal and auxiliary, as indicating a distinction in fact as to the objects of the different administrations; but we should guard ourselves against the conclusion, that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property, and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties here, although the domicile of the testator were abroad. The converse case would of course produce an opposite result. But I am yet to learn, what possible difference it can make in the rights of parties before the court, whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin.

I have already intimated my opinion as to the true principle, that ought to regulate cases of this nature; and I have endeavoured to answer the most pressing objections, satisfactorily at least to my own mind. If, therefore, the question were res integra, I should have no difficulty in deciding, that whether distribution ought or ought not to be decreed, should depend upon the circumstances of each case; that no universal rule ought to be laid down on the subject; or at least, that the rule should be flexible, and depend for its application upon the equity of the particular case presented to the court. But it is said, that the case no longer stands upon general principles; and that the doctrine has passed in rem judicatam. If it be so, it will be my duty, as well as my inclination, to submit to authority; for nothing can be more dangerous than, upon private doubts, to disturb the landmarks of the law. Several cases have been cited from the Massachusetts Reports upon this subject. The first case is Selectmen of Boston v. Boylston, 2 Mass. 384, in which the court held, that an administrator with the will annexed of a foreign testator is not bound, upon taking administration here under our statute (St. June 24, 1785, c. 12), to account for any property received by him abroad under the foreign administration. And the court relied upon the express language of the statute, that the judge of probate in such cases may take bonds, "or grant administration of the said testator's estate lying in this government, with the will annexed, and settle the said estate in the same way and manner, as by law he may or can upon the estates of testators, whose wills have been duly proved before him." The whole reasoning of the court manifestly proceeds upon the supposition, that as to the estate here, the judge of probate may proceed to settle it, like other estates; and so certainly is the language of the statute. The case then is, as far as it goes, an authority against the defendant. Soon afterwards the same case came again before the court (Selectmen of Boston v. Boylston, 4 Mass. 318), when it was distinctly held, that the administrator was bound to account before the probate court for the effects here at the suit of the appellants, who were residuary legatees. S. P. Jauncy v. Sealey, 1 Vern. 397. On that occasion the court said, the administration here "is to be considered, not only as a means of collecting the effects of the deceased within this jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors and all legal liens upon those effects. By the will, under which the administrator is acting, it appears, that the appellants are residuary legatees. They have, therefore, a direct and immediate interest in the account of the administrator, and in every process, which can be instituted, to determine the amount of the effects collected, and the charge, to which they are liable; or, in other words, of obtaining the residuum of T. B.'s (the testator's) effects within this jurisdiction." With respect to the merits of the decree in this case, it is no part of my business to enter into any discussion. But it is most manifest, that the court did contemplate, that the administrator was bound fully to account here, not only to creditors, but to all others entitled to the fund, as next of kin, or residuary legatees. And if the court had been then of opinion, that it was bound to remit the proceeds abroad at all events, it seems difficult to conceive any substantial grounds, upon which their decree rested. For if the account was to be taken here, and then the balance in the hands of the administrator remitted, it would still be necessary to take the account again in the foreign jurisdiction; and if that jurisdiction could reach all the effects received here, as well as abroad, what was done here could not be conclusive upon it. And if the foreign tribunal could not, in virtue of the original grant of administration, compel the administrator to account for effects received here by the exercise of its ordinary powers, (for I speak not here of the extraordinary powers of a court of chancery,) the legatees would be without relief in both jurisdictions. This case came again before the court in a suit brought under the direction of the court upon the probate bond of the administrator. Dawes v.

Boylston, 9 Mass. 337. In the intermediate time, however, the court in Richards v. Dutch, 8 Mass. 506, decided generally, without assigning any reasons, that under St. 1785, c. 12, the administrator may be held to pay debts to creditors here, if any such are claimed of him; but that legatees, who claim only from the bounty of the testator, must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim. Accordingly this doctrine was recognised in Dawes v. Boylston, Mr. Justice Sewall (who seems to have been the only judge, who sat upon its final decision) declaring, "that the rights of legatees, especially residuary legatees, as well as of the next of kin in a case of intestacy, depend upon the laws of the country, where the deceased had his home and domicile, from whom the bequest or succession is claimed; and to that purpose, all the choses in action are to be deemed local, to be there accounted for and finally administered, wherever collected, or accruing in possession to the executor or administrator." And farther, that the administrator, by virtue of his administration here, "has an authority to collect and pay debts, and is liable for the contracts and duties of the testator recoverable, and which may be enforced within this jurisdiction; but is not liable, in the court of probate, upon any partial account to be there rendered and adjusted, to a decree either of payment or distribution, whether for a legacy, or to any claiming by a supposed succession, of the deceased's effects." And farther, that the jurisdiction abroad is "exclusive in whatever regards the final settlement of the estate, the ascertaining of the residue after payment of the debts, and the appointment and distribution thereof." The decision of the court upon the whole view of the case, was, that the administrator was compelled to render an inventory and account to the probate court of the assets received here; and that his refusal so to do was a breach of the probate bond; but that the residuary legatees were not entitled to any farther relief.

It has been supposed by the plaintiff's counsel, that this doctrine has been shaken in a more recent case (Stevens v. Gaylord, 11 Mass. 256), where the court, adverting to the facts, said: "If it should appear upon due examination in our probate court, that T. (the deceased) had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the probate court there." But I cannot perceive in this language any sufficient warrant to justify me in the conclusion, that it was meant to overturn, or bring into doubt, two solemn decisions of the court. I feel myself compelled, therefore, (very reluctantly, I confess,) to admit, that by the law of Massachusetts the probate courts have no jurisdiction, either originally or by a suit on the probate bond, to compel a final settlement or distribution of the estate of a foreigner, whose assets have been collected here under what is called, an "ancillary" or "auxiliary" administration. And if this were a case depending upon the local law of the state, so conclusive should I deem it upon me, not only from the learning and authority of the court itself, but from the necessity of holding, upon principles of public convenience and policy, the judicial construction of state tribunals upon their own laws conclusive upon all other tribunals, that I should not scruple to adopt it in its whole extent, whatever might be my own doubts on the subject. But the case here does not depend upon the local law of Massachusetts. Although a court of probate of that state can administer no relief in virtue of its statutable powers, it does not follow, that a court of chancery cannot in the exercise of its equitable jurisdiction; for the equity powers of such a court must be judged of by its own principles applied to its own organization, and not by the limited rules applied to ecclesiastical tribunals. Besides; the question here is properly a question of international law, dependent upon no local usages, but resting on general principles. The parties are citizens of different states, and their rights must be decided, not merely by the authority of one state, but by principles applicable to all states. Whether, therefore, we are to decide by the doctrines of Massachusetts, or by the opposing doctrines of other states, must depend upon the reasons, upon which those doctrines are respectively built. That a contrariety of opinion exists is most manifest, since the courts of Pennsylvania sustain jurisdiction in cases like the present, and decree distribution to the next of kin according to the law of the place of his domicile. Guier v. O'Daniel, 1 Bin. 349, note. And see, also, Desesbats v. Berquier, Id. 336.

In this state of embarrassment, it would have been a great relief to my mind, if the reasons, on which the state court of Massachusetts proceeded, had been expounded with the usual fulness. But no reasons are given for this particular doctrine. Nor do all the authorities which have been cited on the present argument, appear to have been brought in review before that court. There is, too, a qualification of its doctrine in favor of creditors, the ground of which it would have been most desirable to ascertain. Why should not legatees and distributees be entitled to recover out of the assets here, as well as creditors? It is true, that legatees claim by the bounty of the testator; but it is a legal right, as fixed and vested as the right of the creditor. And, as to distributees, the case is still stronger; for that rests not on the bounty of the intestate, but on the law of the land, which, at the same time, enables the creditor to receive his debt out of the assets, and the next of kin to claim the residue. If it be

said, that it belongs to the public policy of a country to sustain the claims for debts due to its citizens, it seems to me no less to belong to that policy to sustain any other claims of its citizens, which are founded in justice and law. If it be said, that the assets are to be distributed by a foreign law, and it is very difficult and laborious to learn, what that law is, and to apply it correctly, the same objection applies to the payment of debts. The priority of debts, the order of payment, the marshalling of assets for this purpose, and, in cases of insolvency, the mode of proof as well as of distribution, differ in different countries. And if in case of debts, the court here is to apply the lex domicilii, the same embarrassment will arise, as in other cases of distribution to the next of kin. There is no more difficulty in the order of payment of legacies, than of debts. And courts of law must, in these cases, ascertain and apply the foreign law precisely in the same manner they do in other cases. Feaubert v. Turst, Finch, Prec. 207, 1 Brown, Parl. Cas. 129; Fremoult v. Dedire, 1 P. Wms. 429. I pressed the learned counsel for the defendant, at the argument, for a solid ground, on which to sustain the distinction in favor of creditors, either upon principles of national comity, or public convenience, or substantial justice. I heard no vindication of it in either view. And cases may readily be imagined, in which such a distinction might work injustice. Suppose by the lex domicilii, the debts are primarily a charge on the realty, and not on the personal estate; shall the creditor here be permitted to exhaust the personal assets here, when the succession to the real and personal estate may be different in the foreign country? Suppose the assets abroad and at home have a different order of succession or distribution, shall the creditor here be permitted to defeat that order?[2] If not, then the court here must apply the lex domicilii to protect the heirs; and must ascertain the nature and extent of that law (vide Bowaman v. Reeve, Finch, Prec. 577); and if so, why not proceed to distribute the property among those, who are the cestuis que trust entitled to it. The case was very properly put at the argument, whether a court here could refuse here to sustain a suit by a cestui que trust against his trustee here, simply because the trust originated in, and was to be governed by, the law of another country. It was admitted, that it could not; and so certainly are the authorities. Feaubert v. Turst, Finch, Prec. 207, 1 Brown, Parl. Cas. 129; Fremoult v. Dedire, 1 P. Wms. 429. But it was said, that the administrator here is a trustee for the administrator abroad, and not for the next of kin; and that the cestuis que trust cannot follow the property in the hands of a mere agent of the trustee. These positions, in their general latitude, are certainly not well founded. The administrator here is not a mere agent of the administrator abroad. He collects and receives the assets in his capacity as administrator generally; and so far as it may be wanted for payment of debts and legacies, he holds it in trust for the creditors and legatees, and as to the residuum in trust for the next of kin. And even if he were a mere agent of a trustee, the cestuis que trust would be entitled to claim the fund directly from him; for a court of equity may follow a trust fund in whosesoever hands it may be found. Newland v. Champion, 1 Ves. Sr. 105; Doran v. Simpson, 4 Ves. 651. Could the administrator abroad sue the administrator here to recover the assets collected here? I apprehend not. The creditors, legatees, and heirs, are the only persons competent to sue in respect to their own interests; and the administrator, as such, could have no remedy. See Stevens v. Gaylord, 11 Mass. 256. I confess myself unable to admit the distinction in favor of creditors, without admitting, at the same time, the like rights in favor of legatees and heirs. Nor have I been able to find that distinction sustained or adverted to in any other authorities.

It remains to examine the English decisions upon the point now before the court. The earliest case, which I have met with, is Bowaman v. Reeve, Finch, Prec. 577, which was a suit brought by specific legatees of a person domiciled in Holland against the executor and residuary legatee, who had taken out letters of administration, to recover satisfaction out of such residuum for the value of their specific legacies, which had been taken possession of by the creditors in Holland in payment of their debts; and the chancellor decreed satisfaction accordingly, and did not remit the legatees for relief to the domestic forum. Next followed Tourton v. Flower, 3 P. Wms. 369; but there no such objection was raised; and the case went off upon another ground, viz. the want of competent parties to sustain the suit against the English administrator. Then came the case of Pipon v. Pipon, Amb. 25; Id. (Blunt's Ed.) append. "D," Lord Hardwicke's opinion is given from Sergt. Hill's MSS. It was a bill in equity, brought by the plaintiffs as representatives of several sisters of the intestate, against the defendants, who were his sisters, and had taken administration of the intestate's estate in London, and had received a bond debt of 500l. due there. The suit was for a distribution of the 500l.; and the question was, whether it should be distributable according to the laws of England, it being found within the province of Canterbury, in which case the plaintiffs would be entitled to a part? Or whether it should be distributed according to the laws of Jersey, where the intestate resided at the time of his death, in which case the plaintiffs by those laws would not be entitled to any part of it? Lord Hardwicke dis-

[2] There are some curious cases of this conflict of rights growing out of the laws of different countries. See Anandale v. Anandale, 2 Ves. Sr. 381; Balfour v. Scott, 6 Brown, Parl. Cas. 560; Drummond v. Drummond, Id. 601.

missed the bill, and is reported to have said: "I should be very unwilling to go into the general question, for it is very extensive. This is merely the case of a debt. The question, then, is, whether the plaintiffs, as next of kin, have a right to call for an account of this part of the residue only? And I think there is not sufficient ground for it. If I were to go into the general question, the personal estate follows the person, and becomes distributable according to the law or custom of the place, where the intestate lived. The words of the statute are very particular, viz. the residue undisposed of is to be distributed, so that the plaintiffs are wrong in coming into this court for an account of only part; for by that statute, an account must be decreed of the whole, and the general administrator is not before the court." I cannot help suspecting, that there is some error in the language here imputed to Lord Hardwicke; for if the distribution was to be according to the lex domicilii, the statute of distributions (St. 22 & 23 Car. II. c. 10), alluded to by his lordship had nothing to do with the case, for it was not governed by the law of England, but of Jersey. And if the distribution was to be by the lex loci rei sitae, then the fund in the hands of the administrator here was the whole residue, which was distributable under the statute. So that, in either way, the reasoning was untenable. The true ground, on which the judgment stands, is that suggested by his lordship himself; the plaintiffs were not entitled, for the assets were distributable according to the law of Jersey, which excluded them from any share. And so the case was understood by Lord Mansfield (Burn v. Cole, Amb. 415), and by Lord Loughborough (Sill v. Worswick, 1 H. Bl. 665, 690), and also by Lord Hardwicke himself, in a subsequent case (Thorne v. Watkins, 2 Ves. Sr. 35). And it may, perhaps, be gathered from this last case, though obscure in its language, that his meaning in the other reasoning was, not that the next of kin might not maintain a bill for a distribution of the residue here, but that to entitle him to maintain such suit, he must show, that he is entitled by the lex domicilii. "It was never thought," said his lordship, alluding to the case of Hanse Towns v. Jacobson [cited in 2 Ves. Sr. 34], "that on the death of a person having those funds, a bill must be brought by the next of kin of a particular part of that personal estate; the rule must be, that a bill must be brought for the whole, according to what I laid down in Pipon v. Pipon; otherwise it would destroy the credit of the funds; for no foreigner would put into them if, because a title must be made up by administration or probate of the prerogative court of England, it was to be distributed different from the laws of his own country." The reason here given shows, that his lordship was referring to a bill by the next of kin claiming against the lex domicilii, and not to a bill by the next of kin claiming by that law. And surely it will not be pretended, that a person, who by the lex domicilii would be exclusively entitled, as heir, to the residue of the personal estate situate abroad, although not entitled to the residue of the personal estate situate at home, could not maintain a suit for the residue abroad, simply because he could not make title also to the residue at home. Suppose a specific legacy of all the property abroad, shall not the legatee be entitled to claim it here, because he cannot also claim all the property devised to others? Vide Nisbett v. Murray, 5 Ves. 149. Lord Hardwicke certainly did not mean to say, in Thorne v. Watkins, 2 Ves. Sr. 35, that a distribution might not be legally made under a foreign administration; for he says, "it is generally granted on foundation of the administration granted here, and then it must be distributed as here;" not that it must be distributed here. And in that very case he compelled a Scotch executor to account for and distribute funds, which were received by him to be distributed according to the law of Scotland, he being at the same time an English administrator of one of the next of kin, under the Scotch law entitled to share, who died domiciled in England. It is true that the case before the court called for an account of the intestate's estate only; but if Lord Hardwicke had believed, that the account and distribution of the Scotch estate belonged of right to Scotch tribunals only, it seems difficult to believe, that the fact that the administrator was also executor of the Scotch estate, would have made any difference in his decision.

But if Lord Hardwicke's opinion be not susceptible of the explanation, which I have endeavored to give to it, it is not too much to declare, that it is entitled to less weight, than it might otherwise claim, from the very great light, which the learned discussions of more modern times have thrown over the whole subject. In Kilpatrick v. Kilpatrick (cited 6 Brown, Parl. Cas. 584) Lord Kenyon, in a case, where money was in court belonging to a Scotch estate, instead of remitting it to Scotland, decreed distribution according to the Scotch law, giving to the executor, who was also residuary legatee, one moiety, and to the widow the other moiety, which she was entitled to claim by the jus relictae of Scotland. In form the case differs very much from that now before the court; but, in substance, the testator was by the Scotch law intestate as to the moiety of the personal estate, which was decreed to the widow; for of that portion he could not legally dispose by testament. Yet the objection might have been urged there, which Lord Hardwicke is said to have urged in Pipon v. Pipon, that the widow could not sustain a claim for a moiety of this portion of the estate, but ought to bring a bill for a moiety of the whole estate, which could only be in Scotland. In Bruce v. Bruce, 2 Bos. & P. 229, note, and 6 Brown, Parl. Cas. 566, the

whole question was most elaborately discussed, whether the lex rei sitae or the lex domicilii was to prevail in the distribution of intestate property. The case arose in the court of sessions in Scotland, between the heirs claiming by the law of Scotland and those claiming by the law of England; and the court decreed distribution of the property according to the law of England; and this decree was affirmed in the house of lords. During the whole of this discussion, not a doubt was breathed by any one, that the court was competent to decree the distribution. This was followed up by Balfour v. Scott, 6 Brown, Parl. Cas. 550, where the same points were in judgment; and by Hog v. Lashley, Id. 577, where the same principle was applied to testate property. In Bempde v. Johnstone, 3 Ves. 198, there were cross bills filed for distribution by different heirs, according to the law of Scotland and of England; and the question was, where the intestate was domiciled. The lord chancellor decided, that his domicile was in England, and decreed distribution accordingly. In Somerville v. Lord Somerville, 5 Ves. 750, precisely the same question arose; and the master of the rolls, (Sir R. P. Arden,) after a most elaborate argument, decided, that the intestate's domicile was in Scotland, and decreed distribution according to the law of Scotland.

It is remarkable, that the objection, which has been urged at the bar, never occurred, either to the learned counsel or to the court in any of those cases. I can account for it in one way only, and that is, that the law was considered clearly settled, that such a distribution might be made, whenever there were competent parties before the court to require it. It has been stated at the bar, that in all the cases, in which the English courts have decreed distribution, the original executors or administrators were before the court. Whether this be so or not, does not clearly appear in all the cases. But, in my judgment, this circumstance is wholly immaterial. The administrator here is not the less an administrator, because he is not clothed with the same character abroad. If the court can compel a distribution of the assets here, there can be no distinction, whether the person, who administers them, be or be not the original administrator. It is sufficient, that he is the legal and exclusive representative of the deceased, as to those assets. And if, because the foreign administrator is within the jurisdiction, the court will compel him to account and distribute all the assets, foreign as well as domestic, it establishes the authority of the court to an extent greatly beyond what is necessary for the decision of this cause. Vide Nisbett v. Murray, 5 Ves. 149. Chetham v. Lord Audley, 4 Ves. 72.

From this review of the English authorities, there can be no doubt, that the municipal courts of England will, upon a principle of the law of nations, in the case of a stranger, domiciled abroad, and having property in England, distribute that property, in case of death, by the laws of his own country. And so the law is explicitly laid down by one of their best elementary writers. Coop. Pl. Eq. 123.

I have made some researches in the works of foreign jurists, for the purpose of ascertaining, what is the practice of nations governed by the civil law. Those researches have not been very satisfactory; but they leave little room to doubt, that foreign tribunals sustain suits to enforce distribution of assets collected there under auxiliary administrations upon the doctrines so familiar in those courts, that the situs rei, as well as the presence of the party, confers a competent jurisdiction. 2 Hub. p. 2, lib. 5, tit. 1, § 48; 1 Hub. p. 1, lib. 3, tit. 13, § 20, sub finem; 1 Domat, 531, note; Constit. Frederii. Imp. tit. 1, § 10; Bynk. Quest. Priv. Jur. lib. 1, c. 16.

Upon the whole my judgment (though delivered with the greatest deference for a different judgment entertained by others) is, that a court of equity here has authority to decree distribution in cases like the present, according to the lex domicilii, upon the application of the legatees, or the next of kin or other competent parties; that whether it will decree distribution must depend upon the circumstances of each case; and that it is incumbent on those, who resist the distribution, to establish in the given case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity. It stands also commended by its intrinsic equity. And although the authorities are not uniformly in its favor, yet they leave the court at liberty to pronounce that judgment, which, if the question were entirely new, it would be disposed to entertain. Vide Toll. Ex'rs. 387; 1 Wood. Lect. 384, 385.

HARVEY (UNITED STATES v.). See Case No. 15,320.

HARVEY v. The VIVID. See Case No. 16,978.

HARWARD, The. See Case No. 6,186.

Case No. 6,185.

Ex parte HARWOOD.

[Crabbe, 496.] [1]

District Court, E. D. Pennsylvania. Oct. 6, 1842.

BANKRUPTCY—PROOF OF DEBT—IGNORANCE OF LAW—RIGHT TO WITHDRAW PROOF.

A creditor who held collateral securities proved his debt before the commissioner, but subsequently learned that he was on that account obliged to surrender the securities; on his petition, setting forth his prior ignorance that

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

such would be the result, the proof was allowed to be withdrawn.

[Cited in Re Hubbard, Case No. 6,813; Re Brand, Id. 1,809; Re McConnell, Id. 8,712; Re Baxter, 12 Fed. 75.]

[Cited in Nichols v. Smith, 143 Mass. 462, 9 N. E. 815.]

This was a petition by one David Lapsley for permission to withdraw his proof of debt against Harwood, filed in this court. The petitioner in proving his debt had stated that he held certain stocks as security therefor, and his petition set forth that it "never was his intention to relinquish the said securities or any of them, and that he proved his debt because he received a notice from the commissioner, and supposed it to be necessary for him so to do, but without the most distant idea that by so doing he would in the slightest degree affect his rights in the collateral securities." A rule to show cause was granted.

Mr. Graham, for Lapsley.

The proof of debt was made under an evident and mistaken idea that it was necessary to do so, and with no intention to surrender the collateral security; there is no reason to suspect any improper motive for desiring its withdrawal, and permission to do so has been heretofore granted by courts of bankruptcy. Archb. Bankr. (5th Ed.) 112; Ex parte Hossack, Buck, 390; Ex parte Smith, 2 Glyn & J. 105; Ex parte Hopley, 2 Jac. & W. 220.

P. P. Morris, for the other creditors.

As Lapsley has proved his debt and had all the advantages of a proving creditor, he should not be allowed now to withdraw and destroy the right which other creditors have, by his proving, acquired in the securities he holds. However hard the case for him, granting the petition would be unjust towards them. Eden, Bankr. Law, 104; Ex parte Downes, 18 Ves. 290.

Mr. Graham, for Lapsley, in reply.

In Downes' Case the facts were strong to show that the proof was desired to be withdrawn as a matter of speculation, while there is no such evidence here. This proof was made under an erroneous impression, for which the commissioner is partly responsible, for had he informed Lapsley of the consequences of what he was doing, no proof would have been attempted.

RANDALL, District Judge. This application to withdraw the proof of debt is made, I presume, from abundant caution, for the creditor has not commenced a suit at law or equity against the bankrupt, nor obtained a judgment which would be surrendered by making the proof; and the securities which he holds are collateral and independent of the bankrupt's personal liability. In England, a creditor who holds collateral security will not, generally, be allowed to prove his debt, unless the security is surrendered. He may, however, by leave of the court, have the securities sold or valued, and then prove for the remainder of his debt; or, if he has proved the whole debt without reference to his security, the court will order the proof to be expunged, on application of the assignee or other parties in interest, until the securities have been disposed of. The creditor may then, if he has committed no fraud, prove for the balance. In this case there was no concealment, and there is no allegation of fraud; nor is it pretended that the creditor elected to surrender his securities and come in upon the estate for a dividend of the general assets. There is no evidence here that any one was misled by Lapsley's act, or that, until this application was made, any creditor supposed he had gained an advantage by the proof. In Ex parte Downes [supra], relied on by the counsel who opposed this petition, the creditor, supposing his mortgage to be of little value, voluntarily surrendered it, and did not apply for leave to withdraw his proof, and have the mortgage restored to him, until, by an actual sale, its value had been ascertained to be much larger than his dividend of the general assets.

The act of congress [of 1841 (5 Stat. 440)] gives the court power to set aside and disallow any debt, on proof that it is founded in fraud or mistake. The proof in this case having been made for the full amount of the creditor's demand, without deducting the value of the security, as should have been done, and this appearing to be through mistake, the creditor has leave to withdraw the proof of his debt, and the rule is made absolute.

Case No. 6,186.

The HARWOOD.

[9 Adm. Rec. 150.]

District Court, S. D. Florida. Jan. 10, 1866.

SALVAGE—COMPENSATION.

[Dry cotton saved by salvors, appraised at 42 cents per pound, amounted to $168,000, and the damaged cotton, appraised at various rates below 17 cents per pound, to $22,000. The ship's materials saved were sold at $3,078. *Held*, that the salvors should be allowed 14 per cent. on the first item and 40 per cent. on the others.]

[Cited in Peacon v. The Amazon, Case No. 10,871.]

[This was a libel in rem by Richard S. Roberts and others against the cargo and materials of the bark Jane M. Harwood, for salvage.]

Homer G. Plantz, for libellants.

W. C. Maloney, for respondent.

BOYNTON, District Judge. The saved property having been appraised by appraisers appointed by the court at the sum of $190,522, except the saved portions of the ma-

terials of the vessel, which have been sold by order of the court for the sum, as appears by the marshal's account sales, of $3,078.77, and no objection having been made against said appraisement or sale, it is now ordered, adjudged, and decreed, that the said sale be confirmed, and that the said appraisement be adopted for the purpose of fixing salvage in this case. After deducting the costs, charges, and expenses to be taxed in this proceeding, and $100 to be paid petitioner Adams for carrying information, the libellants and petitioners have, receive, and recover for their services in the premises as follows: On the appraised value of the dry cotton, appraised at forty two cents per pound, and amounting to $168,147, fourteen per cent.; and on the remainder of the cargo, reported by the appraisers as damaged, and appraised by them at various rates below seventeen cents per pound, amounting to $22,375, and on the proceeds of the materials of the vessel, forty per cent. And further, that on payment into the registry of the court of the said costs, expenses, charges, and salvage, the saved property be restored and delivered to the claimant for the benefit of the true owner or owners thereof, and that the matter of the distribution of salvage be reserved for future decision.

HARWOOD (MAHN v.). See Case No. 8,966.

Case No. 6,187.

HARWOOD et al. v. MILL RIVER WOOLEN MANUF'G CO.

[3 Fish. Pat. Cas. 526.] [1]

Circuit Court, D. Connecticut. April, 1869.

PATENTS—PATENTABILITY—INFRINGEMENT—"DIPPERS."

1. In answer to the offer to anticipate an American invention by a foreign patent, proof will be received that the devices set forth in the foreign patent are inoperative, impracticable and worthless.

2. When the plaintiff used a perforated dipper for performing the double function of stirring the oil and raising enough for a single operation, and the defendant substituted a dipper of wire gauze, which stirred the oil and raised enough for a single operation, but the raising and lowering mechanism was different, and the mode of applying the oil was different. *Held*, that the defendant's mechanism was a substantial equivalent for the plaintiff's.

This was an action on the case, tried by the court without a jury, and brought to recover damages for the infringement of letters patent [No. 36,603] for improvements in machinery for oiling or lubricating wool or other fibrous material, granted to William Clissold, October 7, 1862, assigned to plaintiffs [George S. Harwood and George H. Quincy] and reissued to them September 13, 1864 [No. 1,764], and again March 27, 1866 [No. 2,213]. The nature of the invention and the claims which it was alleged were infringed by the defendants, are set forth in the opinion.

Hubbard & McFarland, for plaintiffs.
C. G. Child, for defendants.

SHIPMAN, District Judge. This is an action at law for an alleged infringement of a patent. By stipulation it was tried to the court. The suit is founded upon a patent reissued to the plaintiffs, as assignees of William Clissold, the alleged inventor. Clis sold originally took out a patent for the invention in England, February 24, 1862. October 7, 1862, he took out a patent in the United States. September 13, 1864, the same having been surrendered, was reissued to these plaintiffs. The latter again surrendered the patent, and the present reissue was granted to them March 27, 1866. The present action is founded upon this last reissue.

The invention purports to be an improvement in machinery for oiling or lubricating wool, or other fibrous material. The specification contains an elaborate description of the machinery, and the claim includes nine different combinations. The plaintiffs insist that the machine used by the defendants infringes the third, fourth, and fifth combinations set forth in their patent as the inventions of Clissold. The defendants have pleaded the general issue, and given notice of a patent to John Mason, of England, published in a printed volume, which they claim includes and antedates the invention of Clissold. This part of the case, however, is easily disposed of, as the proof by witnesses familiar with the subject is, that the devices set forth in the Mason patent are inoperative, impracticable and worthless. The plaintiffs having proved the validity of their invention of Clissold, and their title to the exclusive use of the same, the only material question left is, that of infringement. It will be extremely difficult, if not impossible, to describe the plaintiffs' and defendants' machines in a judicial opinion so that anyone not familiar with them can understand their precise operation. The plaintiffs' specification sets forth the nature of Clissold's invention as follows:

"This invention relates to the operation of supplying oil or oleaginous mixture to wool, preparatory to its being submitted to the carding engine, and whilst being fed thereto for the purpose of being worked into sliver, the object of this invention being to effect a uniform and equable distribution of the liquid through the mass of fibers under operation, and prevent the waste of oil, labor and time that is consequent on the mode of oiling heretofore practiced. To this end a pressure roller is used, mounted above the feed apron of a carding machine, to which the wool is supplied in the usual manner. This

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

pressure roller, receiving oil from a suitable reservoir through the intermediary of a traveling brush, or brushes, and dipping plate, or plates, which supply the brush or brushes with the requisite quantity of oil, will insure the equable distribution of the oil over the whole surface of the wool as it passes under it, and in contact therewith. The dipper is arranged to perform two functions: first, of continually stirring up and mixing the oil or composition, and second, in carrying or lifting up the requisite quantity of oil for each individual oiling operation. Without this stirring up, it would be impossible to use a composition, or even common oil. The one separates; the other settles with a heavy sediment."

It is unnecessary to attempt a full description of the machinery constructed by Clissold to accomplish this purpose, as the alleged infringement is only of some of the subordinate combinations, whose use he contemplated apart from the other devices.

The third branch of the claim is in the following words: "In automatic wool-oiling machinery, we claim the combination of a tank or reservoir with a dipper or equivalent mechanism for performing the double functions of stirring or agitating the oil or lubricating matter in the tank, and of lifting therefrom at each time a quantity of oil or lubricating matter requisite for one oiling operation, and this is claimed only when arranged for operation as described—that is to say, so that the said dipper shall not come in contact with the wool—substantially as set forth."

The fifth branch of the claim is: "In automatic wool-oiling machinery, we also claim the combination of an oil tank with a dipper, constructed substantially as described, so that the requisite quantity of oil for each operation shall be lifted and conveyed from the tank by adhesion of the oil or lubricating matter to the dipper, substantially as set forth." It is not important to cite the fourth branch of the claim, as the question of infringement is presented in relation to the third and fifth clauses, above cited. In the plaintiff's machine the tank or reservoir containing the oil or other lubricating mixture is placed at one end of the carding engine; a horizontal cross-bar extends over the tank and across the sheet of wool parallel to and over a pressure roller, under which pressure roller the wool passes. On this cross-bar, which is supported by posts at each end, travels a carriage to which is attached a brush, and also an incline or lifting shoe. The dipper plate is of thin perforated metal, lying flat to the surface of the fluid. To this dipper plate is attached a vertical rod, which runs in a vertical slide, the slide being attached to the cross-bar over the tank. The carriage slides backward and forward over the edge or top of the cross-bar, and as it reaches the vertical rod which is attached to the dipper plate, it (the incline) engages a pin inserted in the rod at right angles to it, and raises the dipper plate, and with it, sufficient oil for one operation. This oil is taken by the moving brush and distributed over the pressure roller, the latter carrying it on to the wool. After the dipper plate has been lifted and the brush taken off the oil, the plate, by its own gravity and that of the rod, falls again into the fluid, and at the next return of the carriage is again lifted by the incline or shoe. This operation is continually repeated at each revolution of the endless belt. By this constant rising and falling of the perforated dipper-plate the liquid is agitated and mixed, and a regular and equable quantity presented to the brush. The tank in the defendants' machine is placed in front of the carding engine, and has a shaft placed over it near the outer edge, and traversing its whole length. Near each end of the tank two arms project from this shaft, and from their ends are stretched a piece of wire gauze. One end of the shaft projects from the end of the tank; on this end of the shaft is a fixed pulley, to which is attached a leather strap. This strap is fastened to the end of a curved arm, the other end of which arm is pivoted near the base of the opposite side of the tank, at the same end. A coil of wire is wound round the shaft, the toe or bearing point of which engages the side of the tank, and tends to keep the arms of the shaft resting on the side of the tank, with the wire gauze stretched across above the sheet of wool as it passes to the carding engine. A small pulley is pivoted to the curved arm referred to, and a cam placed on the shaft of a cog-wheel under it. As the cog-wheel revolves, carrying the cam, the latter engages the pulley and lifts the curved arm. By this means the shaft, through the medium of the strap and fixed pulley, is revolved so as to immerse the wire gauze in the fluid in the tank. The incline plane of the cam gradually releases the shaft so that it raises the wire gauze to a certain point, and then, by an abrupt shoulder on the cam, the shaft is wholly and suddenly released, and the coiled spring throws it over with force, the projecting arms of the shaft striking on the edge of the tank, and sprinkling the liquid on the wool.

From the point where the brush takes off the oil in the Clissold machine, and the point where the wire gauze reaches near the top of the tank, and stands on a plane at all points equidistant from the surface of the oil, in the defendants' machine, the operations of the machines are different; but up to these points, they both perform substantially the same operations. The wire gauze in the defendants' is clearly an equivalent for the perforated metal plate in the plaintiffs'. There is, then, a combination of tank and dipper. They both raise the oil by adhesion, and raise only enough for one oiling operation. The only difficult question is, whether the operation is performed substantially in

the same way. In the plaintiff's machine the dipper is immersed by its own gravity, and is raised by the action of the incline or lifting shoe operating directly on the pin in the vertical rod. In the defendants', the dipper is immersed by the operation of the incline on the revolving cam, through the medium of the curved arm, strap, and pulley on the end of the shaft, and is raised by force of the spring on the shaft, bearing on the side of the tank. The same result is reached in both cases, and I am of the opinion that the defendants' mechanism is substantially an equivalent for the plaintiffs', and infringes the third and fifth claims in the latter's patent.

Let judgment be entered for the plaintiffs for one dollar damages and costs.

HARWOOD (TAYLOR v.). See Case No. 13,794.

Case No. 6,188.

HASBROOK et al. v. PALMER et al.

[2 McLean, 10.] [1]

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

PROMISSORY NOTES—ASSIGNEES—NEGOTIABILITY—"NEW YORK FUNDS."

1. A note executed in Michigan, payable in New York, in New York funds, or their equivalent, is not negotiable, within the statute.

2. To bring a note within the statute it must be payable in money, and not in stocks, funds, or current paper.

[Cited in Fry v. Rousseau, Case No. 5,141.]

3. And it must be for a sum certain, subject to no conditions.

4. What shall constitute New York funds, within the contract, is not clear. And what shall be held to be equivalent to New York funds, within the contract, is still less clear.

[Cited in Capron v. Capron, 44 Vt. 411.]

[At law. Action by Hasbrook and Seaman against Palmer and Clark.]

Williams & Ten Eyck, for plaintiffs.

Mr. Frazer, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiffs as assignees on a promissory note, payable at New York, in New York funds, or their equivalent. The defendants demur specially; and for cause of demurrer state, that it is not averred in said declaration of what value the said New York funds or their equivalent in the declaration were at the time and place of payment, and that said note is not negotiable. The Michigan statute in regard to the negotiability of promissory notes, is similar to the statute of Anne, which has been generally adopted in this country. And the principal question under this demurrer is, whether the note, on which this action is brought, being payable in New York funds or their equivalent, is negotiable.

The plaintiffs rely on the decision in the case of Keith v. Jones, 9 Johns. 120, where it was held, that a note payable to A, or bearer, in "New York state bills, or specie," was negotiable within the statute, upon the ground that the bills mentioned meant bank paper, which, in conformity with general usage and understanding, are regarded as cash; and, therefore, that the meaning was the same as if payable in lawful current money of the state. And, also, on the case of Judah v. Harris, 19 Johns. 144, where it was decided that a promissory note, payable at a particular place, in the bank notes current in the city of New York, was negotiable within the statute. And it is insisted that the promise to pay in New York funds, or their equivalent, is equivalent to an undertaking to pay in lawful current money of the state of New York. That it is generally understood New York funds means specie, or a currency equal to specie, and that the drawer of the note promises, substantially, to pay in current New York money.

In support of the demurrer it is contended that to be negotiable a note must be for the payment of money only, and this is laid down in Chit. Bills (Ed. 1839) 152. He says, it is the first and principal requisite, and is established by foreign as well as English law, that a bill or note must be for the payment of money only. That it cannot be for the delivery or payment of merchandise, or other things in their nature susceptible of deterioration and loss and variation in value; nor can it be for payment in good East India bonds, or for the payment of money by a bill or note. Clarke v. Percival, 2 Barn. & Adol. 660. Bull. N. P. 272. A promissory note not payable in cash, or specific articles, is not negotiable. Matthews v. Houghton, 2 Fairf. [Me.] 377; Johnson v. Baird, 3 Blackf. 153. A note payable to A B, or order, in good merchantable whiskey, at trade price, cannot be sued by an assignee, or bearer, in his own name. Rhodes v. Lindly, Ohio Cond. R. 465. A note for a certain sum, payable to A, or order, "in foreign bills," (meaning thereby bills of country banks) has been held not to be a good promissory note within the statute, and consequently not negotiable. Jones v. Fales, 4 Mass. 245. In the case of Leiber v. Goodrich, 5 Cow. 186, the court held, a note payable in Pennsylvania or New York paper currency is not a promissory note for the payment of money, within the statute. And in the case of M'Cormick v. Trotter, 10 Serg. & R. 94, the court decided that a promissory note payable to A B, or order, for five hundred dollars, in notes of the chartered banks in Pennsylvania, was not a negotiable note on which the indorsee can sue in his own name. In South Carolina it has been decided that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the statute of Anne

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

and their act; and on a verdict for the assignee of such a note, judgment was arrested. Lange v. Kohne, 1 McCord, 115; M'Clarin v. Nesbit, 2 Nott & McC. 519.

The cases cited in the 9th and 19th Johns. seem not to be sustained by the current of decisions in this country and in England; and it is difficult to distinguish those cases from the decisions cited, so as to maintain their consistency. If this, indeed, were practicable, it is not necessary to the decision of the question raised by this demurrer. What is understood in this state by New York funds, or their equivalent, may be a matter of doubt; nor does it seem to be of a nature which can be resolved by evidence, so far as regards the question under consideration. The term "New York funds," it is presumed, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. But whether is meant the funds of the state generally, or of the city of New York, is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what constitutes New York funds, the face of the note is indefinite. It is, indeed, susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute. It is not a note, in the language of the decisions, payable in money. It is payable in New York funds, or their equivalent. Now what is equivalent to New York funds? The answer is their value; their value in specie or in current paper which passes at a discount. Might not the drawer pay this note in this description of paper, making up the discount? Would not this, in the language of the contract, be equivalent to New York funds? It would be equivalent if of equal value. The demurrer must be sustained.

Case No. 6,189.

In re HASBROUCK.

[1 Ben. 402;[1] 1 N. B. R. 75; Bankr. Reg. Supp. 17; 6 Int. Rev. Rec. 115.]

District Court, S. D. New York. Sept. 14, 1867.

SURRENDER OF BANKRUPT'S ESTATE.

On the adjudication of bankruptcy, the register is authorized and required to receive the surrender of the bankrupt's estate, and to keep the property safely, until it can be turned over to the assignee.

[Cited in Re Bogert, Case No. 1,599; Re Carow, Id. 2,426; Re Brinkman, Id. 1,884.]

[Cited in Williams v. Merritt, 103 Mass. 187; McGready v. Harris, 54 Mo. 139.]

In this case, on the appearance of the bankrupt [Abraham E. Hasbrouck] before the register to whom the case was referred, he requested the register to take possession of his property, consisting of a store of goods at Lloyd, in Ulster county, set forth in the bankrupt's schedules as of the value of $3,336.08. The register declined to comply with the request of the bankrupt until he should be advised by the court of his duty to do so. The register stated to the court that the bankrupt's request was based upon the following words, contained in section 4 of the act [of 1867 (14 Stat. 519)]: "To receive the surrender of any bankrupt;" that there is nothing else in the act of that tenor, nor are there in it any provisions for the execution of such a trust by the register; that, by rule 13 of the "General Orders in Bankruptcy," the marshal is authorized to take possession of property, but the register thinks that that provision applies only to cases of involuntary bankruptcy; and that, as the property is or ought to be in the custody of the court from and after the adjudication of bankruptcy, it was important to know who is to be responsible for it.

BLATCHFORD, District Judge (after stating the facts as above). In a case of voluntary bankruptcy, the debtor is required, by section 11 of the act, to state in his petition "his willingness to surrender all his estate and effects for the benefit of his creditors." By section 4 of the act, the register has the power, and it is made his duty, to "receive the surrender" of the bankrupt, and "to grant protection." These are all the provisions there are in the act in regard to surrender or protection. Form No. 1 contains an averment that the debtor "is willing to surrender all his estate and effects for the benefit of his creditors." Rule 5 of the "General Orders in Bankruptcy" provides, that a register may conduct proceedings in relation to the following matters, among others, when uncontested, namely, "receiving the surrender of a bankrupt," and "granting protection thereon." In the present case, the bankrupt's petition was referred to the register by form No. 4. The register does not state whether he has made an adjudication of bankruptcy according to form No. 5, and issued a warrant according to form No. 6, but I assume that he has done so. There is nothing in such warrant authorizing the marshal to take possession of the property of the bankrupt, nor is there any provision in the act authorizing or requiring the marshal to take possession of the property of a voluntary bankrupt. After the warrant, form No. 6, is issued, notices of a meeting of creditors are to be given, which meeting may, under section 11 of the act, be held at as late a period as ninety days after the adjudication of bankruptcy and the issuing of the warrant. At such meeting an assignee is to be elected or appointed. The assignee has five days in which to accept the trust, and, as soon as he is appointed and qualified, an assignment of the bankrupt's estate is to be made to him by the judge or the register; and section 14

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

provides, that "such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." It results, from these provisions, that, during the interval between the adjudication of bankruptcy, in the case of a voluntary bankrupt, and the delivery of the assignment to the assignee, and which interval may be as much as ninety-five days, or even more, the property of the bankrupt cannot, under the act, be put into the possession or custody of the court, or of any officer acting under the bankruptcy act, but must remain in the possession and control of the bankrupt, unless it can, during that interval, be kept in the temporary custody of the register, to be handed over by him to the assignee, when elected or appointed. And there seems to be no scope for the operation of the provision in regard to the surrender of a bankrupt, unless it is construed to mean, that a voluntary bankrupt may place his estate in the possession of the register, as soon as he is adjudicated a bankrupt.

In the case of an involuntary bankrupt, section 42 of the act requires that the warrant, to be issued to the marshal as soon as the debtor is adjudged to be a bankrupt, shall direct the marshal to take possession of the estate of the debtor, and form No. 59 contains such a direction. The provision of rule 13 of the "General Orders in Bankruptcy," which says, that "it shall be the duty of the marshal, as messenger, to take possession of the property of the bankrupt, and to prepare, within three days from the time of taking such possession, a complete inventory of all the property, and to return it as soon as completed," applies only to a case where a warrant is issued to the marshal to seize the property, and, therefore, not to a case of voluntary bankruptcy. In analogy to this taking possession by the court of the estate of a bankrupt, in a case of involuntary bankruptcy, as soon as an adjudication of bankruptcy is made, the act contemplates that a voluntary bankrupt, who states, in his petition, his willingness to surrender all his estate and effects for the benefit of his creditors, may, as soon as he is adjudged to be a bankrupt, surrender his property into the hands of the court, by surrendering it to the register who has made the adjudication of bankruptcy.

I am, therefore, of the opinion, that if the debtor, in this case, has been adjudged a bankrupt, and requests the register to receive a surrender of his property, the register is authorized and required to receive such surrender, and to keep the property safely, until it can be turned over to the assignee. It is true that the act contains no special provisions for the execution of the trust, but the power of the court extends, by section 1 of the act, "to all acts, matters, and things to be done under and in virtue of the bankruptcy," and the register exercises the power of the court in regard to the property. The clerk will certify this decision to the register, Theodore B. Gates, Esq.

HASBROUCK, The J. L. See Cases Nos. 7,323-7,326.

Case No. 6,190.

HASELDEN v. OGDEN.

[3 Fish. Pat. Cas. 378; Merw. Pat. Inv. 666.][1]

Circuit Court, S. D. Ohio. March, 1868.

PATENTS—VALIDITY—PRIORITY—INFRINGEMENT—PATENTABILITY.

1. If an invention is made and used in a private way, and then thrown aside and not given to the public, a patent granted to a subsequent inventor would be a valid patent.

2. If in the use of an invention by the first inventor, although private, a subsequent inventor had access to it and could have had knowledge of it, the patent subsequently issued to the second inventor would be void.

3. It is for the jury to say whether the patent is for such an article as requires and demands for its production the genius of an inventor as distinguished from the ordinary skill of a mechanic. If it might have been produced by the latter only, the patent would not be valid.

4. It is an infringement to manufacture a patented article, though it is never used by the maker, or to use a patented article though made by another, or to sell to others the article manufactured by another.

5. The claim governs the patent, and in order to ascertain what is patented, reference must be had to the claim.

6. The patent of James Suggett, granted March 29, 1864, was for a "combination of a perforated iron pipe and pointed plug, in the shape of and to be used as a drill, and a common pump." The manufacture and sale of a pump and drill without a perforated pipe, or of a perforated pipe and drill without a pump, would be no infringement.

[Cited in Andrews v. Carman, Case No. 371.]

This was an action on the case tried before Judge Sherman and a jury, to recover damages, for the infringement of a patent [No. 42,126] for an "improvement in pumps," granted to James Suggett, March 29, 1864, the exclusive right under which, for Montgomery county, Ohio, was assigned to plaintiff [Robert C. Haselden]. The invention was entitled, by the patent, "a new and improved method of putting down and operating bored wells." This method consisted in boring a well in the earth to the desired depth, with any ordinary drill, of the same or larger size than the pipe to be used for drawing the water. The drill was then entirely withdrawn, and an iron pipe, pointed at the lower end and provided with numerous perforations for twelve or eighteen inches above the point, was driven down in the hole prepared by the drill, and sections added as

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 666, contains only a partial report.]

it was forced down, until the perforated portion reached the water. Any ordinary pump was then screwed or soldered to the upper end of the pipe, and the well was ready for use. The claim of the patentee was as follows: "The perforated pipe a, with the pointed end b constructed as a drill, and united with a pump, all substantially as shown and described." Upon the trial, the defendant [Robert Ogden] produced pipes with pointed ends which had been united with pumps, and used in open wells for many years prior to the invention of Suggett, and insisted that the patent of Suggett was not for a process of sinking the well, but for an instrument, and that the instrument being old, although used in connection with open wells, the plaintiff could not recover.

George M. Lee, for plaintiff.
Samuel S. Fisher, for defendant.

SHERMAN, District Judge (charging jury). This is an action of trespass brought to recover from the defendant damages for the infringement of a patent for bored wells, owned by plaintiff.

To sustain his action, the plaintiff produces in evidence a patent issued to one James Suggett, and by the patentee assigned to the plaintiff. The laws of the United States require that, before such a patent shall issue, the proper officer shall be satisfied that the invention claimed is new and useful. Novelty and utility are necessary requisites to a patent. The issuing of the patent by the proper officer, and the production of it in courts, is, therefore, prima facie evidence of the utility and novelty of the invention. In other words, you are to assume that the invention claimed is new and useful until the contrary is proved.

It is claimed by the defendant that the invention for which this patent issued was substantially used by him and the public years before the invention of Suggett, at different places named in the notice. This is a matter for you. The law not only refuses a patent, or if one is granted it will be decided invalid if it is shown that the subject-matter of the patent had been publicly used before the alleged invention, or, if it had been described in any printed publication either in this or a foreign country, or, if the patentee was not the original or first inventor. The prior use of an alleged invention must be a public use and not a private use. If an invention is made and used in a private way, and then thrown aside and not given to the public, a patent granted to a subsequent inventor would be a valid patent. But if in the use of the invention by the first inventor, the second inventor had access to it and could have had knowledge of it, then the patent subsequently issued would be void and invalid. Again, if the article, or what is substantially the same article, has been in general use by the defendant or the public before the issuing of the patent, the patent would be invalid. Of this you are the judges. It is for you to decide from the evidence whether the article that is admitted to have been used by the defendant for years is substantially the same as that described in the patent.

It is also for you to say whether the patent in question is for such an article as requires and demands for its production the genius of an inventor, as distinguished from the ordinary skill of a mechanic. If it might have been produced by the latter only, the patent would not be valid.

If, therefore, from a consideration of the whole evidence, you come to the conclusion that the patentee was not the first and original inventor of the device or article described in the patent; or, if the same thing, or what is substantially the same thing, was used by the defendant, or by others, publicly, for years before; or, the article patented did not require the genius of an inventor, but only the ordinary skill of a mechanic, then your inquiries may here stop, and you will render a verdict for the defendant. But if you find that the patentee was the first and original inventor, that the article was a new and useful one, and that it had not been in public use by defendant and others before the grant of the patent, then you will inquire whether this defendant has infringed upon the rights conferred upon the owners of the patent.

An infringement is a copy made after and agreeing substantially and in principle with the article described in the letters patent. The act of congress [of 1836 (5 Stat. 117)] confers upon the patentee and his assigns the exclusive right to make, to use, or to sell to others to be used, the article patented. It is, therefore, an infringement to make or manufacture a patented article, though it is never used by the maker. It is likewise an infringement to use a patented article, though made by another. It is also an infringement to sell to others the article when it is manufactured by another. The law vests the exclusive right to do all these three things in the patentee, and hence for another to do one or all of them is an infringement.

There is evidence before you tending to show that the defendant manufactured pipes and points similar to those described in the patent, and sold them to others. I am inclined to think that there is not sufficient evidence to convince you that he ever, himself, used the pipes, etc., in a bored well, and, therefore, he has infringed, if at all, in making and selling to others the patented article. In this connection it is claimed that he was only a dealer in iron pipes, and that he never manufactured the article described in the patent. This involves the question: What particular thing is secured to the patentee in his letters patent? This is a question for the court. In construing a patent, in the first place, courts generally look to the claim, which, by law, is required to be a summing up of the particulars of the invention for which the applicant desires a patent. If that

claim is vague and uncertain, then reference is made to the proceedings, specifications, and drawings, together with such other exhibits as may aid in giving a construction to the patent. In this case, in my view, the claim and specification do not altgether agree: one describes an object and purpose, and the other the means to accomplish that purpose. But in my judgment the claim governs the patent, and in order to ascertain what is patented, reference must be had to the claim. What is the claim in this case? It is of a machine to be used in boring a well, and when bored, to be further used in bringing the water to the surface. It is what is well known in law as a combination patent. It is a combination of three old and well-known principles to effect a new and useful purpose. The combination is for a perforated iron pipe, a pointed plug in shape of and to be used as a drill, and a common pump. It is a familiar and undoubted principle of law which must govern you in this case, that in a patent for the combination of three well-known things, the making and use of two only of them is no violation or infringement of the patent.

If, therefore, you find from the evidence that this defendant made and sold the pump and drill, without the perforated pipe, or he made and sold the perforated pipe and drill without the pump, then he has not infringed the patent, and your verdict will be for the defendant. But if you find that the defendant has made and sold all three of what constituted this combination patent, then he is guilty of infringing the patent, and your next inquiry will be the amount of damages the plaintiff, as the owner of the patent, has sustained.

There is no fixed rule of law, as to the amount of damages which a jury must give in this class of cases. It is, however, very well settled that you are to give the actual damages the plaintiff has suffered. The damages should be such as would compensate him, not vindictive or speculative damages. In this case the amount claimed is not large, and therefore, of no great importance.

The jury found a verdict for the defendant.

Case No. 6,191.

In re HASKELL.

[4 N. B. R. 558 (Quarto, 181).] [1]

District Court, E. D. Michigan. March 9, 1871.

BANKRUPTCY—PARTIES—IRRELEVANT ISSUES.

Where the questions certified to a United States district judge in bankruptcy only contain abstract questions, and do not arise in the course of the bankruptcy proceedings, or upon the result of such proceedings, and are certified in behalf of a person who is not a party in the bankrupt court, such questions not being certified as authorized by the act, they will be returned undecided, for the reason that a decision on them would be of no force or effect.

[1] [Reprinted by permission.]

By the Register: I, Benjamin J. Brown, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said matter before me, certain questions arose pertinent to the said proceedings, and were, with the facts upon which the same are based, stated and agreed to by the opposing parties, to wit: by Marston and Hatch, attorneys for John Oliver, and Solomon B. Bliss, for assignee, which statement is hereto annexed.

Upon the first question presented, viz. is it necessary that a mortgage creditor should prove his debt before making application for leave to sell the mortgaged premises? there has been a decision of this court, to the effect that such proof is not necessary. In re High [Case No. 6,473]. But the subsequent practice has not been uniform, I understand, and the question is, therefore, certified for the opinion of the court. The proving of the claim, in such a case, does not seem to the undersigned to be either necessary or proper. First. Because the nature, amount, and consideration of the debt, and all particulars respecting the same, can be equally well verified by the petition, of which the assignee should have notice, and in case of dispute can be determined upon the hearing. Second. If a formal proof of claim is made and filed, the question will arise whether it should be recognized by the register on the final dividend, if the sale has not then been made. A general survey of the provisions of the bankrupt act [of 1867 (14 Stat. 517)] confirms this opinion. While the act vests in the district court the power to regulate the time when mortgaged premises may be sold "so as to secure the rights of all parties, and due distribution of the assets among all the creditors" (section 1), it does not assume to deprive the state courts of jurisdiction, or to say that the "manner of sale according to the terms of the decree" shall be interfered with. The sale, under a decree of a state court, in nowise connects itself with proof of the claim, unless the mortgagee submits to the jurisdiction of the district court, and seeks to make such proof; and the court should, under section 20, "direct" the sale to be made in such "manner." But section 20 contemplates a summary proceeding, a sale under the direction of the district court, not by virtue of the decree of a state court, and unless the property is so sold, the creditor cannot prove "any part of his debt." If, then, the court does not "direct" the manner of sale, but permits the sale to be made at such time as may appear to be most advantageous to the great body of creditors, the provisions of the act relative to proof of debts would not appear applicable to the case under consideration. I think the application for leave to sell will be reasonable if made at any time before decree. Third. I am of opinion that leave of the court should in all cases be applied for, and that the assent of the assignee is not sufficient. The records of the court should show that the

sale is authorized from considerations of public policy, if for no other reason.

To Hon. Benj. J. Brown, Register in Bankruptcy:

The undersigned respectfully ask you to certify the following questions to the district court of said district for its decision thereon: First. Is it necessary that the mortgage creditor hereinafter mentioned, should prove his debt before making application for leave to sell mortgaged premises? Second. Will an application made at any time before decree in the cause hereinafter mentioned be reasonable? Third. If the assignee assents to a sale of the premises hereinafter mentioned, being made under such decree, is any action of the said district court necessary to make such sale valid, and to cut off any right of redemption? The following are the facts upon which such questions arise: On the 1st day of September, 1868, said Stephen V. Haskell, being indebted to John Oliver in the sum of one thousand dollars, executed and delivered his promissory note therefor to said Oliver, due one year after date; and further, to secure said indebtedness, said Haskell executed and delivered to said Oliver a mortgage upon the following described piece or parcel of land situated in Iosco county, state of Michigan, to wit: Lot No. three (3) in block No. four (4) in the village of Tawas City, Michigan, according to the recorded plat of said village. Said mortgage was duly recorded in the office of the register of deeds for Iosco county, on the 29th day of September, 1868. On the 22d day of October, 1870, said Oliver filed his bill in the circuit court for the county of Iosco, in chancery, praying that said mortgage might be foreclosed, and the premises sold to satisfy said mortgage. The said bankrupt and the assignee in bankruptcy were made parties defendant to said bill. There are other mortgages on said property given subsequent to the mortgage to Oliver, and the amount of such mortgages exceeds the value of said property. The value of the premises is about fifteen hundred dollars.

Marston & Hatch, for Oliver.
Solomon B. Bliss, for assignee, etc.

LONGYEAR, District Judge. The "point or matter" above certified, does not appear to have arisen "during the proceedings before the register" or "in the course of such proceedings, or upon the result of such proceedings," within the meaning of section 6 of the bankrupt act. Neither is it a statement of "any question or questions in a special case" within the meaning of said section. Neither is Oliver, for whose benefit the opinion of the district judge is sought, a "party" to the bankruptcy proceedings, nor to any proceedings whatever commenced and pending before the register. The questions certified are really nothing more than abstract questions; and, instead of being questions arising in the course of any proceedings in the bankrupt court, or upon the result of any such proceedings, they, in fact, relate merely to proceedings in a suit in another and different court, and are certified in behalf of a person, who, although a party to such latter proceedings, is not a party to any proceedings in the bankrupt court. It may be said that the questions agreed on and stated make "a special case" within the meaning of section 6. But this is not the provision of the section. It is not that parties may make a special case, but it is that they may "state any question or questions in a special case." There must, of course, be, first, parties, and, second, a case in which questions can arise and be stated. Here both of these elements are wanting. Questions are to be decided only when they necessarily arise, and are not to be anticipated. If Oliver had proved his debt (as a secured debt, of course), and thus became a party to the bankruptcy proceedings, and had then applied for leave to sell the mortgaged property, and thus have made a special case, there is no doubt that questions arising therein might be stated by consent, and be properly certified; but I do not see how it could be done, short of this, under the law.

See In re Frizelle [Case No. 5,133]; In re Wright [Id. 18,069]; In re Sturgeon [Id. 13,564]; In re Bray [Id. 1,818]. The questions certified not being authorized by the act to be certified, a decision upon them would be coram non judice, and, of course, of no force or effect, and they are, therefore, returned undecided.

Case No. 6,192.

In re HASKELL.

[11 N. B. R. 164; [1] 1 Cent. Law J. 531; 1 Am. Law T. (N. S.) 182.]

District Court, D. Massachusetts. 1874.

BANKRUPTCY—ACT OF JUNE 22, 1874—COMPOSITION WITH CREDITORS—PROCEDURE.

1. The amendment to the bankrupt act of June 22, 1874 [18 Stat. 178], does not require that there should be a written proposition from the bankrupt preceding the notice to creditors, to lay the foundation for their action in accepting or rejecting a composition, and to inform them what they were to be asked to accept.

[Cited in Re Holmes, Case No. 6,632.]

[Cited in Scott v. Olmstead, 52 Vt. 212.]

2. There is nothing in the mere words of the statute to require, in cases of composition, any other or different statement than is required in bankruptcy, and the most obvious course would be to make it as much like that schedule as possible.

[Cited in Re Weber Furniture Co., Case No. 17,331.]

[Cited in Cobbossee Nat. Bank v. Rich, 81 Me. 174, 16 Atl. 510; Home Nat. Bank v. Carpenter, 129 Mass. 5.]

3. It is not the intention of the statute that no debtor can make a composition with his creditors, under section 17 of the amended bankrupt

[1] [Reprinted from 11 N. B. R. 164, by permission.]

act, who, by reason of preference or otherwise, would not be able to obtain his discharge.

[Followed in Re Becket, Case No. 1,210. Cited in Re Weber Furniture Co., Id. 17,330; Re Shafer, Id. 12,695.]

In bankruptcy.

LOWELL, District Judge. Several objections are taken to the acceptance of the resolution of creditors to accept a composition of twenty-five cents on the dollar. Section 17 of the amended bankrupt act introduces a new feature into the system, by enabling a certain amount and proportion of the creditors to accept a composition which shall be binding on all the rest. Full power is given to the supreme court to make rules; but until the next session of that court the law, being in full operation, must be worked out as well as may be. Three points have been argued:

First. That there should be a written proposition from the bankrupt preceding the notice to creditors, to lay the foundation for their action, and to inform them what they were to be asked to accept. There is much force in this objection, abstractly considered, and it may be that the rules will prescribe something on the subject; but the statute does not, I think, require it. The course of proceeding pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions; and then they may not only accept or reject a proposition which was made and filed ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer. The creditors are to be notified of the time, place, and purpose of the meeting, but not necessarily of the precise proposition to be made; unless the matter should be carefully regulated, there might be danger of introducing too much precision by requiring that there should be a written point of departure for these proceedings. We have taken this section from the English act of 1869 (32 & 33 Vict. c. 71, § 126). Under that act, very many and careful rules have been made and forms have been prescribed. Nos. 106, 108. These forms do not contain, either in the application by the debtor, or in the notice to his creditors, any intimation of what the proposition is likely to be. This shows the judges construe that section in the way I have suggested; there seems to be no reason to say that the debtor must have made up his own mind what he will offer before he meets his creditors. He may be investigating his affairs and may need their advice and assistance.

Second. A somewhat similar course of reasoning lies to the second objection, which is that the statement of assets produced at the meeting was insufficient. This was the schedule of assets already filed in bankruptcy. There is nothing in the mere words of the statutes to require any other or different statement than is required in bankruptcy; and the most obvious course would be to make it as much like that schedule as might be, which is the rule prescribed by the court in England. It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority or by a single creditor and including a due inspection and explanation of the books. All this had been done some weeks before by a committee of creditors, who had reported to the others; so that there was no real lack of information in this case, and I do not think I could lay down any better general rule for the written statement than that, in cases in which the sworn schedules have already been filed, they shall be used.

To consider the third objection in all its possible bearings would be tedious. The objecting creditor offered evidence which he insists proves that a preference, to a considerable amount was made to one creditor in June, after the debtor was insolvent. It is said that this fact would prevent the debtor's discharge, and therefore ought to prevent the acceptance of the resolution, which, if recorded, is intended to work a discharge. As I said at the hearing, I do not believe the statute intends that no debtor can compound with his creditors, under this section, who would not be able to obtain his discharge. The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. This thing had been known for weeks to all the creditors, and had been the subject of a report by a committee. The court has a discretion to accept or reject, as may be for "the best interest of all concerned." This means the best interest at the time being, all things considered. In passing upon the acceptance of the resolution, I think the court ought to take into view all the circumstances, including, perhaps, the probability of a discharge in bankruptcy, and certainly, the conduct of the several parties, in its bearing on the composition. I have found nothing in this case which requires to reject this resolution. Resolution to be recorded.

Case No. 6,193.

HASKELL v. INGALLS.

[1 Hask. 341;[1] 5 N. B. R. 205.]

District Court, D. Maine. May 10, 1871.

BANKRUPTCY—ACT OF 1867—FRAUDULENT OR PROHIBITED PREFERENCE—JUDGMENT CREDITOR.

1. The seizure of an insolvent debtor's property on execution, within four months of his

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

bankruptcy proceedings, by a creditor having reasonable cause to believe the debtor insolvent, when not made to perfect the lien of a valid attachment, works a fraudulent preference under the bankrupt act [of 1867 (14 Stat. 517)], if shown to have been so intended by the parties and intended to defeat the purposes and policy of the law.

[Cited in Warren v. Delaware, L. & W. Ry. Co., Case No. 17,194.]

2. An intended preference and a purpose to defeat the provisions of the bankrupt act are shown by the instituting of a suit against an insolvent debtor and the attachment of his property, followed by judgment and execution, without objection by the debtor, and a seizure of the property thereon, without the debtor meantime submitting his property to equal distribution in bankruptcy.

[Cited in Warren v. Tenth Nat. Bank, Case No. 17,202.]

3. Semble. From later authorities, that mere inaction by the debtor in permitting a judgment and execution against him upon a valid debt, without meantime filing his petition to be adjudged bankrupt, is not "suffering his property to be taken on execution" so as to defeat the seizure for that cause. Buchanan v. Smith, 16 Wall. [83 U. S.] 277; Wilson v. City Bank, 17 Wall. [84 U. S.] 473; National Bank v. Warren, 96 U. S. 539.

In bankruptcy. Bill by [Thomas H. Haskell] the assignee of a bankrupt, to restrain a judgment creditor from gaining a fraudulent preference by taking the land of the bankrupt in execution, that had been seized thereon within four months of the bankrupt proceedings and not to perfect the lien of a valid attachment. The respondent [Darwin Ingalls] by answer asserted that he was attempting to collect his debt by legal process in the usual course, and had obtained a seizure of his debtor's land on an execution without fraud or collusion, and thereby had acquired a valid lien upon the debtor's land that could not be defeated by his subsequent proceedings in bankruptcy, notwithstanding the seizure was made within four months thereof. The facts were agreed.

Thos. H. Haskell, pro se.

Josiah H. Drummond, Woodbury Davis, and Nathaniel S. Littlefield, for respondent.

FOX, District Judge. Cleaves was adjudged bankrupt on his own petition filed March 17, 1871, and the plaintiff has been duly qualified as his assignee.

On the 20th of December last the respondent attached on a writ against Cleaves, returnable at the January term, all said Cleaves' real estate. The action was duly entered, the defendant defaulted, and judgment rendered January 30th. The real estate attached was seized on the execution February 21st, and thereupon before any levy was completed, on the 12th of April, the assignee instituted this suit to enjoin further proceedings upon said execution against the estate of the bankrupt on the ground that a fraudulent preference would be obtained. The case is submitted on bill, answer and agreed statement. It is admitted, that on the 20th of December the bankrupt was insolvent, and that the debt due Ingalls was for money lent by him to the bankrupt in September last, to be repaid in thirty days. The answer admits that the respondent, previous to commencing his action, had called upon Cleaves several times for payment; that he had always promised to pay in a few days, but always failed so to do; that he knew other suits had been commenced against Cleaves and his property attached thereon.

The bankrupt being then insolvent, having thus repeatedly failed to pay borrowed money when pressed for payment, and the respondent having been compelled, with other creditors, to resort to legal process to obtain security for their demands, I hold he must be held to have then had reasonable cause to believe the bankrupt insolvent, as is required by the provisions of the bankrupt act to invalidate a preference.

The bankrupt must be deemed to have intended a preference to the attaching creditors, as he allowed their suits to proceed forthwith to judgment and execution against him, and he delayed taking any steps to avail himself of the provisions of the bankrupt act and vacate the attachments until the rights of the creditors had not only ripened into execution, but they had actually seized his real estate thereon and were proceeding to dispose of the same in satisfaction of their claims. All this the bankrupt could have obviated by answering to the actions and filing his petition to be decreed bankrupt. The inevitable consequence of his acquiescence in the actions of the creditors was to give them a preference. His intention as well as that of the creditor must be judged of by the legal consequences of their conduct, and I therefore find that the bankrupt did intend to give and the respondent, in fraud of the act, did intend and attempt to obtain a preference over the other creditors by the suit and proceedings under it.

The case does not find that the bankrupt procured the attachment to be made or his property to be seized on execution; but it does most clearly establish that he being insolvent suffered his property to be attached and afterwards taken on legal process with intent to give a preference to the attaching creditor; thus an act of bankruptcy is shown, for which most certainly he could have been adjudged a bankrupt on a creditor's petition, if filed within six months, and if Cleaves were an involuntary bankrupt, the present bill could certainly be maintained, as the books contain at least a score of authorities, in which, in similar cases, creditors thus obtaining a preference by legal process, have been enjoined against further proceedings, or required to refund the amounts thus collected by them in fraud of the act.

The proceedings in bankruptcy having been commenced within four months of the attachment, all rights by virtue of such attachment were dissolved under the provi-

sions of the 14th section of the act, and the respondent is compelled to rely on his alleged lien by force of the seizure of the estate on the execution on the 20th of February last, after Cleaves had committed an act of bankruptcy by suffering his property to be attached on legal process by the respondent. It is claimed, that the creditor, not having instituted involuntary proceedings, but having allowed Cleaves to proceed in his own behalf as a bankrupt, the case is not affected by the provisions of the 39th section, but must depend on the 35th section, "relating to preferences and fraudulent conveyances;" that whilst by the 39th section, the procuring or suffering of his property to be taken on legal process by an insolvent, intending a preference, is declared an act of bankruptcy and is clearly in fraud of the act, yet by the provisions of the 35th section, it is only when such insolvent, with such intent, procures his property to be attached or seized on execution, that the attachment or seizure is declared void; that, ex industria, the suffering by an insolvent of his property to be thus attached, or seized, is not denounced, and such an attachment or seizure on execution is not declared void, when the debtor is not active in procuring it to be made, but is only passive in allowing the law to take its usual ordinary course, and apply his property by due process of law in discharge of his liabilities.

It is true that the 35th section does not in express words declare an attachment or seizure on execution void, which an insolvent suffers to be made and continue upon his property; but after declaring, that if an insolvent with intent to give a preference procures any part of his property to be attached or seized on execution, the same shall be void, it further provides, that if such debtor "makes any payment, pledge, assignment, transfer or conveyance of any part of his property either directly or indirectly, absolutely or conditionally, the person receiving such payment, &c., having reasonable cause to believe such person is insolvent" and that the same is made in fraud of the act, "the same shall be void"; and if not made in the usual and ordinary course of business of the debtor, "the fact shall be prima facie evidence of fraud." The taking of a debtor's property on legal process cannot be said to be in the ordinary course of his business.

In the case of In re Black [Case No. 1,457], Judge Blatchford in a most able opinion, which has been cited and approved by nearly every one of the district judges, has examined this question elaborately and with great care. It was a case of involuntary bankruptcy where the party had suffered his property to be taken on execution, and was clearly within the 39th section. After demonstrating such to be the case the learned judge proceeds: "The same result follows under the 35th section: The two sections are in pari materia and must be construed together. There is however no conflict between them, and they are of the same purport and tenor. * * * The act of suffering the creditor to take the property of the firm on legal process, the firm being insolvent, when such taking could have been prevented by an application in voluntary bankruptcy, was a fraud on the provisions of the act, and must be held to have been a transfer made by the debtors and with a view to give a preference to the creditor. The creditor was to be benefited by the transfer, and had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act. The transfer was not made in the usual and ordinary course of the debtor's business, and therefore it was void and the assignee is entitled to recover the property transferred or its value." The decision in Re Davidson [Id. 3,599], covers this point. It was a voluntary bankruptcy, and Judge Blatchford there held that the debtor committed an act of bankruptcy in suffering his property to be taken on legal process; that thereby the creditor obtained a preference, and not having surrendered the property, he could not prove his claim, and the sheriff was required to pay to the assignee the amount thus collected on the execution.

The bankrupt act was intended to prevent all preferences by an insolvent within four months of the commencement of proceedings in bankruptcy, and to insure an equal distribution of his estate among his creditors. I cannot believe that a seizure of an insolvent's estate on execution by which if perfected, gross injustice would be perpetrated against the general creditors, can avail a creditor if the insolvent should immediately file his petition to be adjudged a bankrupt, whilst it would be set aside and adjudged void if the creditors should succeed in the case and first procure a decree of bankruptcy against him. Such a construction of the law would cause the validity of the seizure to depend entirely on the alacrity and diligence of the insolvent; at the moment the seizure was made by an officer he could file a petition, thereby preventing his creditors from commencing proceedings against him by which the seizure would be defeated. Opportunity for fraud and collusion and for the indirect preference of favored creditors would thus be obtained, which would go far to defeat the great and leading object of the bankrupt law.

This construction of the law, I think, is sustained by the decisions in Wilson v. Brinkman [Case No. 17,794]; Fitch v. McGie [Id. 4,835]; Re Wells [Id. 17,388]; Street v. Dawson [Id. 13,533]; Beattie v. Gardner [Id. 1,195]; Smith v. Buchanan [Id. 13,016]; and Vogle v. Lathrop [Id. 16,985].

Most of these were cases of involuntary bankruptcy, but this distinction is not, that I can perceive, made the ground of the decision and relied upon in either of the opinions. On the contrary, they all seem to estab-

lish the principle that as a payment of money would be a preference, the obtaining of it would be a preference. The obtaining of it by legal proceedings, not prevented by the debtor availing himself of the law, is averse to the fundamental principles of the bankrupt act and is invalid as against the assignee.

In Beattie v. Gardner [supra], Judge Hall says: "It can scarcely be doubted that an act which directly and manifestly tends to defeat the purposes and policy of the bankrupt act, and which was done in contravention of and with an intent to defeat such purpose and policy, is for that reason fraudulent and void." As said by Lord Mansfield in 2 Cowp. 629, "A fraudulent contrivance, with a view to defeat the bankrupt laws, is void and annuls the act." This principle has received the emphatic approval of the supreme court of the United States in Shawhan v. Wherritt, 7 How. [48 U. S.] 627. Grier, J., in delivering the opinion of the court says: "The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors; hence when a merchant or trader, by any of these tests of insolvency, usually termed acts of bankruptcy, has shown his inability to meet his engagements, one creditor cannot by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally and therefore equitably. * * * A creditor may always recover payment of his debt or security for it from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy, and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt; and if notice of this fact to a creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a state court, after such notice could have no better claim to protection, for notice of the act of the bankruptcy is the test of the mala fides which vitiates the transaction." In that case a party was compelled to refund to the assignee the amount he had obtained from the bankrupt's estate by proceedings in the state court.

"These doctrines, thus held to be applicable to the act of 1841," are said by Judge Blatchford in Re Black [Case No. 1,457], to be much more applicable to the act of 1867, as it was the intention of the congress by that act to "strike at the root of all preferences obtained by a creditor, when his debtor is insolvent or in contemplation of insolvency, by the taking of the debtor's property on legal process, whether the taking be by an act of procurement or an act of sufferance, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent."

The present bill may well be maintained, both on the express provisions of the bankrupt act and the general principle that the acts of the respondent in thus obtaining a preference were fraudulent and void, being intended by both the bankrupt and the respondent to defeat the purposes and policy of the law.

Perpetual injunction to restrain the respondent from proceeding with his seizure and sale of the estate of the bankrupt on the execution recovered against him by said respondent.

HASKELL (MABIE v.). See Case No. 8,653.

Case No. 6,194.

HASKELL et al. v. SHOE MACHINERY MANUF'G CO. et al.

[3 Ban. & A. 553;[1] 15 O. G. 509.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS — INFRINGEMENT — PRESUMPTION — "SEWING MACHINES" — PATENTABILITY.

1. Patents, in due form, when introduced in evidence in a suit for infringement, afford a prima facie presumption that the alleged inventor was the original and first inventor of what is therein described as his improvement.

2. The invention described in letters patent No. 29,785, granted to David Haskell, August 28, 1860, for an improvement in sewing machines, which consisted in the combination of an isolated upright post and a notched movable plate, whereby flat and tubular work may be performed on the same machine: *Held*, to be the proper subject of a patent, and that the patent is valid.

[This was a bill in equity by David Haskell and others against the Shoe Machinery Manufacturing Company and others for an injunction and an account.]

Edmund Burke and J. S. Abbott, for complainants.

Smith & Bates and W. W. Swan, for defendants.

CLIFFORD, Circuit Justice. Patents in due form, when introduced in evidence in a suit for infringement, afford the party seeking redress a prima facie presumption that the alleged inventor was the original and first inventor of what is therein described as his improvement. Redress is sought in this case by the complainants for the infringement of a patent granted to their assignor on the 28th of August, 1860, for an improvement in sewing-machines. When granted, the term of the patent was for fourteen years, but the patent was subsequently extended for the further term of seven years from the expiration of the original term.

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

Without entering into details, suffice it to say the bill is in the usual form, charging infringement.

Service was made, and the respondents appeared and filed an answer. They admit that the patent was granted, and that the term was extended, but deny that the patentee was the original and first inventor, or that the improvement had not been known and used before the alleged invention by the complainants' assignor. Certain other defences are set up to the effect following: Both utility and patentability are denied, and they aver that the patent is in every respect invalid and void, and give notice that they will put three certain patents of prior date in evidence, in which a full description is given of the alleged improvement. Prior use of the improvement is alleged, and they give the name of Curtis Stoddard as the person who knew and used the improvement antecedent to the supposed invention by the assignor of the complainants. All these defences are formally set up in the answer, and they deny that they have ever constructed, used or vended the patented invention in violation of the rights of the complainants.

Proof to show the utility of the patented improvement is very abundant and conclusive. It shows that the advantage of the machine over other sewing machines is, that it combines an isolated work post with a detachable table, by which the same machine will answer both for the purpose of sewing manufactured articles of a tubular form, as well as flat pieces of work requiring larger supporting surface for the manipulation of the work. When sewing tubular articles of manufacture, such as boot-legs or other similar shaped articles, the isolated post is used without the detachable table, and both may be used together when sewing articles requiring the support of a larger surface. Beyond all question it has largely come into use, and the evidence proves to the satisfaction of the court, that it was the proper subject of a patent, and that it is highly useful in accomplishing the work for which it it is designed. Machines of the kind, of course, have a frame, and the specification shows that the patentee has a bed or work-table which, instead of being made with an unbroken flat horizontal surface, as is generally the case, is made with an isolated upright post connected at the bottom, by a foot, with the main portion of the table, whose upper surface is of the same level as the top of the post.

Two explanations are made by the patentee which it is important to notice. (1) That the post may be made as small as desired, in order that articles of thick, stiff material, whether large or small, may be placed upon it, in the manner illustrated by the piece of work represented in red outline in the drawings, with their edges lapping over it on either or all sides, and be turned round upon it in all directions. (2) Suggestion is also made that the needle passes through a hole in or near the centre of the post, and that it may be used to perforate the fabric under operation, either by an upward or downward movement, but the patentee prefers the upward movement, which appears to be satisfactory.

Such a construction of the bed, with an isolated post, the patentee states, is specially adapted for shoemakers' use, and he alleges that it makes a machine capable of doing much of the work on boots and shoes which it has been difficult, and, in some cases, impossible, to do with the machines heretofore used. In order that the machine may be adapted to flat work, as well as that which is tubular in form, he provides a movable plate, in the form shown in the drawings, with a recess to fit around the post, with its opposite side straight to fit the open space, the same being formed with a bevelled end to fit and rest in a half-dovetailed recess and the shoulder provided for its support in the post. What he claims is the arrangement of the isolated upright post, with the notched movable plate, in the manner shown and described.

Viewed in the light of these suggestions, it is clear that the patentee does not claim either the post or the movable plate. Instead of that, the invention consists in the combined arrangement of those two devices in a sewing-machine in the described way, so that the machine may be usefully and successfully used in sewing tubular articles of manufacture, such as boot-legs or flat pieces of work which require a large supporting surface. Construed as the claim should be in connection with the descriptive portion of the specification which precedes, it is clear that the combination described is special, including not only the isolated post and the movable plate, but also the double arrangement by which the two described kinds of work may be successfully accomplished in the same machine. Examined in that light, the court is of the opinion that the machine is a highly useful one, and one that deserves to be favorably considered by the court.

Attempt is made by the respondents to show that the assignor of the complainants was not the original and first inventor of the improvement. They make the allegation, and the burden is upon them to prove it, as the prima facie presumption is the other way. Three patents are referred to in the answer as showing prior invention, of which only two were introduced in evidence. Nor is it necessary to enter into any detailed exposition or explanation of the patents given in evidence, as it is clear that neither of them is of a character to support the issue tendered by the respondents, which is all that need be said upon the subject of those patents. Suppose that is so, still it is insisted by the respondents, that the thing patented was known

and used by Curtis Stoddard prior to the alleged invention thereof by the assignor of the complainants. Evidence upon this issue was introduced by both parties, and the whole of it has been carefully examined, and the court will give conclusions formed from that examination.

1. Taken as a whole, the court is of the opinion that the invention of the assignor of the complainants was made as early as the 28th of February, 1860, as shown by evidence which leaves no doubt of its accuracy and truthfulness.

2. Sufficient appears to satisfy the court that the Stoddard machine, as originally constructed, was completed at a prior date, but that the machine, as constructed and organized at that date, was not of a character to supersede the complainants' patent, for the reason that the combination, construction, and mode of operation were substantially different. But the evidence is satisfactory that it was subsequently altered and made to conform to the machine which is the subject of the present controversy. Marked differences of statement exist among the witnesses in respect to that question, but the court is of the opinion, in view of the whole evidence, that the alteration was not completed until the 19th of May, 1860, and that the assignor of the complainants was and is the original and first inventor of the patented improvement.

Nothing remains except to determine the issue of infringement. Substantial aid in determining that question is derived from the stipulation of the parties, in which it is agreed that the respondents, prior to the filing of the bill of complaint, made or participated in making machines like Exhibit F, which was given in evidence at the hearing. Expert testimony upon that subject was introduced by complainants. They asked their principal expert to state whether, in his judgment, that exhibit does or does not contain the devices, arrangement, and combination of mechanism described in the complainants' patent, and he answered in the affirmative, and stated that it had an isolated work-post and a detachable work-plate in all respects similar to what is described in that patent, and that it is capable of performing the same functions, and is constructed in precisely the same manner. Decisive support of that view is derived from a comparison of the exhibit with the mechanism described in the patent, and is fully confirmed by the other evidence in the case.

Decree for complainants for an account, and for an injunction, with costs.

[See Case No. 13,911.]

HASKELL (UNITED STATES v.). See Case No. 15,321.

HASKELL (WYTHE v.). See Case No. 18,118.

Case No. 6,195.

HASKILL v. FRYE.

[14 N. B. R. 525.] [1]

Circuit Court, D. Massachusetts. Sept. 1, 1876.

BANKRUPTCY—PREFERENCE—LIMITATIONS.

If an insolvent debtor conveys property to a creditor, to hold in trust to such uses as shall be designated before a certain time, in any composition between the debtor and the other creditors; but if no composition is made before that time, then absolutely to his own use, whereby the debt is to be discharged, the limitation runs only from the time so stipulated, if no composition is made; for the title does not vest in the creditor, absolutely to his own use, until that time.

[In error to the district court of the United States for the district of Massachusetts.

[This was an action at law by John C. Frye, assignee, against Jacob M. Haskill.]

T. L. Livermore, for plaintiff in error.

B. C. Moulton, for defendant in error.

CLIFFORD, Circuit Justice. District courts, as well as circuit courts, have jurisdiction of suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property or rights of property of the bankrupt transferable to or vested in such assignee. 14 Stat. 518.

Pursuant to that authority the assignee in this case instituted the present suit in the district court, in which he charges that the bankrupts, on or about the 11th of December, 1874, being insolvent, and the defendant having reason to believe that the bankrupts were insolvent, made a transfer and conveyance of all the personal property they possessed—amounting in value to the sum of three thousand dollars—to the defendant, for the ultimate purpose of giving to the defendant, a preference over the other creditors of the grantors of the property, as more fully alleged in the declaration. Service was made, and the defendant appeared and filed an answer, in which he denied every allegation contained in the charges set forth in the several counts of the plaintiff's writ.

Issue being joined, the parties went to trial, and the jury, under the instructions of the district court, returned a verdict for the plaintiff in the sum of five hundred and forty-two dollars and thirty cents. Exceptions were duly filed by the defendant, and he filed a motion for a new trial, which was subsequently overruled by the court. Judgment was rendered for the plaintiff, and the defendant sued out the present writ of error. It appeared at the trial that the defendant was a creditor of the bankrupts in the sum of one thousand one hundred and seventy-seven dollars, and that they, on the 11th of December, 1874, entered into the written agreement annexed to the declaration. By the terms of the agreement it appears that

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[1] [Reprinted by permission.]

the bankrupts, in consideration of the forbearance of the defendant to sue his claim, assigned and conveyed to the defendant all their title and interest in and to their lease of store, stock in trade, horses, wagons, harness, and all other property whatever, and also all notes, bonds, accounts, and debts, due, on their books or otherwise, from any and all persons. In consideration of the conveyance, the defendant also covenanted and agreed with the bankrupts, to hold and convey all that is conveyed to him in the said instrument in trust, to such uses as shall be designated on or before February 1, 1875, in any composition between the bankrupts and the other creditors. But both parties agreed in the same instrument that, if no composition was made before the time stipulated, the defendant should hold absolutely to his own use all that is conveyed to him in the instrument, and that the debt of the bankrupts to the defendant should be discharged.

Sufficient appeared to show that the grantors, in that instrument, were bankrupt at the date of the same, and that the defendant knew it, and it fully appeared that no composition between the bankrupts and their creditors was ever effected. Instead of that, it appeared that the defendant, on the 8th of February, in that year, took possession of all the property named in the instrument, and that the grantors of the same were, on the 27th of March following, adjudged bankrupts. Due demand was made for the property, and the proofs showed that the defendant refused to deliver the same before the suit was commenced. Other evidence was also introduced at the trial, tending to show that the conveyance was made to prevent small creditors from attaching the property of the bankrupts. Argument is unnecessary to show that the agreement bears date more than two months before the debtors were adjudged bankrupt. Suppose that is so; then it is clear the agreement—if, by the construction of the same, the property conveyed vested in the defendant when the instrument was delivered—cannot be held to have been executed in violation of the bankrupt act. Doubt upon that subject cannot be entertained; but the district court ruled and instructed the jury that the property did not vest in the defendant, as his own property, until February 1, 1875, and that the assignment did not constitute a payment until that time; that the preference did not begin until that time; and that the two months did not begin to run until the assignment constituted a payment of the debt of the defendant.

Prior to that time it is conceded that the defendant merely held the property conveyed in trust for the benefit of all the creditors, and that he would have been bound to convey the same to such uses as should have been designated, in any composition, between the bankrupts and their creditors. Beyond doubt, he acquired the right to the exclusive possession of the property in trust, for the uses described, from the date of the instrument; but it is evident that the title did not vest absolutely to his own use until the time stipulated in the agreement for that purpose.

Decided confirmation of that proposition is found in the fact that the instrument expressly stipulates that the defendant shall hold the property in trust to such uses as shall be designated, before that time, in any composition between the bankrupts and their creditors. Viewed in the light of these suggestions, it is clear that the debt of the defendant was not paid until the property conveyed vested absolutely in the defendant to his own use. Up to that time, the debt of the defendant was not discharged, and if any composition between the bankrupts and their creditors had been effected, the composition must have included the debt of the defendant. Thornhill v. Link [Case No. 13,993]; In re Kansas City, etc., Manuf'g Co. [Id. 7,610]. Tested by these considerations, it follows that the instructions given to the jury are correct. Judgment affirmed with costs.

Case No. 6,196.

HASKINS v. HARDING et al.

[2 Dill. 99.] [1]

Circuit Court, E. D. Missouri. 1873.

INSOLVENT CORPORATIONS—INDIVIDUAL LIABILITY OF STOCKHOLDERS—HOW ENFORCED—MISSOURI STATUTES CONSTRUED.

1. Under the statutes of Missouri, the remedy of a judgment creditor of an insolvent manufacturing and business corporation to enforce the personal liability of stockholders is by suit, and not by motion. 1 Wag. St. Mo. p. 336, § 13. As to certain corporations, the statute gives such a remedy by motion. Id., p. 291, § 11.

2. Under the statutes of Missouri, it is a condition of the right of a creditor of an insolvent corporation to enforce in a summary manner a liability against stockholders personally, that the creditor shall have brought suit against the corporation within one year after his debt became due. Accordingly, where the plaintiff brought suit against the corporation on the debt in the state court within the year, and took a non-suit, and within a year thereafter, but more than a year after his debt fell due, brought a new suit in the federal court and recovered judgment, it was *held* he was barred by lapse of time of the right to enforce a summary personal liability on the part of stockholders.

3. Whether the one year's limitation would apply if creditors of the corporation should bring a suit in equity to enforce against stockholders' payment of their subscriptions for their stock, quaere?

The plaintiff is a judgment creditor of the Cambridge Gas Stove and Boiler Company, and files his motion for execution against certain stockholders in that company. The motion is based on section 11, c. 62, Gen. St. Mo. (1 Wag. St. p. 291, § 11). This chapter relates to the general powers and liabilities of corporations in the state of Missouri, and

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

the eleventh section is as follows: "If any execution shall have been issued against the property or effects of a corporation, and there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount paid thereon; provided, always, that no execution shall issue against any stockholder except upon an order of the court, made upon motion in open court, after notice to the persons to be charged; and upon such motion, the court may order execution to issue accordingly." The constitution of the state contained a provision to this effect: "Article 8. Section 6.—Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon in a further sum, at least equal in amount to such stock." After the plaintiff's judgment was obtained, this provision of the constitution was amended to read as follows: "Article 8. Section 6.—Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable in any amount over and above the amount of stock owned by him or her." This amendment went into force December 12, 1870.

Plaintiff's motion sets out that on the 12th day of November, 1870, he recovered a judgment in this court against the Cambridge Gas Stove and Boiler Company; that thereon two writs of execution have been issued against the company and returned, "No property;" that the judgment remains wholly unsatisfied, and that certain persons—Harding, Pope, and others (naming them, and the amount of stock they respectively own)—were, at the time the indebtedness to the plaintiff was created, and at the time his judgment was recovered, and are at the present time, stockholders in the said company, and that none of said stockholders have paid for their stock, and are severally liable for an amount equal to the amount of stock owned, and the amount unpaid thereon. Wherefore, the plaintiff moves for an execution against the stockholders, to enforce a personal liability to him so far as necessary to satisfy his judgment. Notice of this motion having been duly served upon the stockholders, they have appeared, and resist the application on several grounds:

1. They claim that said section 11 of chapter 62 (Wag. St. 291) has no application to the class of corporations to which the said company belongs; but that their liability is specifically provided for by section 13 of chapter 69 of General Statutes (Wag. St. 336), and if so, then they further insist that such a motion as the plaintiff makes is not authorized by it, but that any liability on their part must be enforced by suit. And they also insist that the plaintiff's action against the company was not brought within the one year required by that section. This section (section 13, c. 69, relating to "Manufacturing and Business Corporations") is as follows: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this charter (and it is admitted that the said corporation was formed under this charter), which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in this company, nor until an execution shall have been returned unsatisfied in whole or in part." Wag. St. p. 336, § 13.

The facts relating to the time the plaintiff's suit was brought against the company are these: His note against it fell due June 27, 1867, and he brought suit thereon in the state court March 20, 1868, against the corporation, which defended, and on the trial the plaintiff took a nonsuit and then brought his action in this court September 18, 1869, and recovered judgment November 12, 1870.

The stockholders also insist: 2. That this court, not having, by rule, adopted the abovementioned special provisions of the state statutes as to enforcing the individual liability of stockholders, has no power to grant the motion or make the order asked for by the plaintiff. It is admitted by stipulation that the persons named in the motion are stockholders, as stated therein, and that they have only paid twelve and one-half per cent. upon the par value of the shares of stock owned by them respectively. It is also admitted that the corporation debtor was formed under the seventh article of chapter 69 of the General Statutes of 1865. Rev. St. 1865, p. 367; 1 Wag. St. 332.

Glover & Shepley, for the motion.

Chester Harding, Jr., & W. S. Pope, for stockholders.

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

DILLON, Circuit Judge. I am inclined to the opinion that a non-resident creditor of a Missouri corporation who has obtained judgment in this court is entitled to the same or similar remedies, by execution or otherwise to enforce it, that creditors have who obtain like judgments in the state courts, and that it is not indispensable or necessary, in order to give this right that there should be a rule of court adopting those portions of the state statutes which provide the manner in

which the individual liability of the stockholders shall be summarily enforced. Whatever doubt there might be upon this subject seems to be removed by the act of June 1, 1872 (17 Stat. p. 197, §§ 6, 7). But under the view we take of the case it is not necessary for the court now to give any opinion upon this question.

Admitting, then, for the purposes of this case, that the plaintiff is entitled to all the remedies and processes for enforcing payment of his judgment that he could have if he were in the state court, we are thus brought to the question whether his motion for an execution against the stockholders is well taken. It will be observed that he proceeds by motion and not by suit, and his motion is confessedly founded upon section 11 of chapter 62 of the General Statutes of Missouri (Wag. St. p. 291, § 11). This section is copied in full in the statement of the case. If the provisions of the section apply to the class of corporations to which the Cambridge Gas Stove and Boiler Company belonged—that is to say, if they apply to "manufacturing and business corporations," such as are provided for by chapter 69 of the General Statutes (Wag. St. 332), the plaintiff, it seems to me, brings his case within its requirements, and as against any objections which the stockholders have made, would appear to be entitled to the order he seeks; but does the above-mentioned section 11 of chapter 62 apply to manufacturing and business corporations organized under chapter 69? Chapter 62 relates to the general powers and liabilities of private corporations, and it is in this chapter section 11 occurs. Chapter 63 relates to railroad companies; chapter 64 to plank-road companies; chapter 65 to telegraph companies; chapter 67 to eminent domain; chapter 68 to savings banks and fund companies, and chapter 69 to manufacturing and business companies. It is admitted that the corporation debtor to plaintiff was organized under this chapter. The thirteenth section of this section of this chapter makes specific provisions in relation to the personal liability of stockholders in companies formed under that chapter. This section is as follows: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this chapter which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in such company, nor until an execution shall have been returned unsatisfied, in whole or in part." 1 Wag. St. p. 336, § 13.

General provisions (such as section 11 in chapter 62) must give way to specific provisions (such as section 13 in chapter 69) inconsistent with the more general expression of the legislative will. This is a familiar principle, and it is undeniable that, so far as there is any conflict between section 11 and section 13 above named, the latter exclusively applies to the corporations and stockholders to which it refers. And the legislature having undertaken to cover all the ground that is embraced in the more general provision, it is perhaps equally clear that section 13 of chapter 69 alone applies to all companies formed under chapter 69, of which the corporation concerned in this case is one.

This being so, has the plaintiff brought himself within the requirements of section 13? We think not. He proceeds by motion, but no such mode of procedure is authorized by this section; but, on the contrary, it contemplates and requires that the proceeding to enforce the personal liability of the stockholder shall be by "suit brought against" him as such stockholder, to be commenced within two years from the time he ceases to be a stockholder. This is apt language to describe a proceeding by suit, but not one by motion. On this ground, therefore, the plaintiff's application, which is by motion and not by suit, must be denied.

But if this should be regarded as too technical a view of the statutes, we are also of opinion that the motion, conceding it to be a proper remedy, must fail, for the more substantial reason that the plaintiff's suit against the company was not brought within one year after the debt became due on which his judgment was recovered. That suit must be brought within one year after the creditor's debt matures is expressly made one of the conditions of "personal liability for the payment of any debt contracted by any company formed under this chapter." Chapter 69.

The plaintiff's debt became due June 27, 1867, and his suit in this court was not brought until September 18, 1869—over two years after his claim matured. He had in the meantime, however, March 20, 1868, brought suit in the state court, and on the trial, December 14, 1868, taken a nonsuit, and he claims that he had a year thereafter in which to bring a new action and to preserve the personal liability of the stockholders.

The company is the principal debtor, and under the statute the personal liability of the stockholder to the creditor is collateral; the creditor must first exhaust his remedy against the corporation. McClaren v. Franciscus, 43 Mo. 452, 465.

The stock in this company is transferable; and all the different provisions of section 13 are special limitations on the duration of the personal liability of the stockholder. The debt must be one to be paid within a year, suit must be brought within a year after it falls due; and suits against stockholders who cease to be such must be brought within two years after that event.

There is no authority to import the provisions of the general statutes of limitations as to the effect of a nonsuit (2 Wag. St. p. 919, § 19) into the special limitations of section 13, in relation to the personal liability of stockholders in corporations. The general limitation statutes refer to the class of actions therein specially described in which the present proceeding is not embraced.

In view of the manifest purpose of the legislature by the special provisions limiting the duration of the personal liability of stockholders;—in view of the fact that a judgment against the corporation is essential to direct summary liability on the part of the stockholder to the creditor, we hold that the suit in which such judgment is obtained must be one which was brought within one year after the debt, in respect of which it is thus sought to make the stockholder individually responsible, fell due.

If this is a correct construction of the statute, the present motion must fail. It is argued that this limitation of one year only applies to the double liability—that is, to the personal liability for an amount equal to the stock, and not to the liability of the stockholder, as a debtor to the corporation, for his unpaid stock. Undoubtedly, under the constitutional provision then in force, the stockholder was individually liable, both for the amount of his unpaid stock, and in an additional amount equal to the amount of his stock. In section 11 of chapter 62 the execution therein provided for against the stockholder may be ordered to be issued in respect to both of these liabilities.

Without the aid of any statute, the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to enforce payment for the benefit of creditors. See Briggs v. Penniman, 8 Cow. 387; Wood v. Dummer [Case No. 17,944]; Ward v. Griswoldville Manuf'g Co., 16 Conn. 593; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Ang. & A. Corp. §§ 602, 603, et seq.; Mann v. Pentz, 3 Comst. [3 N. Y.] 415, 422; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 57; Pettibone v. McGraw, 6 Mich. 441; Spear v. Crawford, 14 Wend. 20.

The language of the 13th section of chapter 69, which, as we have above held, is the one which applies to corporations, such as the debtor corporation in this case, is, that "No stockholder shall be personally liable for the payment of any debt contracted by any company, unless suit for the collection of such debt be brought against the company within one year after the debt shall become due."

This language is certainly very broad, and extends to the personal liability of the stockholder for the payment of any debt contracted by the company. We hold, that so far, at least, as respects this summary proceeding, it bars the creditor of the right to resort to it, even in respect to unpaid subscriptions, if he has not brought his suit against the company within the year.

Whether the creditor may not have a remedy in equity against the stockholder to enforce payment for his stock, which is independent of statute provisions, and may thus escape the one year's limitation in section 13, is a question upon which we are not required to pronounce any opinion. Motion denied.

[Subsequently the plaintiff filed a bill in equity, which was dismissed. Case No. 6,196a.]

NOTE. Construction of similar statute requiring suit against the corporation to be brought within one year after debt becomes due: Fisher v. Marvin (1866) 47 Barb. 159; Tarbell v. Page (1860) 24 Ill. 46; Hovey v. Ten Broeck (1865) 3 Rob. (N. Y.) 316. See, also, Byers v. Franklin Coal Co. (1870) 106 Mass. 131.

Remedy in equity by judgment creditor, against stockholders, to compel payment of balance due on their several subscriptions to their stock: Ogilvie v. Knox Ins. Co. (1859) 22 How. [63 U. S.] 380; Adler v. Milwaukee Pat. Brick Manuf'g Co. (1860) 13 Wis. 57, and cases cited.

Remedy of assignee in bankruptcy of an insolvent corporation to enforce unpaid subscriptions to its stock: Payson v. Stoever [Case No. 10,863].

Jurisdiction of the United States circuit court in such case: Payson v. Dietz [Id. 10,861].

Effect of change of charter on the personal liability of the stockholder: Payson v. Stoever [supra]; Ashton v. Burbank [Case No. 582].

Power of corporation to forfeit stock, and effect: Ashton v. Burbank [supra].

Case No. 6,196a.

HASKINS v. HARDING et al.

[7 West. Jur. 622.]

Circuit Court, E. D. Missouri. 1873.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—LIMITATIONS.

Where by statute a special and particular remedy is provided against stockholders in favor of creditors for the debts of the corporation, the remedy thus given is exclusive of all the remedies, legal and equitable, and must be pursued. The limitation upon the remedy provided by the statute, will bar a proceeding by the creditor by bill in equity to compel the stockholder to pay up his unpaid subscription.

[This was a suit by a judgment creditor against the stockholders of a manufacturing corporation to recover the amount of their unpaid subscriptions to the stock. A motion for execution had previously been denied. Case No. 6,196. Heard on demurrer to the answer.]

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

TREAT, District Judge. The bill discloses that a corporation, of which defendants were stockholders, was a manufacturing corporation, formed under chapter 69 of Revised Statutes of Missouri. It seeks to charge said stockholders to the extent of their unpaid subscriptions to the stock, for the judgment debt recovered by the corporation in this

court, in 1870. The answer sets out that the note on which the judgment was recovered, became due June 27, 1867, and that the suit here was brought September 18, 1869. The demurrer to the answer presents two questions: one as to the general equities under the facts stated, as to the condition and acts of the plaintiff and stockholders in the organization and proceedings of the corporation and its stockholders, and the other as to the provisions of the state statute applicable to manufacturing corporations. The general proposition, as heretofore held in this case, is true, that the unpaid subscriptions to stock are in equity a trust fund for the benefit of creditors of a corporation, which equity may lay hold of. Such was the unquestionable rule, independent of statutory requirements; but when the statute creating a corporation, or under which it is organized, prescribes a specific mode of enforcing liabilities upon unpaid subscriptions, and limits the time in which suits may be brought against stockholders for debts due by the corporation, is the remedy confined or limited by the statute? It is on this point that the court has hesitated. Counsel did not aid the court by referring to, or producing any of the decisions of the many state courts wherein the point has been considered. A provision similar to that in the Missouri statute, and involving the principle to be determined, exists in several states whose courts have been requested to pass upon the proposition. In the Massachusetts Statutes there are several provisions, concerning the liabilities of officers and stockholders, under differing circumstances, with marked differences between manufacturing and other corporations. By section 30 of chapter 38 of the Massachusetts act—when stockholders of a manufacturing corporation are liable for the debts of the company—their persons or property may be taken therefor on attachment or execution issued against the company, in the same manner as on writs or executions against them for individual debts. Section 31 of said act authorizes the creditor, instead of proceeding under the preceding section, or section 29, to have his remedy by bill in equity. The act (section 16) provides that all the members of such a corporation shall be jointly and severally liable for all debts of the company until the whole amount of the capital stock shall have been paid in, and a certificate thereof made out and recorded. On those provisions the courts of that state have held "that individual liability of stockholders in manufacturing corporations was one of a particular and limited character, or to be enforced only in the mode and by the use of the particular remedy named in the statute." 4 Allen, 235. "In Gray v. Coffin, 9 Cush. 199, it is said that this individual liability is one depending upon provisions of positive law, and is to be construed strictly." In Erickson v. Nesmith, 4 Allen, 236, it is held with reference to this class of statutes that "when the statute confers a right and prescribes a remedy, that particular remedy, and that only can be pursued." The various decisions in 4 Allen, 239, 396, 577, show with what technical rigor the statutory provisions have been interpreted.

In that and other states, where, as in Missouri, summary or specified modes of proceeding against stockholders or officers of a corporation, for debts of the corporation, are prescribed by the statute, and discriminations as to the modes of proceeding are made between stockholders and officers of manufacturing and other corporations, the general doctrine, as laid down by the courts, is that the modes prescribed are exclusive of all other. It seems not in accordance with general equity principles pertaining to corporations which maintain that stockholders who have not paid up their subscriptions, shall be charged with the amount unpaid thereon for the benefit of the corporate creditors, as having practically in their hands a trust fund applicable to corporate debts. But, under chapter 69, as to manufacturing corporations, no specific mode of enforcing the creditors' rights is prescribed, and therefore a suit in equity may be proper within the limit as to the time named for bringing the same. An examination of the authorities shows that where state statutes have given the same, or more summary remedies against the stockholders, and have prescribed limitations as to the time of pursuing the remedies, the courts hold that the statutory limitations and remedies were designed to and must prevail, notwithstanding the previously existing remedies in equity; in other words, that the statutes, instead of giving new and cumulative, have presented exclusive remedies, and fixed to them positive limitations. Chapter 69 of the Missouri Revised Statutes (section 13) is in these words: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this chapter, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due," etc. By the general corporation act (chapter 92, § 11), the execution to be issued thereunder, in cases to which the same applies, is against any stockholder, "to an extent equal in amount to the stock by him or her owned, together with any amount unpaid thereon." The summary remedy therefore included unpaid subscriptions, as well as the double liability then existing; both were placed on the same footing, and subject to the same rules. If, then, the statutory modes of proceeding are exclusive of all former remedies in law and equity, and are subject to the limitations prescribed, the answer in this case is a complete defense under the statute, because the suit was not brought within the time limited.

There is another attempted defense not set

out with sufficient distinctness, viz: That the plaintiff entered into an arrangement for the formation of this company upon the basis of 12½ per cent. paid up capital, with a view of giving moneyed value to his patent, and induced these stockholders to enter upon such an arrangement for his benefit, whereby he betrayed them into heavy losses, to his great gain, and now seeks to secure further inequitable and unconscientious advantages. As that defense is not fully set forth, it is not passed upon. It is ruled on this demurrer that, as the answer shows that the manufacturing company against which judgment was had, was not sued until more than one year after the debt was due on which suit was brought and judgment had, the creditors' right of action against the stockholders is lost. Demurrer overruled.

HASKINS (UNITED STATES v.). See Case No. 15,322.

Case No. 6,197.

HASLETT et al. v. The ENTERPRISE.

[19 Int. Rev. Rec. 108.]

District Court, D. New Jersey. 1874.

ADMIRALTY—JURISDICTION—MARITIME LIENS—WORK AND MATERIALS.

1. A barge without mast, bowsprit, rudder, sails, or any other propelling power, used as a mere transport in the harbor of New York, and owned by residents of Jersey City, was brought to the latter place for repairs. The owners failing to pay for the necessary work and materials, a proceeding in rem. was instituted against the craft, at her domestic port, in which it was claimed that a maritime lien existed for the work done and materials furnished. *Held*, that since the change of the twelfth rule in admiralty (May 6, 1872), where a lien upon a vessel is given by the local law of the state, a proceeding in rem. may be used in the admiralty court, to enforce it.

2. Whether, since the abrogation of the said rule prohibiting it, such a proceeding will lie, where there is no local law recognizing the lien, quaere?

3. The said barge being a vessel engaged in a maritime service upon navigable waters, was subject to the lien.

[This was a libel in rem by Henry Haslett and Henry Foster, partners, etc., against the barge Enterprise, etc., for repairs.]

Mr. Wortendyke, for libellants.

Mr. Ransom, for claimants.

NIXON, District Judge. This is a libel filed against the barge Enterprise, etc., for necessary materials furnished and work and labor performed by the libellants in repairing the barge in her home port. The claimant intervenes as owner, acknowledges the furnishing of materials and doing repairs by libellants, but claims that the libel should be dismissed upon two grounds. (1) Because no maritime lien exists on the barge for the said materials, work and labor, the materials having been furnished and the work and labor done and performed in Jersey City, the home port where the libellants and respondent reside. (2) Because the barge is not a sea-going vessel, having no masts, bowsprit, sails, rudder, or any other propelling or directing power.

1. The present unsettled state of the law in this country as to the right of material men for a lien upon domestic ships for materials furnished and labor performed has, doubtless, arisen from the disposition of the supreme court at the outset to recognize the restrictions upon admiralty jurisdiction which grew up in England on account of the jealousy and unreasonable prejudice of the courts of the common law against the courts of admiralty.

The civil law, the general maritime law, and the particular maritime codes of the continent of Europe, do not seem to have made any distinction between foreign and domestic vessels, but have always extended the lien upon both for labor performed and materials furnished for repairs. 3 Kent, Comm. 168; Ben. Adm. §§ 271, 272. Such also was the practice of the English admiralty until the times of Charles II., when the courts of common law, continuing their interference by prohibitions to the admiralty, and impregnated with the common law notion that there could be no lien where there was no possession, decided that material men and mechanics furnishing repairs, had no particular lien upon the ship itself for the recovery of their demands; and this limitation to the jurisdiction of the English admiralty substantially continued until the adoption of the federal constitution in 1789. The constitution of the United States (article 3, § 2) declares that "the judicial power shall extend to all cases . . . . of admiralty and maritime jurisdiction." The judiciary act of 1789 [1 Stat. 73] established the district courts of the United States, and granted to them "exclusive original cognizance of all cases of admiralty and maritime jurisdiction," allotting to this court exclusive admiralty jurisdiction in the words of the constitution.

A difference of views, leading to diverse action, for some time existed in the subordinate courts of the United States and among the judges upon the question whether this jurisdiction should be exercised by the district court according to the principles and practice of courts of admiralty in commercial nations generally, or whether it was limited and interpreted by the cases of admiralty jurisdiction in England when our constitution was adopted. In De Lovio v. Boit [Case No. 3,776], Mr. Story, in an opinion indicating a profound investigation of the subject, contended for the general jurisdiction, while Chancellor Kent, in 1 Comm. 377, expressed a doubt whether the framers of the constitution intended to confer upon the admiralty court anything more than that limited jurisdiction which was settled and in practice under the English jurisprudence

when the constitution was made. To the same effect was the judgment of Mr. Justice Baldwin in Bains v. The James and Catherine [Case No. 756]. But the question has now been settled by the supreme court. In a line of decisions beginning in 1847, with a divided court, in Waring v. Clark, 5 How. [46 U. S.] 441, and ending in 1870, with an unanimous opinion, in Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 1, we have a series of judgments affirming the doctrine that the admiralty and maritime jurisdiction of the United States is not to be limited by the statutes or judicial prohibitions of England, but that it extends, as to the locus or territory not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether "land-locked or open, salt or fresh tide, or no tide;" and that as to contracts, the true criterion is their nature and subject matter, without regard to the place where they are made. The general jurisdiction of the admiralty courts of the United States being thus established it would seem to be necessary in any given case only to inquire, not where did the contract arise, in reference to the residence of the owner, but what is its nature? Does it pertain to navigation? Is it maritime as to its subject matter? And if these questions are answered in the affirmative, then it is a case of admiralty and maritime jurisdiction, and, as such, is only cognizable in the admiralty courts of the United States. The Moses Taylor, 4 Wall. [71 U. S.] 411; The Hine v. Trevor, Id. 555; The Belfast, 7 Wall. [74 U. S.] 624.

Although the supreme court has reached the result that the jurisdiction in admiralty is not to be restricted by the statutes and prohibitions that limited the English admiralty, yet, in the consideration of particular cases, it has shown an indisposition to include within the jurisdiction of the American admiralty many subjects which have always been regarded as maritime in their character by the civil law, and the recognized maritime codes of the commercial world. For instance, it was decided in People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, that the building of a ship was not a maritime contract; and that the admiralty courts of the United States had no authority to enforce a lien claimed by the builder for materials furnished and work done in its construction. The doctrine of this case was re-affirmed in Roach v. Chapman, 22 How. [63 U. S.] 129, and extended to the engine and boilers furnished to a new steamer. Mr. Justice Grier, in delivering the opinion of the court, says, "A contract for building a ship or supplying engines, timber or other materials for her construction, is clearly not a maritime contract." It is, doubtless, the duty of the subordinate courts of the United States to accept these decisions as the law of the American admiralty. They accord with the English doctrine on the subject; but are directly opposed to the maritime codes of other nations, which not only regard the building of a ship as a maritime contract, but give a lien to the builder, for work done and materials furnished. Ben. Adm. § 264. Whether they are reconcilable with what was said by the same court, in the more recent case of Insurance Co. v. Dunham, supra, to wit, (1) that the admiralty and maritime jurisdiction of the United States is not to be limited by the restrictions imposed upon the English admiralty, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdiction, in other countries, constituting the maritime commercial world as well as to that of England; and (2) that the English rule, which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon—making locality the test—is entirely inadmissible; and that the true criterion is the nature and subject matter of the contract, as whether it was a maritime contract, having reference to maritime service and maritime transactions—it must be left to that high tribunal to consider and decide.

Again, as we have before stated, the civil law and the maritime codes of these countries, which have adopted its principles, give a lien or privilege upon the vessel to the person who furnishes repairs or performs labor, upon her, whether abroad or at home. Such jurisdiction has for many years been prohibited to the English admiralty—a lien there being allowed only for repairs and necessaries, when the ship is abroad. Watkinson v. Bernadiston, 2 P. Wms. 367; Buxton v. Snee, 1 Ves. Sr. 154. The supreme court has already held that in either case the contract was maritime and therefore within the jurisdiction of the admiralty courts; but, adopting the English rule, no lien has been recognized in favor of material men and mechanics, who furnish repairs and perform labor upon the ship in her home port, unless a lien has been given by the local law. Admiralty jurisdiction existing in a large class of cases, wholly independent of the doctrine of liens, it decided in the case of The General Smith, 4 Wheat. [17 U. S.] 438, that the general maritime law, following the civil law, established a specific lien upon a foreign ship, for repairs and necessaries, which might be enforced by proceedings in rem.; but no particular lien being given upon domestic ships for like services, in such a case a suit in personam only was maintainable, unless it appeared that the municipal law of the state where the ship belonged and the services were rendered, gave or recognized a lien.

Perhaps no decision of a case in any court, has awakened more comment and criticism, than the case of The General Smith [supra.] It was an effort to compromise the long standing feud, and contest for jurisdiction, between the common law and admiralty courts, and, like most attempts of the sort,

was distasteful to the advocates on both sides. It was first fiercely attacked, eight years after the decision, by Mr. Justice Johnson, in Ramsey v. Allegre, 12 Wheat. [25 U. S.] 614, because it departed from the English doctrine, in recognizing general admiralty jurisdiction over the contracts of domestic material men for repairs and supplies, and allowed suits in personam, in admiralty, to enforce such contracts. On the other hand, its soundness has been seriously questioned by elementary writers upon admiralty jurisdiction and practice, and by judges, who hold to the more extended jurisdiction of the admiralty courts and repudiate the English doctrine, that no implied lien or preference exists in such cases; and who are not able to understand how the court could consistently hold such contracts to be maritime, and yet deny to the libellant the right to proceed in rem for the recovery of his debt. Ben. Adm. § 272; 5 Am. Law Rev. 604; Francis v. The Harrison [Case No. 5,038.] But the question again came before the court in 1833, in the case of The Planter, 7 Pet. [32 U. S.] 324, on an appeal from the district court of the United States, for the Eastern district of Louisiana [Case No. 11,207]. It was a libel filed against a steamer in her home port, for work done and materials found in her repairs. The libel asserted, that by the admiralty law and the laws of the state of Louisiana, workmen employed in the construction or repairs of a ship or boat, had the privilege of a lien thereon, for the payment of sums due for repairs or materials. The answer of the owners averred, that they were citizens of Louisiana, residing at New Orleans; that the libellants were also citizens, and that the court had no jurisdiction over the case. It was held, on the appeal, that the service performed was a maritime service, and the case was one of admiralty jurisdiction; that the state law gave a lien, which could be enforced in the admiralty by a proceeding in rem; and The General Smith, supra, was quoted and relied upon, as exhibiting the correct principle which governed the case. And subsequently, in 1837, in The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, Mr. Justice Story, in delivering the opinion of the court, made reference to the foregoing case of The Planter, in order to correct a misapprehension which seemed to exist respecting its scope and purport, and incidentally reaffirmed the general doctrine of the case. He said that that decision authorized the conclusion that courts of admiralty could only enforce these liens of the local or state law which were given upon maritime contracts; that in The Planter the contract was treated as a maritime contract; and the lien, under the state laws, was enforced in the admiralty, upon the ground that the court, under such circumstances, has jurisdiction of the contract as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies where the jurisdiction is vested by the laws of the United States.

This review of the state of the law in regard to admiralty jurisdiction to this period of time brings us to the consideration of the famous twelfth rule in admiralty, which is supposed to have exerted a large influence upon subsequent adjudications. The sixth section of the act, further supplementary to the Judiciary Act, approved August 23, 1842, (5 Stat. 518), authorizing, inter alia, the supreme court, "from time to time, to prescribe and regulate and alter the forms of writs and other process, to be used and issued in the district or circuit courts of the United States"—that court in 1844 promulgated certain rules for the regulation and government of the practice of said courts, on the instance side, in suits in admiralty, the twelfth rule of which was as follows: "In all suits by material men for supplies or repairs, or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem., or against the master or the owner alone, in personam. And the like proceeding in rem. shall apply to cases of domestic ships where, by the local law, a lien is given to material men for supplies, repairs, or other necessaries." This rule was doubtless prepared under the foregoing authority to make the process and modes of proceeding in admiralty cases to harmonize with the admiralty jurisdiction of the courts, as the supreme court had determined it. It authorized material men to proceed in rem. against the ship and freight for supplies and repairs to a foreign ship or a ship in a foreign port; and it applied a like proceeding in rem. to cases of domestic ships where the material men had a lien by the local law. The inference to be drawn from the rule undoubtedly is, that there was no lien for materials, repairs, or supplies on a ship in her home port, unless the same existed by the force and operation of the local law. The rule remained unaltered until 1858, and Ch. J. Taney, in The St. Lawrence, 1 Black [66 U. S.] 530, gives the reason for its original adoption, and for its subsequent change. He says it was adopted as a rule of practice to enforce a state lien in the admiralty courts by the ordinary admiralty process; that the state lien, however, was enforced not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purposes of justice, when it did not involve controversies beyond the limits of admiralty jurisdiction. It was altered because, in many of the states, the laws were found not to harmonize with

the principles and rules of the maritime code; that certain conditions and forms of proceeding were usually required to obtain the lien, which differed in different states; and that, if the process in rem. were used wherever the local laws gave the lien, it subjected the admiralty court to the necessity of examining and expounding the varying lien laws of every state, and of carrying them into execution, which was found to be inconvenient, impracticable, and troublesome.

The rule as amended, and which was to take effect from May 1, 1859, read as follows: "In all suits by material men for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem., or against the master or owner alone in personam. And the like proceeding in personam, but not in rem., shall apply to cases of domestic ships for supplies, repairs, or other necessaries." The change is in the last clause, and consists in expressly applying the proceeding in personam to all cases of domestic ships for supplies or other necessaries, and of expressly denying the proceeding in rem. in like cases, although a lien should be given by the state or local law. When this change was made there was a sentiment prevailing that the grant to the United States, in the constitution, of judicial power in all cases of admiralty and maritime jurisdiction, was not an exclusive grant, but that the states had a concurrent jurisdiction, except when its exercise by them came into conflict with the national legislation on the subject. But since then the cases of The Moses Taylor, The Hine v. Trevor, and The Belfast [supra] have established a different principle, and it seems now the settled doctrine that maritime liens can be enforced by proceeding in rem. only in the district courts of the United States, and that no jurisdiction over them exists in the state courts.

It then became apparent that the twelfth rule, as amended, prohibiting the use of the process in rem. to enforce a maritime lien, in the courts of the United States, was equivalent to denying such a process in every court; and that no matter how clearly the right existed, there was no remedy anywhere for its enforcement. The result was another amendment, or rather the repeal of the rule, and the substitution of the following, in its stead, on the 6th of May, 1872. Admiralty rule 12: "In all suits by material men for supplies or repairs or other necessaries the libellant may proceed against the ship and freight in rem., or against the master or owner alone, in personam." It will be perceived that the new rule differs from the former rules in two important particulars. It does not distinguish between foreign and domestic vessels, like the preceding amendment, but embraces both in a single class. It makes no mention of a lien given by the local law, as the first rule did, but seems to assume, although it does not assert, that a lien exists in favor of material men by virtue of the general maritime law. See 7 Am. Law Rev. 19. How does this change of the rule affect the whole subject? Does it mean that the court is now prepared to retrace its steps on the question of materials furnished, and repairs made to domestic vessels and hereafter to give a lien, and consequently, the process in rem., for the collection of these claims? Or does it intend to restore the rule of 1844, in regard to liens created by the local law and apply the proceeding in rem. to domestic ships, in such cases, and to still withhold that remedy for the enforcement of such maritime contracts, in the absence of a local law, giving a lien? Without any exposition of the view of the court, in making the alteration, we are left wholly to conjecture for its motive and intent. We are strongly inclined to hold, that so long as the supreme court adheres to the doctrine that repairs or supplies to a vessel, engaged in maritime commerce, is a maritime contract, cognizable exclusively in the admiralty—the legal consequence of the recent change of the twelfth rule, is to authorize a proceeding in rem., to enforce such a contract, without any limitation upon the right, because the vessel happens to be in her home port, or is engaged in a strictly internal commerce when the service is rendered. But as jurisdiction in the present case can be sustained upon another ground, which is within the authority of the case of The General Smith [supra], and which ought to be accepted as the law in this court until it is overruled by the tribunal that made the decision, we prefer to hold, that by virtue of the first section of the act of the legislature of the state of New Jersey entitled, "An act for the collection of demands against ships, steamboats, and other vessels," approved March 20, 1857 (Nix. Dig. 570), a local lien is given to the libellant for the work done and materials furnished to the vessel attached, and which is enforceable in this court by the proceeding in rem.

2. The second objection to the jurisdiction has reference to the character of the vessel. The libel is filed against the barge Enterprise. The answer of the claimant admits that the barge is of the burthen of about seventy-five tons: and that "she is a boat used by the respondent for being towed about the harbor of New York to transport coal, lumber, or other materials from one point to another in the city of Jersey City and the city of New York;" and the allegation is, that the matters set forth in the libel are not within the admiralty and maritime jurisdiction of the United States, or of this court, because "the said barge is not a sea-going vessel, having no masts, bowsprit, sails, rudder, or any other propelling or directing power." The jurisdiction in the case does not depend upon the question whether the barge was a sea-going ship, with the power of self-propulsion,

and having the spars, tackle, apparel, and furniture deemed necessary for her complete equipment, but whether she was a vessel engaged in a maritime service upon navigable waters. The act of the legislature of New Jersey, which gives the lien in the case was passed to aid in the collection of demands against ships, steamboats, or other vessels. It is admitted that there is no authority in the state legislature to enlarge or regulate the jurisdiction of the admiralty courts; and although the local law establishes the lien, there is no jurisdiction to enforce it here, except in a maritime contract for a maritime service. But it is admitted by the respondent, that we have here a vessel, navigating the waters of New York Bay, and engaged in transporting coal, lumber, and other materials, from point to point, in the cities of New York and Jersey City. This is essentially a maritime service. Her repairs was a maritime contract, and jurisdiction is not to be refused, because the vessel is not a ship, with a self-directing power, and fully equipped for the navigation of the seas. The remark of Ch. J. Marshall, in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 220, in reference to the laws of congress for the regulation of commerce, seems applicable here. To the objection that steamboats were not to be included within the privileges conferred upon vessels by a license, he said: "These laws do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water. * * * Every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery." Confusion on this point has, doubtless, arisen from the fact, that some of the district and circuit courts have held that canal boats, navigating the canals of the states, are not within the jurisdiction of the admiralty. But it must be observed that these decisions rested upon the doctrine of the supreme court, as announced in The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, that the admiralty jurisdiction of the United States depended upon and was limited to the ebb and flow of the tide. That doctrine was overruled in The Genesee Chief, 12 How. [53 U. S.] 443, and, in all subsequent cases, navigability, not tide, has been considered the true test of admiralty and maritime jurisdiction. As an indication of the progress and growth on this subject, in the mind of a single judge, it may be remarked that the late Justice Nelson, in The Ann Arbor [Case No. 408], after deciding the case upon its merits, added an obiter dictum, that he was inclined to think, that a canal boat, exclusively adapted to canal navigation, was not a ship or vessel, upon the North river, or other navigable waters, within the admiralty jurisdiction, subject to maritime liens in the admiralty, for breaches of contract for affreightment. Ten years afterwards, the same great judge, in delivering the opinion of the supreme court in The Eagle, 8 Wall. [75 U. S.] 21, not only adopted and extended the principle of The Genesee Chief, but quoted with approbation the ruling of Dr. Lushington in the case of The Diana (1 Lush. 539), that the admiralty jurisdiction of England extended to a collision on the Great Holland canal. Since navigability has been accepted as the limit of the admiralty jurisdiction, rather than the ebb and flow of the tide, is it going too far to say, that a canal boat, navigating the waters of the Delaware and Raritan canal, is as much within the jurisdiction of the admiralty, as the white-winged ship, "that most perfect and wonderful production of human art," which circumnavigates the globe, and exchanges the products of all climes?

Mr. Benedict, in the last edition of his learned work on the American Admiralty (section 217), observes, that "questions have sometimes arisen, how far size, capacity, purpose and mode of propulsion, must enter into the definition of a ship or vessel, under the maritime law, and cases are found in the books, in which ships or vessels are denied that character, because their size was small, compared with the more capacious constructions of modern times, and because they were employed in the humble occupations of agricultural or agrestic commerce. But to those structures can hardly be denied the character of ships and vessels, which, in every particular, are superior to the ships and vessels of those countries, and periods, in which the great codes of maritime law were promulgated and enforced: nor can it make any difference, whether the vessel is propelled by the wind, the tide, or paddles: by steam, by animals, or by the human arm, or towed by another vessel;" and in section 218, that "a scow, a lighter, a ferry boat and probably a raft or timber ship, under certain circumstances, would be held to be a ship or vessel, and subject to the same maritime law as other vessels. It is not the form, the construction, the rig, the equipment or the means of propulsion, that establishes the jurisdiction, but the purpose and business of the craft, as an instrument of naval transportation." Accepting this as a correct statement of the law, at the present time, it must be held, that the admiralty jurisdiction of the court extends to the barge in controversy, and it is ordered accordingly.

Case No. 6,198.

HASSELL v. BASKET et al.

[8 Biss. 303; 7 Cent. Law J. 308; 11 Chi. Leg. News, 58; 18 Alb. Law J. 323; 3 Civ. Law Bul. 919.] [1]

Circuit Court, D. Indiana. Oct., 1878.[2]

DONATIO CAUSA MORTIS—DELIVERY—TITLE—CERTIFICATE OF DEPOSIT—INDORSEMENT.

1. Donatio causa mortis must be of personal property or choses in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder, or other impending peril, and from which death must ensue without any complete intermission.

2. The gift must vest in the donee a present title, though it is defeasible until the death of the donor.

3. The deceased, the donor, indorsed a certificate of deposit to the defendant, but the indorsement was of such a character as to absolutely prohibit the latter from claiming any present title to the money, or any right to demand payment until after the death of the donor: *Held*, not to be a donatio causa mortis.

[See note at end of case.]

This was a bill in chancery brought by Milas J. Hassell as administrator of Hillery M. Chaney, deceased, to recover from the defendant, Martin Basket, possession of a certificate of deposit, which had belonged to Chaney before his decease, and which the defendant claimed as donatio causa mortis.

A. & J. E. Iglehart and T. T. Foreman, for complainant.

Shackelford & Richardson, Denby & Kumler, Jonathan W. Gordon, and J. J. Turner, for defendants.

GRESHAM, District Judge. The bill in this case alleges that Hillery M. Chaney, a citizen of Sumner county, Tennessee, on the 8th day of September, 1875, deposited in the Evansville National Bank, at Evansville, Indiana, $23,514.70, taking a certificate of deposit therefor; that in January, 1876, said Chaney suddenly died, and the plaintiff was appointed his administrator; that the defendant, Martin Basket, who was a nephew of Chaney, by a fraudulent combination with one Bryan, whose wife was a niece of Chaney, obtained possession of the certificate of deposit and refused to surrender the same on demand; that no consideration of any kind passed from the defendant Basket to Chaney for the certificate; that Basket claimed to hold the same by gift from Chaney, but that at the time of such alleged gift, and for a long time previously, Chaney was of unsound mind.

The National Bank, its president and cashier, and Messrs. Shackelford and Richardson, who as the counsel for the defendant Basket, have possession of the certificate, are made defendants.

The defendant, Basket, by his answer admits the possession of the certificate, and alleges that Chaney, sixty days before his death, then being in full possession of all his mental faculties, but in apprehension of death from a disorder with which he was then suffering, with his own hand wrote and signed the following indorsement on the certificate: "Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain; I may live through this spell, then I will attend to it myself. H. M. Chaney;" and delivered the paper so indorsed to the defendant, Basket; that Chaney died of the disorder, and the certificate remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as his brother and sisters, at his option.

The bank and its officers answered, asking the protection of the court in the payment of the money. Basket filed a cross bill, setting up the gift as in his answer, and the plaintiff answered, traversing the material allegations. General replications were filed to all the answers.

For several years before his death Chaney had been in failing health, complaining of dyspepsia, and physicians had treated him for that disease. During the sixty days that elapsed between the delivery of the indorsed certificate to Basket, and Chaney's death, in January, 1876, he was generally up and about his premises looking after his business, as he had done for months previously. It appeared from a post mortem examination that he had also suffered from consumption. The testimony conclusively shows that at the time the certificate was delivered to Basket, Chaney was not in extremis, and that he did not act in apprehension of immediate death. On this point there was no serious controversy. Chaney's domicile being in the state of Tennessee at the time of his death, the laws of that state determine the succession to his personal property.

In construing the statutes of Tennessee, relating to wills, the supreme court of that state has held that nuncupative wills must be made in extremis. Hatcher v. Millard, 2 Cold. 30; Gwin v. Wright, 8 Humph. 639. Section 2165 of the Tennessee Code, declares that no nuncupative will is good unless proved by two disinterested witnesses, present at the making thereof, who were specially requested by the testator to bear witness to it. The indorsement on the certificate has never been probated as a testamentary instrument according to the laws of Tennessee. It follows that the defendant, Basket, cannot claim the money as a testamentary gift.

The plaintiff, as administrator, is, therefore, entitled to the fund in controversy, unless it belongs to Basket, as a gift causa mortis. It would seem that the courts and law-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 18 Alb. Law J. 323, contains only a partial report.]

[2] [Affirmed in 107 U. S. 602, 2 Sup. Ct. 415.]

writers have not always been clear in speaking of gifts of this kind.

In 2 Kent, Comm. *p. 444, we find the following: "Such gifts are conditional, like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death; and, with reference to their effect after his death, they are good, notwithstanding a previous will, and if he recovers, the gift becomes void."

In Story, Eq. Jur. § 606, the gift is thus defined: "It is, properly, a gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect, there must be a delivery of it by the donor; and it is subject to be defeated, by his subsequent personal revocation, or by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime; and, therefore in no sense is it a testamentary act."

Williams, in his treatise on the Law of Executors and Administrators, in speaking of this kind of gift (volume 1, p. 771), says: "First—The gift must be with a view to the donor's death. Second—It must be conditioned to take effect only on the death of the donor by his existing disorder. * * * Third—There must be a delivery of the subject of the donation."

In Nicholas v. Adams, 2 Whart. 17, the opinion of the court was delivered by Chief Justice Gibson, who says: "Donatio causa mortis is something spoken of as being distinct from a gift inter vivos, the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me; as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril. The gift is consequently inter vivos."

Gifts causa mortis must be of personal property or choses in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from such existing disorder or other impending peril without any complete intermission.

But without further effort to define such gifts, it is sufficient to say that they are not good and are never upheld without certain essential requisites, one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the subject matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual. Such gifts afford tempting opportunities for fraud, and therefore the Roman law required them to be executed in the presence of five witnesses. And inasmuch as delivery lessens the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that choses in action, whether negotiable or not, may be the subjects of gifts causa mortis. Brunson v. Brunson, Meigs, 630; Brown v. Moore, 3 Head, 671; Meach v. Meach, 24 Vt. 591; Hanson v. Millett, 55 Me. 184; Cutting v. Gilman, 41 N. H. 147.

The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate, as indorsed, he had no right to demand the money from the bank. If on his demand the bank had paid the money, such payment would not have protected it against another demand by the donor. The indorsement was not of such a character as to enable Basket to reduce the money to his possession. He could not by virtue of the indorsement have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is, "If I die in my present illness, it is my intention that the money evidenced by this certificate of deposit shall belong to Martin Basket. When I thus die, and not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it.

But it is said that the subject of a gift causa mortis vests in the donee only at the death of the donor, and that therefore the conditions expressed in the assignment would have been implied, if the certificates had been delivered, with a blank indorsement, or no indorsement at all. It must be conceded that some of the authorities seem to support this view.

A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is of the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament, and a gift causa mortis. The indorsement was testamentary in character, and if it had been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will.

There is a wide difference between a legacy and a gift. Both possession and title

must pass to the donee to constitute a gift. This applies as well to gifts causa mortis as to gifts inter vivos. The title must pass inter vivos, or it never can pass, but will go to the donor's legal representative. In a gift inter vivos, the donor reserves no right of revocation; in a gift causa mortis he does. The donee of a gift causa mortis holds the thing given, not as bailee of the donor, but as present owner on the condition attached to such gifts. A gift causa mortis vests in the donee a present but inchoate, or defeasible title until the happening of the event necessary to render it absolute, and therein it differs from gifts testamentary and gifts inter vivos. This question is discussed in Gass v. Simpson, 4 Cold. 294. "The property," say the court, "must pass at the time, and not be intended to pass at the giver's death. * * * Upon the happening of the event upon which the gift is dependent, the title of the donee becomes by relation complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently the gift is inter vivos." See, also, Duncan v. Duncan, 5 Litt. [Ky.] 12.

In Parish v. Stone, 14 Pick. 198, the transfer of choses in action as gifts causa mortis is discussed. "These cases," said Chief Justice Shaw, in delivering the opinion of the court, "all go on the assumption that a bond, note, or other security, is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession."

In the case at bar, the certificate was delivered, as the language of the indorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor.

The donor lived in Nicholas county, Kentucy, the place of his birth, until 1871, when he was sixty years old. He was married to Miss —— Hanby in 1832, with whom he lived thirty-six years, and by whom he had seven children; one son and four daughters grew up, married and settled near their parents. During these thirty-six years, by industry, economy and good judgment, an estate worth some $50,000, was accumulated. The evidence shows that the donor was an eccentric man, and his widow testified that he was always a hard man to get along with. In 1868 he seems to have become fascinated with a woman named Nancy Hyatt, with whom he established immoral relations, which fact became known to the public and his family. The wronged wife's remonstrances and entreaties were of no avail in winning back to his family the faithless and unfeeling husband and father. Not content with the injustice already inflicted upon his family, he showed himself utterly insensible to every sentiment of affection and honor by publicly attacking the chastity of his wife and denying the paternity of all but one of his children.

It is not pretended that there was the slightest foundation for this monstrous slander, and naturally enough a separation ensued, when the property was divided by agreement, the wife and children getting the home farm worth about $8,000. Previous to this strange infatuation with the Hyatt woman, the donor had the respect and esteem of his neighbors, and previous to that time the evidence fails to show that he was not attached to his family. Shortly after the separation, and the division of the property we find him and Nancy Hyatt in Hancock county, Indiana, where, after a residence of only four months, by a fraud on the jurisdiction of the court, he succeeded in having a decree of divorce entered in his favor, and straightway he and the Hyatt woman went through the formality of a marriage. Immediately after this, he and his pretended wife removed to Sumner county, Tennessee, and settled upon a farm, where they separated after having lived together two years.

The money on deposit, it is claimed, was given to the defendant, Basket, a nephew, when no one was present but the alleged donor and donee, and the remainder of the donor's estate all went to other collateral relations. In such a contest, it must not be thought strange if the donee is held to the strictest proof of his title. The outraged wife and children who had a natural claim upon the donor's bounty, will not appeal to a court of equity in vain, unless their adversary has established his right to the money in dispute, by the most convincing testimony.

The allegation of mental unsoundness is not sustained by the evidence—it would be well for the memory of the donor if it were. These views render it unnecessary to consider other questions which were argued with ability by counsel on both sides. Decree that the certificate of deposit be delivered to the complainant, and that the money evidenced by it be paid to him.

[NOTE. An appeal was then taken by the defendant to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Matthews, who said that the indorsement was invalid, as it did not divest the donor of all present control, and enable the donee to reduce the fund into possession at once. 107 U. S. 602, 2 Sup. Ct. 415.

[The defendant then made a motion for a rehearing on the ground that the indorsement and delivery of the certificate of deposit, if void as a donatio mortis causa, was nevertheless good as a will of personalty under the laws of Tennessee, and, passing the title as such, entitled the appellant to a decree of payment. The petition was denied in an opinion by Mr. Justice Matthews, who said that, even if good as a testamentary disposition, the fund would nevertheless pass first to the administrator. 108 U. S. 267, 2 Sup. Ct. 634.]

Case No. 6,199.

In re HASTINGS.

[4 Am. Law Rev. 173.]

Circuit Court, D. California. 1869.

CONTEMPT — ACCUSATIONS AGAINST THE COURT — NAME OF PROCTOR STRICKEN FROM THE ROLLS.

[Name of proctor stricken from the rolls of the court for contempt in filing a notice of motion to set aside a decree on the ground that the same was rendered without any consideration or deliberation, without examination of the pleadings, proofs or written arguments, and was the result "of either prejudice or corruption," and in "willful violation of a known duty."]

W. Hastings, proctor in admiralty, brought a suit in the United States district court against the ship Gentoo, claiming damages for alleged ill treatment. The case was tried before Judge Hoffman, who delivered an opinion, and entered a decree dismissing the libel. An appeal was taken by Mr. Hastings to the circuit court, and the decree of the district court was affirmed by Judge Field. Under these circumstances, Mr. Hastings gave a notice of a motion to be made before Judge Hoffman, the result of which was the following order:—

HOFFMAN, District Judge. A rule having been heretofore entered requiring Mr. Hastings, a proctor of this court, to show cause on this day why he should not be stricken from the rolls of the court, or otherwise proceeded against as for contempt; and the said Hastings being here present in court, and being called upon to answer said rule, admitted and avowed that he filed with the clerk a certain paper purporting to be a notice of motion, which paper is as follows:—

"In the Circuit Court of the United States for the District of California.—Sigmund Austin et al., Libellants and Appellants, v. The Gentoo (L. Freeman, Claimant), Appellee.—In Admiralty. You will please to take notice that as soon as appellants can obtain an impartial hearing I will move the court to set aside the decree made by the circuit court in the above-entitled cause, and grant a hearing thereof, on the following grounds; namely: First. That the decision is clearly against evidence. Second. That the decision is clearly against law. Third. That the decision was made without examination of the pleadings, proofs, further proofs, or written arguments in said cause, or the questions of law raised and submitted therein for consideration and adjudication, and without due or any consideration or deliberation. Fourth. That said decision is the result of either prejudice or corruption, and made in wilful violation of a known duty. And you will further take notice, that on the hearing of said motion the pleadings, proofs, and further proofs adduced in said cause and the opinion of the court below, the brief or written argument submitted by appellee, and the brief or written argument submitted by appellants, will be read and referred to on the hearing of said motion and affidavits to be filed.

"W. W. Hastings, Proctor for Appellants.

"June 23d, 1869.

"To Messrs. Casserly & Barnes, Esqrs., Proctors for Appellee."

And the said W. Hastings having also admitted that he had served a copy of same on W. H. L. Barnes, proctor and advocate of this court, and thereupon having asked the court twenty days' time to prepare his defence and to make good and substantiate the charges and statements contained in said notice, which was by the court refused, and it appearing from the files of this court, and also by the confession of the said Hastings, that he had filed and served the paper hereinbefore set forth—it is therefore adjudged by the court that the said W. Hastings is guilty of a contempt of this court; and it is ordered that the name of the said W. Hastings be stricken from the roll of attorneys, counsellors, solicitors, proctors, and advocates of this court, and this judgment and order be entered on the minutes.

HASTINGS (GOULD v.). See Case No. 5,639.

Case No. 6,200.

HASTINGS et al. v. GRANBERRY et al.

[3 Cranch, C. C. 319.] [1]

Circuit Court, District of Columbia. May Term, 1828.

STATUTES — MARYLAND ACT OF DESCENTS — NON-RESIDENT INFANTS — DECREES.

1. This court, at Washington, cannot decree the sale of the lands of an intestate, if any of the heirs are non-resident infants.

2. Quaere, whether this court, as a court of chancery, can decree partition or sale of the real estate of an intestate, under the Maryland act of descents (Acts 1786, c. 45, § 8)?

3. A decree must be according to the allegata as well as probata.

This was a bill in chancery, filed May 19, 1825, by the widow and adult heirs of John Granberry, against his infant heirs; stating that John Granberry, of Norfolk, died seized of lots 2, 3, 4, and 5, in square 249, in the city of Washington, and praying that the lots may be divided among the complainants, if divisible without loss, &c., and, if not so divisible, that they may be sold, and the proceeds divided among the complainants, &c., and that a commission may issue "to five discreet, sensible men," to inquire whether the estate may be divided without loss, &c., to ascertain the value, and to divide the same if divisible, &c., and, if not, to report, &c., "agreeably to the act of assembly in such case made and provided." And as the said minors reside out of the jurisdiction of this court, the complainants or petitioners

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

pray that a guardian may be appointed, to appear and answer; or that a commission may issue to three persons, to appoint a guardian, &c., and for further relief. And the widow, Susanna Granberry, states that she is the mother and natural guardian of the defendants; that her husband left no other means for the support of the children; and prays that she may receive their share, to be applied to their support. The bill does not state that John Granberry died seized of an estate of inheritance, nor does the widow ask that her dower may be assigned. On the same day a commission was issued to appoint a guardian, and to take the answers of the infants, which was done and returned, July 8, 1825. By their answer they assent to the prayer of the bill. On the 12th of April, 1826, a commission was issued to five persons, to make partition, &c., if, &c., (having due regard to the widow's dower,) and if not, &c., to report, &c., and the value, &c., "according to the act of assembly in such case made and provided." On the 26th of April, 1826, the commissioners gave notice to the complainants that they should proceed to execute the commission on the 10th May, 1826; on which day they reported that the land could not be divided without loss, &c., and gave their reasons, and valued the land at $480, and laid off the widow's dower, and assigned her lot 5, during her life. On the 13th of January, 1827, the court ratified and confirmed the report; the widow filed her assent in writing that the land should be sold free of her dower, upon receiving a compensation. The heirs, who were of full age, refused to take the land at the valuation, and it was sold by the commissioners, and the court allowed her one ninth of the purchase-money in lieu of her dower.

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

CRANCH, Chief Judge (after stating the case as above). The court is now moved to ratify the sale; and, as non-resident infants are concerned, it is proper that the court should be well ascertained of its authority to sell their interest in the land, so that they may not be unjustly deprived of their estate, and that the purchasers under the decree of this court, or under the authority of the commissioners, may be safe. The first question is, whether, under the eighth section of the act of descents of Maryland (Acts 1786, c. 45, § 8), a sale can be made of the interest of a non-resident infant in lands lying in this county, which descended to the infant? The words of that section are general, namely:—"In case the parties entitled to the intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, the court of the county where the estate lies shall issue a commission, to ascertain whether the estate can be divided without loss, and to ascertain the value, and to make partition if it can be done without loss; or to sell it if it cannot be so divided, and if none of the heirs will take it at the appraisement." The sale is to be made under the direction of the commissioners, and the purchase-money to be justly divided among those entitled thereto; but by the act of 1797 (chapter 114, § 6) the sale is not valid until ratified by the court.

There is nothing in the act of 1786 which excepts the interests of non-resident infants from its operation. The proceeding is in rem; the land is to be divided or sold. It is, therefore, no objection to say that the court has no jurisdiction over the person of the non-resident infant, unless the non-residence of the infant should take away the power which is given to the court by the latter part of the eighth section, where the expression is also general, that "if any minor shall be interested, who hath not a guardian, the court from which the commission issued shall appoint a guardian for the purpose." Yet the fifth section of the act of 1797 (chapter 114) says:—"And whereas it is doubtful whether or not there is any method of proceeding whereby a person holding land, jointly or in common with an infant residing out of the state, may obtain partition of the said land, be it enacted that, on a bill filed for the purpose of obtaining partition of land, held jointly or in common with an infant residing out of the state, the chancellor, on the complainant's motion, may direct a commission to issue to three persons, such as he shall approve, authorizing them, or any two of them, to go to the infant and appoint a guardian, for the purpose of answering and defending the suit. And authorizing them, likewise, to take the answer and return it to the court; and, on receiving such answer, there may be the same proceedings as if the defendant had been regularly summoned, and had been heard by guardian appointed by the court." The doubt, thus expressed, is only as to the power to make partition; yet it must have been equally doubtful whether there was a power to make sale of the land of a non-resident infant; for the power to make partition under the act of 1786 is co-extensive with the power to make sale, and any doubt as to one, must have extended to the other.

Perhaps it may be said that the twelfth section of the act of 1785 (chapter 72) gives the chancellor the power to decree a sale of the lands of a non-resident infant. The words are, "That in case any infant, idiot, or person non compos mentis, hath, or shall hereafter have, a joint interest, or interest in common, with any other person or persons," "in any lands" &c. "and it shall appear to the chancellor, upon application of any of the parties concerned, and upon appearance of the infant," &c. "as aforesaid, and hearing and examination of all the circumstances, that it will be for the interest and advantage, both of the infant," &c. "and of the other person or persons concerned, to sell such lands," &c. "or any part thereof, the chancel-

lor may order, and direct such lands," &c. "to be sold," &c. The expression here also is general, "any infant," which comprehends non-resident infants. But the expression is equally general in the eighth section of the act of 1794 (chapter 60), "That in case any infant," &c. "hath, or shall hereafter have a joint interest, or interest in common, with any other person or persons," "in any lands," &c. and it shall appear "to the chancellor upon application of any of the parties concerned, and upon the appearance of the infant by guardian to be appointed by the chancellor for that purpose, and for the purpose of answering and defending on the part of such infant," &c. "and upon hearing and examining all circumstances, that it will be for the interest and advantage of all persons concerned, to make partition of such lands," &c. "the chancellor may order and decree partition," "in the same manner, and under the same regulations as if all parties were of full age;" yet the act of 1797 (chapter 114, § 5), shows that such doubts were entertained of the power of the chancellor to decree partition of the land of a non-resident infant, as to induce the legislature to pass a law to remove them. Here, again, the power to make partition was co-extensive with the power to make sale, and the doubt as to the former was equally applicable to the latter. The legislature removed the doubt as to partition, but not as to sale; so that it now remains quite as "doubtful whether or not there is any method of proceeding whereby a person holding land jointly or in common with," a non-resident infant, may obtain a sale of the land, as it did in 1797, whether he could obtain partition.

Perhaps it may be said that this doubt has been removed by the act of 1799 (chapter 79, § 4), by which it is enacted, "That if any bill in chancery hath been or shall be filed against an infant out of the state, there shall, at the chancellor's discretion, be the same proceedings, and the chancellor may decree as if the infant were of full age." But if the infant defendant and all the other parties were of full age, the chancellor would have no power to decree a sale of the land against the will of either of the parties. He could only decree partition. The doubt expressed in the act of 1797 (chapter 114, § 5), was probably the doubt of the chancellor himself, who had well considered the act of 1786 (chapter 45, § 8), as well as the several acts enlarging his powers as chancellor, and his general jurisdiction in equity. It may, therefore, be considered a reasonable doubt, and I do not think that a court of law or of equity should order the sale of an infant's real esate, upon doubtful authority.

There are also other objections to the ratification of the sale. The bill is of a doubtful character. It is addressed to the court, as a court of chancery, yet it seeks relief under the act of 1786 (chapter 45, § 8), which gives relief in a court of law only, unless the land lies in two or more counties, which is not the case here. It does not aver that John Granberry died seized of an estate of inheritance; so that it does not appear that the complainants have any interest in the land. It seeks to have the land divided among the complainants, to the exclusion of the infants. The widow, (although one of the complainants,) does not ask for dower, nor aver that she is entitled to it. It is a general principle that the decree for a plaintiff must be according to the allegata, as well as the probata, and be consistent with the prayer of the bill. For these reasons, I think, the sale ought not to be ratified.

Case No. 6,201.

HASTINGS et al. v. SPENSER et al.

[1 Curt. 504.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1853.

ASSIGNMENT FOR BENEFIT OF CREDITORS — ASSIGNEE'S AND COUNSEL FEES NOT ALLOWED WHEN FRAUDULENT—LAW OF RHODE ISLAND.

Where an assignment, made by an insolvent debtor, was held voidable, as actually fraudulent as against creditors, and the assignee either had knowledge of the extraneous facts which rendered the assignment voidable by creditors or the means of knowing them, and was put upon inquiry, it was held, that he had no lien as against an attaching creditor, upon proceeds of the property assigned, for his services in partially executing the trusts, or for retainers paid to counsel.

[Cited in Re Cohn, Case No. 2,966; Re Kurth, Id. 7,948.]

[Cited in Therasson v. Hickok, 37 Vt. 456; Clark v. Sawyer, 151 Mass. 66, 23 N. E. 726.]

[This was an action at law by George Hastings and others against Gideon L. Spenser and others.]

CURTIS, Circuit Justice. This is an action founded on the statute law of Rhode Island (Digest 118, §§ 21–24), against the defendants, as the garnishees of Horton & Brother, against whom the plaintiffs recovered a judgment at law in this court, at the June term, 1851. The questions raised in this case depend upon the facts stated in the answers of the garnishees, which are, in substance, that an assignment of a large stock of merchandise and other property, was made to them by Horton & Brother in trust for creditors, which assignment was decreed by this court to be invalid as against the plaintiffs, and other creditors of Horton & Brother, at the November term, 1852; that immediately after that assignment was made, and before any creditor had interposed, by attachment, or otherwise, to avoid the assignment, the defendants, while proceeding to execute the trusts which it declared, sold some part of the assigned property, for the proceeds of

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

which they admit themselves to be chargeable as garnishees; but they claim to deduct from these proceeds the sum of four hundred dollars, as a compensation for their personal services in taking charge of the property, on the 10th day of March, when the assignment took effect, and keeping the same until the 17th day of March, when it was attached, and for making the sales and collections, whence the moneys now in their hands resulted, during that period of seven days. And they also claim the right to make the further deduction of the sum of five hundred dollars, for so much money paid by them to two counsel for general retainers in respect to all questions arising between themselves, as assignees, and third persons; the counsel having been retained on the fifteenth day of March, two days before any attachment of the property, though their retainers were not actually paid until some months afterwards. No question has been made before me concerning the propriety of the amounts of either of these charges, the only question being, whether any, or all of them, in part, or in whole, are in this proceeding, a legal charge upon the fund attached in the hands of the defendants. The proceedings in the suit in equity by Stewart v. Spenser [Case No. 13,437], in which the assignment was decreed to be void, are not in terms, made part of this case; but the answers state the fact, that the assignment which is therein mentioned is the same which was thus avoided by the decree of this court, and the case has been argued, on both sides, upon the assumption that those proceedings, thus referred to, are before the court in this case.

The questions, therefore are, whether assignees, under a deed of trust for creditors, voidable by them as actually fraudulent as against them, can retain, out of the moneys received under the assignment, compensation for their personal services, rendered before any creditor interposed to avoid the deed, and for a general retainer agreed to be paid to counsel. The garnishees are to be charged or discharged, according to the state of things existing at the time of the service of the process upon them. The question is, whether they then held property or moneys of the debtor, liable to be taken out of their hands, and applied by the law in this process, in payment of debts of the principal defendant. It is not denied that these garnishees did at that time hold funds which belonged to the debtors, the deed of assignment being imperative; but the inquiry is, whether the whole of these funds were liable to be taken out of their hands, and applied by the law in this process to the payment of debts of their assignor. In Thomas v. Goodwin, 12 Mass. 140, it was held, that although the person summoned as trustee may have previously received property of the debtor for the purpose of delaying creditors, yet if he has paid the proceeds to bona fide creditors before the service of the process on him, he cannot be held as a trustee. In Andrews v. Ludlow, 5 Pick. 32, the same rule was applied to bona fide claims of the assignee himself, and it was held, that he could retain enough to pay himself the amount of all such claims, though the assignment was invalid. On the other hand, in Burlingame v. Bell, 16 Mass. 318, and Harris v. Sumner, 2 Pick. 129, it was held, that an assignment, fraudulent on its face, or actually fraudulent, could confer no lien on the assignees, so as to enable them to hold the property against the attachment thereof specifically by a creditor. These decisions are reconcilable. Because, when the assignee is proceeded against as a trustee or garnishee, he retains, to meet his claims or payments, not by force of the invalid deed, but by that principle of law which enables him to retain funds sufficient to meet his own claims and liabilities, and requires him only to pay the balance. He is under no necessity to set up the deed; he has the right of retention to that extent, if it were wholly invalid, or had never been made. And, therefore, if these garnishees had claims against the assignors, for bona fide debts, contracted independently of the assignment, I do not perceive why they might not deduct from the moneys in their hands sufficient to satisfy those debts, and by paying over the residue discharge themselves from liability. But it must be admitted, that claims for services rendered in partially executing an assignment actually fraudulent, do not stand upon the same ground as bona fide debts. If the assignees were themselves participators in the fraud, or, in other words, if they undertook to execute the trusts, knowing that they were fraudulent and unlawful, the law cannot recognize such services as ground for a legal claim for compensation, and cannot treat them as creditors of the assignors.

According to the evidence in the suit in equity, the assignee knew the contents of the assignment, and the facts that the assignors had absconded from the state, and carried with them some money, when they entered on the execution of the trusts. The circumstances were so peculiar, that I think they were at once put upon the inquiry, how much the assignors had carried away with them. Their answers declare they did not know how much, or that it was any great sum of money, until they found there was no cash on hand, and very few debts receivable. When, in point of fact, they learned this, does not appear; but it is apparent, they had the means of learning it as soon as the execution of the trust began; for they then had the books and papers of the assignors. A party who is put upon inquiry, and has the means of knowing a fact, is in equity deemed to know it. And I must therefore consider that these assignees either knew all the facts upon which the deed has been declared void, or had the means of knowing them very soon after the deed was delivered.

And when they proceeded, under these circumstances, to execute such trusts, I consider that they acted at the peril of losing all compensation for their services, if creditors should interpose and the trust be declared fraudulent, by reason of facts within their knowledge.

I do not impute to them any intentional wrong; but the principles of law must be applied to their case. Upon those principles they were executing trusts fraudulent as against creditors, and they had at least constructive knowledge of the fraud. They cannot be treated as creditors upon the footing of a claim for such services. The claim to retain for the retainers engaged to be paid to counsel is still less tenable. If they cannot retain for their own services, rendered before creditors interposed, certainly they cannot for payments made to resist creditors, by setting up a deed, invalid as against creditors, because actually fraudulent.

Case No. 6,202.

HASTINGS v. THOMPSON.

[See Syllabi, 198.]

HASTINGS (UNITED STATES v.). See Case No. 15,323.

HASTINGS BANK (HAWKINS v.). See Case No. 6,244..

HASTINGS NAT. BANK (HAWKINS v.). See Case No. 6,245.

HATCH (BANK OF THE UNITED STATES v.). See Case No. 918.

Case No. 6,203.

HATCH v. BURROUGHS.

[1 Woods, 439.] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1870.

BANKS—PERSONAL LIABILITY OF STOCKHOLDERS—BILLS ISSUED IN AID OF THE WAR OF REBELLION—BONA FIDE HOLDER FOR VALUE.

1. The stockholders of the Merchants and Planters' Bank of Savannah, whose charter provides "that the persons and property of the stockholders shall be at all times liable, pledged and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual may hold and possess," are liable as principals to redeem the bills of the bank at their face, after the bills have been presented to the bank and payment refused, although the assignee of the bank has assets in his hands sufficient to pay the bills.

2. Acts of the legislature of Georgia which show upon their face that they were passed in furtherance of the rebellion are void.

3. No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a bona fide holder for value, unless made absolutely void by statute. Notes, bills, or other securities issued in aid of the rebellion are valid in the hands of a bona fide holder, for value.

[Cited in Third Nat. Bank v. Harrison, 10 Fed. 247.]

[Cited in Sondheim v. Gilbert, 117 Ind. 77, 18 N. E. 687; Bank v. Portner, 46 Ohio St. 385, 21 N. E. 655.]

4. The act of congress entitled "An act to admit the states of North Carolina, etc., to representation in congress," passed June 25, 1868 [5 Stat. 73], did not attempt to reenact the constitutions of the states, but merely recognized the fact that they had been adopted by the people, and that the states were entitled to representation in congress.

Heard on demurrer to pleas.

Wm. Dougherty and A. W. Stone, for plaintiff.

W. S. Basinger, Wm. Law, J. M. B. Lovell, and Robert Falligant, for defendant.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. The declaration alleges in substance that on January 1, 1860, the defendant became a stockholder in the Merchants and Planters' Bank of Savannah, being the owner and holder of 100 shares in the bank, and that he still owns and holds the same. That by an act of the legislature of Georgia, dated February 13, 1854, said bank was incorporated as such. That in and by the act of incorporation it was provided that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of the bills and notes at any time issued, in proportion to the number of shares that each individual might hold and possess. That on the times specified in the declaration, the said bank issued and put in circulation the bills or notes commonly called bank bills, which are set out and described, making in the aggregate the sum of fifty thousand dollars. That afterwards the said bank bills came into possession of petitioner for a valuable consideration then and there paid by him, and he is now the owner and holder and bearer thereof. That afterwards, to-wit, on the 8th day of January, 1867, he presented said bills to the president and cashier of said bank for payment, and payment was refused. That on March 15, 1867, he instituted a suit against the bank for the recovery of the money due on said bills in the circuit court of the United States, for the Southern district of Georgia, and on November 25, 1867, recovered judgment against defendant in said court for $50,000, interest and costs, and that afterwards on May 23, 1868, an execution was issued on said judgment and returned nulla bona. That the bank is insolvent, has suspended payment, and is without property out of which said judgment can be made. To this declaration the general issue and eight special pleas were filed. On the 23d day of October, 1869, by leave an amendment was filed to the declaration, to the effect that on December first, 1866, plaintiff purchased the

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

bills mentioned in the declaration, for a valuable consideration, to wit, 15 cents on the dollar, without notice or knowledge that said bills or any of them had been issued, circulated or used in the late rebellion against the United States, or upon any other illegal consideration whatever, or had been used in any illegal manner. To this declaration as amended the defendant has filed special pleas. The plaintiff demurs generally to the second, sixth, eighth and ninth pleas to the original declaration, and to the first eight pleas to the amended declaration.

In considering the questions raised by this demurrer, we shall follow the order adopted by counsel for defendant, and take up first the eighth plea to the amended declaration, which is in substance as follows: Actio non, because defendant says he was but a surety for the redemption of the bills of the said bank, without consideration, and that his risk as such surety was increased and he was exposed to greater liability by the operation of statutes of the state of Georgia, passed after the incorporation of said bank, having reference to all the banks in said state and injuriously affecting the said Merchants & Planters' Bank. It is insisted on the part of the plaintiff that this plea sets up only conclusions of law, and is therefore bad, but we are disposed to take the view of it advanced by counsel for defendant, namely: that the averment of suretyship is merely matter of inducement. If this view be correct, then the plea in substance amounts to this, viz: that by the case made in the declaration the plaintiff shows the defendant to be a surety only, and being such surety, his liabilities and risks have been increased. By this construction of the pleading the demurrer presents these questions: (1) Whether, under the charter of the bank, as set forth in the declaration, the defendant is a surety; and (2) whether, by the statutes of the state of which the court will take judicial notice, the risk and liability of defendant is in fact increased.

After a careful consideration of the charter of the bank, we are unable to reach the conclusion that the stockholders are mere sureties or guarantors; on the contrary, the language seems to import, with great clearness and force, a primary liability. The persons and property of the stockholders are at all times liable, pledged and bound for the redemption of the bills of the bank. The stockholders, in person and property, are liable at all times. At the very moment the bill is issued by the bank this liability arises, and there is no word or phrase to indicate that the liability is conditional or secondary, or that it can in any way be avoided save by the redemption of the bills. In other words, it appears to us that, under this charter, the bank and the stockholders, jointly and severally, undertake to pay the bills. Not that a stockholder will redeem a bill whenever or wherever presented to him, but each stockholder, jointly with the bank, undertakes that when the bills are presented at the bank, payment thereof shall be made. It is the joint liability of bank and stockholders to redeem on presentation of the bills at the counter of the bank. We do not feel authorized to insert in the sentence which creates this liability, any terms or conditions which the law has not put there.

The liability is principal and absolute, and so we must leave it. That this construction is not new or strange will appear from the adjudicated cases. Angell & Ames on Corporations (section 611) lay down the rule as follows: "When each of the stockholders of a corporation is made personally responsible in his private estate, the stockholders are then subject to the same liabilities they would have been had they been associated for prosecuting the enterprise without a charter of incorporation."

In Harger v. McCullough, 2 Denio, 123, a charter made the stockholders jointly and severally personally liable for the payment of all debts or demands contracted by the corporation. Held, by Brownson, C. J., that the stockholders, in their individual as well as corporate capacity, are principal debtors, although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company has been denied them, and their personal liability has been expressly declared. They are thus placed in relation to the creditors of the company upon the same footing as though they were an unincorporated association or partnership. In Allen v. Sewall, 2 Wend. 327, it was held that the members of an incorporated company were made by statute individually liable as carriers at common law, and responsible to the same extent and in the same manner as if there was no act of incorporation. The case of Corning v. McCulloch, 1 Comst. [1 N. Y.] 47, was an action brought by a creditor of a corporation to enforce the individual liability of a stockholder. The charter of the company provided that the stockholders should be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation; that the stockholders might be sued therefor, but not until judgment had been obtained thereon against the corporation, and an execution issued and returned unsatisfied. In this case it was held that the personal liability of the stockholders for the payment of the debt of the corporation was immediate and absolute the moment the debt was contracted or incurred by the company.

But we are referred to three cases decided by the supreme court of Georgia, where, it is said, a different construction is put upon the individual liability clause in the bank charters granted by the state. Lane v. Morris, 8 Ga. 476; Carey v. Jones, Id. 516; Belcher v. Willcox, 40 Ga. 391. In reference to the

first two cases named, it is sufficient to say that the language of the charter is not the same in words or substance, with the one under consideration. In those cases the charter provided that the stockholders should be liable for the "ultimate" redemption of the bills of the bank, and while we have great doubt whether the use of the word "ultimate" does in fact change the nature of the liability, yet the omission of the word in the charter before us is significant. We do not find it here and we cannot interpolate it. The case of Belcher v. Willcox, 40 Ga. 399, contains the first judicial construction of a bank charter granted by the state, which is in substance like the charter under consideration. With the profoundest respect for the learning and ability of that court, we are unable to concur in that decision. After a careful review of the case, we are satisfied that this is not an instance in which this court is bound to follow the adjudication of the state court. The charter of the bank forms no part of the local law of the state, the construction of which by the state tribunal we are bound to follow. Although in Georgia all acts are public, yet in fact the charter is a private act, and the rule under discussion does not apply to private acts. Williamson v. Barry, 8 How. [49 U. S.] 495. The rule prescribing how far the United States courts are to be controlled by the decisions of the state courts is laid down by the supreme court in the recent case of Butz v. City of Muscatine, 8 Wall. [75 U. S.] 583. Where the settled decisions in relation to a statute, local in its character, have become rules of property, the United States courts will follow the adjudication of the state courts. The decision in Belcher v. Willcox, supra, stands alone. It is recent; the statute construed is not a local one, and is not and cannot become a rule of property. It is simply a contract, and this court is free to construe it as shall appear just and right. We feel no embarrassment, then, in holding that under the charter of the Merchants and Planters' Bank of Savannah, the stockholders were not sureties, but principal debtors within the limits prescribed for them by the charter. But assuming that the stockholders are sureties for the bank, has their risk been increased, and have they been exposed to greater liability by the operation of the statutes of the state of Georgia, passed after the incorporation of the bank? We are referred to three acts of the legislature, which it is claimed have this effect: the act of November 30, 1860, the act of November 30, 1861, and of November 29, 1862. As to the two acts last named, it is sufficient to say that they were passed during the late rebellion against the United States; that on their face they clearly show that they were passed in furtherance and support of the rebellion, and that they fall within the rule laid down by the supreme court of the United States in Texas v. White, 7 Wall. [74 U. S.] 733, and must be regarded as invalid and void. Of right, therefore, they had no binding force upon the bank, and cannot in any way influence the question before us. The act of November 30, 1860, suspended for one year the penalties imposed by law upon the bank for its failure or refusal to redeem its liabilities in gold and silver. Clearly the only purpose of this enactment was to aid the bank and save it from destruction. The act is entitled "An act to grant relief to the banks." It does not compel the suspension of specie payments; it does not in terms authorize it; it merely relieves the bank, in case it is compelled to suspend, from the pains and penalties imposed by law for such suspension. How such an enactment could increase the risk or extend the liability of the stockholders, it is difficult to see. We are of opinion, therefore, that the facts as stated in the declaration do not make the defendant a surety for the bank, and that his risk has not been so increased, or his liability so enlarged, as to discharge him even were he a surety. The demurrer on the eighth plea to the amended declaration must therefore be sustained. The views already expressed settle the question raised by the demurrer on the second and ninth pleas to the original declaration. If the defendant is a principal debtor, then he is liable and bound to redeem the bills of the bank at their face, no matter what the plaintiff paid for them, and the fact that the bank has assets in the hands of its assignees sufficient to pay the bills is no defense to an action against the stockholders, after the bills have been presented at the bank and payment refused. The demurrers to said second and ninth pleas are therefore sustained.

This leaves for consideration the demurrers to the sixth, seventh and eighth pleas to the original declaration, and the first seven pleas to the declaration as amended. These pleas are in substance: (1) That the bank bills were issued directly to the Confederate States and the state of Georgia, for the purpose of carrying on rebellion against the United States, and were so used. (2) That they were issued to the Confederate States and state of Georgia, for bonds of the Confederate States and state of Georgia, which latter were issued in aid of the rebellion. (3) That they were issued during the rebellion, for the purpose of aiding the same. That said banks entered into contracts with the Confederate States and state of Georgia for the loan of money for the purpose well known to all parties to said contract, of aiding the rebellion, and that said bank bills were issued in connection with said illegal contracts of loan, and as the consideration therefor. (6) That said bank bills were issued by the bank in furtherance of and as a consideration for a contract between the bank and the Confederate States, with the purpose on the part of both parties to the contract of aiding the rebellion. (7) The

same plea as the sixth, except that the contract of the bank is alleged to be with the state of Georgia. (8) That bills were issued by the bank to the Confederate States during rebellion, for the purpose of aiding the same, and said purpose was known to both the bank and Confederate States. (9) Same plea as eighth, except that it alleges that the bills were issued to the state of Georgia. (10) Same as eighth, except that it alleges the bills were lent to the Confederate States. (11) Same as eighth, except that it alleges the bills were lent to the state of Georgia.

We entertain no doubt, if the facts named in these pleas be true (and on demurrer they are admitted), that as between the bank and the Confederate States, the bank bills were illegal and void, and that as between the original parties to the issue of their bills, no suit could be maintained upon them. Even when, as in the seventh plea to the original declaration, it is alleged that the bills were issued for the notes and bonds of the Confederate States and state of Georgia, which latter were issued in aid of the rebellion, the bank bills would be illegal and void as between the original parties. This is expressly decided in Craig v. Missouri, 4 Pet. [29 U. S.] 437, where it was held that certificates issued by the state of Missouri, in sums not exceeding ten dollars, received in payment of public dues, were bills of credit the emission of which was prohibited by the constitution of the United States, and that a promissory note given to the state in exchange for such certificate was void. Mr. Justice Story, in Clark v. Protection Ins. Co. [Case No. 2,832], says: "I adopt the language of Lord Holt and Lord Chief Justice Tindal, that every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract, although the statute does not mention it, but only inflicts a penalty on the offender. In other words, imposing a penalty imports a prohibition, and makes the prohibited act illegal." But the plaintiff says in his declaration, as amended, that he purchased the bills sued on for a valuable consideration, without notice that they had been issued or used in aid of the late rebellion against the United States, or upon any other illegal consideration whatever, or had been used in any illegal manner, and that he is a bona fide holder. This averment of the declaration is not traversed by any of the pleas, so that it stands admitted, and thus the question is presented, Whether the facts alleged in the pleas make the bills invalid in the hands of a purchaser for value without notice?

The well known rule of commercial law is that a bona fide holder for value without notice is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he received it, even although such person may have acquired it by fraud or even by theft or robbery. This doctrine is indispensable to the circulation and security of negotiable instruments, and is founded on the most comprehensive and liberal principles of public policy. Story, Prom. Notes, § 191. It is insisted, however, that these bills, being void because their issue for the purpose set out in the pleas was in effect prohibited by statute, are void in all the hands to which they may come. In other words, that an innocent holder cannot recover when the illegality of the instrument comes from the statute. We thing this claim too broad. The true rule is thus stated: In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff or some other party between him and the defendants took the bill bona fide and gave a valuable consideration for it. But unless the instrument has been expressly declared void by the legislature, illegality of consideration will be no defense in an action at the suit of a bona fide holder for value without notice of the illegality, unless he obtained the bill after it became due. Brown v. Turner, 7 Term R. 630; Story, Prom. Notes, § 192; 3 Kent, Comm. 79, 80; Gould v. Armstrong, 2 Hall, 266; Cazet v. Field, 9 Gray, 329; Norris v. Langley, 19 N. H. 423; Converse v. Foster, 32 Vt. 828; Meadow v. Bird, 22 Ga. 246; Thorne v. Yontz, 4 Cal. 321; Johnson v. Meeker, 1 Wis. 436. The notes given for a gaming consideration were by the statute of 9 Ann. (chapter 14), declared to be "utterly void, frustrate and of none effect to all interests and purposes whatever." It was under this statute that it was held that gaming note was void in the hands of a bona fide holder for value. Such great inconvenience was the result of this statute and ruling that now by virtue of 5 & 6 Wm. IV. (chapter 41), a bill or note given for a gaming or usurious consideration will be valid in the hands of a bona fide holder for value. The result of the authorities is that no matter how illegal or immoral the consideration of the note or bill, it is valid in the hands of a bona fide holder for value unless made absolutely void by statute. We have been shown no statute declaring bank bills or other notes or securities issued in aid of the rebellion to be void, and we are constrained to hold such instruments valid in the hands of a bona fide holder for value. What has been said applies to negotiable commercial paper. It applies however with much greater force to bank bills which are issued to the community to circulate as money. To hold that an illegal or vicious consideration for the issue of such bills makes them void in all hands would disturb all the channels of business and either put an end to the circulation of bank notes, or leave the public to the mercy of the directors of the banks. The highest dictates of public policy require that

the people who freely receive and pay out bank bills as money should be protected by that wise and salutary rule that cuts off all defenses to the paper when in the hands of a bona fide holder for value. Every man in the community who receives or pays out bank bills is interested in the stability of this rule. If the defense set up by these pleas is good for the stockholders, it would be good for the bank. If the courts should hold that the directors of a bank might issue their thousands and hundreds of thousands of dollars for an illegal or immoral purpose, and then set up such purpose as a defense against the payment of the bills in the hands of the innocent public, they would make themselves the instruments for the accomplishment of the most stupendous frauds, and bring wide spread disaster upon the people. The whole community would be at the mercy of the banks. It is insisted, however, that the bills in suit are made void by the second paragraph of section 17 of the present constitution of the state of Georgia. The plaintiff admits that the bills in suit fall within the purview of that constitutional provision, but says that the section itself is void as impairing the obligation of the contracts. We understand counsel for defendant to admit that the clause in question is open to this objection, but seek to avoid its force, on the theory that the constitution of Georgia is the act of congress, and that congress is not restrained by the provision of the constitution of the United States, which declares no state shall pass any law impairing the obligations of contracts. Without deciding whether congress itself has any power to pass a law impairing the obligations of contracts, we are very clear in this instance congress has not attempted to do so. The act of congress which it is claimed enacts the constitution of Georgia is the act of June 25, 1868. It is entitled "an act to admit the states of North Carolina, Georgia, etc., to representation to congress." The preamble recites that, whereas, the people of said states have, in pursuance of an act for the more efficient government of the rebel states, passed March 2, 1867 [14 Stat. 428], framed constitutions of state government which are republican, and have adopted said constitutions by large majorities, and it is enacted that said states shall be entitled to representation in congress on certain conditions, among which in the case of Georgia is, that certain provisions of the constitution shall be void, and that the general assembly of the state shall, by solemn public act, declare the assent of the state to the said fundamental condition. It seems to us to be a very strained construction of this act to hold that by fixing the terms upon which the state should be admitted to be represented, congress enacted the constitution of the state. By the resolution of March 20, 1821 (3 Stat. 645), the state of Missouri was admitted into the Union upon the fundamental condition that the fourth clause of the twenty-sixth section of the third article of the constitution, submitted on the part of said state to congress, should never be construed to authorize the passage of any law by which any citizen of either of the states of this Union shall be excluded from any of the privileges and immunities to which such citizens are entitled under the constitution of the United States.

The constitution of Missouri recognized and established slavery. If the position of counsel for defendant is as good as respects the constitution of Georgia, then the constitution of Missouri was the act of congress, and congress established the institution of slavery in that state, which it is admitted on all hands congress had no power to do. In admitting Georgia to representation, congress did not undertake to reenact the constitution of this state; it merely recognized it as having been framed in accordance with law, and adopted by the people. Finally, it is said that plaintiff is not an innocent holder, because he had many reasons to believe the bills of the bank illegal, but the plaintiff says he had no notice or knowledge of the illegality of the bills, and this averment is admitted by the pleas. Plaintiff admits that he bought the bills at 15 cents on the dollar of their face value. But this, it seems to us, is not notice that the bills were illegal. To a prudent man it would only indicate that the bank had suspended and was insolvent. We both concur in the opinion that the liability of the stockholders of the bank was a principal and primary liability; that admitting their liability to be that of a surety, their risk has not been increased or their liability enlarged by any valid legislative acts; that the bills of the bank (if the pleas be true) were invalid and void as between the bank and the state of Georgia or the Confederate States, but valid in the hands of a bona fide holder for value; that on the pleadings as they now stand, the plaintiff must be regarded as a bona fide holder for value, and as a consequence of these rulings the demurrer to these pleas must be sustained.

Case No. 6,204.

HATCH v. CHICAGO, R. I. & P. R. CO. et al.

[6 Blatchf. 105.] [1]

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

REMOVAL OF CAUSES — JURISDICTION OF FEDERAL COURTS — CITIZENSHIP — NOMINAL PARTIES — INJUNCTION AGAINST CORPORATION — KNOWLEDGE OF EXISTENCE OF BY AN OFFICER BINDS.

1. A corporation created by a state other than the state of New York, does not, by reason of its having an office, and transacting material branches of its business, within the state of New York, or by force of the state statute of New York, of April 10th, 1855 (Laws 1855, c. 279), lose the privilege, which otherwise be-

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

longs to it, as a corporation created by another state, of having all its members regarded as citizens of that state, within the meaning of the acts of congress in regard to the removal of causes into the circuit courts of the United States.

[Cited in Morton v. Mutual Life Ins. Co., 105 Mass. 144.]

2. A suit brought in a state court of New York, by a citizen of New York, against a corporation created by a state other than New York, and against a citizen of a state other than New York, and against other defendants who are citizens of New York, cannot be removed into a circuit court of the United States in New York, under the twelfth section of the judiciary act of September 24th, 1789 (1 Stat. 79), unless the defendants who are citizens of New York are merely nominal parties to the suit.

[Cited in Amsden v. Norwich Union Fire Ins. Soc., 44 Fed. 517.]

3. Where the officers of a corporation are made co-defendants with the corporation to a suit in equity, but no relief is prayed for as to any of such officers that is not prayed for in respect to the corporation, and no relief is prayed for against any such officer in his individual capacity, such officers are merely nominal parties to the suit.

[Cited in Heath v. Erie Ry. Co., Case No. 6,306; Doyle v. San Diego Land & Town Co., 43 Fed. 349.]

4. An injunction against a corporation, if served on an officer thereof, or even if known by him to exist, binds him to obedience.

5. A plaintiff cannot, by joining, as nominal defendants, with a corporation, persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing a cause into a court of the United States.

[Cited in Pond v. Sibley, 7 Fed. 135; Mayor, etc., of New York v. New Jersey Steam-Boat Transp. Co., 24 Fed. 818.]

6. When the proper steps to effect the removal of a cause under the said act of 1789 have been taken, and evidence thereof is presented to the state court, the right to have the removal made is perfected, and no action of the state court can either confer the right or take it away.

[Cited in Broadnax v. Eisner, Case No. 1,909.]

7. The discretion to be exercised by the state court in passing on the question as to whether such proper steps have been taken, is a legal discretion.

8. No order by the state court for the removal of the cause is necessary.

[Cited in Railway v. Stringer, 32 Ohio St. 476.]

9. If the defendant does all that is necessary to secure a removal, he can, whether the state court makes an order of removal or not, perfect the removal, by entering in the federal court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary; and, when that is done, the cause will proceed in the federal court.

[Cited in Brigham v. C. C. Thompson Lumber Co., 55 Fed. 884.]

[Cited in Dunn v. Burlington, C. R. & N. Ry. Co., 35 Minn. 83, 27 N. W. 453; Rigg v. Parsons (W. Va.) 2 S. E. 83.]

10. When a case is removed under the said act of 1789, any injunction issued before its removal, ipso facto falls.

In equity.

These suits [by Rufus Hatch against the Chicago, Rock Island & Pacific Railroad Company, John F. Tracy and others] were originally commenced in the supreme court of the state of New York. The parties plaintiff and defendant to both suits were the same, except that Edward W. Dunham was a party to the second suit, and was not a party to the first suit. The suits now came before the court on a motion by the plaintiff to remand them to the state court, and on a motion by the defendants to dissolve injunctions granted in them by the state court.

John K. Porter and John E. Burrill, for plaintiff.

Charles O'Conor and Charles Tracy, for defendants.

BLATCHFORD, District Judge. These suits are now in this court, either as respects all of the defendants in each, or as respects the defendants the railroad company and Tracy, or one of them, in each, by virtue of certain proceedings for the removal of the same from the state court into this court, taken in the state court on behalf of the railroad company and Tracy. Those proceedings were taken under three several acts of congress—the twelfth section of the judiciary act of September 24, 1789 (1 Stat. 79), the act of July 27, 1866 (14 Stat. 306), and the act of March 2, 1867 (Id. 558). The state court made an order, in each suit, on the 15th of February, 1868, which recites, that the defendants the railroad company and Tracy, have presented their petition and affidavits, that the petition, among other things, prays for a removal of the cause into the circuit court of the United States for the Southern district of New York, in pursuance of the several acts of congress in such case made and provided, that the company and Tracy have entered their appearance in pursuance of said petition and said acts of congress, and that the said petitioners have given good and sufficient surety, as required in said acts of congress, by a bond, approved in said court and filed with the clerk thereof, and then orders that the surety so offered is accepted by said court, and that said court will proceed no further in the cause against the company and Tracy, or either of them, and that no further proceedings be had in said court against the company and Tracy, or either of them, and that the cause, as against the company and Tracy, is removed from said court to the circuit court of the United States for the Southern district of New York, in pursuance of the provisions of the said act of July 27th, 1866. The order states, that it "is granted under and pursuant to the last-mentioned act of congress, and is without prejudice, as therein provided, to the rights of the parties." Copies of certain process, pleadings, depositions, testimony, and other proceedings in the suits in the state court, have been filed in this court, which are asserted, and not denied, to be copies of all the process, pleadings, depositions, testimony, and other proceedings in said suits,

which existed therein when the orders for the removal were made by that court. The company and Tracy have entered, each of them, a general appearance in this court, in each suit. No one of the other defendants has entered any appearance in this court in either suit. The plaintiff, insisting that if the suits are in this court at all, they are here only as respects the company and Tracy, now moves to remand the suits to the state court, on the ground that a cause does not exist for the removal of either of the suits, in any respect, under any one of the three acts of congress referred to.

The complaint in each suit states, that it is brought on behalf of the plaintiff and of all other stockholders of the Chicago, Rock Island and Pacific Railroad Company who may elect to avail themselves of it and contribute to the expenses of the action. The plaintiff alleges, in the complaint in the first suit, that he is a stockholder in the company, and that the company is a corporation, and is organized by virtue of the laws of the states of Illinois and Iowa; that all the directors of the corporation except three reside in the state of New York; and that the individual defendants in said suit are, and have been since April, 1867, such directors. The gravamen of that complaint is, that the defendants are about, without right or authority, and without the sanction of the stockholders of the company, to make a contract, on the part of the company, to extend its railroad from Des Moines, Iowa, to the western boundary of Iowa, and to create a liability on the part of the company in respect thereto, and to use the moneys of the company for such purpose; that they have recently issued, in the name of the company, and sold in the market, at less than par, forty-nine thousand new shares of the capital stock of the company, in addition to ninety-one thousand shares previously issued, all the shares being of the par value of one hundred dollars each; that the proceeds of such new shares, which amount to more than four millions of dollars, are in the possession and control of the directors; and that the pretence on the part of the directors, in issuing the new shares, was, that such issue was necessary to enable the company to procure funds to construct such extension of its road, and was made for that purpose. The prayer of the complaint in the first suit is, for a judgment, that the defendants be enjoined and restrained from making any such contract, and from creating any such liability, and from using any of the moneys of the company for such purpose, or in execution of any contract to build such extended road, and from further increasing the capital stock of the company, and from using the proceeds of any of the new forty-nine thousand shares, except to redeem and extinguish such shares, until the stockholders of the company shall, at their next annual meeting, in June, 1868, or at any special meeting to be called for that purpose, have passed upon the action of the directors in issuing the new shares, and upon the disposition to be made thereof, or of the proceeds thereof, and in regard to the proposed extension of the railroad. The complaint also prays, that the defendants may, during the pendency of the action, be enjoined and restrained as above provided, and that a receiver of the proceeds of the forty-nine thousand new shares may be appointed. On this complaint, and on affidavits accompanying it, an ex parte injunction was issued by the state court, on the 6th of January, 1868, enjoining and restraining the defendants, until the further order of the court, as above prayed for.

The complaint in the second suit reasserts the allegations of the complaint in the first suit, and brings in, as an additional defendant, Dunham, who is the treasurer of the company, but not one of the directors. The principal allegations in the second complaint are, that a committee of the directors, consisting of five of them, and called an executive committee, have, by a majority vote, determined to close the transfer office of the company in the city of New York, and to remove all its books and valuable papers beyond the jurisdiction of the court; that the defendants have refused to allow said books to be examined or inspected by the stockholders; that they are about to remove all the money, securities, and property of the company beyond the jurisdiction of the court; and that they refuse to permit any transfer to be made, on the books of the company, of any of the shares of stock in the company. The prayer of this complaint is, for a judgment as asked for in the first complaint, and further, that the defendants be enjoined and restrained from removing any of the books of the company, or of the directors, or of the executive committee, beyond the jurisdiction of the court, and from preventing the plaintiff, or other stockholders, from obtaining an examination and inspection thereof, and from interfering with them in making such examination and inspection, and from removing the proceeds of the forty-nine thousand new shares of stock, or any other property or proceeds thereof, beyond the jurisdiction of the court, and from permitting to be made any transfer of any shares of the stock of the company, whether of the original ninety-one thousand shares, or of the forty-nine thousand additional shares, until a transfer of all the shares, whether original or additional shares, shall be permitted to be made without distinction, and from closing the office or place of business of the corporation in the city of New York, and that the defendants may be restrained during the pendency of the action. On the complaints in the two suits, and on affidavits on the part of the plaintiff, an ex parte injunction was issued by the state court, on the 7th of January, 1868, enjoining and restraining the defendants, until the further order of the court, as so prayed for in the complaint in the second

suit. It is provided, by the act of July 27th, 1866, that any injunction granted by the state court before the removal of the cause, against the defendant applying for its removal, shall continue in force until modified or dissolved by the United States court into which the cause shall be removed. A motion is now made to this court, on the part of the company and Tracy, to dissolve and set aside the said injunctions.

The motion to remand the causes to the state court will be first considered. It is not disputed that the plaintiff is a citizen of the state of New York; nor that the company is a corporation created either by the state of Iowa, or the state of Illinois, or both; nor that all the other parties defendant, except Tracy, are citizens of the state of New York. On the question of fact, on the evidence, as to the citizenship of Tracy, I concur with the view of Judge Cardozo, in the state court, that, for the purposes of a removal of the suits into this court, Tracy is a citizen of the state of Illinois. The petition to the state court, by the company and Tracy, was in proper form, they duly entered their appearance in the state court, and they gave good and sufficient surety, by a proper bond, as required by the acts of congress, and the state court accepted the surety so offered. Copies of all the proceedings in the state court have been duly filed in this court, and the appearance of the company and Tracy has been entered in this court. So far as formalities are concerned, therefore, every thing required by the acts of 1789 and 1866, to be done by the company and Tracy, to obtain and perfect the removal of the causes into this court, has been done by them.

The objection is taken by the plaintiff, that the company, although a corporation created by a state other than the state of New York, has, by reason of its having an office, and transacting material branches of its business, within the state of New York, and by force of an act of the legislature of that state, passed April 10, 1855, (Laws 1855, c. 279), lost the privilege, which otherwise would have belonged to it, as a corporation created by another state, of having all its members regarded as citizens of that state, within the meaning of the acts of congress in regard to the removal of causes into this court. That act is one providing for the mode of serving on a foreign corporation process in a suit. It is settled, by the decisions of the supreme court, that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created, that it exists only in contemplation of law, and by force of that law, that where that law ceases to operate the corporation can have no existence, and that it must dwell in the place of its creation. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286. It is also settled, by like decisions, that a suit against a corporation, in its corporate name, must be regarded as a suit against citizens of the state which created it, the legal presumption being, that its members are citizens of that state, the only state in which the corporate body has a legal existence; and the legal presumption, therefore, being, that a suit against the corporation, in its corporate name, is a suit against citizens of the state which created it, and no averment or evidence to the contrary being admissible, to withdraw the suit from any jurisdiction which a court of the United States would otherwise have over it. Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 232; Ohio & M. R. Co. v. Wheeler [supra]. It follows, therefore, that, for the purposes of jurisdiction by the courts of the United States, these suits, so far as they are suits against the company, are suits against citizens of the state which created the company. Such state was not the state of New York. Nothing done by the company in regard to the place or manner of transacting its business, and no statute of the state of New York in regard to it, can deprive it of the rights and privileges which thus belong to it, as a corporate body created by another state than New York. It is still a foreign corporation, so far as its entity and legal existence is concerned. In Pomeroy v. New York & N. H. R. Co., decided in this court, in December, 1857 [Case No. 11,261], it was held, that a foreign corporation, sued, by its own assent, by summons served on an agent in New York, was still a foreign corporation, resident in the state which created it; that it could not exist in New York in its corporate capacity, except as a New York corporation; that, as a foreign corporation, it could not be said to have any legal existence in New York; that its existence in the foreign state might be recognized in New York, and the exercise of many rights and privileges in New York might be permitted to it, either by express statute, or by comity; but that its corporate existence in New York could be created only by New York laws, and by making it a New York corporation.

These suits, therefore, are suits brought in the state of New York, by Hatch, a citizen of New York, against the members of the company, all of whom are citizens of the state which created the company, and which is a state other than New York, and against Tracy, a citizen of Illinois, and against other defendants, who are citizens of New York.

The first question is, whether the case is removable under the act of 1789. Under the twelfth section of that act, the suit, to be removable, must be commenced against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state. By the eleventh section of the the same act, original jurisdiction is given to the circuit courts, of civil suits where "an

alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state." The language of the two sections is substantially identical in regard to the citizenship. Under the eleventh section, it was held, in Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, that each distinct interest must be represented by persons, all of whom are entitled to sue or may be sued in the federal courts; that is, that, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts. Under the twelfth section, it was held by this court, in Ward v. Arredondo [Case No. 17,148], that a suit by a citizen of New York, against a defendant who was an alien, and a defendant who was a citizen of New York, could not be removed into this court by the alien, where the defendant who was a citizen of New York, was not a mere nominal party to the suit, but was a real and an indispensable party to the decision and final determination of the merits of the case. These decisions have always been followed by the courts of the United States, and it results from them, that these suits cannot be removed into this court, under the act of 1789, unless the defendants, other than the company and Tracy, are merely nominal parties to the suit.

The entire scope and object of the first suit, as shown by the complaint therein, is to restrain the company from extending its road beyond Des Moines, and from using any of its moneys or property for that purpose, and from issuing any new shares of stock, and from using any of the proceeds of the forty-nine thousand new shares, except to redeem and extinguish those shares, until the stockholders of the company shall, at a meeting, have passed upon the whole subject, and to have a receiver appointed of the proceeds of the forty-nine thousand new shares. The entire scope and object of the second suit, as shown by the complaint therein, is the same as in the first suit, and, in addition, to enjoin and restrain the company from removing its books or property beyond the jurisdiction of the court, and from interfering with the stockholders in examining the books, and from permitting any transfer of any shares to be made unless a transfer of all, without distinction, old and new, is permitted, and from closing its office or place of business in New York. All the relief that is prayed for in either suit is by injunction, except the prayer in the first suit for a receiver. All the relief by injunction is prayed for in respect to all of the defendants. No such relief is prayed for in respect to any defendant, other than the company, that is not prayed for in respect to the company. The suits are really, both of them, wholly against the company alone. The directors and the treasurer, who are its codefendants, are merely its servants and agents, through whom necessarily it acts. It was not necessary or proper to make them parties to the suit at all. The injunctions prayed for and the injunctions issued, if issued against the company alone, and served on any director, or on the treasurer, would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the comapny, would bind the officer to obedience. People v. Sturtevant, 5 Seld. [9 N. Y.] 263, 277. The directors and the treasurer are, therefore, not real parties to the suits, but merely nominal parties. No personal demand is made against any one of them, nor is any personal accounting asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is, that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, ipso facto, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be, that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge. There, the dissolution of his official relation would not affect the propriety of his being retained as a defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complaints, and which is the only guide the court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation, persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court. In Wormley v. Wormley, 8 Wheat. [21 U. S.] 421, 451, it was held, that the joining, as defendant in an equity suit in the circuit court, of a person who was a citizen of the same state with the plaintiffs, constituted no objection to the jurisdiction of the court over the suit, where such person was merely a nominal defendant, joined for the sake of conformity in the bill, and against whom no decree was sought; and the principle was

laid down, that the court would not suffer its jurisdiction to be ousted by the mere joinder of formal parties, but would decide on the merits of the case between the parties who had the real interests before it, whenever that could be done without prejudice to the rights of others. This doctrine is as applicable to a jurisdiction conferred by a removal, as it is to one conferred by the bringing of an original suit. So, also, in Carneal v. Banks, 10 Wheat. [23 U. S.] 181, 188, where parties were made defendants to a suit in equity, who were citizens of the same state with the plaintiff, the court held that they were improperly made defendants, and that that fact could not affect the jurisdiction of the court as between the parties who were properly before it, and that the bill might be dismissed as to the improper parties, without in any manner affecting the suit against the proper parties.

The matter in dispute in the suit exceeds the "sum or value of five hundred dollars, exclusive of costs," within the meaning of that language, as used in the twelfth section of the act of 1789. The matter in dispute is a right claimed by the plaintiff, and denied by him to the corporation, and is a right concerning property, and a right having a known and certain value in money, which can be calculated and ascertained in the ordinary mode of a business transaction, and which is shown to be of the value, in money, of more than the sum of five hundred dollars, exclusive of costs. Barry v. Mercein, 5 How. [46 U. S.] 103, 120.

There is no satisfactory evidence that the company or Tracy, or any of the defendants in the suits, entered an appearance in the suits in the state court, or did any thing which was equivalent to the entry of such an appearance, prior to the entry of appearance made by the company and Tracy at the time they presented their petition to the state court for the removal of the suits. The sureties offered to the state court were good and sufficient, and were so held to be by the state court by its acceptance thereof, as shown by the orders of that court to that effect. The sureties consisted of a bond in each suit to the plaintiff in the penalty of $5,000, reciting the filing of a petition and affidavits, by the company and Tracy, in the state court, for the removal of the suits into this court, and conditioned that the company and Tracy should, on the first day of the next session of this court, enter in this court copies of the process against the company and Tracy in the suit, and of all pleadings, depositions, testimony, and other proceedings in the cause affecting or concerning them, and of all other proceedings in the suit, and should also appear and enter their appearance in this court.

Everything, therefore, was done by the company and Tracy, that was requisite to effect a removal of the causes under the act of 1789. When the proper steps had been so taken, and evidence of their having been so taken was presented to the state court, it was the duty of the state court to accept the sureties, and proceed no further in the causes. The right of the company and Tracy to have the removal made was perfected by the taking of those steps and the presentation of that evidence, and no action of the state court thereon could either confer the right or take it away. The discretion to be exercised by the state court in passing on the question as to whether the proper steps for a removal have been taken, and as to whether the evidence thereof is sufficient, and as to whether the surety is good and sufficient, is a legal discretion. Gordon v. Longest, 16 Pet. [41 U. S.] 97, 104. No order of the state court for the removal of the cause is necessary. The right of the defendant to a removal is not dependent on the question whether the state court does or does not make an order for the removal. If it were so dependent, the refusal of the state court, in a proper case, to make such an order, would make it impossible for the defendant to secure the removal, except by carrying the suit through the state tribunals, and then carrying it from the highest state tribunal to the supreme court of the United States, under the twenty-fifth section of the judiciary act of 1789. A defendant is not, however, where a state court is improperly proceeding in a cause, in violation of the twelfth section of the act of 1789, restricted to such mode of relief. Where the right to remove a cause is complete, the power of the state court, in respect to the cause, is at an end, and the defendant is not obliged to follow the cause further in any state court, either of original or appellate jurisdiction. Kanouse v. Martin, 15 How. [56 U. S.] 198. If he does all that is necessary to secure a removal, then, whether the state court makes an order of removal or not, he can perfect the removal, by entering in this court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary. When that is done, the cause will proceed in this court. These observations are made for the purpose of showing that these causes are removed into this court under the act of 1789, and are removed wholly and not partially, and are removed as between all the parties thereto, the only parties thereto being those who are the real parties, namely, the plaintiff and the company, and that they are so removed, although the order of the state court in each case states that the cause is removed as against the company and Tracy, in pursuance of the act of 1866, and that such order is granted under and pursuant to the last-named act.

These cases having been thus removed into this court under the act of 1789, and being properly in this court under that act, it becomes unnecessary to consider any of the questions discussed by counsel as to removals of the cases under the acts of 1866 and

1867. The motion to remand the cases is denied.

Where a case is removed under the act of 1789, any injunction issued before its removal, ipso facto falls, for the reason that the twelfth section of the act, while it is careful to preserve the lien of an attachment issued before the removal, in certain cases, does not preserve an injunction, and, where congress has intended to preserve the lien of an attachment, and also continue in force an injunction, it has so expressly declared, as in the acts of 1866 and 1867. McLeod v. Duncan [Case No. 8,898]. The motion to dissolve the injunctions, was, therefore, unnecessary, as the injunctions are no longer in force. The motion is, therefore, denied.

HATCH (CHICKERING v.). See Cases Nos. 2,671 and 2,672.

Case No. 6,205.

HATCH v. CODDINGTON et al.

[5 Blatchf. 523.] [1]

Circuit Court, S. D. New York. Nov. 20, 1867.

WRIT OF ERROR—PROCEDURE BELOW—BOND—SUPERSEDEAS.

1. Where, after a trial, in an action at law, a motion is made for a new trial, and the motion is denied by an opinion of the court filed in the clerk's office, and a judgment is then entered, the ten days within which a writ of error must be sued out to be a supersedeas and stay of execution, does not commence to run from such filing of such opinion, but from the entry, in the clerk's office, of the rule for judgment.

2. Where a judgment is for a large amount, it is discretionary with the court to approve of a bond, intended to operate as a stay, with a penalty less than double such amount, having regard to the security and its sufficiency for the amount embraced in the condition of the bond.

3. In this case, the usual affidavit of the ability of the sureties accompanied the bond at the time of its approval, and, there being no allegation of their inability, the court held the bond to be regular, and did not require any further justification, although the sureties had not justified in compliance with a notice from the defendant in error requiring them to do so.

This was a motion, on behalf of the plaintiff [Edwin A. C. Hatch], for leave to issue execution on a judgment entered in his favor for $43,311, notwithstanding a writ of error had been sued out on the judgment, by the defendants [Thomas B. Coddington and others]. The bond on the writ of error was in the penalty of $45,000, and was executed by two sureties, each of whom justified in the sum of $90,000.

Edward H. Hawke, for plaintiff.

Stephen P. Nash, for defendants.

NELSON, Circuit Justice. The first ground on which the motion is made is, that the writ of error was not allowed and filed within ten days after the entry of judgment. But this is based on a misapprehension of the practice. The ten days did not commence to run from the filing of the opinion of the court denying the motion for a new trial, but from the entry of the rule for judgment in the clerk's office; and, on the papers, the writ of error was filed within ten days from that time.

The other ground is, that the bond, which was approved by the judge, is informal and not in a sufficient amount, within the act of congress. I think the bond is substantially good and sufficient as to its amount and the ability of the sureties. It is not, indeed, in double the amount of the judgment; but, in the case of a judgment of a large amount, it is discretionary with the court to approve of a bond intended to operate as a stay, with a penalty less than double such amount, having regard to the security and its sufficiency for the amount embraced in the condition of the bond. There is another objection—that the sureties did not justify, in pursuance of a notice by the plaintiff's attorneys, requiring them to justify. The usual affidavit of the ability of the sureties accompanied the bond at the time of its approval, and there it no allegation of their inability; and I am not inclined to require any further justification. Motion denied.

Case No. 6,206.

HATCH v. DORR et al.

[4 McLean, 112.] [1]

Circuit Court, D. Michigan. June Term, 1846.

EXECUTION — SUPPLEMENTARY PROCEEDINGS — CREDITOR'S BILL FOR DISCOVERY—CHANGE OF RESIDENCE—JURISDICTION.

1. A creditor's bill [for discovery] is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law.

[Cited in Babcock v. Millard, Case No. 699. Distinguished in Putnam v. New Albany, Id. 11,481. Cited in Arnold v. Frost, Id. 558; Re Sabin, Id. 12,195.]

2. In such a case, a change of residence of the complainant to the state of Michigan does not oust the jurisdiction of this court.

[Cited in Winter v. Swinburne, 8 Fed. 51; Claflin v. McDermott, 12 Fed. 376.]

In equity.

Mr. Abbott, for complainant.

Joy & Porter, for defendants.

OPINION OF THE COURT. This is a creditor's bill for discovery, filed upon a judgment obtained in this court in January, 1845, against Dorr; and an execution having been issued on the judgment, was returned nulla bona. The bill is filed in aid of the execution; S. N. Rendrick is made a de-

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

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

fendant, as the trustee of Dorr. The complainant was a citizen of the state of New York at the time the suit at law was commenced, but before the return of the execution by the marshal, he removed into this state. To the bill there is a general demurrer, which assigns for cause of demurrer, that the court has not jurisdiction of the case, as the complainant abandoned his citizenship in New York, and is now a resident of Michigan, where the defendant resides. This is not an original suit. "Original bills are those which relate to some matter not before litigated in the court, by the same persons, standing in the same interests." "Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are an addition to or continuance of an original bill, or both." According to this definition, a creditor's bill is the continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant so as to be made liable to his judgment, which assets have been secreted or fraudulently assigned to defeat the judgment. An injunction bill is said not to be an original bill, as it sets up some matter of equity against the plaintiff's claim, of which he could not avail himself at law. In that case, as in this, equitable considerations are inquired into in the one case, to carry the judgment into effect, and in the other to prevent the plaintiff from availing himself unjustly, of a legal advantage. If the case before us be not an original suit, but the extension of a former controversy, the change of residence by the plaintiff, can not affect the jurisdiction of the court. [Dunn v. Clarke], 8 Pet. [33 U. S.] 1; [Morgan v. Morgan], 2 Wheat. [15 U. S.] 290; Dunlap v. Stetson [Case No. 4,164]; [Logan v. Patrick], 5 Cranch [9 U. S.] 288.

It is well settled, that where jurisdiction of the court has once attached, no change of residence by the parties will oust that jurisdiction.

Case No. 6,207.

HATCH v. EUSTIS.

[1 Gall. 160.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

EXECUTORS AND ADMINISTRATORS — ACTIONS AGAINST—SUBSTITUTION OF—JUDGMENT AND EXECUTION AGAINST.

1. The pendency of a commission of insolvency is no bar to a scire facias against an administrator on a judgment had against him.

2. If after verdict, and before judgment, the defendant die, and his administrator become party to the suit, and judgment pass against him, and execution issue thereon, and be returned unsatisfied; on scire facias against the administrator, he may well plead no assets, or insolvency, for he had no time to plead such plea in the original suit.

[Cited in Kelly v. Herrall, 20 Fed. 365; Gerling v. Baltimore & O. R. Co., 14 Sup. Ct. 542.]

[Cited in Wade v. Kalbfleisch, 58 N. Y. 282; Ingraham v. Champion (Wis.) 54 N. W. 398; Smith v. Stevens, 133 Ill. 191, 24 N. E. 511.]

3. Quaere, in such case, if any execution ought to have issued on the original judgment until after a scire facias against the administrator.

[This was an action at law by Eliza Hatch, as executrix of Nathaniel Hatch, against George W. Eustis.]

S. Dexter, for plaintiff.

A. Ward, for defendant.

STORY, Circuit Justice. This is a scire facias, brought by the plaintiff as executrix of Nathaniel Hatch, to charge the defendant de bonis propriis with the amount of a judgment recovered against him as administrator with the will annexed of Thomas Eustis deceased. The declaration alleges the recovery and judgment to have been had in the circuit court of the United States, at October term, 1809, for the sum of $1276.66 debt or damage, and $86.95 costs of suit, and that execution duly issued thereon on the 28th of April, 1810, upon which a return was made of nulla bona testatoris. The scire facias issued on the 26th, and was served on the 31st of July, 1810. To this the defendant has pleaded in substance: That the original suit was commenced and tried in the lifetime of said Thomas Eustis, and after trial and before judgment the said Thomas Eustis died, whereupon the said George took administration with the will annexed, and took upon himself the defence of said suit, and afterwards judgment was rendered as aforesaid. That the estate of said Thomas being insolvent, on the 3d day of September, 1810, a commission of insolvency duly issued from the probate court of Middlesex county, which commission is yet pending in due course of law. To this plea there is a general demurrer and joinder.

In support of the demurrer it has been argued, that the plea is bad, because it does not state any bar to the action; for it is nowhere averred, that the estate is absolutely insolvent, and unless it be, the remedy at law is not gone. And this objection seems perfectly well founded. If this had been an original writ brought against the administrator, before an apparent insolvency, (which exists where a commission has issued,) he might have obtained continuances, until it should appear, whether there were or were not an apparent insolvency. If after such insolvency, and the demand had not been disputed, such insolvency might have been pleaded in abatement of the action. But in the former case, notwithstanding the apparent insolvency, the creditor would have been entitled to judgment, though not to execution. Hunt v. Whitney, 4 Mass. 620. And even

[1] [Reported by John Gallison, Esq.]

in the case of an absolute insolvency after action brought, it can never be a bar, save to the issuing of execution. Id. See Act June 15, 1784 (1 Mass. Laws, 182). But the present is not an original suit against an administrator, as such, but is merely a judicial writ, brought before the apparent insolvency, to obtain the fruits of a former judgment. And if in any shape the insolvency could avail as a bar, it could only be so when absolute; and in the mean time, the facts alleged in the plea could only be matter of continuance. As the consequence of adjudging the present plea bad would probably (as has been intimated) be a motion to replead, and to continue the cause, for this purpose it becomes important to decide, whether in point of law an absolute insolvency would in the present case avail the defendant.

At common law, the death of a sole plaintiff or defendant, before final judgment, would have abated the suit; but if either party had died in vacation after verdict, judgment might have been entered in that vacation, as of the preceding term, and it would have been a good judgment at common law, as of the preceding term. 2 Saund. 72m; 1 Salk. 87; 1 Ld. Raym. 695; 2 Ld. Raym. 766, 849; 3 Salk. 116, 159; 3 P. Wms. 399; Willes, 427; Barnes, 266; 6 Term R. 368; 7 Term R. 20; Cro. Car. 509; 1 Sid. 143; 2 Tidd, Pr. 829. But where either party dies between verdict and judgment, the statute 17 Car. II. c. 8, enacts, that it shall not be matter of error, if judgment be entered within two terms after the verdict. The judgment upon this statute is entered by or against the party, as though he were alive. 1 Salk. 42; 2 Tidd, Pr. 830, 831, 1004. But there must be a scire facias against the administrator to revive it, before any execution can issue; and such scire facias, pursuing the form of the judgment, should be general, as on a common judgment recovered by or against the original party himself. 2 Ld. Raym. 1280; 1 Wils. 302; 2 Tidd, Pr. 1004; 2 Saund. 72m. By statute 8 & 9 Wm. III. c. 11, if either party die after interlocutory and before final judgment, a scire facias to complete the proceedings shall issue by or against the executor or administrator, but upon this statute the final judgment is entered by or against the executor or administrator, and not against the original party. 2 Tidd, Pr. 1004, 1006; 1 Salk. 42. Under this statute it has been adjudged, that the plaintiff must sue out two successive writs of scire facias, to entitle himself to take out execution; one before final judgment, to make the executors or administrators parties to the record; the other after final judgment, to give them an opportunity of pleading the want of assets, or any other matter that an executor may plead in his defence to a scire facias brought upon a final judgment, against his testator; for it would be unreasonable, that the executor or administrator should be in a worse situation, where his testator or intestate died before final judgment, than they would have been in, if he had died after. Say, Rep. 266; 2 Saund. 72n; 2 Tidd, Pr. 1006.

I have the rather examined fully the proceedings under these statutes, because they throw light upon analogous proceedings in our own courts. The act of congress of 24th September, 1789, c. 20, § 31 (1 Laws [by Folwell] 71 [1 Stat. 90]), provides, that in any suit in a court of the United States, where either party shall die before final judgment, his executor or administrator, in case the cause of action shall by law survive, shall have full power to prosecute and defend the same until final judgment, and the court are authorized to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if on scire facias such executor or administrator shall neglect to appear, final judgment may be rendered against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself party to the suit. This statute embraces all cases of death before final judgment, and of course is more extensive than the statutes 17 Car. II., and 8 & 9 Wm. III. The death may happen before or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment; and in all these cases the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. The present is a case, where the administrator became a party after verdict, and I shall confine my attention to the rights of the administrator, under these particular circumstances. Now the scire facias, which issued originally in this action, to make the administrator a party to the suit, must have been to show cause why the damages assessed by the jury should not be adjudged to and recovered by the plaintiff. Tidd, Pr. & Forms, 446; 2 Saund. 6, note 2; Id. 72n; 1 Wils. 243; 1 Term R. 388; 2 Tidd, Pr. 100. To such a scire facias could the defendant have pleaded any plea of no assets, or insolvency, or plene administravit? If he could, and neglected it, then manifestly he is bound by that judgment, and it would be conclusive evidence of assets, and the defendant would be estopped to show the contrary. 1 Saund. 216, 219; 3 East, 2; 3 Term R. 685; 2 Tidd, Pr. 921, 999. If he could not, then all the proceedings in this case have been irregular, or the administrator is not now barred of his right to plead any of the pleas aforesaid. Now it is argued, that the administrator to such a scire facias (to appear and show cause, &c.) could not so have pleaded, for he had no day in court for that purpose. The verdict had been already given, and it would seem no objection to adjudging the damages to the plaintiff, that there were no assets in the hands of the administrator. He would still be entitled to judgment, although not to execu-

tion. In the analogous cases in England, under the statute 8 & 9 Wm. III., it is very clear, that the administrator would not be let in so to plead on the first scire facias, although the judgment would be against the administrator de bonis testatoris. But then the plaintiff could not obtain execution on such judgment until a second scire facias, to which the administrator might plead in the same manner, as if the judgment had been in the lifetime of his testator. Upon principle, I can perceive no difference between these cases and the present. The administrator must have a right, at some time, to plead in his own defence no assets, or insolvency. I do not perceive how, upon any acknowledged principles of pleading, this could have been done by him in that stage of the proceedings in which he became on the original scire facias a party to this record, and if not then, no execution ought to have issued, until after judgment on a scire facias founded on the original judgment against him in his capacity of administrator. According to the English practice, the present scire facias, being founded on a return to an irregular execution, ought to be quashed, the original execution set aside, and the plaintiff put to his scire facias against the administrator as such. If, however, the execution were to be considered regular according to any practice established in our state courts, and I know of no such practice, still in the present scire facias the administrator ought to be let in to all the defences, which he would have on an original scire facias against him on a judgment against his testator. As, however, the case now stands upon the pleadings before us, no special order can be made, and we can only declare the defendant's plea in bar bad; and unless other motions intervene, the judgment must be for the plaintiff.

Afterwards on motion the defendant had leave to withdraw his plea, and the cause was continued for further answer.

Case No. 6,207a.

HATCH v. METROPOLE INS. CO.

[13 Reporter, 293.] [1]

Circuit Court, D. Colorado. Jan., 1882.

FIRE INSURANCE—ACTION—CREDITOR.

A policy of fire insurance was payable to the creditor of the insured "as his interest may appear." *Held*, that the creditor had no right of action on the policy.

Action on a fire policy of insurance, payable to plaintiff "as his interest may appear." The plaintiff was a creditor of Mrs. Oray, the insured, the indebtedness being secured by trust deed upon the premises covered by the insurance. It does not appear in the pleadings what was the amount of the insurance or the amount due plaintiff. On demurrer to complaint.

H. Butler, for plaintiff.

Charles & Dillon, for defendant.

HALLETT, District Judge. If it appeared in the complaint that insurance was taken out by Mrs. Oray, and that the stipulation of the policy was, that the loss, if any should occur, should be paid to the plaintiff, all of it,—the entire sum,—a question would be presented as to the right of the plaintiff to recover on such an instrument, which is not very well settled in the authorities. Perhaps the weight of authority is that in such case the plaintiff would be entitled to maintain the action. That is to say, if two persons contract for the benefit of a third, the third party, although a stranger to the consideration, may maintain a suit upon that contract. But that is not the case as presented here. It is entirely consistent with the allegations of this complaint that the sum due the plaintiff was much less than the amount for which the policy of insurance was issued. And at all events, whatever the fact may be as to that, the policy of insurance provided for payment to the plaintiff as his interest might appear. At the time of insurance he was a creditor of the party taking out the policy, and his indebtedness might be entirely extinguished or greatly reduced before the policy should mature. That was, perhaps, the reason for putting in the policy this clause in this phraseology, "payment should be made to him as his interest might appear." That is, more or less; the sum due him, whatever it might be; and upon that no right of action can arise to the plaintiff, because it is not a stipulation to pay the plaintiff the loss, all of it, whatever it may be, upon maturity of the policy; and that must be the agreement to enable the plaintiff, under a stipulation of this kind, to recover in the action. That is very well expressed in an opinion in Hartford Fire Ins. Co. v. Davenport, 37 Mich. 613. Mrs. Oray is the owner of this policy and entitled to sue upon it. Mr. Hatch has no right of action whatever. Demurrer sustained.

[1] [Reprinted by permission.]

HATCH (NICHOLSON PAVEMENT CO. v.). See Case No. 10,251.

HATCH (PHILIPS v.). See Case No. 11,094.

Case No. 6,208.

HATCH v. PRESTON.

[1 Biss. 19.] [1]

Circuit Court, D. Illinois. April Term, 1853.

FEDERAL COURTS — JURISDICTION — EFFECT OF PRIOR DECREE OF STATE COURTS UPON THE SAME MATTER.

1. The fact that a suit is connected with and grows out of matters litigated in a state court,

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

does not prevent this court from taking jurisdiction in the case, if otherwise within the 12th section of the act of 1789 [1 Stat. 79], for the removal of cases from the state to United States courts.

2. A decree of the state court binds all parties before it, and this court will not reverse or alter it, but where a second suit is brought to connect other parties with the transaction and obtain a decree against them, there is no force in the objection that this is not an original proceeding, and that this court by assuming jurisdiction, would interfere with the decree of the state court.

3. The defendants not being precluded from maintaining the main point in controversy here by anything appearing in the decree of the state court, it is within the meaning of the act a suit commenced against them.

In equity.

Blackwell & Beckwith, for plaintiff.

Mr. Grimshaw, for defendants.

DRUMMOND, District Judge. On the 18th of March, 1848, Reuben Hatch, the present plaintiff, filed a bill on the equity side of the circuit court of Pike county, in this state, against John Preston one of the present defendants, and the representatives of James Wilson. The bill alleged that Hatch and Wilson had become indebted to Preston in the sum of $10,327.20 in four notes, to secure the payment of which they had executed a mortgage on certain lands—that Wilson in 1836 sold his interest to Hatch, and the latter assumed payment to Preston, and Wilson was deceased—that there was due Preston about $10,000—that Preston had become indebted to Hatch in a larger amount on notes of Preston, which had been assigned to him. The bill prayed for a set-off to be allowed and a satisfaction of the mortgage.

Preston answered, stating that the notes given to him had been assigned to a third party, and denied the indebtedness on the notes held by Hatch. In July, 1851, a decree was made allowing the set-off; and in October following, a final decree was entered finding due from Preston to Hatch the sum of $3,069.50, and directing the notes of Hatch and Wilson to Preston to be delivered up by the latter, and on delivery the master was to cancel them. Preston was required to enter satisfaction of the mortgage, and on default the master was to do it, and a perpetual injunction was issued against using or negotiating the notes and mortgage. The master entered satisfaction of the mortgage in conformity with the decree.

At the March term, 1853, a bill was filed on the equity side of the same court against Preston and Thaxter, the present defendants, who at the time were not citizens of Illinois, by Reuben Hatch, now plaintiff, at that time a citizen of Illinois. The bill recited the foregoing facts, and alleged that Preston had not delivered up the notes, and that Thaxter pretended to be the owner of the notes and mortgage and threatened to sue to recover the same; that Preston fraudulently transferred them to Thaxter to evade the decree after the equitable right of set-off had accrued, and after the suit before mentioned was commenced. The bill charges that Preston is the real owner of the notes and mortgage, and was at the time the bill was filed in 1848; that the allegation made by Preston in his answer that he had assigned the notes was disproved in the former case. The bill prays for an injunction, &c., and that the notes and mortgage be delivered up, &c. The defendants being non-residents, notice of the suit was given according to the practice in this state.

At the proper time the defendants presented their petition to have the cause removed to this court under the act of congress, and it was removed accordingly. At this time the counsel of the plaintiff moved to dismiss the cause for want of jurisdiction, and to remand it to the court from which it came, as having been improperly sent here.

The act of congress provides that, if a suit be commenced in any state court by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, the cause shall be removed on a proper application to the circuit court of the United States. Judiciary Act 1789, § 12 (1 Stat. 79); Gordon v. Longest, 16 Pet. [41 U. S.] 97.

There is no objection made to the form or manner of the application, and it is not denied but the parties were in a condition as to citizenship, to enable the defendants to avail themselves of the act of congress. But it is strenuously insisted, that this bill is not an original proceeding, but is a mere sequence of the former suit in the state court. The plaintiff had obtained a decree for the delivery of the notes, and that satisfaction should be entered on the mortgage, which last has been done in accordance with the decree, but the former has not, and the allegation is, that Thaxter is by collusion the mere nominal owner of the notes, and the objection is that if this court assumes jurisdiction of the case, it will be an interference with the decree of the state court.

It may be admitted that this controversy is connected with the litigation in the state court, and the bill seeks in some sort to carry the decree into effect as to the delivering up of the notes. But if the court were to go on and do what the bill wishes to be done, it would do no more as to Preston than the state court has already done. A court of equity would hardly sustain jurisdiction of a cause for the purpose of repeating decrees already made. It could only be in consequence of the altered condition of the parties, or of new facts, that the court would look into the case anew. If this bill necessarily involved a revision or alteration of the decree of the state court, there would be great weight in

the objection of the plaintiff's counsel, but it seems to me that it does not. In fact, the bill does not ask for it, and even if the cause were to proceed in the state court, the decree would have to stand. Story, Eq. Pl. §§ 429, 430. It must be the same here. This court could not in this proceeding interfere with or modify the decree of the state court. So long as it is unreversed it is binding upon all the parties to it. But the main point is as to the effect of this decree upon those who were not parties, and while it is clear that Preston is bound by it, it is equally clear, that from anything that appears upon the face of the proceedings in the state court, Thaxter is not bound by that decree. If binding on him, it must be in consequence of something not brought to the knowledge of the state court, and it is avowedly for the purpose of obtaining a decree binding upon him that the present bill is filed. The only question therefore for this court to examine, is, whether this is a suit commenced in the state court against these defendants, within the meaning of the 12th section of the judiciary act. If it is, then the duty of this court to entertain jurisdiction is imperative, as much so, as is the obligation, in such circumstances, on the part of the state court to decline jurisdiction. And after a proper application has been made in a proper case to the state court, to remove the cause to the circuit court of the United States, any subsequent step in the state court is illegal and invalid. Gordon v. Longest [supra]. And it would appear there could not be much doubt but that this is a suit commenced against these parties within the meaning of the act of congress. It is not the less a suit because it grows out of matters already litigated between one of the defendants and the plaintiff, and is, in some respects, connected with that suit. The main question, it would seem, to be decided in this case, will be whether Thaxter held the notes bona fide by assignment in due course of business before their maturity, a fact which, if it exist, he is not precluded from showing by anything that appears in the decree of the state court.

The motion to dismiss and to remand the cause is consequently overruled.

[In Case No. 13,866 a bill in equity to foreclose the mortgage mentioned in this case was dismissed upon the ground of want of jurisdiction under the eleventh section of the judiciary act of 1789.]

HATCH (STOUGH v.). See Case No. 13,499.

HATCH (THAXTER v.). See Case No. 13,866.

HATCH (THOMAS v.). See Case No. 13,899.

HATCH v. UNITED STATES. See Case No. 3,097.

HATCH (UNITED STATES v.). See Case No. 15,325.

Case No. 6,209.

HATCH v. WHITE.

[2 Gall. 152.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1814.

MORTGAGES — FORECLOSURE — DEFICIENCY MAY BE RECOVERED UPON THE BOND.

After a foreclosure of a mortgage, the mortgagee may still recover at law, upon the attendant bond or note, the deficiency of the mortgaged property to pay the debt due, calculating the value of such property at the time of the actual foreclosure.[2]

[Cited in Upham v. Brooks, Case No. 16,797; O'Maly v. Swan, Id. 10,508.]

[Cited in Hunt v. Peake, 5 Cow. 475, 476; Morse v. Woods, 5 N. H. 300; Southerin v. Mendum, Id. 432; Lovell v. Leland, 3 Vt. 586; Robinson v. Leavitt, 7 N. H. 92; Schnebly v. Ragan, 7 Gill & J. 122; Charter v. Stevens, 3 Denio, 35; Belding v. Manly, 21 Vt. 552; Thurber v. Jewett, 3 Mich. 306; Eastman v. Porter, 14 Wis. 39; Green v. Cross, 45 N. H. 577; Sprague v. Martin, 29 Minn. 229, 13 N. W. 34; Burges v. Souther, 15 R. I. 204, 2 Atl. 441.]

This was an action of debt on a judgment for $4,605.31 damages, and $36.03 costs of suit, recovered in the supreme judicial court of Massachusetts in September, 1810. The defendant, after praying oyer of the record, among other pleas, pleaded, in substance, that the judgment was recovered on a promissory note given by the said White, for the sum of $——, to the said Hatch, on the 20th day of May, 1807, payable at a day long since past, and that, at the time of making the said note, the said White mortgaged to the said Hatch in fee, as collateral security for the payment of the same note, a certain farm situate in Rutland, in Massachusetts; that the said Hatch afterwards, on the 10th of May, 1810, on account of the breach of the condition of said mortgage deed, by open and peaceable entry, made in the presence of two witnesses, took actual possession of said mortgaged premises, and continued that possession peaceably for more than three years after said entry; and the plea then avers a payment of $36.03 in satisfaction of the costs in said suit. To this plea there was a general demurrer and joinder.

Mr. Pitman, for plaintiff.

Mr. Humphreys and E. Cutts, for defendant.

STORY, Circuit Justice. There is no averment in the plea of the value of the mortgaged estate; nor that it was taken in full satisfaction of the debt; nor that the equity of redemption of the mortgagor was fore-

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[1] [Reported by John Gallison, Esq.]

[2] The point here adjudicated is not yet fully settled. See Lansing v. Goelet, 9 Cow. 346; Lovell v. Leland, 3 Vt. 581, where the S. P. is recognized. See, however, a line of cases collected both ways in 4 Kent, Comm. (5th Ed.) p. 183, notes a, b, c, d. See, also, page 194, where many cases are collected.

closed. The case, therefore, stands drily upon the legal operation of the allegations in the plea unaided by collateral facts. Oyer of the record is prayed and has been allowed by the parties without objection. But, as this judgment is a record of another court, in strictness no such oyer is demandable. It is therefore an irregularity, which, though, not affecting the merits, might well attract the attention of the parties. Waiving however all exceptions to the regularity of the pleadings, I proceed to the consideration of the only question argued at bar by the parties; whether, after a foreclosure of a mortgage (as the entry and continued possession for three years pleaded in this case are by the statute of Massachusetts admitted to be) the mortgagee can, in a suit upon the attendant note or bond, recover the deficiency in value of the mortgaged estate to satisfy the debt due to him.

It is contended by the defendant, that the foreclosure is either an absolute purchase of, or an election to take, the land in full satisfaction of the debt; and by the plaintiff, that it amounts to a satisfaction of so much only of the debt, as equals the value of the land. If the doctrine asserted by the defendant be true, it will be found in many instances to work great injustice. Where the value of the property mortgaged, whether real or personal, is less than the debt, no foreclosure of the equity of redemption, and no absolute ownership of such property, can ever be acquired, but upon the absolute extinguishment of the whole debt. Under such circumstances, the value of the pledge in the hands of the mortgagee would be materially diminished, and it would frequently prove, in literal exactness of language, mortuum vadium, a dead and worthless security. If the mortgagee be compellable to make an election, the pursuit of a personal remedy on the attendant bond is as much an abandonment of the pledge, as the appropriation of the latter is an abandonment of the debt. In a case therefore of suspected insolvency he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck. The argument, which would lead to such consequences, is not easily admissible, and if it stand at all, it must be upon technical principles, or authorities, which cannot now be questioned. A mortgage is but a mere security for the debt, and collateral to it. The debt has an independent existence, and remains with all its original validity notwithstanding a release of the mortgage. The former is the principal, and the latter an incident, though not an indispensable incident. An assignment of the debt will, in equity, if not at law, carry the mortgaged property along with it; and a release of the debt will relieve the property from all farther claims of the mortgagee. Martin v. Mowlin, 2 Burrows, 969; Green v. Hart, 1 Johns. 580. Where the contract executed between the parties is, strictly speaking, a mortgage, that is, a conditional conveyance of the property subject to be divested by a performance of the condition, by nonperformance the conveyance becomes absolute, according to the express stipulations of the parties. Where the contract amounts but to a pledge, that is, a mere deposit as security, redeemable on payment of the debt, the creditor acquires a lien or qualified property to that extent; but the stipulations of the parties in no event import a conveyance of the absolute property to the creditor. If he can acquire it, it can only be by an appropriation recognized and enforced by law, in aid of his right, upon the default of the debtor; as seems to have been the case by the ancient writ transmitted to us by Glanville. Lib. 10, c. 6; Mores v. Conhan, Owen, 123. But an absolute property in the pledge acquired either way, by the stipulations of the party or by the course of the law, upon the default of the debtor, would not seem of itself to operate an extinguishment of the debt secured by a covenant or agreement independent of such pledge. The parties have not agreed to an extinguishment of the debt in such an event, and it is difficult to perceive, how the law should found a peremptory bar, upon the default of the very party who pleads it, against another to whom no laches can be imputed. If, indeed, during the time of redemption, the pledge be injured or lost, or wrongfully detained, there seems reason to hold, as in the ancient law, that a proportionate value should be deducted from the debt, unless a restoration or satisfaction were otherwise made. Glanv. lib. 10, c. 8. But where there is no such ingredient in the case, the debt ought to retain its original validity; and if equity should interfere to enlarge the time of redemption, or to prevent a double satisfaction, it is the utmost exercise of its authority, which justice or good conscience would seem to require. To deprive the creditor even of a single satisfaction of his debt, in favor of a negligent or fraudulent debtor, would not comport with the maxims, which usually govern courts acting ex aequo et bono. Upon principle then, there would seem no reason to restrain the mortgagee from every remedy in rem and in personam, until he has obtained a full satisfaction of his debt.

Let us now examine the point with a view to authorities. No case has been cited from the English reports, and as far as a diligent search could enable us to pronounce, no case exists at law, in which the point has been solemnly presented for adjudication. This universal silence, in a case of so frequent occurrence, affords a pretty strong argument, that at law such a plea has never been held a sound defence. Yet, even at law, the incidental expressions of learned judges show the general understanding of the profession on the subject; and the frequent applications to chancery for injunctions, to restrain the

creditor from pursuing his personal remedy, have drawn from that court explicit avowals. In Smart v. Wolff, 3 Term R. 342, Lord Kenyon, comparing it with the case before him, says, "as in case of a pawn, the right to detain which is not devested by the pawnee's also taking a covenant as farther security, on which he may sue the person of the covenantor. The covenant is only considered as an additional remedy, and the party may proceed on both." In Schoole v. Sall, 1 Schoales & L. 176, Lord Redesdale declared, that a mortgagee had a right to proceed on his mortgage in equity, and on his bond at law, at the same time. In Aylet v. Hill, in 1779, 2 Dickens, 551, and again in Tooke v. Hartley, in 1786, 2 Brown, Ch. 125, and Took v. ——, 2 Dickens, 785, Lord Thurlow, upon an application for an injunction, held that notwithstanding a foreclosure, the mortgagee had a right to proceed at law on his bond, and might recover on such suit the deficiency of the mortgaged estate to cover his debt; and he declared the law to be now so established. The same may be inferred from the early case of Dashwood v. Blythway, 1 Eq. Cas. Abr. 317, the only effect there attributed to such suit being, that it opened the foreclosure, and let in the equity of redemption of the mortgagor. It is true, that Lord Thurlow in Took v. ——, 2 Dickens, 785, (which, notwithstanding some discrepancy in dates, is probably the same case as in 2 Brown, Ch. 125), is said to have declared, that after a foreclosure, so long as the mortgagee kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly and without collusion for the best price, and it produced less than the debt, he would be entitled to recover on the bond for the deficiency. The reason given for this distinction does not seem satisfactory. The actual value of the estate may as well be ascertained, while it is in the hands of the mortgagee, as after a sale; and indeed must be so ascertained, in order to see if it was sold at the best price. At least the fact is not more difficult to settle, than many which ordinarily engage the attention of courts and juries; and if the deficiency be once found, the same equity to have it paid exists in both cases. Besides, if the debt be deemed satisfied while the estate is in the mortgagee's hands, it is not easy to conceive how, by his own act of transfer, he can defeat the legal effect of that satisfaction. And if the doctrine in Dashwood v. Blythway be correct, there would be still less reason to allow the mortgagee to recover after a sale, because, as it would be inequitable to open the foreclosure against the purchaser, it would enable the mortgagee to defeat the revival of the equity of redemption resulting from his personal suit. It was this last consideration, that inclined Lord Eldon, in Perry v. Barker, 8 Ves. 527, to hold, that after a foreclosure and sale of the mortgaged estate, the mortgagee had no right to proceed at law upon the attendant bond, because by the sale he had incapacitated himself to reconvey the estate to the mortgagor; and upon this ground, in the case before him, he granted an injunction until the hearing. In this case however Lord Eldon stated, that in Tooke v. Hartley, Lord Thurlow had held (and so was a MS. report of the case taken by Sir Samuel Romilly) that whether the estate was sold to a stranger, or remained in the mortgagee, there was no distinction, but an action might be brought for the difference. There seems therefore some reason to doubt the accuracy of the report in 2 Dickens, 785. The case of Perry v. Barker, afterwards came to a hearing before Lord Erskine (13 Ves. 197), who after a full argument decided, that notwithstanding a foreclosure the mortgagee had a right to proceed on his bond; but that such a proceeding entitled the mortgagor to redeem, and if the mortgagee had previously sold the estate and could get it back, equity ought to allow him time for the purpose. It seems however to have been his lordship's opinion, that if this could not be done, the mortgagee ought to be restrained from proceeding, and under the peculiar circumstances of the case before him, he decreed a perpetual injunction. We profess ourselves unable to comprehend the particular principles, upon which in either case a court of equity proceeds to restrain a creditor from pursuing his remedy at law, when by the foreclosure he has not obtained a satisfaction of his debt. We should have thought that natural justice, as well as the stipulations of the parties, would have been better subserved by allowing the creditor every remedy in rem and in personam, until his debt should be completely satisfied. If afterwards he should make an oppressive use of his power by attempting to obtain a double satisfaction, then and not till then the interposition of chancery by way of injunction would seem conscientious and salutary.

As little can we comprehend the ground, on which, as in Dashwood v. Blythway, courts of equity have held that a suit on the attendant bond opens the foreclosure, and lets in the equity of redemption. By such foreclosure the mortgagee obtains an absolute estate, which perhaps may well be deemed a purchase at the full value of the land, if less than the debt, and if greater, at the amount of the debt. But why a personal suit to recover the deficiency of the land to pay the debt should change the nature or effect of a foreclosure, has not yet been satisfactorily explained. It is rarely that a foreclosure can take place, where the estate much exceeds the debt in value. Another purchaser is usually found, and a non-redemption therefore affords a pretty strong evidence of an inferiority in value. Besides, is it no inconvenience to the creditor to take

land instead of his money? If, after the foreclosure, the estate should become materially lessened in value, the loss has never been deemed to be the mortgagor's. Why then should he derive benefit from an accidental rise in value, when he has been altogether in default? If, indeed, after a foreclosure, the mortgagee should come into equity to seek relief against the mortgagor, there might be some room to apply the maxim, that he who seeks equity, must do equity. But in fact he only claims the exercise of his legal rights secured to him by contract; and is then told, that he must submit to retrace all his steps, or an injunction will bar his proceedings. And even if such a hard measure of justice were dealt out to the mortgagee, while the property was in his own hands, it would seem not inequitable, when he had rightfully passed it to a purchaser, to hold him entitled to his personal remedy for all the pledgor had failed to pay. That a sale after a foreclosure should be deemed so far a wrongful act, as to draw after it the penalty of a perpetual injunction, is a doctrine not easily reconcilable with the sound principles, which govern contracts of this nature. We are happy to add, that the opinions imputed by the better authorities to Lord Thurlow sanction the doctrines, for which we contend. But whatever may be the effects attributed to a suit in personam after a foreclosure, as to reviving the equity of redemption, such effects can be allowed in chancery only when it acts upon its own peculiar principles, unaffected by statutory provisions. In Massachusetts, where this mortgage was executed and enforced, and of course, by whose laws it is to be regulated, the equity of redemption is limited to three years after possession obtained, and negatived afterwards by the express provisions of the statute. Stat. March 1, 1799, c. 77. The foreclosure therefore, once complete, fixes the absolute rights of the parties, and no subsequent event can control or alter their legal efficacy.

To return; whatever may be the differences of opinion among the learned chancellors on other points, the foregoing examination abundantly shows, that they all proceed upon the supposition, that at law a foreclosure of the mortgage is no bar to an action on the attendant bond; and that equity alone can afford relief by acting on the conscience of the creditor, and decreeing a perpetual injunction. Sitting then in a court of law, we should have no difficulty, even if this were a case primae impressionis, in holding, that the plea is bad, and that the demurrer must be sustained. Our judgment would be, that upon principle the mortgagee must be entitled to recover on the note in damages the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption; and that, even admitting the foreclosure to be a purchase of the property, in no event could the purchase-money be deemed to exceed the debt. But this question has been solemnly adjudged in the state, where this contract of mortgage was made and to be executed. In Amory v. Fairbanks, in 1793, the supreme court of Massachusetts decided, upon a special plea like the present, that the bar was bad, and the mortgagee entitled to recover the deficiency of his debt, notwithstanding the foreclosure. 3 Mass. 562. At the distance of fourteen years, this decision was cited and approved by the same court, and may now be considered as the settled law of that state. Id. 154. Such an authority, even if not binding on this court, is so conformable with principle and so highly respectable in itself, that it is not easy to shake its force.

It has been argued, that the creditor might in Massachusetts have first sued his note, and levied his execution on the mortgaged estate at its appraised value, and thereby have avoided the ill effects of a foreclosure, if the estate was of less value than the debt, and that therefore there is less reason to hold him entitled to recover, when he elects a foreclosure in the first instance. But is it quite certain that the mortgagee would in equity be allowed in this way to avoid the mortgage? And even if he might, still it might well admit of doubt, how far such a proceeding extinguished his mortgage, so as to let in other intermediate incumbrances and attachments on the estate. If the defendant's argument be correct, the election of a personal suit would amount to a waiver of the mortgage, whether the execution were levied on the mortgaged property, or remained unsatisfied. Yet authority does not seem to countenance such a principle. See Bantleon v. Smith, 2 Bin. 146.

There are some other views of this case, which, if the principal point admitted of doubt, might deserve consideration. The suit is upon a judgment of another state, and must have all the validity and conclusiveness here, that it has there. See [Griffith v. Frazier], 8 Cranch [12 U. S.] 29. If the plaintiff was bound by his election to foreclose the mortgage, that election had been made previous to the original suit, and might have been pleaded in bar to it; and the neglect so to do cannot now be helped. If, on the other hand, the bar did not arise until after the election so made and an actual extinguishment of the equity of redemption, then, by the law of Massachusetts, it was no defence against a suit on the judgment. On the whole, we are of opinion, that the demurrer is well taken, and that judgment on this plea must pass for the plaintiff. Plea adjudged bad.

Case No. 6,210.

In re HATCHER.

[1 N. B. R. 390 (Quarto, 91); 1 Am. Law T. Rep. Bankr. 48.] [1]

District Court, D. Kentucky. 1868.

BANKRUPTCY — PETITION — EFFECT OF FAILURE OF PETITIONER TO APPEAR — DISMISSAL.

1. Where a petitioner in bankruptcy fails to attend before the register on the day fixed in the order of reference, he may, nevertheless, be adjudicated a bankrupt within a reasonable time thereafter.

2. If he does not appear within a reasonable time, upon the fact being reported to the court by the register, the petition may be dismissed.

[In bankruptcy. In the matter of Benjamin H. Hatcher.]

BALLARD, District Judge. The register certifies that the petitioner failed to attend before him on the day fixed in the order of reference, and that he has not since appeared, and that consequently he declined to make adjudication. He asks whether or not he has "power to appoint another day for the bankrupt's attendance, that is, enter upon his memorandum that he sat at the time and place designated in the order of reference, and adjourned to some future day to allow the bankrupt to report, or should a new order of reference be obtained?" I see no necessity for any new order of reference. The case has already been referred, and general order No. 4 provides that when it is referred to a register "thereafter all the proceedings required by the act shall be had before him, except," &c. True, the order of reference, form No. 4, designates a day on or before which the petitioner shall attend before the register, and rule 2 of this court authorizes the register to fix the times when he will act upon the several matters arising in the case referred to him, other than the attendance of the bankrupt as fixed by order form No. 4; but I think neither the order, nor the rule, prevents the register from making adjudication, and taking other proceedings when the bankrupt does appear within a reasonable time after the day fixed and asks for the appropriate orders. The petitioner should, of course, explain in a written affidavit why he did not attend as required by the order of reference, because if he wilfully disobey this, or any other, order he may not be allowed his discharge; but an adjudication of bankruptcy can be none the less valid because it is entered on a day subsequent to the time fixed in the order of reference. If the bankrupt does not appear within a reasonable time, upon the fact being reported by the register to the district court, the petition may be dismissed.

HATCHER (DAVIE v.). See Case No. 3,610.

[1] [Reprinted from 1 N. B. R. 390 (Quarto, 91), by permission. 1 Am. Law T. Rep. Bankr. 48, contains only a partial report.]

Case No. 6,211.

HATFIELD v. BUSHNELL.

[1 Blatchf. 393; 22 Vt. 659; 7 N. Y. Leg. Obs. 331.] [1]

Circuit Court, D. Vermont. May Term, 1849.

ACTIONS — ABATEMENT BY DEATH — SUBSTITUTION OF PERSONAL REPRESENTATIVE — LAW OF VERMONT.

1. An action pending in this court does not abate by the death of the plaintiff before judgment, but his personal representative may, under section 31 of the judiciary act of 1789 (1 Stat. 90), become a party to the suit, and prosecute it to final judgment, in case the cause of action survives to him by the local law.

2. By the law of Vermont, an action of ejectment is one in which the cause of action does so survive.

[Cited in U. S. v. De Goer, 38 Fed. 82.]

3. Jurisdiction of such an action having once vested in this court, the fact that the administrator of the deceased plaintiff is a citizen of Vermont and resides in the same state with the defendant, will not divest the court of jurisdiction, in case the administrator be admitted to prosecute.

[Cited in Culver v. Woodruff Co., Case No. 3,469; Trigg v. Conway, Id. 14,173; Winter v. Swinburne, 8 Fed. 51.]

This was an action of ejectment to recover lands claimed by the plaintiff [Peter Hatfield], an alien and a subject of Great Britain. The plaintiff having died intestate pending the action, and letters of administration on his estate having been granted by the court of probate in Vermont, the administrator, a resident citizen of Vermont, appeared, and, the death being suggested on the record, moved for leave to enter and prosecute the action. The defendant [Ira Bushnell] objected to the leave being granted, and filed a motion to dismiss the action.

Samuel S. Phelps and C. D. Kasson, for administrator.

Asahel Peck, for defendant.

PRENTISS, District Judge. The act of congress of 1789, commonly called the "Judiciary Act" (1 Stat. 90, § 31), provides: "That where any suit shall be pending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, &c."

The act, it will be perceived, extends to every action, and saves it from abatement by the death of the parties, where the cause of action survives, whatever may be the nature of the action. Whether or not, in any particular case, the cause of action survives, must depend altogether upon the local law. With that question the act of congress

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 7 N. Y. Leg. Obs. 331, contains only a partial report.]

has nothing to do. It does not profess to say what causes of action, nor, of course, what particular forms of action shall or shall not survive, but refers this to the laws of the respective states. If, in the present case, the cause of action, by the law of Vermont, survives to the personal representative, and he might sue originally upon it, the action does not abate by the death of the plaintiff, but may be prosecuted by his administrator.

By the law of Vermont (Rev. St. c. 48, §§ 10, 12, 17), actions of ejectment to recover the seisin and possession of lands, as well as many other actions which would abate by the common law, and the causes of action, survive; and any such action may be commenced, or, when commenced in the life time of the deceased party, may be prosecuted by the executor or administrator. The lands are in the nature of assets for the payment of debts, and, for that reason, the executor or administrator is the only party primarily, and for a time, at least, entitled to maintain an action to recover them. Neither the heir nor the devisee can sue until the lands have been assigned to him by a decree of the court of probate, or the time allowed the executor or administrator for the payment of debts has elapsed. The cause of action in this case, therefore, surviving by the law of Vermont, the administrator, under the act of congress, has a legal right to become a party to the suit and proceed in it to judgment.

It is objected, however, that the administrator is a citizen of Vermont, resident in the same state with the defendant, and that the court cannot exercise jurisdiction in a case such as this will be if the administrator become a party, between citizens of the same state. But, it is to be observed, that the administrator, if admitted, is not to be considered in the light of an original party to the action for the purposes of this or any other question. The action was commenced and regularly pending in the lifetime of his intestate, who was the original party; and he comes in, not in his own right, but in the right, and merely as the representative of such original party. It is in this special character, and under these special circumstances, that he appears and prosecutes. As was said in the case of Green v. Watkins, 6 Wheat. [19 U. S.] 260, the death of the party neither raises any new cause or right of action, nor produces any change in the condition of the cause or in the rights of the parties. If these remain the same as before, why does not the jurisdiction continue the same as before, irrespective of the citizenship of the personal representative?

It is well settled, that if the jurisdiction of the circuit court be once vested in a suit between citizens of different states, a subsequent change of domicil of the parties, pendente lite, either by the defendant removing into the state where the plaintiff resided, or by the plaintiff removing into the state where the defendant resided and the suit was brought, will not divest the jurisdiction. Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 290; Cameron v. M'Roberts, 3 Wheat. [16 U. S.] 591; Thomas v. Newton [Case No. 13,905]. And, where a judgment has been recovered in the circuit court, in a suit at law between citizens of different states, a bill in equity for an injunction to stay execution on the judgment may be entertained by the court, although the adverse parties to the judgment have, subsequent to the judgment, become citizens of the same state. Dunn v. Clarke, 8 Pet. [33 U. S.] 1. The doctrine upon which these cases rest is, that where the jurisdiction has once attached, no subsequent change in the relation or condition of the parties, in the progress of the cause, or after judgment, will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. On this doctrine, an executor or administrator may bring a scire facias in the circuit court to revive a judgment recovered therein in a suit brought by the testator or intestate, or to have execution against the bail in the suit, or, if no judgment be recovered in the suit so brought, but it be still pending, may of course become a party to and prosecute the same, although he may be a citizen of the same state with the adverse party, and, for that cause, incompetent to bring in such court an original suit against him.

The deceased plaintiff was an alien, and the court had jurisdiction of the action. The administrator comes in, as has been already said, merely as the representative of the deceased plaintiff, and prosecutes as such. Thus coming in to prosecute to judgment a suit already pending, however it might be in a suit originally commenced by him, his residence or citizenship, whether in the same state with the defendant or a different one, is immaterial. To hold otherwise might render the provision of the act of congress in a measure nugatory. The local law of the state may not allow the appointment of a person as administrator who resides out of the state, or, if it does, the court of probate may refuse to appoint such person; and no letters of administration but such as are granted in this state will give any authority to sue or prosecute here.

The sum of the whole matter therefore is, that an action of ejectment pending in this court, does not abate by the death of the plaintiff before judgment, but his administrator may, under the provision of the thirty-first section of the judiciary act of 1789, become a party to the suit and prosecute the same to final judgment, the cause of action, by the local law, surviving to the personal representative; and, jurisdiction of the action having once vested, it continues and may be exercised, notwithstanding the administrator may be a citizen of Vermont, residing in the same state with the defendant. How far the right to recover may be affected, if

at all, where the administrator comes in, as in this case, in right of an alien, a subject of Great Britain, whose title may or may not be held under the ninth article of the treaty of 1794, is a matter proper to be decided, not on a preliminary motion, but on the trial of the merits. The motion of the defendant to dismiss the action is consequently denied, and the motion of the administrator for leave to enter and prosecute allowed.

HATFIELD (PARKER v.). See Case No. 10,736.

HATHAWAY (COLLINS v.). See Case No. 3,014.

Case No. 6,212.

HATHAWAY v. JONES.

[2 Spr. 56.] [1]

District Court, D. Massachusetts. Jan., 1863.

ADMIRALTY — WHALING VOYAGE — PROPORTION OF PROFITS OF DISCHARGED SEAMAN — GRIEVANCES — FOREIGN CONSUL.

1. In whaling voyages, if a man who ships at home is discharged abroad for other cause than sickness, and without his own fault, he is to have the same pro ratâ settlement that is provided in the articles for discharge by reason of sickness. This is not an absolute rule of law, but is adopted by this court, by analogy, and as most just and reasonable, and most consonant with the nature and purposes of the voyage. If other terms of discharge are fairly agreed upon, they are binding. If the circumstances of any particular case show the pro ratâ settlement to be inapplicable or unreasonable, it will not be enforced.

[Cited in Jenks v. Cox, Case No. 7,277.]

2. It is the duty of the master of a ship to hear complaints by inferiors against superiors, made in a reasonable manner, and to redress grievances found to exist; and he is not necessarily to sustain the superior because of his station.

3. The discharge made in a foreign port must be before the consul, but the money settlement need not be; and the consul is not entitled to charge a commission on the amount paid, for merely witnessing the payment.

In admiralty.

R. H. Dana, Jr., for libellant.

W. W. Crapo, for respondent.

SPRAGUE, District Judge. This is a suit in admiralty for the wages of the second mate of the respondent's ship Eliza Adams, engaged in the whale-trade. The libellant was discharged at Honolulu, and paid off at his lay (one-thirtieth) of the oil actually taken at that time, at what is called consular prices. The libellant now asks to set aside this settlement, and claims to be paid pro ratâ on the entire voyage,—that is, to receive his lay of such portion of all the oil taken during the whole voyage, as the time he served bears to the length of the voyage; or, if that is not allowed, then to receive his lay of the oil taken at the time of his discharge, at the New Bedford prices. The respondent contends that the settlement at Honolulu is binding. There are certain charges and deductions, made at Honolulu, to which the libellant objects.

By the shipping-articles in whaling voyages, it is provided that when a man is separated from the vessel during the voyage by death or sickness, he shall be paid pro ratâ, as above stated. But there are no stipulations in the articles to govern any other case of a separation from the vessel. In such cases, this court has adopted the rule provided in the articles for cases of separation by death or sickness, by analogy, and as in itself just and reasonable, and therefore most likely to effectuate the real intention of the parties at the time the contract was made. But if there are circumstances showing that the pro ratâ settlement would not be just and reasonable, or if any other mode was fairly agreed upon at the time the man left the vessel, the pro ratâ settlement will not be adopted; the object of the court being to ascertain and carry out the intention of the parties which they have not expressed. But in most cases of discharge by consent, where each party acts freely, the terms upon which the contract of service shall be dissolved are agreed upon; the willingness of one or the other party to dissolve the contract usually depending upon the state of the voyage at the time, and the probabilities of the future, and the pecuniary terms proposed.

In this case, the witnesses, who are the libellant, Captain Hawes, the master, and the third mate, Mr. Thomas, now master of another ship, are respectable and trustworthy men, and agree substantially in their statements, and, I am persuaded, all intend to give fair accounts of the transaction. From their evidence I gather the facts to be these. The libellant and the chief mate could not agree. The master was satisfied that the difficulty between them was of such a character that the interests of the voyage and the comfort of all made it best that one or the other should leave. The libellant was a peaceable man and a good officer; and, if the master had only his own wishes and the comfort of the crew and officers to consult, he would have retained him. The chief mate made trouble on board, and had attacked the third mate and ill treated the libellant. But he was a good whaleman, had taken a great deal of oil, and was a favorite of the owners for that reason, while the libellant had been entirely unsuccessful in getting oil. The master did not approve of the conduct of the chief mate; but said that it was his duty to sustain him, right or wrong. The libellant said that if the chief mate imposed upon him, he should resent it, and defend his own rights, if they were not protected by the master.

The libellant was willing to be discharged, while the chief mate was not. Under these

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circumstances, the master and libellant agreed on a discharge, the terms of which were that the libellant should receive his lay of the oil then taken. But it was not determined, or was not fairly understood between them, whether he should be paid there, at consular prices, or take an order on the owners for a settlement at the end of the voyage, at New Bedford prices.

The master and libellant went ashore to effectuate the discharge, and on their way to the counsul's office the master said he should pay off the libellant there, at consular prices. The libellant objected, and said he did not wish for his money there, and would not accept consular rates, but wished for an order to settle at New Bedford. This the master refused. The libellant then said he would return to the vessel and fight it out, or words to that effect, rather than take those terms. The master said it had gone too far now for him to return, and insisted on the discharge being completed on those terms. The libellant yielded, but proposed that, after getting the discharge before the consul, the wages should be paid without the intervention of the consul, as the consul charged a commission; but the master, probably thinking it necessary, insisted on the payment being made before the counsel. This was done, and the consul took off two and a half per cent. as his commissions.

From these facts, it seems to me that the discharge at first was by consent, on the terms of a lay of the oil taken. So far, the agreement was fair and mutual. Afterwards, the parties differed as to the further question of the place and rate of payment. In many cases where a part of an agreement falls through, the whole must be set aside. But in this instance, it seems to me right to carry into effect the terms of the discharge, so far as they had been agreed upon. The subsequent point, upon which they differed, is fairly separable. I shall therefore give the libellant his lay of the oil taken, and not the pro rata on the entire voyage, as he claims. But I think he is not bound by his assent to the terms of consular prices. He yielded under that kind of duress against which a court of admiralty, which acts on equitable principles, will relieve him. There was sure to be trouble and discomfort, and perhaps danger, in his relations with the chief mate. The master, who all agree is a kind and just man, had yet a notion, very common among masters, but entirely erroneous, that he must sustain his chief officer, right or wrong, so long as he kept him in command. And if the libellant had insisted on going back, it would have been an assertion of a bare legal right, against the will of the master; and if the master had found it necessary to yield to it, the situation of the libellant would have been such that no court could require him to insist on continuing the voyage, at the peril of losing a portion of the stipulated compensation for previous services.

I wish it understood that the master, while at sea, as holding supreme authority, is to do justice to all persons under his command. He should control the officers as well as the men. All should be able to come freely to him, in a reasonable manner, with their complaints; and if there has been a serious wrong, the master should protect the men or inferior officers. I know it is said this will relax discipline. But, in my judgment, it will tend to secure a more ready submission to the master's authority. If he sustains the officer, right or wrong, the officer, and not he, decides the question. The knowledge that masters have this feeling leads men to fear to present their grievances, and gives confidence to bad officers, until things ripen into mutiny or violence. My experience in this court is, that many of the most serious troubles would be avoided, if masters would be the actual rulers and arbiters, and inquire into complaints when reasonably stated, and redress grievances if found to exist. This is their duty, as it is their best policy.

As the place where the lay should be paid and the rate at which it should be calculated were, as I have said, not agreed upon, but acquiesced in under duress, it is necessary for me to determine what the libellant is entitled to. It is most in consonance with the terms of the contract and nature of the voyage, to have it settled at New Bedford, and at home prices. If a man chooses to take money in a foreign port, at the price in that port, he can do so; but if he does not agree to it, he should not be compelled to take money when he does not wish for it, and at consular rates, which the evidence shows are, for some reason or other, almost always a good deal below what would seem to be the fair calculation of the market rate of the place, or the estimated New Bedford price, less freight home and insurance. By settling before the consul, a commission of two and a half per cent. was incurred. There is no reason for this. The discharge must be made before the consul, but the payment need not be before him. It may be with or without witnesses; and if before witnesses, no witness charges a commission for seeing money paid, and that is all the consul did.

The libellant is to have his lay of the oil taken at the time of his discharge, at the price for which the oil sold in New Bedford, with costs.

Case No. 6,213.

HATHAWAY v. ROACH.

[2 Woodb. & M. 63.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

PATENTS—TAXABLE COSTS—MODELS—DEPOSITIONS NOT USED—TRAVELING EXPENSES—ACTS OF CONGRESS ON COSTS.

1. No act of congress is in force, which in terms gives costs to the prevailing party.

[Cited in Jordan v. The Agawam Woolen Co., Case No. 7,516; Ethridge v. Jackson, Id. 4,541.]

2. But several acts recognise the existence of the right of such a party to costs generally, and several specify the fees, which shall be paid to certain officers, jurors, and witnesses. It is doubtful whether the act of March 1, 1793 [1 Stat. 333], which allowed to parties such compensation for travel and attendance and attorney's fees as were given in the superior courts of the respective states, is now in force.

[Cited in The Baltimore v. Rowland, 8 Wall. (75 U. S.) 388; Spaulding v. Tucker, Case No. 13,221; Jerman v. Stewart, 12 Fed. 274; U. S. v. Treadwell, 15 Fed. 532; The Vernon, 36 Fed. 115; Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 348; The Advance, 60 Fed. 423.]

3. But the 34th section of the judiciary act [of 1789 (1 Stat. 92)], settling the rights of parties in the courts of the United States by the laws of the states, when not provided for by congress specially, is broad enough to cover the rights of parties to costs; and this construction is strengthened by a contemporaneous construction, and a practice since of half a century conforming to it.

[Cited in Burnham v. Rangely, Case No. 2,177; Dennis v. Eddy, Id. 3,793. Approved in Ethridge v. Jackson, Id. 4,541. Cited in Cooper v. New Haven Steam Boat Co., 18 Fed. 589.]

4. There are, also, several rules of the supreme court of the United States, and of the circuit court, besides several acts of congress, which recognise the general right of the prevailing party to costs.

[Cited in Edwards v. Bond, Case No. 4,294.]

5. Where neither the laws of a state, nor the acts of congress provide for the allowance of any particular item of costs, it is to be taxed only when relating to the competent evidence in the case, and connected with what is appropriately a matter of cost rather than damages, and expenses in preparing a cause.

6. The court must use a sound discretion as to such items, and allow in amount only a reasonable compensation.

7. Models, like the plaintiff's, in a suit for violating a patent, obtained by the defendant, are a proper item, as they are evidence, and the plaintiff is not obliged by law to produce them. Models of other patents are not taxable.

[Approved in Woodruff v. Barney, Case No. 17,986. Cited in Hussey v. Bradley, Id. 6,946a; Wooster v. Handy, 23 Fed. 60, 62.]

8. Copies of the patent of the plaintiff procured by the defendant are not taxable, as the plaintiff is bound to produce them. But copies of assignments of the patent, procured by the defendant, are taxable, as they are evidence, and often important, and the plaintiff is not bound to produce them. A deposition, properly taken, cannot be taxed if the party taking it did not use it, but put the witness on the stand and taxed him as attending.

9. If a case is suspended for a few days, and postponed by agreement of parties, and not by order of the court, except to carry the agreement into effect, the witnesses will not be allowed another travel, unless it was a part of the agreement, but their continued attendance till discharged will be allowed in such case. In the courts of the United States witnesses are entitled to travel "from the places of their abode," by the act of congress, though beyond the line of the state, unless otherwise agreed by the parties.

[Cited in Burnham v. Rangely, Case No. 2,177; Woodruff v. Barney, Id. 17,986; U. S. v. Sanborn, 28 Fed. 301; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 281; Pinson v. Atchison, T. & S. F. R. Co., Id. 465.]

[Cited in Alexander v. Harrison, 2 Ind. App. 53, 28 N. E. 119.]

This was an action [by Joshua G. Hathaway against William Roach] for a violation of a patent of the plaintiff for a two-flue stove for cooking. [Patent No. 505, granted Dec. 7, 1837.]

At the trial here at this term, several rulings were made, and the cause not finished as to the testimony when the plaintiff became nonsuit. But the case had been on trial between two and three weeks before the nonsuit, and by agreement between the parties, without any order from the court except to acquiesce in the agreement, the trial had been suspended and postponed for about ten days, after it had been in progress four or five days. The defendant's bill of costs was taxed and revised by the clerk, but containing several items, which, though objected to by the plaintiff, were retained by the clerk, the objections were heard at the adjourned term. As they will fully appear in the judgment of the court on them rendered at the same session, they need not be detailed here.

B. R. Curtis, and Mr. Whiting, for plaintiff.
Rand & Choate, for defendant.

WOODBURY, Circuit Justice. Most of the different objections to the bill of costs in this case are to items not specially provided for by any statute. If allowed at all, then, it is to be from considerations of what is reasonable and equitable, or the practice of courts rather than any positive statutes, or adjudged precedents, which are reported either in this state or the United States. It is a little extraordinary that no act of congress gives any express direction for taxing any of the items in controversy, except perhaps one, and that very few directions exist in any such acts, unless as to the fees of marshals, clerks, and jurors, and those of a general character for witnesses. It is still more extraordinary, that there is no act of congress expressly enacting that costs generally shall be given to either party, but several merely specify some particulars as first remarked, which may be taxed for particular officers and persons. It is to be inferred, however, from a uniform practice over half a century, that the prevailing party in civil actions in the courts of the United States is to recover his cost to some ex-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

tent or other; and several provisions by congress as well as some rules of the supreme court, no less than of this, seem clearly to recognise such a right as existing by law. Thus, in the 71st section of the act of March 2, 1799 (1 Stat. 678), a revenue officer, prosecuted without sufficient cause, is entitled to recover double costs. So the act of March 1, 1793, c. 20, § 4 (1 Stat. 333), gave "in favor of parties obtaining judgments" in courts of the United States, such compensation "for their travel and attendance" and for attornies' and counsellors' fees as were given in the superior courts of the respective states. But this act was to be in force only one year, and till the end of the next session of congress, and was not extended or revised till by act of March 31, 1796 (1 Stat. 451). It was then continued in force two years longer, and till the close of the next session. But no express renewal was then made. When the act of February 28, 1799 [1 Stat. 624], was passed, it omitted in terms to make this provision perpetual. But it was probably designed to make the act as an act perpetual; because it expressly repealed the third section of it. And the courts and the profession have ever since acted on the premises as if the rest of the act was operative, and they have allowed or withheld those fees for attendance and attorneys as the state laws or superior courts under them did. See Sebring v. Ward [Case No. 12,598], and Foster v. Swasey [Id. 4,984], at this session. But whether this be considered as legally done under these acts, or some others, if at all, is not very clear. I have recently held in the case last named, (Foster v. Swasey) that it is not to be justified, as was there supposed by counsel under the acts of congress in relation to process. Though this court is bound to conform to those process acts, even where final discharges are made under them, (U. S. v. Knight [Id. 15,539]; [Beers v. Haughton] 9 Pet. [34 U. S.] 329), yet the taxation of cost is not a "process" or "precept," but rather a right given or refused by state laws, or those of the United States.

Further, respecting the legislation by congress as to costs, it will be seen that the act of congress of February 28, 1799, expressly fixes the fees for witnesses in their travel and attendance per mile and per day. 1 Stat. 626. So costs are given against defendants in criminal cases. Section 5, Act May 8, 1792 [1 Stat. 275]. So in prosecutions for penalties (Act May 8, 1792; 1 Stat. 275), as existing in the different states, and sometimes against plaintiffs. So the act of July 22, 1813, authorizes the consolidation of suits and costs, where several are instituted. 3 Stat. 19. So in admiralty and equity cases, the "rates of fees" shall be allowed as in the states in like courts and cases. 1 Stat. 94; Act September 29, 1789. See, also, 2 Stat. (by Story) 65, § 23. So the 20th section of the judiciary act restricts the plaintiff from receiving cost at all, unless he recovers as much as $500 debt or damages, and subjects him in such case to cost in the discretion of the court. 1 Stat. 83. This raises a strong implication, that in other cases the plaintiff is entitled to cost; and enacts expressly, that the defendant may receive them in the particular case described. Again, the 34th section of this same judiciary act provides, that the laws of the different states shall be the guide to this court in settling the rights of parties where no provision is made by the constitution or acts of congress. This is probably the most material express provision, covering this inquiry, as it is broad enough to embrace cost. It is no very forced construction to suppose, that this applies to the rights to costs as well as to the rights connected with the merits in controversy on the pleadings. As first remarked, the right to costs is often very valuable. At all events, it is understood to have been the practical usage by the courts of the United States to conform to the state laws as to costs, when no express provision has been made and is in force by any act of congress in relation to any particular item, or when no general rule of court exists on this subject. Hence that may be deemed a contemporaneous construction of this and the other acts of 1799 before referred to, which, having been made or conformed to for half a century, should not now be departed from without new legislation. Besides this, in the various reported cases, which exist in relation to costs in those courts, it seems to have been taken for granted, that either under the judicary act or some others, they are to be allowed, and generally as the laws of the different states provide, where congress has not legislated. See Sebring v. Ward [supra]; Bowne v. Brown [Case No. 1,743]; The Antelope, 12 Wheat. [25 U. S.] 549. The only exceptions to this are, that costs are by various decisions, and by a rule of the supreme court, never awarded against the United States (see Rule 45; [U. S. v. La Vengeance] 3 Dall. [3 U. S.] 301; U. S. v. Barker, 2 Wheat. [15 U. S.] 395; [U. S. v. Hooe] 3 Cranch [7 U. S.] 73; 12 Whart. 346; [U. S. v. Ringgold] 8 Pet. [33 U. S.] 150; 8 Greenl. 106); or against a state (2 Tyler, 44; 4 Gill & J. 507; 4 How. [45 U. S.] 639). And that they are not given where the court possess no jurisdiction over the subject-matter. See the cases collated in Burnham v. Rangely (Me. Dist. May Term, 1847) [Case No. 2,177].

The rule of the common law, which gave no costs, has not prevailed in this court or in Massachusetts. 2 Inst. 288; Jackson on Real Actions, 99. But rather the statute of Gloucester, which allowed costs in cases of damages, and which being a portion of the laws of England when our ancestors emigrated hither, came with them. It was a part of their birthright, and applicable to their condition here, and practised on, if it had not been expressly re-enacted in Massachusetts either as a colony or a state. See Owners of the De Soto v. Owners of the Luda, 5

How. [46 U. S.] 441, opinion of the minority; State v. Rollins, 8 N. H. 550. Also, U. S. v. New Bedford Bridge (Mass Dist. Oct. Term, 1846) [Case No. 15,867]. If it has been altered in any particular in Massachusetts by any express statute, which may relate to this inquiry, it is only to give costs to "the party prevailing" in all cases of trials, under certain express exceptions, and hence to prevent other exceptions from being made which are accustomed to be elsewhere. Costs are now, by virtue of statute, allowed in Massachusetts in all cases, jurisdiction or otherwise, as in all there is a party prevailing. Hunt v. Inhabitants of Hanover, 8 Metc. [Mass.] 343; 7 Metc. [Mass.] 591. The statute supposed to sanction this is that of 1786 (chapter 121), which gives costs, in terms, in "all civil actions to the party prevailing." This is contrary, however, to the general rule in most of the states, and the decisions in the federal courts, where no jurisdiction exists over the subject-matter, and can be justified only by a broader construction of the Massachusetts statute than is usual in like cases. See Burnham v. Rangely [supra].

The practice to allow costs in ordinary cases to the successful party, extends in most of the states, even beyond the Statute of Gloucester, as that gave them only where damages were recovered, and as an increase or increment to the damages. 3 Bl. Comm. 399. But by 23 Hen. VIII. c. 15, the defendant was also allowed costs on a nonsuit or verdict in his favor. So 8 Eliz. c. 2, and various others since as to both plaintiff and defendant. See 1 Har. Dig. 1715, "Costs;" 2 Tidd, Pr. 864, some cases early as 52 Hen. III. In time in England, where the plaintiff would be entitled to cost, the defendant was, if recovering. In Greetham v. Theale, 3 Burrows, 1723. All the statutes passed in England before the emigration of our ancestors, when suited to our condition, became in force here as much as the common law. (See cases, ante.) Thus, in Massachusetts, and like the civil law, the rule is, without respect to damages, "vinctus, victori in expensis condemnatus est." They go to the party, prevailing on the whole, though failing as to a part. Williams v. Wright, 1 Wend. 277. Some of the rules of this court tend to sustain these views. The 41st seems to authorize the prevailing party to have his cost as is the provision in the Massachusetts statutes. So the 10th and 11th rules. So the 45th rule of the supreme court of the United States expressly recognises the right of the prevailing party to costs, except against the United States, and so do the 20th and 37th.

These inquiries need not be protracted, as they have been pursued far enough to show the propriety of allowing some cost to the prevailing party in this court, though not expressly provided for in the present case by any special act of congress. We seem justified, therefore, to make the amount and items of cost in the state courts, the general guides where no acts of congress give specific directions as to those amounts or items. But the courts of Massachusetts are not directed by any positive statute how to act in respect to several of the items objected to here. Nor is their practice in respect to such items known to the counsel, if these items have ever been called to the notice of the state courts. What then is proper to be done under such circumstances, as to those particular items? In cases of admiralty, it has been laid down, that costs and expenses are to be allowed according to the "sound discretion" of the court in items not regulated by any statute. Canter v. American & O. Ins. Co., 3 Pet. [28 U. S.] 319. Looking to long usage here and elsewhere in some such items of costs, all courts may be said to possess discretion as to the amount, as well as the allowance of them. Yet where they have such a discretion, it must not be a wild and lawless one, but governed by fixed rules, and appropriate principles, connected with the subject of costs. Nor can it be exercised with a view to full indemnity as to every expense to a party, involved in litigation, which in its very nature ever has been and always will be in many respects ruinous. The true course is not to attempt to make the party prevailing "whole," as it is termed, for all his various items of expense and trouble; for that would be vain, without much further legislation in most cases of parties involved in litigation. But now it is so far expressly provided for and to be obeyed, that in some cases double costs are by law expressly allowed; that in others, some of the costs and expenses are permitted to be compensated in the award of damages by the jury (Allen v. Blunt [Case No. 217]; and that in others the court is specially empowered in its discretion, as in patent cases, to treble the damages. Without such an express provision in England, courts in their discretion have allowed actual expense and loss of time paid to medical men and attorneys for attendance as witnesses beside the usual fees, but have refused it to all others, such as experts and men of science. 2 Doug. 438; 3 Car. & P. 212; 5 Maule & S. 156; 4 B. Mon. 300; Lyon v. Wilkes, 1 Cow. 591. In this country I am not aware that any courts without statute have gone so far as this, where some fees, though insufficient, have been prescribed expressly. In the case of The Antelope, 12 Wheat. [25 U. S.] 547, it seems to have been held, that where no act of congress, or law of a state regulated an item of cost, "its amount or allowance was to depend on the discretion of the court taking care to make" a "reasonable compensation" and that only. This is a very broad principle, and I should hesitate to carry it out in all things, and in all views of the subject. But, limiting it to matters suitable for bills of cost, and necessary in the case or proper as evidence, whether in its prosecu-

tion or defence, it may be the best guide in the absence of express and detailed legislation as to many items. 6 Moore, 235. Let us, then, by this rule, test the different items which are here excepted to, and not in any way provided for by the state laws or by congress.

The first objection is to the double travel, charged for witnesses, who attended at only one term, but attended before and after a postponement, made within that term by agreement of the parties, and for the accommodation of the counsel of the defendant. Had the witnesses come in twice at different periods, and by order of the court, as jurors sometimes do, it would seem to be reasonable, as such an order is presumed to be for the public convenience, to pay the witnesses for two travels. The jurors generally are allowed them in such cases. But when the witnesses come in twice at the same term on account of a postponement by agreement of the parties, and not by any order of the court and not on public account, the payment of a second travel to them should depend on the agreement, if it covers the case. And if it does not cover the case, it seems to me, that the presumption of law and fact must be that the witnesses should continue their attendance, and be paid for it till they were discharged by the parties or the court.

The next objection is, that an agreement was then made between the parties not to bring in new witnesses after the adjournment from a distance, specifying Albany in New York, for an example, as to distance; and that some were brought from beyond, from Buffalo or Canada, and ought not therefore to be taxed. The allowance of these witnesses, if they actually attended, and before the plaintiff became nonsuit, though not examined, is usual. 11 Pick. 241; 5 Scott, 410; 3 Smith, 361; 11 Price, 511; 2 Chit. 200. If the plaintiff does not object for want of so early an attendance as the disposition of the trial by a nonsuit, the allowance depends entirely on the agreement. If that is proved satisfactorily to the clerk as above described, then they should not be taxed for the whole distance, but if not so proved, they must be allowed. Such an allowance, however, is unusual in this state, so as to be paid travel beyond the line of the state. Melvin v. Whiting, 13 Pick. 184; 1 Metc. [Mass.] 293. And hence, if by the practice in this court, travel still further has been accustomed to be paid in this district in cases at law, as the act of congress expressly says, from the "place of abode" (1 Stat. 626), it would be very natural for the parties to make an agreement to obviate this departure from the rule, which prevails in the state. As I understand this act of congress of February 28, 1799, it is imperative on this point, and travel has been allowed beyond the line of the state in such cases by my predecessor after full hearing and deliberation. Whipple v. Cumberland Manuf'g Co. [Case No. 17,515]. But for these considerations, I of course should not feel inclined, as to any of the distant witnesses, to depart from what is considered the law of the state, in respect to such travel.

The next objection is to the items of models of stoves procured and used by the defendant. If these were models of the stoves, described in the plaintiff's patent, it is my opinion, contrary to that of the counsel for the defendant, that the plaintiff was not bound by any law to produce them. The defendant might then properly and usefully obtain them. They were likely to be beneficial in explaining the patent, and were competent evidence of its coincidence or difference, compared with other stoves; as they related to doings of the plaintiff himself on the subject of his patent. For such models the defendant ought, therefore, to be allowed a "reasonable compensation." This must be what it was actually worth to make them, and not of course what was in fact given for them, though that may be primâ facie the standard. If other models are taxed, I do not think them proper items for the bill of costs, any more than the drawings of other patents procured, or the books which describe them, they all being rather arguments than proofs. Baily v. Beaumont, 11 Moore, 387. This is the analogy in respect to maps and surveys of land, and the allowance for them, as those of the land in dispute are only to be taxed by ordinary practice in some states, because such alone are evidence in the cause.

In the next place an objection is made to the cost of copies of various assignments by the plaintiff. But as it was a part of the defence, contemplated before closing, to show that the plaintiff had not retained an interest, which authorized him to recover, I think, that the defendant acted discreetly in procuring these copies. They were competent and proper evidence in respect to such a defence, and the legal charge for them should therefore be taxed. 5 Pick. 540. In England the expense of getting them is also allowed sometimes. 1 Alc. & N. 144; 2 Cowp. 548. Nor was he bound, as is argued, to ask first the plaintiff's admission as to these assignments, as he may have resided at a great distance; and the defence have been first thought of, when it would be too late to ask those admissions, and, if refused, to procure the copies before the trial. But as to a copy of the plaintiff's patent, I think that need not have been procured by the defendant, as the plaintiff was bound by law to offer it in evidence, could not proceed at all without so doing, and hence it was not needed in order to be used as evidence by the defendant. But I can readily see, that the defendant might want it for himself and counsel, in order to examine critically what he was to defend against. That, however, was a want not for proof, but preparation and argument; and like all such documents, is not generally taxed in the bill of

cost, but borne by each party for himself. Thus, in England, experiments made to test a patent for clarifying sugar, cannot be taxed as cost. 6 Moore, 235; 3 Brod. & B. 72. It is said, also, that in one instance a deposition is taxed of a witness, who was examined on the stand. If this be so, although the deposition was properly taken, yet if the party chose in the end to dispense with it, and examine the witness before the jury, it is well settled in general practice, that it cannot be taxed. Lamb v. Stone, 11 Pick. 527. It is unreasonable, likewise, that the party should be subjected to pay the expense of the travel and attendance of a witness who did testify at the trial, and, besides that, pay for the deposition of the same witnesses, which was not used at the trial. I believe these remarks will dispose of all the objections made, and the clerk will settle the bill of cost finally in conformity to them.

HATHAWAY (SLOCUM v.). See Case No. 12,952.

HATHAWAY (SWIFT v.). See Case No. 13,698.

HATHAWAY (UNITED STATES v.). See Case No. 15,326.

Case No. 6,214.

In re HATHORN et al.

[2 Woods, 73.] [1]

Circuit Court, D. Louisiana. April Term, 1875.

BANKRUPTCY—JURISDICTION OF FEDERAL AND STATE COURTS.

1. The bankrupt court, in a proceeding by two partners in a firm of three, to have the partnership adjudicated bankrupt, has jurisdiction over the partnership property, although the third partner, in a proceeding in a state court to settle the partnership, and to obtain a decree for the amount due him from his copartners, has had himself appointed receiver and is in possession of the partnership assets.

2. In such a case, the bankrupt court may enjoin such third partner from disposing of the assets of the partnership, or from any interference with them until the question, whether or not the firm is bankrupt, can be tried.

The firm of Hathorn & Batchelor consisted of Fergus Hathorn, T. J. C. Batchelor and A. J. Reid. It was dissolved on the 13th of November, 1874, by the withdrawal of Hathorn. On the 20th of the same month Hathorn filed a petition in the fifth district court of the parish of New Orleans against his late partners, in which he stated, that the partnership had been dissolved by his own withdrawal, and that owing to disagreement between himself and them, an amicable settlement of the partnership could not be effected, and in which he prayed for an accounting, for a settlement of the partnership, for a decree in his favor against the other members of the late firm for what would appear to be due from them to him on such settlement, and for a receiver for the partnership property. To this petition an answer was filed by the defendants, averring that the firm was insolvent, that there was no necessity for a receiver, and declaring a purpose on the part of defendants to go into bankruptcy. On January 4, 1875, the state court decided that the partnership was insolvent, and decreed the appointment of a receiver, and on the 12th of January, ordered that Fergus Hathorn be appointed receiver, on giving bond in the sum of $10,000. In the mean time, to-wit, on the 11th of January, 1875, Batchelor and Reid, the other members of the late firm, filed their petition in the United States district court, in which they alleged, that the said firm of Hathorn & Batchelor, and they, individually, were insolvent, and praying that they might be adjudged bankrupt. The adjudication was made in conformity with the prayer of the petition, and Berry Russell and C. W. Wood appointed assignees. Afterwards, on the 16th of March, 1875, an order was served on Fergus Hathorn to show cause on the 20th of the same month, why the firm should not be declared bankrupt, and its property and effects turned over to said assignees for administration. Hathorn filed an answer, denying the insolvency of the firm and demanding a trial of the issue by a jury. This demand rendered a decision of the issue impossible until the appointment of a district judge for this district. These matters having transpired on the 5th of April, the assignees filed their petition in the bankrupt court, praying an injunction against Hathorn, forbidding him from making any disposition of partnership property and assets, or from any interference therewith until the issue of bankruptcy vel non of said firm could be tried. This petition was submitted to the circuit judge during a vacancy in the office of district judge, for an order directing the injunction to issue as prayed for. It was objected that this court had no jurisdiction to make this order, because all the assets of the firm were in the hands of the state court for administration.

W. O. Denegre and B. F. Jonas, for petitioner.

E. W. Huntingdon, contra.

WOODS, Circuit Judge. It has been held in a case where the facts were almost identical with the facts in this, that one member of a firm is not prevented from calling the partnership into court, and having it declared bankrupt because of the proceedings in the state court. In re Noonan [Case No. 10,292]. The inference is inevitable, that the bankrupt

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

court has the right in such case to administer the bankrupt property, notwithstanding the order of the state court placing it in the hands of a receiver. It seems to me, that the position taken by respondent is equivalent to a denial of the power of the bankrupt court to adjudge a firm bankrupt, and administer its assets, if one of the members has applied to the state court for the settlement of the partnership and the appointment of a receiver: in other words, that a failing firm may defeat the operation of the bankrupt act [of 1867 (14 Stat. 517)], by applying to a state court to settle its affairs and distribute its assets. "The design and purpose of the bankrupt law is, that the property of insolvents shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against device to establish false claims, fictitious debts and illegal or inequitable preferences, which that act provides, and in the summary manner in which the proceedings are required to be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say, we can devise a better, or safer, or more economical mode of reaching the same final result. If it were true, it would be only saying, we will resort to an expedient to defeat the bankrupt law, and our reason therefor is, that we think our plan is wiser and better than that which congress has seen fit to prescribe." Woodruff, Circuit Judge, in Re Bininger [Case No. 1,420]. See, also, Thornhill v. Bank [Id. 13,992]; In re Merchants' Ins. Co. [Id. 9,441]; In re Independent Ins. Co. [Id. 7,017]; In re Safe Deposit Institution [Id. 12,211]. This is not the case where a creditor is proceeding in a state court to enforce his claim against the property of his debtor, and has had a receiver appointed before the proceedings in bankruptcy were commenced, but it is the case of a member of a firm against which a petition in bankruptcy is pending, seeking to have the assets of the firm administered by the state court for his own benefit, and that he may enforce his individual claim to the partnership assets against his copartners. To hold that such a proceeding bars the action of a court of bankruptcy, or protects the assets of the firm from administration in the bankrupt court, would be to allow all copartners at their option to defeat the bankrupt law, and transfer the power and jurisdiction of the bankrupt courts to the state courts in all cases of the insolvency of partnerships. In my judgment, the assets of this firm ought to be preserved by the order of the bankrupt court to await the result of the trial of the issue of bankruptcy vel non, and the injunction ought to issue to restrain Hathorn as prayed for in the petition of the assignees. Ordered accordingly.

Case No. 6,215.

In re HATJE.

[6 Biss. 436;[1] 12 N. B. R. 548.]

District Court, E. D. Wisconsin. Sept., 1875.

ATTACHING CREDITOR MAY CONTEST ADJUDICATION — COSTS OF ATTACHMENT PROCEEDINGS — EVIDENCE—LETTERS TO THIRD PARTIES—NON-PROVABLE DEBT.

1. An attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication on the ground that the requisite number and amount of creditors have not joined in the petition.

[Cited in Re Williams, Case No. 17,706; Re Scrafford, Id. 12,557. Distinguished in Re Jewett, Id. 7,305; Cited in Re Jonas, Id. 7,442.]

2. Costs of attachment proceedings do not constitute a demand against a debtor which can be included in estimating the amount of his provable debts, nor will such costs be paid from the funds of the estate unless such proceedings were auxiliary to contemplated bankruptcy proceedings and beneficial to the estate.

[Cited in Re Broich, Case No. 1,921; Re Austin, Id. 662.]

3. Letters written by the debtor to third parties, admitting the payment of a claim, are admissible in evidence in a contest between attaching and petitioning creditors, where the former attempt by interposing such claim to defeat adjudication.

4. A claim for money loaned to a debtor to aid him in the commission of an act of bankruptcy cannot be included among his provable debts.

[Cited in Re Broich, Case No. 1,921.]

In bankruptcy.

Cotzhausen, Sylvester & Scheibor, for petitioning creditors.

Cottrill & Cary, for attaching creditors.

DYER, District Judge. On the 24th of April, 1875, certain creditors of Albert W. Hatje filed a petition that he might be adjudicated a bankrupt. The principal act of bankruptcy charged, was that the debtor had departed from the state with intent to defraud his creditors. On the 3d of May, 1875, Smith, Chandler & Co., creditors of said Hatje, who had, by virtue of process issuing from the state court, attached a stock of goods left by the debtor, moved to set aside the petition, alleging that this court had not jurisdiction to entertain the bankruptcy proceeding. This motion was supported by an affidavit setting forth that at the time the petition was filed, the debtor was indebted to one H. P. Hatje, in the sum of five hundred and ninety-five dollars for money borrowed; and it appearing that neither H. P. Hatje nor Smith, Chandler & Co. had joined in the petition for adjudication, it was contended that the aggregate amount of the debts held by the petitioning creditors did not equal one-third of the provable debts of the debtor. Objection was made by the petitioning creditors to the right of the attaching

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

creditors to make the motion or to resist adjudication on the ground mentioned, neither Albert W. Hatje nor H. P. Hatje appearing. Notwithstanding some conflict in the authorities on the question, I held that the attaching creditors stood in such relation to the property of the debtor, and had such an interest in the pending proceedings, that they had a right to appear and contest adjudication upon the jurisdictional point named. This ruling I regarded as sustained by In re Boston, H. & E. R. Co. [Case No. 1,677]; In re Derby [Id. 3,815]; and Clinton v. Mayo [Id. 2,899]. The question has since been similarly decided by Judge Brown in Re Bergeron [Id. 1,342].

Having determined that the attaching creditors had a right to be heard upon the issue presented, an order was made directing the debtor to file a list of his creditors; but no list being filed, the case was referred to the register, to take proofs on the question whether the debts represented by the petitioning creditors amounted to one-third of the provable debts of the debtor. At the hearing before the register, the attaching creditors made proof of their own claim, amounting to $678.32, and interposed the claim in favor of H. P. Hatje, and also the costs of the attachment proceedings commenced by them in the state court, as provable demands against the debtor. Treating the demands in favor of the attaching creditors and of H. P. Hatje as subsisting provable debts, it resulted that the requisite amount of debts was not represented by the petitioning creditors. But the register rejected the claim in favor of H. P. Hatje as paid and no longer subsisting. and, including the costs of the attachment proceedings as provable, found and reported that the aggregate debts held by the petitioning creditors constituted one-third of all the provable debts of the debtor. To this report the attaching creditors filed exceptions.

I. The position taken preliminarily by counsel for petitioning creditors, that there was collusion between the debtor and the attaching creditors, and that the former procured his property to be taken on legal process, with intent to give the latter a preference, is not sustained by the evidence. The proofs are, that within a day or two after the debtor absconded, he wrote a letter to a personal friend who was salesman for Smith, Chandler & Co., informing him of his departure, and requesting him to take the goods and do the best he could with them. Knowledge that Hatje had absconded being communicated to Smith, Chandler & Co., probably by the salesman, they began legal proceedings by attachment. There is no evidence of collusion, or even concerted action between the parties. The attaching creditors, as they had a right to do, merely endeavored by the usual legal proceedings to reach the property of an absconding debtor.

II. The register erred, I think, in allowing the costs of the attachment proceeding as a demand against the debtor, in estimating the amount of his provable debts. The costs incurred by the attaching creditors in their legal proceedings, which were not then concluded, did not in my judgment constitute a debt within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], which should be considered in ascertaining the amount of debts owing by the debtor when the petition was filed. In the language of some of the cases, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request. In re Davenport [Case No. 3,586]; In re Preston [Id. 11,394]. I have held, and I think it is the only safe and correct rule, that even upon applications for the payment of such costs from the estate of the bankrupt, payment will not be ordered, unless it be shown that the attachment proceedings were auxiliary to contemplated bankruptcy proceedings, and beneficial to the estate. This is the rule adopted and enforced by Judge Longyear. In re Ward [Id. 17,145]. See, also, Gardner v. Cook [Id. 5,226].

III. The validity of the demand in favor of the attaching creditors is not disputed. The contest here is upon the alleged claim in favor of H. P. Hatje, who is the father of the debtor. It is a claim not personally asserted by H. P. Hatje, nor resisted by A. W. Hatje, for neither of these parties appear. It is presented by the attaching creditors and contested by the petitioning creditors. The proof satisfactorily shows that originally there was a genuine indebtedness for $600, owing by the debtor to his father. A small payment was made upon it, leaving due $595. The question is, was a preferential payment of the balance of this debt made, at or about the time the debtor absconded? To show such payment, the petitioning creditors rely upon certain letters written by the debtor at Chicago and San Francisco, since he absconded, to third parties in Milwaukee. These letters contain important disclosures concerning the object and circumstances of the writer's departure, and reveal strong indications that one of the purposes of his flight was to save money for his father. But it is earnestly contended that these letters are not admissible in evidence, and when the point was first made I doubted their admissibility. The fact, however, must not be ignored, that the letters are the declarations or admissions of a party to the record—the debtor proceeded against. The admissions relate to a claim against himself in favor of one supposed creditor, but interposed by other creditors and resisted by the petitioning creditors. All are parties to a proceeding which is something more than a mere suit between the creditors petitioning, and the debtor. "It rather partakes of the nature of a proceeding in rem," and all creditors are parties in interest. In re Boston, H. & E. R. Co. [supra].

It is a well-settled principle, that the dec-

larations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. Now in this case the attaching creditors are interposing a supposed claim held by another alleged creditor against the debtor to defeat adjudication. Here is, to some extent at least, identity of interest, and although the attaching creditors, by reason of their interest, are permitted to appear, and to the extent of their individual interest do independently appear and contest this proceeding, they nevertheless, so far as the creditors concerned are interested in having an adjudication, represent the debtor, and speak as well for him as for themselves in setting up this claim. It is right, therefore, that they should abide by the admissions of the debtor, and in this state of the case I do not discover that it is a violation of rules of evidence to permit them to stand as testimony on the point involved. If H. P. Hatje were prosecuting the claim, and the debtor were seeking to defeat it, his admissions of its validity would be competent evidence to support it. His admissions of its payment are, I think, likewise admissible in this controversy, where creditors struggling to maintain a preference by attachment are endeavoring to defeat adjudication of their debtor as a bankrupt by asserting this claim to be a subsisting unpaid demand. These letters show, I think, that at or about the time the debtor left, he paid his father $500 on the demand in question. In one of them he says that he had to leave as the only way to save at least the greatest part of the money for his father. Again he says, in order to do this, he was obliged to let other creditors lose, and speaks of the necessary secrecy of his departure. The letters, taken together, show a payment of $500, that he borrowed $50 from his father for the journey, and that he still owes him $150, the $50 being part of that amount. This state of facts presents the question whether there is any part of this $150 which ought not to be counted, in estimating the amount of the debtor's provable debts. Apart from the question whether the balance of the debt of $595 yet unpaid is provable (the creditor having received a partial payment under the circumstances named), I can have no doubt that the debt of $50, created in aid of the debtor's flight, is not provable. To depart from the state with intent to defraud creditors is an act of bankruptcy. To furnish a party with money for the purpose of aiding him in committing the act, is to participate in the fraud. To permit a party thus to assist another in the commission of an act of bankruptcy, and then to allow him to assert his claim for money thus furnished as a provable debt, and thereby defeat bankruptcy proceedings, would simply give legal effect to a fraud. Counsel for the attaching creditors urge that it is not proven that H. P. Hatje knew the purposes for which the debtor borrowed this $50. The testimony shows that the debtor secretly absconded, going first to Chicago, thence to San Francisco; that he left behind him unpaid debts; that he provided for the payment of his father's claim to the extent that he was able, and that this was one of the purposes of his departure; that his family accompanied him; that H. P. Hatje, the father, also left Milwaukee; that a few weeks before leaving he stated that his son was to pay him his money, or part of it, and that he was going to Germany, and one of the letters written by the debtor distinctly states that his parents went away with him. Unless all inferences from this testimony be dispensed with, the conclusion is unavoidable, that H. P. Hatje must have known the purpose for which the $50 was borrowed from him by his son. It is true that fraud is not to be presumed, but fraud may be shown by circumstances. The circumstances here satisfy my mind upon the point. As to the amount of fifty dollars loaned by H. P. Hatje to the debtor, the case "falls within the principle of the maxim ex turpi causa, non oritur actio." In re Stephens [Case No. 13,365]. Whether the remaining one hundred dollars of the original indebtedness is provable, the debt being single and entire, and a payment in preference having been made upon it, it is not necessary to decide. Classing it with the claim of the attaching creditors as provable, but rejecting the item of fifty dollars before referred to, the claims of the petitioning creditors amount to more than one-third of all provable debts. Exceptions to register's report are overruled and order of adjudication will be entered.

Case No. 6,216.

The HATTIE.

[Blatchf. Pr. Cas. 579.] [1]

District Court, S. D. New York. Dec., 1863.

PRIZE—CAPTURE OF LOYAL VESSEL—RESTORATION—SALVAGE.

After condemnation of the vessel and cargo, the decree as to the vessel was opened, by consent, on the application of loyal owners of the vessel, who showed that she had been previously captured from them by a privateer of the enemy. The court ordered the vessel to be restored to such owners on payment of one-eighth of her value, as salvage, to the captors.

In admiralty.

BETTS, District Judge. The above-named vessel and cargo were captured as prize, June 21, 1863, at sea, off the harbor of Wilmington, North Carolina, by the United States war steamer Florida. On the 3d of July, 1863, both were libelled in this court, and were, by due process of law, condemned as forfeited, on default, by a regular decree of the court, July 21, 1863.

On the 17th of December instant, by consent of the United States attorney, the de-

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

fault as to the vessel was vacated in court, with leave that Thomas Hillyard and others might appear and make proof that they are loyal owners of the vessel, and that the same was captured at sea, as prize of war, by the Retribution, an armed vessel cruising under the authority of the Confederate States, and was appropriated to their use, and that, when seized in this suit, she was navigated in the interest of the said Confederate States, and that said Hillyard and associates might be permitted to intervene against the proceeds of the said vessel realized in this suit, and claim the same, on the allowance of lawful salvage to the captors of said vessel, the libellants in this suit. Pursuant to such consent the said Hillyard and others have this day filed their claim in this suit, alleging that they are bona fide owners of said vessel, and that she was seized and captured from them by a vessel called the "Retribution." It is conceded, in writing, by the United States attorney, "that if the claimants establish their ownership of the said vessel by proper evidence, they will be entitled to the restoration of the said vessel to them upon payment of one-eighth of her value, as salvage."

The evidence presented to the court under the above claim consists of a copy of the register of the vessel made at the port of Boston, Massachusetts, November 7, 1860, to the claimants; the deposition of James T. Sparks, of Provincetown, Massachusetts, sworn to October 19, 1863, before a notary public; and the deposition of one of the claimants, Thomas Hillyard, taken before a notary public December 17, 1863, the assistant of the United States attorney being present and cross-examining the witness. No objection is made on the part of the United States to the competency and sufficiency of the said evidence to that end, and the proctors for the claimants having moved the court for a decree of restitution of the said vessel to them, the court is satisfied, upon the proofs aforesaid, that the claimants are loyal citizens of the United States, and are the true and bona fide owners of the said prize vessel, recaptured by the United States war vessel Florida.

It is, therefore, ordered and decreed, that the said schooner Hattie be restored to the claimants, on payment by them of one-eighth of the value of the said vessel.

Case No. 6,217.

The HATTIE.

[Blatchf. Pr. Cas. 595.] [1]

District Court, S. D. New York. Jan., 1864.

PRIZE COMMISSIONER — COSTS — COMPENSATION — ACT OF JULY 17, 1862.

1. A charge by the prize commissioner, in his bill of costs, of one per cent. custody fee on the proceeds of the vessel and cargo, disallowed.

2. The act of July 17, 1862 (12 Stat. 608, § 12), forbids the allowance to a prize commissioner in this district of any larger emolument than a salary of $3,000 a year.

In admiralty.

BETTS, District Judge. This is a case of the adjustment of compensation to Prize Commissioner Elliott, upon facts and circumstances similar to those which existed in the case of The Merrimac [Case No. 9,477]. The prize was arrested off Wilmington, N. C., June 23, 1863, and was sent into this district for adjudication, and here libelled on the 3d of July thereafter. A defence was interposed December 17, 1863, and a final decree in the suit was rendered by the court December 28, 1863. The bill of costs was submitted to the court for adjustment on the 5th of January instant.

In this case, as in that of The Merrimac [supra], the commissioner charges one per centum custody fee, computed upon the joint products of the vessel and cargo, being the sums of $64,146.18 from the cargo, and $2,025 from the vessel. The custody fee amounts to $661.71, and, in addition, there are special items of service which make the whole charge amount to $846.11. The evidence presented in support of the aggregate charge consists of the deposition of the prize commissioner who performed the duties, made on the 5th of January instant, who says "that the bill is true and correct, according to the best of his knowledge, information and belief, and that the charge of $846.11, above mentioned, is not more than a just and suitable compensation for his services in the cause, as he verily believes"; and of the consent in writing of the United States district attorney that the bill be taxed at the sum of $846.11. The charges claimed in the bills of the United States prize commissioners for services performed prior to the act of congress of July 17, 1862, were assessed provisionally by the court, subject to adjustment and payment at the treasury, pursuant to the laws of congress in relation to indeterminate claims against the government, the bills almost universally claiming repayment of disbursements or liabilities, as well as conjectural valuations of official acts not identified by proofs as specific performances. The act of July 17, 1862 (12 Stat. 608, § 12), having forbidden the salary to a prize commissioner to be increased in any case, under any of the prize acts, so as to exceed $3,000, I feel constrained to refrain from sanctioning items in his claim of costs which must presumptively enhance his compensation beyond that maximum. The consent of the district attorney cannot dispense with the limitation of the statute. I must, therefore, in this case, upon the evidence before me, decline to allow the charge of $661.71, or any part of this sum, for custody fees in this suit. Both bills will be approved by the court, if the approval is asked for by the

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

commissioners, after these deductions are made.

The observations made by the court in the case of The Merrimac apply with like effect to the same items of charge in this case. The two bills are corrected, accordingly, in this taxation or allowance, upon the reasons more fully stated in that case.

HATTIE JACKSON, The (UNITED STATES v.). See Case No. 15,327.

HATTIE ROSS, The. See Case No. 2,598.

HATTIE ROSS, The (CHAPIN v.). See Case No. 2,598.

Case No. 6,218.

HATTON et al. v. The MELITA.

[3 Hughes (1880) 494; 3 Balt. Law Trans. 133 (No. 17).] [1]

District Court, D. Maryland.

MARITIME LIENS—PRIORITIES—ADJUSTMENTS.

The relative priorities and dignities of many claims upon the same vessel asserted by libels and petitions, composed, adjusted, and settled in a careful opinion by the court.

[Cited in The Brantford City, 29 Fed. 386; The Scotia, 35 Fed. 909.]

[This was a libel by Edward Hatton and others to recover for supplies and repairs furnished to the schooner Melita.]

GILES, District Judge. The original libel was filed in this court by Messrs. Hatton and others, of the city of New York, on the 30th January, 1869, against the said schooner, to recover the sum of $445.10 for supplies furnished said vessel, in October and November, 1868. The libel states that said vessel belonged to citizens of Great Britain, residents of Nova Scotia. The vessel at that time was in the custody of the sheriff of Baltimore city, under an attachment issued out of the superior court at the instance of James P. Melledge and others, mortgagees, which was not released until the 16th of February, 1869, when the marshal took possession of her under the process served in this case. Before this process was served, six other libels were filed in this court against said schooner: one, on the 11th of February, 1869, by Timothy L. Mays and Nathaniel Tarr, of Boston, to recover the sum of $37.40 for supplies furnished said schooner in October, 1868; one by Robert Miller, of Boston, to recover $30 for repairing the sails of the said vessel in March, 1866; one by Dicks & Potter, of Boston, on the 11th of February, 1869, to recover the sum of $200 for sails furnished to said vessel; one by Loud & Co. of same date to recover the sum of $57 for supplies furnished said vessel in January 1869, in this port; one by William D. Beckford to recover the sum of $993.55 for supplies furnished said vessel in 1866 and 1867, at Boston; and one by the mate and seamen to recover the wages due them for services on said vessel. Besides these libels, several petitions were filed in this case by materialmen, claiming to have liens on said vessel, and praying to be made parties to this case. They are David B. Small, Kelsey, Gray & Co., and others, and this court, by its order passed the 17th of March, 1869, ordered all these libels and petitions to be consolidated with this case. Previously to that, on the 19th of February, 1869, this court, on the petition of libellants, and with the consent of said creditors and of the captain and half-owner of said vessel, passed an order for the sale of the said vessel, and which was carried into execution by a sale of the said vessel by the marshal on the 27th day of February, 1869, and the net proceeds of sale, to wit, the sum of $3,641.57 were deposited in the registry of the court, to await its future order. On the 27th of March, 1869, the court passed a decree in case of the mate and seamen against said vessel, in their favor, ordering that the sums adjudged by the said decree to be due to them should be paid to them out of the proceeds of the sale of said vessel in the registry of the court. The amount thus paid was $727.29, leaving only the sum of $2,914.28 to meet all the other claims made against said vessel. Besides these claims, a claim was filed by the captain of said vessel for wages due him, which he claimed to be a lien on said vessel by the laws of Great Britain; and a claim was also filed by Messrs. Tucker & Co., of this city, for damages which they suffered by the delay in delivering a cargo shipped by them on board said vessel on the 23d day of January, 1869, to be transported to Trinidad, in the West Indies, and which was not delivered until the 4th of April, 1869, owing to the fact, that the vessel did not leave this port until the 4th of March, 1869, more than a month after the time she should have sailed. A claim was also filed by Messrs. Melledge & Co., of Boston, to recover the sum of $2,165.40, balance due them for supplies, and furnished to said vessel at various times from 1864 to 1869, and for which they held a mortgage of said vessel, and also an agreement with her captain and half-owner, by which they received the freights of said vessel. The mortgage was executed the 27th of January, 1868; and is made to secure the payment of $3,800 alleged to have been loaned to the owners of said schooner by the said Melledge & Co. And the agreement bears date the 7th of July, 1868.

As all these several claims amount to much more than the balance of the proceeds of the sale of the said vessel, it becomes necessary for the court to marshal the assets and to decide who, if any, of these various claimants

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 3 Balt. Law Trans. 133 (No. 17), contains only a partial report.]

are to be preferred, and to have priority in the distribution of these assets. The questions growing out of these facts have been argued with great ability by the learned counsel representing the various claimants. It has been contended on the part of the claimants, Messrs. Tucker & Co., that the captain, who was one-half owner of the said schooner, has no lien against any of the claimants, and this is the first question that presents itself in the consideration of this case. As captain he contracted for the supplies made to this vessel, and as half-owner he is liable in solido for the amounts severally due to the various materialmen who are claimants in this case. He also made the contract of affreightment with the Messrs. Tucker, and as owner is responsible to them for its due performance; I therefore hold, that although by the present law of England he as captain would have a lien for his wages, yet as in this case he is also one-half owner, he has no lien as against the creditors I have named. The second question is, have the mortgagees, Messrs. Melledge & Co., any lien? Now, although mortgagees have no standing in a court of admiralty, to enforce their mortgage claim by original libel, yet they may be allowed payment out of surplus funds in admiralty, for the proceeds of a mortgaged vessel, sold by decree of the court. But this is only allowed after the payment of all prior liens on said vessel. And I held, in 1855, in the case of Reeder v. The George's Creek [Case No. 11,654], that subsequent liens obtained by materialmen for necessary supplies or repairs took priority over a prior recorded mortgage. Now although a part of the amount secured by the Messrs. Melledge & Co. was for supplies furnished to the said vessel, yet upon an examination of their account filed by them it will be found that said amount is fully paid by the cash and freights received by them, the balance of said account being for charges for material and commission, which under no circumstances of the case could ever be held a lien on the vessel. Indeed, it is doubtful whether, independent of the mortgage, Messrs. Melledge & Co. would have any lien on said vessel or its proceeds for any part of their said claim, or that this court would have jurisdiction of such a case, as the account shows them to have been the general agents and factors of the owners of said vessel. See case of Minturn v. Maynard, 17 How. [58 U. S.] 477. Their petition, like that of the captain's, must also be dismissed. We come now to the next question, have the materialmen any lien for their supplies and repairs? Libellants reside in New York, where the supplies charged for in their account were furnished to the said vessel, belonging to New Brunswick. Several of the other materialmen reside in Boston, where certain other supplies were furnished, and others reside in our city. The supplies furnished by those materialmen who reside in New York and in Boston were furnished to said schooner on previous voyages from New Brunswick to Boston and New York; and the supplies furnished by the claimants who reside in this city were furnished a short time before her seizure and sale in this case, to fit her for her then contemplated voyage. The amount due to these last is as follows:

To Messrs. Kelsey & Gray....	$ 24 17
To John Hermon.....	12 95
To Lander & Waddy.....	11 83
To Loud, Claridge & Co.....	56 90
To David B. Small.....	16 00
To William Harris.....	3 75
To C. H. Lange.....	4 00
	$129 60 in all.

All these supplies are proved to have been necessary and proper at the several times they were furnished, and that they could only have been procured by the credit of the vessel. Are they a lien upon the vessel? The learned counsel for Messrs. Tucker & Co., with their usual ability, have argued that, although these supplies were furnished in an American port where the general maritime law prevails, yet, inasmuch as this was a British vessel, there is no implied lien on it. That the lien only arises from the power of the master to make or create it, and as by the laws of England he possesses no such power save by a bottomry bond, there was no tacit lien in this case. I take a different view of the law. The first question is, By what law is this to be decided? By the law of the domicil of the owner, or by the lex loci contractus? Says Justice Story, in his great work on the Conflict of Laws (a work not only the most learned, but at the same time the most practical of any I have ever read), in section 322, in which he is treating of the effects of contracts, that "they, like the validity of contracts, are dependent upon and are to be governed by the lex loci contractus." And after enumerating various cases which are thus governed and controlled, he says, "In these and the like cases, where the lien or privilege is created by the lex loci contractus, it will generally though not universally be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the lex fori." And in section 401 he says, "That by the general maritime law, acknowledged in most if not in all commercial countries, hypothecations and liens are recognized to exist for seamen's wages, and for repairs of foreign ships, and for salvage." And in section 402 he says: "Upon the general principles already stated, as to the operation of contracts, and the rule that vessels have no locality, it would seem that these privileges, hypothecations and liens, ought to prevail over the rights of subsequent purchasers and creditors in every other country." Until recently in England the court of admiralty, being restrained by the jealousy of the common-law courts, could not enforce such liens. But by the statute of 3 & 4 Vict. (chapter 65, § 6), that court has now ample jurisdiction over such cases. And this was the

view taken of the law by the supreme court in the case of The General Smith, 4 Wheat. [17 U. S.] 438. Justice Story, in delivering the opinion of the court in that case, says: "Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in admiralty to enforce his right." It would be a useless waste of time to cite the many decisions at the circuits in which the courts have acted upon and enforced this view of the law.

In opposition to this principle, I have been referred to only three cases: one in England and two in this country. First, as to the one in England,—Stainbank v. Fenning, 6 Eng. Law & Eq. 412 (and there is a similar case, growing out of the same transactions, reported in 20 Eng. Law & Eq. 547). These cases, which are alluded to by Justice Curtis in the case of Thomas v. Osborn [19 How. (60 U. S.) 22], also cited by the counsel, were actions on policies of insurance; and the question was whether the plaintiffs had an insurable interest in the vessel under the assignment executed by the captain? He undertook to convey the vessel as a security for repairs and supplies furnished in Canada to this vessel, whose owners resided in England. It will be seen, that where the supplies were furnished, as well as where the owners resided, the laws of England prevailed. But, says Judge Curtis, in full view of the only other case cited,—Pope v. Nickerson [Case No. 11,274]: "Neither of those learned courts considered what should be the effect, in an English tribunal, of the law of the place where the repairs and supplies were obtained, if that law tacitly created a lien on the vessel." It will be found on examining the case of Pope v. Nickerson [supra], that it was an action of assumpsit on four bills of lading signed by the master of a schooner belonging to the defendants, for fruit, and were shipped on board of her at Malaga, and consigned to plaintiffs at Philadelphia. No such question as the one I am discussing arose in the case. The question was, "By what law were the bills of lading to be governed as to their obligation and extent upon the owners," whether by the law of Spain, where the contracts of shipment were made, or by the law of Pennsylvania, where the goods were to be delivered, or by the law of Massachusetts, where the owners resided, and to which the vessel belonged? And that learned judge, after a long and full discussion of the question, arrived at the conclusion, that the extent of the responsibility of the owners was to be measured by the law of Massachusetts, and not by the law of Spain or Pennsylvania. This case is so different from the one I am now to decide, that I shall not further consider it. The same learned judge, in the case of The Jerusalem [Case No. 7,294], (very early in that judicial career which reflected so much credit on himself and the high tribunal in which he sat), had maintained the same principle of admiralty law which he enunciated in 4 Wheaton. He says: "It will be recollected that this is a foreign ship, and that by the general maritime law, every contract of the master for repairs and supplies imports an hypothecation." Says Chancellor Kent, in his great work (3 Kent, Comm. marg. p. 168): "The civil law and the law of those countries which have adopted its principles, give a lien upon the ship, without any express contract for such a claim, to the person who repairs or fits out the ship, or advances money for that purpose, whether abroad or at home. The English law allows of such a lien, from the necessity of the case, for repairs and necessaries while the ship is abroad, but it is not adopted as to repairs and supplies furnished at home." And in support of this principle the learned chancellor refers to many decisions in the English courts which fully sustain him. I hold, therefore, in this case that the rights of these materialmen are to be judged of by the general maritime law which is recognized and adopted in our American courts. And by that law, as I understand it, the repairs and supplies furnished to fit this vessel for her last voyage have a priority over the claim for repairs and supplies furnished to fit the vessel for previous voyages. We come now to consider the last question, have the Messrs. Tucker any claim to the proceeds now in the registry? The facts out of which their claim arises, are briefly these:

On the 23d of January, 1869, they shipped on board said vessel a cargo of flour and other articles to be carried for them to Trinidad, one of the West India Islands, and they paid on account of the freight the sum of $319, gold. Owing to the attachment and subsequent sale of the vessel hereinbefore stated, she did not leave this port until the 4th of March, 1869, and only reached Trinidad on the 4th of April, 1869. She was bound to have sailed with all reasonable dispatch. If she had sailed on the 24th of January, she ought to have arrived at Trinidad about the 23d of February. She lost more than a month by the delay. The cargo would have sold for much more money, had she sailed and arrived in due time, than it brought on the 4th of April, 1869, on its arrival. And for this difference with interest the Messrs. Tucker file their petition. Had they a lien on the vessel? No one can doubt that. By all the writers on admiralty law it is recognized. Says Parsons, in his last work on Shipping and Admiralty (volume 2, p. 251): "The owner of the cargo has a lien on the ship for any injury he may sustain by the fault of the ship or the master." But it is contended by the learned counsel for the libellants, that the Messrs. Tucker had no right to let their cargo remain on board so long while the vessel was in the custody of the marshal; that

they ought to have procured another vessel. Now it is perfectly clear by all the principles of law applicable to such a case, that they had no right to consider the voyage as broken up until the sale by the marshal. This took place on the 27th of February. Up to that time they had every reason to believe, from the daily representations of the captain, that the vessel would be released, and proceed on her voyage. When the sale took place the voyage was broken up, and the owner was bound in good faith not to let his cargo remain here any longer, and subject the shipowner to any additional damage. Now, under this obligation, did not the Messrs. Tucker do the very best thing they could to expedite the delivery of their cargo at Trinidad? It was then on board the Melita. It would have taken in all probability more than five days to have procured another vessel, and transshipped the cargo. The Melita had to be supplied with some new sails, which took four days, and on the morning of the fifth day, after the sale by the marshal, she departed for Trinidad. I think the Messrs. Tucker have a valid claim upon these proceeds in the registry for whatever damages they may be found to have suffered by the delay I have mentioned, with interest from the 4th of April, 1869, to the date of the decree. Now what is the measure of damages in such a case? Says Parsons, in the work to which I have already referred (volume 1, p. 271): "In an action against a carrier for undue delay in the delivery of goods, where they had fallen in value from the time when they ought to have been delivered, it was held that the diminution of value could be recovered as damages." The same rule is held in Arthur v. The Cassius [Case No. 564]; 6 Ohio, 358; and 12 Serg. & R. 188. Have the shippers any priority over the materialmen? As between them and the Baltimore claimants this question is not necessary to be raised, as there will be money enough to pay both. And from what I have already said, it is perfectly clear, to my own mind at least, that they both have priority over the New York and Boston claimants, who claim for supplies furnished to this vessel on previous voyages.

But it may be interesting to the profession to know that there is very high authority for the principle that the shipper, under the circumstances of this case, would take precedence in payment, next to the seamen for their wages. Judge Ware, in the case of The Rebecca [Case No. 11,619], and Judge Betts, in the case of Juste Pon v. The Arbustci [Id. 7,589], recognize this doctrine. It only remains for me from the evidence to ascertain the damages due to the Messrs. Tucker. They have examined two witnesses in Trinidad: one, George Spiers. the consignee of the cargo; the other, William Norman, a merchant of Trinidad. The estimate of Mr. Norman does not embrace all the articles of the cargo. Mr. Spiers makes the difference between what the cargo would have sold for on the 15th of February, 1869, and what it brought on the 4th of April to be $1,173.30 in gold. But then my impression is, that we must allow at least thirty days for the voyage from this port to Trinidad, as that was the time actually consumed, so that she should have arrived out on the 23d of February; and we must take the prices of that date, as compared with what the cargo brought on the 4th of April. I have, therefore, made a close examination of the price-currents filed with the commission from Trinidad, and I think I shall be right in allowing the loss of the Messrs. Tucker to be $1,000 in gold, to which add the freight prepaid, $319, and we have the sum of $1,319 due the shippers on the 4th of April, 1869; now add nine months and twenty days interest to that sum, and we have the sum of $1,382.50 due them on the 24th of January, 1870. Now the shipowners would have the clear right to tender to the shippers on the day of the trial of this case that amount in gold; and if this was an action in personam, the decree of this court would be for that amount in coin; but as the funds in the registry of this court are in currency, and out of that fund the shippers must be paid, I must decree that they be paid such a sum in currency as will represent the amount due them in gold on the day of the decree. At the price of gold yesterday (121⅜) that sum will be $1,681.47. To this add the costs of their commission. After these sums are deducted, as also the several sums due the Baltimore claimants and the costs of this case, the balance of the moneys will be distributed among the other claimants ratably.

Case No. 6,218a.

HATTRICK et al. v. The SPANISH BARK.[1]

District Court, S. D. Florida. Dec., 1880.

SALVAGE COMPENSATION—EXTRAORDINARY EXPENSES.

[1. The breakage of a propeller by a towboat in rendering salvage services. and similar extraordinary expenses, are not to be compensated by the salved vessel, but are only to be taken into consideration as showing the danger incurred, and thus enhancing the salvage.]

[2. Seven hundred and fifty dollars allowed on net proceeds of $2,000 for salving a vessel lying dismasted and in a helpless condition near the shore of a dangerous coast, at a great distance from any port.]

[This was a libel for salvage, filed by Hattrick and others against a Spanish bark, whereof Antonia Batet was claimant.]

LOCKE, District Judge. This is one of those unsatisfactory cases of salvage claim brought up before a court for adjudication, where, on account of the greatly disproportionate value of labor and services rendered

[1] [Not previously reported.]

as decided by any other criterion, it is impossible to compensate the salvors with the liberality which should always control such awards, and be an inducement for others to render like services on similar occasions. The salved vessel had been dismasted, and for five days lay at anchor in a disabled and helpless condition near the shore of a dangerous coast, at a great distance from any port. She was in a certain degree of danger, and certainly required the assistance rendered. The salving vessel undoubtedly forfeited any insurance which the owners might have had, besides materially increasing the risks of the voyage to herself and cargo. The actual expense incurred by the detention was considerable, and sufficient to justify a much more liberal compensation than can be paid for the property saved. It is shown that the propeller, during the services, was broken, thereby entailing an extraordinary expense, which, it is claimed should be paid by the salved property. The entire property salved would be insufficient to fully compensate for the loss claimed to have been caused, nor do I understand that such extraordinary damages are to be thus compensated, although, as evidence of the greater risk incurred, they may always be considered in determining a reward. This was a towboat, fitted and prepared for that business, and her officers and crew always supposed to be ready to meet the emergency of broken harnesses and like accidents, without material damages. Had the same occurred during the performance of a regular towage service, there could not possibly be any claim against the other vessel; nor do I consider there can be any in this case, further than to be considered as evidence of the great risk incurred, and, as far as possible, covered, not by award for damage, but increased compensation. After payment of the necessary expenses attending the preservation and sale of the property the net proceeds will be about $2,000. Of this I consider $750 as large a compensation as can, under the circumstances, be reasonably allowed. This will be an unusually large percentage of the property saved, according to awards for like services, yet necessarily very small when the actual amount of labor performed and property expended is considered. This cause having been fully heard, and the court being duly advised in the premises, and the salved property having been sold upon application of parties for $2,790.42, the vessel and material for $2,667.75, and the stores for $122.67, it is hereby ordered and adjudged and decreed that the libellants have and receive for the service as alleged $750, and that upon the payment of said $750, together with the costs and expenses here incurred as ordered and allowed, the residue be paid the claimant for the benefit of the true and lawful owners thereof.

Case No. 6,219.

In re HAUCK et al.

[17 N. B. R. 158.][1]

District Court, D. Iowa. 1878.

BANKRUPTCY—"KNOWLEDGE" UNDER BANKRUPT ACT.

1. A person, being a merchant or trader, is insolvent when unable to pay his debts as they mature in the ordinary course of business.

2. The word "knowledge" in section 35, as amended, of the bankrupt act [18 Stat. 180], means actual knowledge, as contra-distinguished from constructive knowledge.

3. A person having notice of such a state of facts in regard to the financial affairs of the bankrupt as in law constitute insolvency, either as that term denotes when applied to a merchant or trader, or when used in its general and popular sense, must be presumed to have actual knowledge, upon receiving any payment, assignment or conveyance from the bankrupt, that the same is a fraud upon the bankrupt act.

[Cited in Metcalf v. Officer, 2 Fed. 643; Swan v. Robinson, 5 Fed. 295; Harris v. Hanover Nat. Bank, 15 Fed. 788.]

Petition of George H. French, assignee, against Deere & Co., for the recovery of money or property, alleged to have been received by them from said bankrupts, as preferred creditors, and in fraud of the bankrupt act. In January, 1874, A. S. Hauck & Co. commenced doing business in the purchase and sale of agricultural implements at Bedford, Iowa, and continued in said business until the 29th day of December, 1876, on which day they filed their petition in bankruptcy, were adjudged bankrupts, and said George H. French was duly appointed assignee of their estate. On the —— day of ——, 1876, said bankrupts executed to said Deere & Co. their promissory note for nine hundred and sixty dollars and seventy cents, payable on January 1, 1877, the consideration thereof being the purchase price of agricultural implements purchased of said Deere & Co. On the 12th of December, 1876, said Deere & Co. procured from said bankrupts divers promissory notes, known as "farmers' note," which they intended to be applied on said note of nine hundred and sixty dollars and seventy cents as a payment to the amount of four hundred and ninety-seven dollars and twenty-nine cents. It is claimed by said assignee that said "farmers' notes" were so procured by Deere & Co. in fraud of the bankrupt act.

Twomey & Stuyvesant, for assignee.
R. T. McNeal, for Deere & Co.

By D. B. NASH, Register:

It appears from the evidence that said bankrupts were merchants or traders, within the meaning of those words as used in the bankrupt act; hence, in considering the question of their insolvency, the character of

[1] [Reprinted by permission.]

their business becomes material. The term "insolvency," in its general and popular meaning, denotes the insufficiency of the entire assets of an individual to pay his debts. But when the same is applied to a merchant, or trader, it is used in a more restricted sense, and expresses the inability of a party to pay his debts as they become due in the ordinary course of business. Toof v. Martin, 13 Wall. [80 U. S.] 40. In view of the foregoing definition of the term "insolvency," as settled by adjudication, and as applied to a merchant or trader, it is manifest that insufficiency of assets, when ultimately converted into money, to pay all debts, is not necessarily essential to constitute a state of insolvency. The want of time, simply to make such a conversion of assets into money, may constitute the essential element of insolvency. When the financial affairs of a merchant or trader arrive at such a stage of embarrassment as places it beyond his ability to convert his assets into money in time to meet the payment of his liabilities as they mature, and compels him to seek extension of time to enable him to effect such a conversion of his assets, he must be deemed, in purview of the bankrupt act, in a state of insolvency. From and after such a period in his affairs the law contemplates that creditors shall equally share in the distribution of his estate, and any payment, assignment or conveyance, inconsistent with such equitable distribution, must be deemed to be in contravention of the provisions of the bankrupt act, if made within the prescribed limits of time specified therein. But, although such payment, assignment, or conveyance, may have been made contrary to the provisions of said act, yet, as against the party benefited thereby, the same is void only when such party had reasonable cause to believe that the person making the same was insolvent, and knowing that such payment, assignment, or conveyance, was made in fraud of the provisions of said act. Hence, it is obvious, in order to render such payment, assignment, or conveyance void as against the person benefited thereby, there must be shown the following facts: First —That the party making the same was insolvent, or in contemplation of insolvency. Second.—That the same was so made with a view to give a preference. Third.—That the person benefited thereby had reasonable cause to believe such person insolvent at the time, and knowing that such payment, assignment, or conveyance was made in fraud of the provisions of the bankrupt act.

1. In regard to the fact of the insolvency of the bankrupts, the evidence clearly shows the existence of such insolvency, and not only such insolvency as that term denotes when applied to a merchant or a trader, but also such as the same expresses when used in its general and popular meaning, as above explained. Nor do I understand that the fact of such insolvency was sincerely questioned by counsel in argument.

2. Did the said bankrupts assign the notes in question with a view to give a preference? It appears from the testimony of the bankrupts that they were unable to pay their debts as they matured. That both an extension of time, and the advantages of another year's trade, were necessary to enable them to pay their debts. That their property, if then converted into money by legal process, would not have been sufficient to pay their liabilities. That they knew that such was the condition of their affairs at the time. It further appears from the testimony in the case that, within the period of twenty days after the date of said interview, over fourteen thousand dollars of the commercial paper of said bankrupts would mature, and the remainder, about two thousand dollars, during the thirty days next following. Also, that said bankrupts intended to change their business, in view of their financial embarrassments, to a commission business. I am inclined to believe that where a debtor, having, in fact, ample means and only technically insolvent, and his commercial paper maturing at such intervals of time, and in such amounts as would, with some forbearance on the part of creditors, afford a reasonable expectation and belief that he can continue in business and pay all his debts, might make some payment of indebtedness without being properly chargeable with an intent to give a preference in fraud of the bankrupt act. But where such debtor, knowing that he is, in fact, insolvent, and that his present means are insufficient, by present conversion into money, to pay all his liabilities, and all, or nearly all, of the same having either matured or being on the eve of maturity, the payment in whole or in part of one creditor, either in money or in property, affords very cogent evidence of an intent on the part of such debtor to make an unlawful preference. Hence, in view of the evidence of the case, I feel constrained to find that said bankrupts, in assigning said notes to Deere & Co., acted with a view to give them a preference.

The remaining question is, whether Deere & Co. procured the notes in question, having reasonable cause to believe that the said bankrupts were insolvent, and knowing such procurement of the same was in fraud of the provisions of the bankrupt act? On June 22, 1874 [18 Stat. 180], section 35 of said act was amended by inserting the word "knowing"—thereby providing that the person receiving the benefit of the payment, assignment, or conveyance, must not only have reasonable cause to believe the bankrupt insolvent, but have knowledge that the same was in fraud of the provisions of said act. Under this amendment it is obvious the person receiving the alleged preference must be shown to have knowledge that the payment,

assignment, or conveyance was in fraud of said act. But what particular weight of evidence, in any particular case, shall be deemed sufficient to establish the existence of such knowledge must be determined by the court or jury before which the same is tried. There appears to be some conflict of decisions as to what state of facts will constitute a legal presumption of such knowledge. It has been held by some of the courts, that where such a state of facts is shown as would lead a person of ordinary caution and prudence to believe the bankrupt insolvent, then the persons receiving the alleged preference must be presumed to have received the same with knowledge of the fraud upon the act. That such person must be presumed to know what he has reasonable cause to believe. See Hamlin v. Pettibone [Case No. 5,995; Brooke v. McCraken [Id. 1,932]; Webb v. Sachs [Id. 17,325].

It is true that it is a general rule that a party who has sufficient notice to put him on inquiry is chargeable with knowledge of all facts which, by proper inquiry, he might have ascertained. While this is a well settled doctrine in the general administration of the law, yet it is obvious that said section 35, as amended, requires something more to be shown than simply constructive notice or knowledge. Constructive knowledge is that which is inferred as a matter of legal presumption, from notice of such a state of facts as should have put the person, sought to be charged, on inquiry. But there is a well defined distinction between such constructive knowledge and actual knowledge. It is manifest that a person may have constructive knowledge of a fact, and yet not have actual knowledge of the same. Taking into consideration the adjudications under said section 35, prior to said amendment, and the circumstances attending such amendment, I believe it to be more consonant with proper judicial construction to hold that said section, as amended, requires actual knowledge, as contradistinguished from constructive knowledge, to be shown. There can be no doubt, however, that actual knowledge may, under some certain circumstances, be properly a matter of legal presumption. As, for instance, when the person receiving the alleged preference is shown to have actual notice of a state of facts, in relation to the financial affairs of the bankrupt, constituting, in law, a state of insolvency. Under such circumstances, actual knowledge would, ordinarily and properly, be inferred as a matter of legal presumption. This legal presumption rests upon the principle that every person must be held to intend the necessary and natural results of his own acts, as viewed under the law. Toof v. Martin, 13 Wall. [80 U. S.] 40; Webb v. Sachs [supra]; In re Herpich [Case No. 6,418]. Every one is presumed to know the law, and when a person enters into a transaction, the natural and necessary result of which is an infraction of the law, it becomes properly a matter of legal presumption that such person had actual knowledge of such unlawful result of his own act.

Having thus considered some of the more material questions of law, I come now to the consideration of the evidence. It appears from the testimony of Lucian Wells and Charles Deere, they being the authorized representatives of Deere & Co., that, about the 12th day of December, 1876, they had an interview with A. S. Hauck, one of the bankrupts, wherein he gave to them a list containing the names of all the creditors of A. S. Hauck & Co., with the amount owing each creditor. This list, if true, must have shown to Deere & Co. that the indebtedness of said bankrupts amounted to about the aggregate sum of sixteen thousand dollars, above fourteen thousand of which was either due, or would become due on January 1st, 1877 (or within twenty days after said interview), and that the remaining portion of said indebtedness would become due within the period of thirty days thereafter. It does not positively appear that the date of the maturity of each debt was stated in said list; but if not, under all the circumstances of said interview, I think it is fair to find that the several dates of the maturity of the debts contained in said list were substantially made known by Hauck to them—at least that the whole of their indebtedness was on the eve of maturity. It also appears, from the testimony of said witnesses, that said Hauck stated at said interview that his firm had been unable to realize on a great deal of their "farmers' paper," and for that reason they were not going to be able to pay all their paper which would mature the following month; that he had to request Deere & Co., as also all their other creditors, for an extension of time; that their means were ample to pay all indebtedness, but that they must have some further time to collect their notes and accounts; that Charles H. Deere stated in reply, that Deere & Co. were willing to make the same extension as the other creditors. Also Hauck testified that he stated at said interview, that they could not pay their debts as they fell due, and that it was necessary to have the benefit of another year's trade in order to enable them to pay their debts.

It is manifest that these facts, thus stated by Hauck, constitute in law at least a state of commercial insolvency, or insolvency such as that term denotes when applied to a merchant or trader. They were also, as above shown, in fact insolvent within the general and popular meaning of that term. They were, as merchants and traders, commercially insolvent by reason of their inability to pay their debts as they would mature in the ordinary course of business, irrespective of ampleness of means to pay all their debts in case prop-

er extension of time should be obtained. Nor can it be doubted from the facts, testified to by the witness Metzger, agent and representative of said Deere & Co., of the telegram and letter being sent by said Deere & Co. to said Metzger immediately after said interview, and the other transactions which occurred between Metzger and said bankrupt, after receiving said telegram and letter, that Deere & Co. felt no inconsiderable anxiety to protect themselves, as far as possible, amidst these threatening financial embarrassments of the bankrupts. Although the said representatives of Deere & Co. may have believed, from the representations made to them by said bankrupts, that they possessed ample means to pay all their debts in the event of their obtaining the extensions of time they asked for—and stated they must have—yet, they having had actual notice of a state of facts in relation to the financial conditions of the bankrupts, which in law constituted a state of insolvency within the meaning of that term, as applicable to them as merchants and traders; and they at the same time, in fact, being insolvent within the general and popular meaning of that term, it is manifest that it must be deemed a matter of legal presumption, from such a state of facts, that the said representatives of Deere & Co. had actual knowledge that the procuring of the notes in question was a fraud upon the provisions of the bankrupt act—as it must be so deemed in fact. To hold thus, I believe to be in harmony with the views of the supreme court, as stated in Toof v. Martin, above cited. If a debtor is, in fact, insolvent—and a creditor, receiving the alleged preference, has actual notice of a state of facts constituting in law such insolvency—then there arises a presumption of actual knowledge on the part of such creditor, of the unlawful result of his act, and such presumption must be held as conclusive until rebutted by proper proof on the part of the creditor. This rule must apply to both kinds of insolvency as above defined. But it is undoubtedly true that, in cases of commercial insolvency, such presumption of knowledge might be rebutted frequently by comparatively slight evidence. Where the debtor, however, as in the present case, at the time of the alleged preference is in fact insolvent by reason of the excess of indebtedness over and above the value of assets, although having actual notice only of such a state of facts as constituted in law commercial insolvency—yet the presumption of actual knowledge of the fraud becomes very cogent and decisive, requiring clear and satisfactory evidence to overcome the same.

Under all the circumstances of the case, I feel compelled to find that Deere & Co. received the notes in question in violation of the bankrupt act, as provided in section 35 thereof; and an order of court must issue, directing them to either deliver the same to the assignee herein, or pay the value thereof in money—in which event, the amount of the value thereof is fixed at four hundred and ninety-seven dollars and twenty-nine cents. And the allowance of proof of claim must be upon the condition of compliance with such order.

LOVE, District Judge. The foregoing cause having been submitted to said court on the 19th day of July, 1877, at Keokuk, and the court having heard counsel, and examined said cause and the opinion of the register, doth adjudge that the judgment of said register be confirmed and ratified. It is further ordered that the register proceed accordingly.

DILLON, Circuit Judge. The foregoing named petition for review of the said order, having been argued and submitted to me by the counsel for Deere & Co., and by the counsel for the assignee, and the same having been duly considered, it is ordered that the said order and decision of the said district judge be and the same is hereby affirmed in all respects, and the register is ordered to proceed accordingly.

HAUEL (LOW v.). See Case No. 8,560.

Case No. 6,220.

The HAUGESUND v. The BOWDOIN.

[36 Leg. Int. 462; 25 Int. Rev. Rec. 386.]

District Court, E. D. Pennsylvania. Oct. 5, 1878.

ADMIRALTY—SAILING AND STEAM VESSEL—COURSES—RIGHT TO TACK BY SAILING VESSEL.

[1. A sailing vessel tacking has almost unlimited discretion to change her tack.]

[2. It is the duty of a steamer to avoid getting into such close proximity to a tacking vessel that a change of her tack might cause a possibility of danger.]

[This was a libel by the bark Haugesund, Bartelson and others, claimants, against the schooner Bowdoin and the tug Cynthia, for damages caused by collision.]

Alfred Driver and J. Warren Coulston, for libellant.

J. B. Roney, for the Bowdoin.

A. L. Wilson and J. G. Johnson, for the Cynthia.

OPINION BY THE COURT. The report of the assessors was presented in the spring of 1877. Further evidence was afterwards adduced, and in November, 1877, the case was reargued. The decision has been deferred, because it was supposed that in another case, or cases, before the circuit court, a question somewhat similar might be considered. It is not easy for a landsman, like myself, or even, perhaps, for a mariner of limited experience,

to conceive rightly the nautical relations between a tacking vessel and one sailing with the wind, or propelled by steam, and especially one propelled by steam. The difficulty arises from a tendency to assume that the tacking vessel may change her tack without the danger of missing stays or of some other retardment, such, for example, as occurred in the present case. But there is almost always more or less of such danger. Therefore, it is, in the opinion of men of nautical experience, always the duty of a steamer to avoid getting into such proximity to a tacking vessel that a change of her tack might cause a possibility of danger. They concur in attributing to the tacking vessel an almost unlimited discretion to change her tack in many cases in which a landsman might suppose that relations of other vessels would require the tack to be prolonged. I always find difficulty in understanding or applying the rules of decision which are proper in such cases. In the present case the schooner was on a tack, and the assessors are of opinion that she had, with relation to the tug, a right to change the tack. For this opinion they give an unanswerable reason. It is, that had she prolonged her former course, extending it inside of the buoy, and then attempted to tack, she must, if she had missed stays, have gone ashore. This opinion of the assessors does not depend upon any question of the depth of water at the buoy, or inside of it, but on the nearness of the shoals on which she would, or might have been wrecked if she had missed stays.. The language of the assessors must, in this respect, be understood with reference to variable depths and to the shoals inside of the buoy. When she tacked, it happened that, although her head sheets were lighted up so as to enable her to luff, she did not luff. There had been a possibility that this might happen. The tug being in too close proximity, the collision ensued. For this proximity the tug alone was in fault. One of the assessors thinks that the schooner was remiss in certain particulars which he mentions. But this, if so, would not prevent the tug from being primarily liable for the whole damage suffered by the bark which she had in tow. The case would not be a proper one for dividing the damages. If the owners of the bark should fail to obtain satisfaction from the tug, they might possibly, under the present libel, have an ulterior recourse against the schooner. But no such question arises practically.

The decree must be against the tug for such damage as shall be ascertained to have been suffered by the bark.

[This case, upon appeal to the circuit court by the tug Cynthia, was affirmed. Judge McKennan, who delivered the opinion, refused, however, to affirm the statements of law as to the respective rights of steam and sailing vessels as laid down by the district court. See Case No. 1,067.]

Case No. 6,221.

HAUGH et al. v. TEXAS & P. R. CO.

[3 Cent. Law J. 447; 22 Int. Rev. Rec. 257; 3 N. Y. Wkly. Dig. 174.] [1]

Circuit Court, W. D. Texas. April Term, 1876.[2]

CONSTRUCTION OF ROAD—FELLOW SERVANTS—SCIENTER OF MASTER—WHO ARE FELLOW SERVANTS.

1. It is the duty of a railroad company to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipments, including properly constructed engines and their several parts, and in the selection of competent and skilful agents and subordinates to supervise, inspect, repair and regulate its machinery.

2. The corporation or master is not liable for injuries suffered by one employee solely through the carelessness or negligence of another employee of the same master, engaged in the same general service or business, and under the same general control.

3. Each employee engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his co-employees.

4. Before a master can be made liable to a servant for an injury resulting from the incompetency or unskilfulness of another servant of the same master, it must be affirmatively shown, not only that the latter servant was unskilful or incompetent, but that the master knew it, and did not exercise proper care in his selection. And if the injury arise from a defect or insufficiency of machinery it must be shown that the master had positive knowledge of such defect or insufficiency, and failed to exercise proper care in providing a remedy.

5. All agents and employees on a railroad who are engaged in the same general employment and business of keeping up, running and operating the road are fellow servants. Master-mechanics, foremen of round houses, and other persons engaged in the repair of machinery and rolling-stock are fellow servants with engineers, conductors and other persons engaged in running trains.

[This was an action by Annie Haugh, in her own right and as guardian of her infant son, James A. Haugh, against the Texas & Pacific Railway Company to recover damages for the death of her husband, Wentworth C. Haugh, an engineer in charge of one of defendant's trains.]

Robertsons, Herndon, Turner & Lipscomb and George L. Hill, for plaintiff.

F. B. Sexton and William Stedman, for defendant.

DUVAL, District Judge (charging jury). This is a suit brought on the 9th June, 1875, both for compensatory and exemplary damages, by Annie Haugh, of the state of Iowa,

[1] [Reprinted from 3 Cent. Law J. 447, by permission; 3 N. Y. Wkly. Dig. 174, contains only a partial report.]

[2] [Reversed in 100 U. S. 213.]

in her own right, and as the surviving wife of Wentworth C. Haugh, and as the natural guardian of her infant son, James A. Haugh, for the death of her husband, the said Wentworth C. Haugh. She alleges that her said husband being in the employment of the defendant, and in charge of engine No. 4, running between Shreveport and Marshall, was killed by said engine being thrown from the track on or about the 8th day of March, 1874, and that such death was the result of wilful and gross negligence of defendant in not furnishing a safe and reliable engine; that the engine in question was thrown from the track by a steer attempting to cross in front of it, and in consequence of the defective construction and arrangement of the pilot or cow-catcher, which failed to throw said animal from the track. She further alleges that the steam whistle attached to said engine was not properly and securely fastened to the boiler, so that when the engine fell over, the fastening of the whistle blew out, and a jet of scalding steam and hot water was thrown upon her husband, thereby causing his death, etc. The defendant denies all these allegations, and avers that engine No. 4 was entirely safe and reliable; that the pilot or cow-catcher was properly constructed and attached to the same; that the engine was thrown from the track in consequence of a bull or steer running between the driving wheels and forward trucks, under such circumstances as rendered it impossible for human sagacity or exertion to prevent the accident. Defendant further avers that the whistle of said engine was securely fastened to the boiler, in accordance with the usual approved mode, and that if it came out of said engine at all, it did not blow out, but was knocked or torn out when the engine was thrown off the track; that if there was any defect about the engine, the same was well known to the deceased, and not known to the defendant, and that said deceased, who had run other engines belonging to defendant, was at his own request assigned to the run between Marshall and Shreveport, well knowing that said engine No. 4 belonged to, and was used upon, said run, etc.

These are the material issues made by the pleadings, and upon them, and the facts in evidence, I have to instruct the jury:

1. That it is the duty of a railroad company or corporation to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipments, including properly constructed engines and their several parts, and the necessary and proper material for their repair; also, to select competent and skilful agents and subordinates to supervise, inspect, repair and regulate the machinery, and to regulate and control the operations of the road. The corporation or master, however, is not liable for injuries suffered by one employee, solely through the carelessness or negligence of another employee of the same master, engaged in the same general service or business, and under the same general control. Each employee engaged with others, in the service of a common master, takes upon himself the liability to injury resulting from the negligence of his co-employees. The hazard is incident to the nature of the employment in which he enters. There is no implied warranty of life or guaranty against injury. The employee takes his place subject to all the dangers incident to the position. The master is only bound to provide competent and proper machinery and materials, and to furnish skilful and careful employees to keep the same in repair and safe condition. If this be done and one of the workmen or employees thus provided is simply guilty of negligence resulting in an injury to another employee, it is not the negligence of the master, and the corporation is not responsible. In such case, to render the master or corporation liable, the injury must have resulted to one servant, not from the mere negligence of another, but from his incompetency or unskilfulness, and this must be shown satisfactorily, and if the injury arises from a defect or insufficiency in the machinery or any of its necessary parts, which have been furnished by the master to the servant, a knowledge of this defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence and want of proper care. In other words, it must be shown that he either knew, or ought to have known the defects which caused the injury, in order to render him liable. A different rule, however, would apply as respects the liability of the master to a passenger over the road. All agents and employees on a railroad, who are engaged in the same general employment and business of keeping up, running and operating the road, are fellow servants. Master-mechanics, foreman of round houses, and other persons engaged in the repair of machinery and rolling-stock for a railroad, are fellow servants with the engineers, conductors and other persons engaged in running trains.

Under the general principles of law as thus announced, I charge the jury:

2. That, if they believe from the testimony that the accident which resulted in the death of W. C. Haugh, was produced by a bull running at, or under the locomotive or tender, of which said Haugh was the engineer, and throwing the same off the track, and that such accident occurred under such circumstances as that human skill and foresight could not prevent or reasonably provide against it, then the defendant was not guilty of negligence, and you will find for the defendant.

3. If you believe from the evidence that engine No. 4 was, when purchased and set

up by the defendant, a standard and safe engine, and that the defendant exercised due and proper care in the employment of competent, prudent and skilful agents to keep it in the same condition, and that the accident in question was not one resulting from the want of such competency, prudence and skilfulness, then you will find for the defendant.

4. If there was a defect in engine No. 4, or in the pilot thereto attached, and you believe from the evidence that the same was known to the deceased while he was running said engine, and before the happening of the accident described in plaintiff's petition, or if you believe from the evidence that some days before the accident, the pilot attached to said engine was slightly damaged, or knocked out of square, but that the same was repaired by the agents or servants of the defendant who were skilful and competent to make such repairs, and that after such repairs were made, said pilot was considered safe by those whose duty it was to make them and determine on their safety, and that the deceased afterwards received and ran said engine and pilot, then, in either event, you are instructed that the plaintiff can not recover, and you will find for the defendant. But,

5. If the jury are satisfied from the evidence before them, that the death of the deceased was owing, not to the negligence simply, but to the incompetency or want of skill on the part of any servant or agent of the defendant, who was working in the defendant's machine shops, then the defendant would be liable, and the plaintiff would be entitled to recover such actual pecuniary damage only, as the evidence may satisfy you the plaintiffs have sustained, and as you may think proportioned to the injury resulting from such death.

The testimony in this case is in some respects quite conflicting. It is the duty of the jury to reconcile all discrepancies, if they can, but whether they can or not, it is their right to weigh the whole of the evidence, and give to each and every part of it such weight and credence as they may think proper. And in weighing the testimony and determining its credibility, the jury can consider the manner and mode of testifying by the witnesses, their acquaintance with the subject about which they testify, their interest in the result of the suit, if any, and any other circumstances they may think proper to take into account.

Verdict for defendant.

[Upon error to the supreme court this decision was reversed, and a new trial granted, for the purpose of submitting to the jury the question whether or not, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing the use of the engine. Opinion by Mr. Justice Harlan. See 100 U. S. 213.]

Case No. 6,222.

HAUGHEY v. ALBIN.

[2 Bond, 244;[1] 2 N. B. R. 399 (Quarto, 129); 2 Am. Law T. Rep. Bankr. 47.]

District Court, S. D. Ohio. Feb. Term, 1869.

BANKRUPTCY—PREFERENCE—WHEN VOID.

1. Where a member of an insolvent firm executed a note to a creditor, payable one day after date, with a power of attorney to confess judgment, the creditor knowing the insolvency of the firm, and of the member of the firm giving the note and cognovit, and judgment was entered on the note and the property of the debtor seized on execution by the sheriff, and the debtor soon after applied for the benefit of the bankrupt law, and an assignee was appointed, *held*, in an action of replevin brought by the assignee in bankruptcy against the sheriff to recover possession of the property of the bankrupt, levied on to satisfy the execution. That the giving of the note by the bankrupt firm, with a cognovit to confess judgment, was a fraudulent preference of a creditor within the meaning of section 35 of the bankrupt act [of 1867 (14 Stat. 534)].

[Cited in Alderdice v. State Bank of Virginia, Case No. 154.]

2. That such preference being in fraud of the act, the note, warrant of attorney, judgment, and execution were nullities, and that the title to the property levied on, vested in the assignee in bankruptcy, who had a right to its possession, to be disposed of for the equal benefit of all the creditors.

[Cited in Graham v. Stark, Case No. 5,676; Martin v. Toof, Id. 9,167.]

In bankruptcy.

J. Warren Keifer and Lewis H. Bond, for plaintiff.

Jacob D. Cox and Mr. Burnett, for defendant.

LEAVITT, District Judge. This is an action of replevin brought by Laban W. Haughey, as assignee of Russell B. Reeder, who, on his own petition, has been declared a bankrupt, to recover possession of a stock of merchandise held by the defendant, as sheriff of Clarke county, under a levy made by him on executions in his hands. Keturah Ann Jones and Elizabeth Bates, claiming an interest in the property by virtue of judgments recovered against Reeder before a justice of the peace of said county, and levies made by a constable on said property, by consent of the plaintiff, have been admitted as defendants in the suit. Issues have been made by the pleadings to test the question of the right of possession to the property in controversy; and a jury having been waived by the parties, the case is submitted to the court.

The material facts in evidence are that Reeder, in his own name, and as a member of the firm of Reeder & Co., had, for some years prior to his insolvency, been engaged in business in the town of South Charleston,

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

in Clarke county, as a retail dealer in various descriptions of merchandise. Reeder, for himself, and as a member of said firm, had dealt largely with the firm of Kelton, Bancroft & Co., of Columbus, prior to September 1, 1867, and about that time was indebted to said firm in his own right, and as a partner in the firm of Reeder & Co., by book account, in a sum upward of $1,500. On the 16th of September, Sheldon, the confidential clerk of said firm of Kelton, Bancroft & Co., called on Reeder at his place of business in South Charleston, and requested a settlement of the account due the firm. Reeder then paid him $200 on account, and, at the request of Sheldon, gave his promissory notes, payable one day after date, for the balance due from Reeder individually, and from the firm of Reeder & Co., giving, at the same time, warrants of attorney to confess judgments on said notes. On the 24th of September, separate judgments were entered on the notes in the court of common pleas of Delaware county; and on the same day executions were issued on the judgments, directed to the sheriff of Clarke county, which were immediately placed in the hands of the defendant [Cyrus] Albin, then being sheriff of that county. And on the 27th of September, a levy was made on the entire stock of merchandise in possession of Reeder, and Reeder & Co., under which the sheriff has since held, and to which he now asserts the right of possession, adverse to the claim of Haughey, as assignee in bankruptcy of Reeder. Reeder filed his petition in bankruptcy on November 15, 1867, and having been duly adjudged a bankrupt without objection by his creditors, the plaintiff, Haughey, was appointed assignee on the 28th of November. No objection being filed to the final discharge of Reeder, it was granted August 28, 1868. The assignee, soon after his appointment, demanded of the sheriff the possession of the merchandise held by him under the executions in his hands, which was refused.

The question for the decision of the court is, whether the assignee of Reeder, or the defendant Albin, in right of Kelton, Bancroft & Co., as creditors of Reeder, have the right to the possession of the property. On the part of the plaintiff, as assignee, it is insisted that the notes given with a cognovit to Kelton, Bancroft & Co., by Reeder, were given, he being insolvent, or in contemplation of insolvency, with knowledge by said creditors that he was then insolvent; and that, in effect, they operate as a preference over other creditors, and were in violation of the bankrupt act, and therefore void; and that a levy on executions upon the judgments created no lien on the property, which is protected or can be enforced under the act. Kelton, Bancroft & Co. insist that the judgment notes given by Reeder were executed in good faith, in the ordinary course of their business, to secure a just debt, without knowledge of Reeder's insolvency on their part, and when Reeder did not believe he was insolvent, and, therefore, not in contemplation of insolvency or bankruptcy, or with intent to give an unlawful preference, within the meaning of the bankrupt act. They claim, therefore, that their levies are valid, and that no title to the property in question vested in the plaintiff under the assignment in bankruptcy.

The decision of this case turns upon the construction to be given to section 35 of the bankrupt act of 1867. That part of the section applicable to this case is as follows: "That if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this law, shall be void," etc. From this and various other provisions of the bankrupt act, it is apparent that it was the intention of the law to prevent all preferences by an insolvent person, and, as far as possible, to insure the equal distribution of his property to all his creditors. And to effect this object, the statute has taken a step in advance of any prior bankrupt act in this country, and perhaps in England. It differs in a material point from our act of 1841 [5 Stat. 440]. By section 2 of that act, to render void a payment, transfer, or assignment, it must have been made "in contemplation of bankruptcy," which, as interpreted by the courts, was understood to mean a state of bankruptcy at the time of the transaction known to the bankrupt, or the expectation that he was to become a bankrupt. Now, section 35 of the present law quoted above, as applicable to unlawful preferences, includes persons "being insolvent, or in contemplation of insolvency." This is noticed here for the purpose of the remark, that from this difference in the phraseology of the two acts the cases cited by counsel involving the construction of the act of 1841 have no direct application to the case before the court.

In this case the questions are: (1) Was Reeder actually insolvent when he executed the notes to Kelton, Bancroft & Co., and gave the warrant to confess judgment on them? (2) Was it with a view to give a preference to said firm? (3) Had that firm reasonable cause to believe Reeder was insolvent at the time? If these questions can be answered affirmatively, the result will be that the notes

and cognovit, and consequently the judgments, executions, and levies, are nullities, and give no lien or title to Kelton, Bancroft & Co., to the property taken in execution by the sheriff, and no right of possession in the sheriff.

As to the first point—the actual insolvency of Reeder—the evidence leaves no room for doubt. His schedules in bankruptcy show that, at the time he gave his notes to the firm, and at the time of his application in bankruptcy, his debts and liabilities amounted to $16,000, while his entire property, by his own estimate, was but $8,000. It is true Reeder, as a witness, testifies that he did not know, on the 16th of September, when he gave the notes and cognovit, that he was insolvent. But the statute does not require this knowledge to invalidate the transaction. It requires only the existence of the fact of insolvency, to bring it within the scope of the section quoted, if the other elements contemplated by the statute, to render the transaction a nullity, co-exist.

This brings me to the second inquiry, namely: Was the execution of the notes and cognovit with a design to give Kelton, Bancroft & Co. a preference over other creditors? It is a very familiar principle of law, that every one is presumed to intend what is the necessary and unavoidable consequences of his acts. The fact of Reeder's insolvency being established, the giving of notes, payable one day after date, with a warrant to confess judgment, importing the right to an execution without delay, and a consequent levy upon his property, affords the strongest ground for the presumption that the intention was to give Kelton, Bancroft & Co. a preference over other creditors. The evidence shows, conclusively, that this was the result. The notes and cognovits were given on the 16th of September; judgment was entered on the 24th, and executions issued the same day and were put into the hands of the sheriff for service, and on the 27th levies were made on the merchandise in controversy. It is hardly to be supposed that Reeder did not know that this course could and would be taken, and it is difficult to resist the conclusion that he did not intend to give this firm a preference. All the circumstances connected with the transaction known to Reeder must have convinced him, it was the intention of Kelton, Bancroft & Co. to make an immediate levy on his property, and thus give them a preference, in violation of the policy and intention of the bankrupt act, or, in the words of the statute, "in fraud of the law." It would not be a strained construction of section 35 of the statute to hold that Reeder had thus procured his property to be taken in execution, as his act, in giving the judgment notes, naturally and certainly led to such a result—thus breaking up his business and putting him in a state of bankruptcy.

The third inquiry is: Had that firm reasonable cause to believe Reeder was insolvent at the time? On this subject there is some conflict in the testimony. Sheldon swears he did not know that Reeder was insolvent when he was applied to for a settlement, and when he procured the notes and cognovits. On the other hand, Fulton, a disinterested witness, testifies that Sheldon, about the 1st of October, stated that he had known, for two months past, that Reeder was insolvent. If this witness is credible, it establishes the fact that Sheldon was cognizant of Reeder's failing circumstances some time before he applied for a settlement and procured the notes and cognovit. But, without reference to this direct evidence on this point, all the facts point to the conclusion that the firm had "reasonable cause" to suppose Reeder to be insolvent. The firm had been dealing with Reeder for some time, and had, without hesitation, given him credit. On his application for further credit, they refused to give it unless he would pay the sum then due, which he was unable to do. They advised him then to purchase elsewhere on credit, and raise the means to pay them. Sheldon, some time after, made a personal application to him for settlement of his account. He could pay only $200; and, on the request of Sheldon, he then gave his notes, as before stated, with warrants to enter judgments. The notes were payable one day after date, and the cognovits authorized judgments to be entered as soon as the notes were due. Judgments were entered a few days after the notes and cognovits were given, in a county other than that in which the debtor resided; and executions immediately issued, and levies were made. This surely is not according to the ordinary course of business, as between mercantile creditors and debtors of whose solvency they are confident. The witness, Sheldon, says his firm sometimes pursued this course; but it is fair to presume that such steps to collect a debt are not resorted to unless the creditor has good reason to believe his debtor is in failing circumstances. The whole course pursued by the creditor firm clearly indicates that they supposed Reeder was unable to meet his liabilities, and that great haste was necessary to enable them to get the start of other creditors.

Without pursuing this investigation further, I state it as my conclusion that this transaction, in view of all the facts, is within the scope of section 35 of the bankrupt act, and that the judgment notes are nullities, and that Kelton, Bancroft & Co. have no valid lien on the merchandise in controversy; and, consequently, that the right of possession is in the assignee and not in the sheriff. As to the claims of the aged females, Mrs. Jones and Mrs. Bates, I see no reason why their liens on the property are not protected. They were, severally, cred-

itors of Reeder long before his insolvency and application in bankruptcy. They held his notes for debts honestly due; and, when he failed to pay, suits were brought on the notes before a justice of the peace. Each obtained judgments, on which executions were issued, and levies made on the merchandise in controversy, then in possession of the sheriff under the levy on the executions in favor of Kelton, Bancroft & Co. These proceedings were all in good faith, and according to the ordinary course in such cases. They had no conference or communication with Reeder in regard to their doings; nor was it with his knowledge or at his request they brought their suits. There is no proof that they were apprised that Reeder was in doubtful circumstances or insolvent. In short, there is no fact in evidence showing any fraudulent intent in suing for their debts, or any intent to obtain an unlawful preference over other creditors. They stand, therefore, as persons who, by lawful means, have sought to secure their just rights, and wholly free from the imputation of any fraud, actual or constructive. The levies made by the sheriff on the executions upon the judgments in favor of Kelton, Bancroft & Co., being adjudged invalid, the levies by the constable on the executions in favor of Mrs. Jones and Mrs. Bates are clearly valid, and created a lien in their favor, which is protected by the bankrupt law. In one of the cases, it is claimed, the lien under the constable's levy, after the expiration of thirty days, the lifetime of the executions under the law of Ohio, was at an end. But I know not of any authority by which it can be maintained that the lien, under the facts of this case, was lost. Further proceeding on the judgment was suspended by reason of the property remaining in the possession of the sheriff, but the lien continued. The other case is like the one referred to, except that after the expiration of thirty days, and after the return of the execution by the constable, a vendi issued, upon which no proceeding was had, for the reason just stated. The lien, however, was undoubtedly preserved. Judgment in this suit, as against the defendant, Albin, will be rendered for the plaintiff, and an order entered, if necessary, for the delivery of the property to him. As to Mrs. Jones and Mrs. Bates, who were by consent, irregularly, and as I think, unnecessarily, made defendants, I do not see what judgment, if any, can be entered. Perhaps the better way would be for them to ask leave to withdraw their pleas, and for an order in the court of bankruptcy directing the assignee to allow and pay their claims in full from the proceeds of the bankrupt's estate. Such an order will be made, if required. The costs in the case, made by the two females, must also be paid from the proceeds of the bankrupt's estate. So far as Albin is concerned, there must be judgment for costs against him.

Case No. 6,223.

In re HAUGHTON.

[1 N. B. R. 460 (Quarto, 121).] [1]

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

BANKRUPTCY—PETITION IN—AMENDMENTS.

Where a petition averred that acts were committed by bankrupt, in contemplation of bankruptcy and insolvency, and evidence of insolvency only was given, the petition should be amended accordingly.

[Cited in Re Gallinger, Case No. 5,202.]

[This was a proceeding in bankruptcy by Hill, Hardy & Whitfield against Joseph Haughton.]

G. A. Seixas, for creditors.

Brown, Hall & Vanderpool, for debtor.

BLATCHFORD, District Judge. The petition in this case was filed on the 20th of January, 1868. It alleges as acts of bankruptcy, that the debtor, on the 24th of December, 1867, at New York, being in contemplation of bankruptcy and insolvency, procured and suffered his property to be taken on legal process in favor of Nicholas Haughton, namely, upon an execution issued to the sheriff of the city and county of New York upon a judgment entered against him in the New York supreme court by Nicholas Haughton for $913.92, with intent thereby to give a preference to Nicholas Haughton, and with the intent, by such disposition of his property, to defeat and delay the operation of the bankrupt act [of 1867 (14 Stat. 517)], and which judgment was entered up on an offer made by him on the 9th of December, 1867, to said Nicholas Haughton, to allow judgment to be entered against him for $892 and costs, which offer was accepted by Nicholas Haughton on the 13th of December, 1867, and said judgment was thereupon entered on the 18th of December, 1867, in accordance with the provisions of the Code of Procedure of the state of New York, that the debtor, on the 24th of December, 1867, being in contemplation of bankruptcy and insolvency, procured and suffered his property to be taken on legal process in favor of Bernard Reilly, namely, upon an execution issued to the sheriff of the city and county of New York upon a judgment entered against him in the common pleas for the city of New York by said Reilly, for the sum of $2,556.17, with intent thereby to give preference to said Reilly, and with the intent, by such disposition of his property, to defeat and delay the operation of the bankrupt act, and which judgment was entered against the debtor in an action brought by said Reilly in said court to recover the sum of $2,000, interest, and costs, and in which action the debtor made no defence, and allowed, suffered, and permitted said judgment to be entered against him by default on the 5th of De-

[1] [Reprinted by permission.]

cember, 1867. The debtor having appeared in this court, under an order to show cause, on the 1st of February, 1868, and denied the act of bankruptcy alleged in the petition, and demanded a trial by the court, a reference was made to a commissioner of the circuit court, under section 38 of the act, to take testimony in regard to the matters alleged in the petition, and report the same to the court. Under this order of reference a large amount of testimony has been taken. Certified copies of the records of the two judgments have been introduced, and the testimony of two of the members of the firm of the petitioning creditors, of Isaac Rosenthal and Albert Cornell, creditors, of John Kelly, the sheriff, and of Bernard Reilly and Nicholas Haughton, the judgment creditors in the two judgments, has been taken. The facts set forth in the petition are fully proved, and it satisfactorily appears therefrom that the debtor, being in contemplation of insolvency, and being in fact insolvent, did, at the time named in the petition, namely, on the 24th of December, 1867, suffer what amounted substantially to all the property he had, to be taken on executions issued on the judgments named in the petition, which were recovered in the manner set forth in the petition, with intent to give a preference to the judgment creditors. This is, under section 39 of the act, ground for an adjudication of bankruptcy; the other particulars required by that section to warrant an adjudication being shown to exist. The petition alleges that the debtor committed the acts, "being in contemplation of bankruptcy and insolvency"; no proof is given that he was "in contemplation of bankruptcy" as the meaning of that term is held by this court. The creditors may amend their petition by striking out the words "being in contemplation of bankruptcy and insolvency" when they twice occur in the petition, and by inserting instead the words "being insolvent or in contemplation of insolvency." When this is done, an order of adjudication of bankruptcy will be entered.

HAUGHTON (BEERS v.). See Case No. 1,230.

Case No. 6,224.

HAUGHTON et al. v. EUSTIS et al.

[5 Law Rep. 505.]

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

BANKRUPTCY—ATTACHMENT—LIEN OF—STATUS OF LEVY UNDER SUBSEQUENT JUDGMENT.

The property of the alleged bankrupts was attached on mesne process on March 14th. On April 17th, a petition in invitum was filed, praying for a decree of bankruptcy. Subsequently, but before a decree, judgment was recovered, and the goods were levied upon. *Held*, that the attachment constituted a lien or security within the meaning of the proviso in the second section of the bankrupt act [of 1841 (5 Stat. 440)], and was thereby saved from the operation of that act. Ex parte Foster [Case No. 4,960]; Parker v. Muggridge [Id. 10,743]; Ex parte General Assignee [Id. 5,305]; Downer v. Brackett [Id. 4,043].

[Cited in Re Reed, Case No. 11,640.]

[Cited in Martin v. Dryden, 6 Ill. 213; Kittredge v. Warren, 14 N. H. 536; Kittredge v. Emerson, 15 N. H. 252; Hubbard v. Hamilton Bank, 7 Metc. (Mass.) 344.]

On the 14th day of March, 1842, Eustis & Co. attached on mesne process the goods of Rice & Boardman. At the May term of Windsor county court, in which the suit, commenced by said process, was entered, judgment was recovered by the plaintiffs. On the 23d of June, execution was taken out on said judgment and levied on the goods thus attached. On the 28th of said June, Haughton and others procured from the district court of the United States, an injunction upon the sale of said goods on said execution, setting forth, by petition, as the ground of said injunction, that on the 15th day of said March, said Rice & Boardman committed an act of bankruptcy, and said Haughton and others had on the 17th of April last, filed their petition that said Rice & Boardman be declared bankrupts, and that said petition was then pending. On the 31st of August, Eustis & Co. moved the district court to dissolve said injunction. Which motion said court adjourned into the circuit court.

S. S. Phelps and William Upham, counsel for Haughton and others, relied mainly on Ex parte Foster [supra], and the authorities therein cited.

A. Tracy and L. B. Peck, for Eustis & Co., cited Rev. St. c. 42, §§ 50, 51; Id. c. 49, § 53; 2 Aiken, 215; 2 Vt. 388; 4 Vt. 88; 9 Vt. 309; 12 Vt. 65; 1 Day, 117; 2 Caines, 300; 9 Mass. 209; 16 Pick. 264; 9 Conn. 522.

THOMPSON, Circuit Justice. In the first place, there is no pretence of anything fraudulent in the proceedings of the attaching creditors. Their debts were bona fide, and have gone into judgment. Their attachment was made in good faith agreeably to the laws of the state, and before any act of bankruptcy by the debtors. They had, up to the service of the injunction, taken the steps required by the laws of the state to enforce the payment of their debts. Does the attachment in this case constitute a lien or security, within the meaning of the proviso in the second section of the bankrupt law, and is it thereby saved from the operation of that law? In my opinion it does. The doctrine in this state is, that an attachment of property on mesne process, constitutes a lien. It is so treated in the statute, and so deemed and denominated by the supreme court of the state. The courts of the United States are to be governed by the decisions of the state courts, as to what the state laws are: the law of this state, thus clearly appearing, must gov-

ern this court in giving operation to the bankrupt law, in the case before me.

To the argument urged by counsel, that the proviso at the close of the second section was inserted to save certain rights peculiar to the laws of Louisiana, it is answered, that it does not appear from anything in the act, that the proviso was intended to have reference to Louisiana alone. And certainly, though counsel in argument might take the liberty, it would by no means be proper for the court to regard the history of the bill in its progress of becoming a law, in giving effect to what are clearly its provisions. It is said, too, that by the words "lien and other securities" only such are intended as are created by contract. Now this position is not true even with reference to Louisiana; for divers rights in respect to, and securities upon property in that state, within the clear meaning of the language of that proviso, arise as entirely by operation of law, and as little by virtue of contract either express or implied, as the lien by judgment in New York, or by attachment on mesne process in this state. That a judgment, docketed before an act of bankruptcy committed, is not in New York a lien on the property of the debtor, valid as against the operation of the bankrupt law, is a doctrine to which I cannot assent. Again, I am clear, that the phraseology and evident import of the law itself does not justify restricting the operation of the saving clause of the second section, to common law liens merely. In the different states there are various securities upon property, unknown to the common law, which, by the laws of the respective states, are as essentially a lien upon the property, as these existing at common law. And in my opinion, it is the purpose of the bankrupt law to preserve those liens or securities, thus peculiar to the several states, as much as to preserve common law liens. It is of no importance what they are called, whether liens, or securities, or anything else. What the bankrupt law provides for and saves against proceedings in bankruptcy, is any security attaching upon property by the state law. Now attachment on mesne process, by the laws of this state, is a security upon the property attached—a security valid as against the world, and indefeasible, excepting by the attaching creditor, up to the rendition of judgment. He alone can control it, and if he recover, then that judgment must be satisfied, pro tanto, out of that property, unless he gives up his right to such satisfaction. Indeed, such an attachment constitutes more peculiarly a lien, than a docketed judgment in New York—for by such attachment, the security is fixed upon specific property, and that specific property is holden to respond the judgment, while a judgment in New York is a general lien on all the debtor's property, and no specific part is holden to satisfy that judgment till levied on by execution. However, a judgment in New York, and an attachment on mesne process in this state, rest on the same principle as to the security they fix upon the property affected by them: and that security, when it fastens before an act of bankruptcy committed by the debtor, is not to be invalidated by such act. As to the argument, that the rights or security upon property attached, is contingent, and depends upon a course of judicial proceeding to render it perfect and absolute, it is sufficient to remark, that it is no more contingent than a lien by mortgage. That is in its very nature defeasible. So, in fact, is the common law lien. Defeasibility, contingency, necessarily enter into the idea of a lien, for the moment the right becomes absolute, it ceases to be a lien. In case of mortgage, a course of judicial proceeding is as necessary to render absolute the right and title to the property, as in case of attachment. Injunction dissolved.

NOTE. This report is taken from the Vermont Mercury newspaper, of January 20, 1843, which has been sent to us from some unknown source. We find the following remarks on the case in the same newspaper.—Editor Law Reporter.

"It was hoped that the opinion of Mr. Justice Thompson in the case below named would have been given to the public from his own pen. But as that hope has not yet been, and seems not likely to be, gratified, one who was present at the trial and decision of the case, and who took minutes of the opinion, ventures to present the following outline of that opinion. He believes it to embody the substance of the remarks of the learned judge, and is assured in that belief by the concurrence of one of the principal counsel employed in the argument, to whom this report has been submitted. Since seeing the remarks of the editor in the January number of the Law Reporter, on the opinion of Judge Prentiss, of Vermont, in the cases of Downer v. Brackett [Case No. 4,043], and In re Cook [Id. 3,152], it seems proper to remark, that in this case, the only question in issue was, whether an attachment on mesne process, by the laws of Vermont constitutes a lien on the property attached, within the meaning and saving of the proviso of the second section of the bankrupt law. This was the only question raised by counsel, and the only one passed on by the court. For it was not contended that the judgment subsequently obtained, could have any operative effect as to the property, unless the attachment itself constituted a valid lien."

HAUKEY (UNITED STATES v.). See Case No. 15,328.

HAUN (UNITED STATES v.). See Case No. 15,329.

Case No. 6,225.

HAUPTMAN v. NELSON.

[4 Cranch, C. C. 341.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

BANKRUPTCY—RIGHTS OF NON-RESIDENT CREDITORS.

A discharge under the insolvent law of the District of Columbia, does not affect the rights

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

of a non-resident creditor, unless the debtor be confined at his suit at the time of the discharge, and special bail will be required notwithstanding such discharge.

Mr. Hall moved the court to permit him to appear for the defendant [Arthur Nelson] without bail, because the defendant had been discharged under the insolvent law of this District since the cause of action accrued.

Mr. Brent, for plaintiff, stated that the plaintiff [Philip Hauptman] was not a resident of the District of Columbia, and was not the creditor at whose instance the defendant was confined. See the act of May 6, 1822, entitled "An act for the relief of certain insolvent debtors." 3 Stat. 682.

Mr. Hall, in reply, contended that that act applied only to non-resident debtors who might be arrested and confined here. That the proviso does not extend beyond the evil intended to be remedied, which was that non-resident defendants had not the benefit of the act of 1803. The act of 1822 gives them the benefit, but with a proviso that the discharge shall not operate against any creditor residing out of the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined.

But THE COURT (THRUSTON, Circuit Judge, absent) said that the proviso goes further than the case stated in the clause repealed, and expressly provides, that "no discharge under this act or the act of which it is amendatory, shall operate against any creditor residing without the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined." The words being positive, and extensive enough to take in the present case, THE COURT cannot limit them so as to exclude it. THE COURT had before decided the point in the same way, in several cases.

Case No. 6,225a.

HAUST et al. v. BURGESS et al.

MILLER et al. v. BURGESS et al.

[4 Hughes, 560.]

Circuit Court, E. D. Virginia. Jan., 1882.

GARNISHMENT—FUNDS HELD BY ASSIGNEE FOR BENEFIT OF CREDITORS.

[Funds in the hands of an assignee for the benefit of creditors are not subject to garnishment under executions issued against the assignor after the date of the assignment.]

[Cited in Lackett v. Rumbaugh, 45 Fed. 29.]

[This was a hearing on process of garnishment against W. L. Jeffries, under executions issued against Burgess, Popham & Co. on judgments obtained against them by Haust, Miller & Co. and Daniel Miller & Co.]

There were judgments in these cases against the defendants, and executions in each case. On suggestion that W. L. Jeffries held funds of the latter liable to the judgments, and service of process of garnishment on him, in each case, he came into court and made answer as follows: "The respondent, answering, says that individually he owes Burgess, Popham & Co. nothing, and owed them nothing on the 17th day of November, 1881, when this process was served on him; that on the 5th day of September, 1881, said defendants entered into an agreement with your respondent (in a writing hereto appended) by which they assigned to him all moneys and other personal assets belonging to said firm, in trust for the benefit of all the creditors of said firm; the funds to be applied to said debts pro rata; that the balance in respondent's hands under said agreement on the 17th day of November, 1881, was $861.34; your respondent insists that the said fund is not liable to the plaintiff's suggestion or executions, because the title thereto was vested in him before the executions under which they claim were issued, and the said executions are therefore no lien upon said funds; your respondent further says that the plaintiffs had notice of said assignment before their suggestions were made." A copy of the assignment referred to was filed with this answer.

HUGHES, District Judge. The paper recited by Jeffries in his answer to the process of garnishment conferred on him a power coupled with a trust. The power is what the legal writers call "an imperative power"; and if the donee of it accepted it and entered upon the execution of it he became bound by the directions of his donor. As soon as he made collections under it, he became an agent charged with a trust; and the funds he collected became trust funds, which it was his duty to dispose of according to the direction of the makers of the writing. This is certainly so as to the funds on hand before the issuing of the executions. See Perry, Trusts, § 248.

I think the principle is well settled, that when a principal assigns his effects for the benefit of his creditors, and gives the assignee a power of attorney to collect and receive all debts and outstanding claims, the power is irrevocable; and the funds, when collected by the agent, became charged with the trust set forth in the appointment. See Story, Ag. § 477; Walsh v. Whitcomb, 2 Esp. 565. I think the funds held by Jeffries must be held not to be affected by the executions which have issued in these cases; and that they must be applied in accordance with the trust with which he was vested.

A copy,
[Seal.] Teste: M. F. Pleasants. Clerk.

Case No. 6,226.

The HAVANA.

[1 Spr. 402;[1] 22 Law Rep. 150.]

District Court, D. Massachusetts. April, 1858.

ADMIRALTY JURISDICTION OF DISTRICT COURT — BRITISH VESSEL—LIEN OF MASTER FOR WAGES.

1. The district court may exercise jurisdiction against a British vessel, in favor of a British subject residing in the British dominions, but is not bound to do so.

[Cited in The Maggie Hammond, 9 Wall. (76 U. S.) 452. Followed in The Pawashick, Case No. 10,851. Cited in The Belgenland, 114 U. S. 364, 5 Sup. Ct. 864.]

2. By the maritime law, a master has no lien on his ship for his wages. By statute of 17 & 18 Vict. c. 104, such a lien is given to masters of British vessels.

[Cited in The Island City, Case No. 7,109; The Enterprise, Id. 4,498; Covert v. The Wexford, 3 Fed. 579.]

3. The lien so given may be enforced in the admiralty courts of the United States.

[Cited in Lorway v. Lousada, Case No. 8,517; The Maggie Hammond, 9 Wall. (76 U. S.) 450; The Becherdass Ambaidass, Case No. 1,203; Whitney v. The Mary Gratwick, Id. 17,591; The Trenton, 4 Fed. 662.]

[See The Bee, Case No. 1,219.]

[This was a libel in admiralty against the bark Havana, William Davidson, claimant, for wages due to the libellant as master of the vessel.]

J. Hardy Prince, for libellant.
Abraham Jackson, for claimant.

SPRAGUE, District Judge. This is a libel against a British vessel, by a British subject domiciled abroad. In such case, the court may exercise jurisdiction, but is not bound to do so. It will do so for the purposes of justice, and the more readily, if no objection be made by the consul of the nation to which the vessel belonged. This libel is by the master of a ship for his wages. In such case the maritime law gives no lien; but upon British vessels such a lien is created by the merchant shipping act, 17 & 18 Vict. c. 104. The question is whether this court should enforce this statute. It is to be observed that it creates not a mere remedy, but a right. It gives security; the lien is a jus in re, and should be enforced wherever the res may be found. Cases analogous to this have come before this and other courts of the United States. The maritime law gives no lien upon a domestic ship. Several of the states have by statutes given liens to material men, for supplies furnished to a vessel in her home port. In such case, the admiralty courts of the United States take jurisdiction, and enforce the right thus created by the state laws; and, being in its nature maritime, this is the same in principle as the case now before me. In those cases the courts recognize and enforce only the right created by the local laws,—not the remedy. In some cases, as in the first act of Massachusetts upon that subject, no process was provided, and the right was enforced only in this court; and when, as in the subsequent Massachusetts statutes, a remedy is given in the state tribunals, still this court applies its own remedy and mode of procedure. The circumstances of the present case illustrate the propriety of exercising jurisdiction to enforce the lien created by the act of parliament, which has been cited.

The ship arrived in Boston in September last, owned by a British subject living in St. John, New Brunswick. A creditor of the owner, also a British subject residing in St. John, where the debt also was contracted, came to Boston, obtained process from a state court, by which the vessel was attached, and he afterwards recovered judgment, and took out an execution, by virtue of which the ship was sold by the sheriff, and the creditor became the purchaser, and is now the claimant in this suit, contesting the right of the libellant. The master who brought this vessel to Boston, had commanded her for two years, at stated wages, and had a large amount due to him. He had, by the laws of his country, security upon his ship, on which he had a right to rely, and doubtless did rely, in giving so extended a credit to his owner, who has become insolvent. The courts of this country have sustained the application of a British creditor, who had no security upon the ship, and caused her to be arrested and sold for the payment of a debt existing only by virtue of British law. And now another British subject, having a higher and paramount right under the British law, appeals to a court in this country for a remedy. To refuse his application would be to sustain by our tribunals the inferior and subordinate claim of one British subject, and refuse the higher and paramount right of another. It would not only be doing injustice to the libellant, but a friendly nation might well complain of such a perversion of her law, by a partial administration of it. That the sale by the sheriff did not divest or impair the lien, has recently been decided in this court. Indeed, this point has not been raised by the intelligent counsel for the claimant in this case. The only remaining question is, for what sum a decree shall be rendered. The accounts of the libellant contain items to the amount of between four and five hundred dollars, which are disputed. As these, or some of them, may depend upon British law and usage, I shall invoke the aid of the British consul, by appointing him an assessor to ascertain what amount thereof, if any, should be allowed.

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

Case No. 6,227.

HAVEMEYER v. LOEB.

[Cited in Hunker v. Bing, 9 Fed. 279. Nowhere reported; opinion not now accessible.]

HAVEN (BLANCHARD v.). See Case No. 1,511.

HAVEN (BRONDE v.). See Case No. 1,924.

Case No. 6,228.

HAVEN et al. v. BROWN et al.

[6 Fish. Pat. Cas. 413.][1]

Circuit Court, S. D. Ohio. May, 1873.

PATENTS—EQUITY—PARTICULARITY OF—PRACTICE.

Although upon principle, a bill in equity which did not state particulars in infringement would be demurrable, yet the practice of alleging generally that the defendant infringes, without specifying particular claims or particular devices, is now too well settled to be disturbed.

Demurrer to bill in equity. Suit brought [by James L. Haven & Co.] upon letters patent [No. 58,437], for "improvement in bedstead fastenings," granted to John Lemmon, October 2, 1866, assigned to complainants and reissued to them June 14, 1870. The bill, after setting forth the grant, assignment, and reissue of the patent, charged infringement in the following words: "Yet, the said defendants, well knowing the premises and the rights secured to your orators aforesaid, but contriving to injure your orators, and to deprive them of the benefits and advantages which might, and otherwise would, accrue unto them from said invention, since the assignment aforesaid, and after the issuing and reissuing of the letters patent as aforesaid, and before the commencement of this suit, did, as your orators are informed and believe, without the license or allowance, and against the will of your orators, and in violation of their rights, and in infringement of the aforesaid letters patent, reissued and numbered 4,028, unlawfully and wrongfully and in defiance of the rights of your orators, make, construct, use, and vend to others to be used, the said invention, and did make, construct, use, and vend to others to be used, a large number of improved bedstead fastenings, made according to, and employing and containing said invention, and that they still continue so to do; and that they are threatening to make the aforesaid improved bedstead fastenings in large quantities, and to supply the market therewith, and to sell the same." To this the defendants [Philip Y. Brown and others] demurred, showing cause as follows: "That the complainants have not, in their said bill of complaint, alleged how many claims are contained in the said reissued letters patent referred to therein, and have not alleged which of these claims, if any, these respondents are accused of infringing, and by reason of thus not alleging the said matters, these respondents may be compelled to undergo great and unnecessary expense and labor in preparing to defend against said bill of complaint."

Fisher & Duncan, for complainants.
James Moore, for defendants.

SWAYNE, Circuit Justice. The bill in this case is founded upon a patent originally granted to one John Lemmon, and by him assigned to the complainants, who subsequently procured a reissue, upon which the suit is brought. The bill fails to describe the nature of the improvements, either in the language of the specification or in any other way. It merely declares that the patent is for an improvement in bedstead fastenings, and in the same general terms it alleges the infringement of the reissued patent by the defendants.

To this bill the defendants demur, and for cause show that the complainants have not, in their said bill of complaint, alleged how many claims are contained in the said reissued letters patent referred to therein, and have not alleged which of these claims, if any, these respondents are accused of infringing, and by reason of thus not alleging the said matters, these respondents may be compelled to undergo great and unnecessary expense and labor in preparing to defend against said bill of complaint.

The cause set out in the demurrer is perfectly true in point of fact, and the question therefore is, is the bill sufficient to put the defendants to their answer. There is no doubt that, upon the general principles of equity pleading, the bill, in failing to specify the nature of the patented improvement, or of the infringement, is bad, and we should, in the absence of authority, have held it bad upon general demurrer.

But, upon looking into the forms bearing upon this subject, we find in Greenleaf on Evidence (volume 2) a declaration at law which has the same general character as the bill before us, giving no summary of the specification or claim, or pointing out the particulars of infringement. In Curtis' American Precedents, published in 1859, the first edition having been published some thirty years ago, the form given for a bill in equity is of the same general character. In Curtis on Patents (4th Ed. § 406) an elaborate statement is given as to how a bill in equity should be drawn, and the bill in this case conforms to all the requirements there laid down.

The form here used obtains, we believe, throughout the United States, and it is an old remark, founded in good sense, that there is no better evidence of what is a sufficient pleading than a form that has long been used. The form of the bill in the present case rests upon a foundation too deep to be

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

disturbed. We, therefore, feel bound to hold that the demurrer must on authority, though not on principle, be overruled.

Case No. 6,229.

HAVEN et al. v. HOLLAND.

[2 Mason, 230.] [1]

Circuit Court, D. Massachusetts. May Term, 1820.

MARINE INSURANCE—LETTER OF MARQUE — POWERS OF—POWERS OF MASTER—DEVIATION.

1. A vessel armed as a letter of marque, and insured as such, has no right to cruise at large for prizes, but she may chase and capture hostile vessels coming in sight, in the course of her voyage, without its being a deviation; and there is no difference in the law, if the vessel be not described in the policy as a letter of marque, provided that fact be made known to the underwriter before underwriting the policy.

2. Every vessel, whether armed or not, has a right of self-defence against hostile attacks; and the master has a large discretion on this subject. He is not bound to attempt an escape in the first instance, and only to repel an attack when made. He is, on the other hand, at liberty to lay to, or attack the enemy ship, or chase her, if he deems that the best means of self-defence, and not wait until a direct attack is made on his own vessel, for self-defence may be then fruitless, by his being crippled.

3. If a vessel capture an hostile vessel in self-defence, she has a consequent right to take possession and man out the prize, for she has a right to make her victory effectual, and it will be no deviation, if thereby her own crew be not injuriously weakened.

Assumpsit upon a policy of insurance upon merchandise on board of the ship Volant, from her port of lading in France, to her port of discharge in the United States. The policy was in the usual form, and the subscription of the defendant was for 1,000 dollars. The declaration contained two counts, in one of which the plaintiffs [Nathaniel Haven and another] aver a loss by capture, and in the other ask for a return of the premium. The facts were these. The Volant was captured on her homeward voyage by the British, carried to Halifax, and there, with her cargo, libelled and condemned as prize; war then existing between the United States and Great Britain. Before the ship sailed from Bayonne, where she had been a long time detained, from the difficulty of obtaining permission to unlade her outward, and take on board her homeward cargo, the master applied for, and obtained from the American minister, a commission and letter of marque, and increased his armament from four to fourteen guns, and his crew from twenty-five or thirty to seventy men. The ship and outward cargo were addressed to the house of Morton & Russell, merchants in Bordeaux, and they were consulted by the master and a Mr. Bartlett, who went out as joint supercargo of the Volant, (but was not the agent or consignee of the plaintiffs) as to all important proceedings concerning the ship or voyage; and particularly as to the propriety and expediency of taking the commission aforesaid. Their advice was to take the commission, it being understood, that the commission was to be taken, and the armament increased, for the purpose of defence only. There were, however, no written directions, tending to restrict the use of the commission: there being no other orders than those which were given at the commencement of the outward voyage; which were to proceed from France on the return voyage, as expeditiously as possible. After being out three or four days from France, a vessel was descried, which was supposed to be standing for the Volant; and attempts were made to avoid her, but the two vessels having approached so near to each other as to enable the master of the Volant, to ascertain that the supposed enemy was of little force, he wore ship and demanded a surrender, which was made, and possession of the vessel, which proved to be the American brig Criterion, lately captured by the British, was taken by the master of the Volant; who took her crew on board of his ship, manned the prize, and ordered her for France, where she arrived and was condemned. The time consumed in taking and manning the brig, was between two and three hours. There was no cruising and no chase, other than what is above stated. Evidence was introduced on the part of the plaintiffs to show, that the defendant [John Holland], at the time of underwriting the policy, knew that the Volant was armed, and had a commission and letter of marque. The defence was, that the stopping to capture the Criterion, and the actual capturing of her, with the consequent delay caused thereby, was a deviation, which discharged the underwriter.

Bliss & Webster, for plaintiffs.

Welsh & Prescott, for defendant.

STORY, Circuit Justice (after summing up the facts to the jury). It does not appear to me, that there is any serious difficulty in the law applicable to this case. It is clear from the authorities, that a vessel insured as a letter of marque, has no right to cruise at large for prizes; but she has, in my opinion, a right to chase and capture hostile vessels, which are met with and are in sight in the course of the voyage.[2] Here, however, the vessel was not insured as a letter of marque, although it was well known to the underwriters, at the time of the insurance, that she possessed such a commission. And the argument is, that knowledge of the fact, does not aid this defect of description in the policy. I do not profess to feel any doubt on this point. It appears to me, that it is wholly immaterial, whether the vessel be described in the policy

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

[2] See Jolly v. Walker, Marsh. Ins. 195; Parr v. Anderson, 6 East, 202; Park, Ins. (6th Ed.) 399; Hooe v. Mason, 1 Wash. [Va.] 207, 211.

as a letter of marque or not, provided the fact of her sailing under such a commission, be known to the underwriters. The description of the fact, does not make the construction of the policy more broad, but it repels any defence founded upon the concealment of a fact, material to the risk. There are many cases, in which this doctrine is applied. Although this is my opinion, yet as the principal question in this case turns upon another point, I am disposed to reserve this point, and to direct the jury to find a verdict for the defendant, unless the capture was made in necessary self defence.

Whether a vessel be commissioned or not, she has a right to repel any attack of an enemy, and to protect and defend herself by all reasonable precautions, against a meditated hostile attack. If a vessel, supposed to be an enemy cruiser, be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defence, and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavour to make his escape in the first instance, and on failure of this, to meet the enemy; nor is he bound to lay by or fly until an attack is commenced upon him, and he has received injury, and then, and not before, to exert his right of self-defence. The law vests him with a large discretion for the benefit of all concerned. He is to consult the safety of the persons and property on board, in the best manner he can. He may lay to, or chase the enemy ship, if he deem that the most effectual means of securing his object. It may be his best course to begin the attack, and to attempt to cripple the enemy, or to encourage his own crew by commencing a chase, or to intimidate the enemy by laying to, and shewing a determination to resist any attack.[3] These are considerations, which are confided to his discretion, and he is to judge, under all circumstances, what is the most promising mode of defence. To deprive him of this right of choice, would be to subvert the great object of his appointment, and to sacrifice to ignorance and mistake, all the advantages of skill and management. The only question in cases of this nature is, whether what is done, is fairly attributable to a mere intention of self-defence, or to motives of another nature, such as the desire of profit. If the former, then the act is justifiable; if the latter, then it is a deviation. Apply these principles to the present case. If, when the Volant wore round to attack the Criterion, it was for the purpose of self defence, to intimidate the enemy, and to repel a meditated attack, before the Volant should herself be disabled, then it is clear, that the act was not a deviation. But if this was wholly unnecessary, and was done by the master without any view to self-defence, and for the mere purpose of making a prize, then it was a deviation.

But it is contended, that if the capture was made solely in self-defence, still the master had no right to take possession of, and man out the prize, but was bound to proceed on his voyage without this delay. I am of a different opinion. If the capture was made in self-defence, the master had a right to take possession of his prize, and if without injuriously weakening his own crew, he could man the prize, he had a right so to do; and the delay for these purposes was not a deviation. He had a right to make the capture effectual, to prevent the enemy from re-commencing the attack, or giving information to other cruisers. The right of capture drew after it all the other incidents. It would be most mischievous to the interests of trade, to discourage a crew from making a gallant defence by the knowledge, that in no event could they reap a reward from the victory. I know of no authority in the law, that compels me to such a doctrine, and I cannot perceive that it stands on any solid principle of justice or reason, or public convenience.

Verdict for plaintiffs.

A motion was afterwards made for a new trial, upon the ground that there was error in the law as laid down by the court; but the motion was overruled, and judgment passed for the plaintiff.

[3] See Parr v. Anderson, 6 East, 202, Lord Ellenborough's remarks at the trial at nisi prius.

HAVEN (UNITED STATES v.). See Case No. 16,788.

HAVEN (UNITED STATES & FOREIGN SALAMANDER FELTING CO. v.). See Case No. 16,788.

Case No. 6,230.

In re HAVENS.

[8 Ben. 309.] [1]

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

BANKRUPTCY—REPAYMENT BY ASSIGNEE—MONEY WRONGFULLY COLLECTED BY INSOLVENT BANK—INTEREST—COSTS OF SUIT AGAINST ASSIGNEE.

On August 1, 1870, H. deposited with the Central Bank of Brooklyn for collection a check for $3,125. By the rules of the bank, he was not allowed to draw against it until the bank had received notice of its collection. The bank was, at the time, insolvent; and, before the check was paid, it was enjoined, by the order of a court of the state of New York, from collecting, receiving, or paying moneys, and a receiver was appointed. The check was afterwards collected, and the proceeds placed among the moneys of the Central Bank, and, on the appointment of an assignee in bankruptcy proceedings which were afterwards taken, they passed with those moneys into the hands of such assignee. H. commenced a suit in a state court against the assignee, and obtained a judgment for the amount of the check with interest and costs. He afterwards presented a petition to the bank-

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

ruptcy court for an order that the same be paid to him by the assignee, and proved the facts above stated. *Held*, that the check never became the property of the Central Bank, and that H. was entitled to the proceeds of it, and that the court would grant the order that the assignee pay him that amount, but would not order the payment of the costs in the suit in the state court, nor of interest on the amount of the check, the loss of which was the result of his misfortune in having his property mingled with the funds of the insolvent bank, and of his delay in applying to the bankruptcy court for relief.

[This was a petition by Joseph H. Havens, the depositor of a check for collection with the Central Bank of Brooklyn, for leave to withdraw from the assets of the bank the amount of the check collected by the bank after insolvency. A similar petition presented at a former term was denied for insufficiency of proofs. See Case No. 2,549.]

E. F. Sanderson and John H. Bergen, for petitioner.

BENEDICT, District Judge. This is a petition addressed to this court, requesting that the petitioner be allowed to withdraw from the funds in this court, as assets of the Central Bank of Brooklyn, the sum of $4,282.85. The petition is supported by evidence taken on order of this court, on due notice to all interested, and the facts are not disputed.

It appears that on the first day of August, 1870, the petitioner had on deposit in the Central Bank the sum of $977.84. On that day he deposited in the bank a check for $3,125, dated August first, and drawn by George H. Lamb on the Fulton Bank of the City of New York. This check, when deposited by the petitioner, was endorsed by him for collection, and it was deposited in pursuance of a rule by which he was not permitted to draw against it until the bank had received notice that it had been paid. The Central Bank, when it received the check, was, in fact, insolvent, and, on the next day, and before the check in question had been paid, was enjoined by the supreme court of the state from exercising any of its corporate rights and from collecting or receiving or paying moneys; and a receiver was thereupon appointed. The order of the supreme court was received at the bank between 12 and 1 o'clock of August second, and the bank then closed its doors about 2 o'clock of the same day. The check in question was collected of the Fulton Bank, and the proceeds were then placed among the moneys of the Central Bank. These moneys were subsequently transferred to this court by virtue of proceedings in bankruptcy taken against the Central Bank.

Upon this state of facts I am of the opinion that the petitioner is entitled to receive at the hands of this court the amount realized from this check, deposited in the manner stated. The circumstance that property which belonged to a third party, had become subject to the control of this court by reason of the fact that it was in the possession of the bankrupt, and therefore passed into the possession of the assignee in bankruptcy, presents no obstacle to the actual owner who desires to regain possession of his property. Nor does the fact, that in this case the money realized from the check in question has been mingled with other moneys, make any difference, inasmuch as an equal amount can be given him without injury to the right of any one.

The facts here proved show that this is not the case of an ordinary depositor in an insolvent bank. The petitioner, upon depositing the check as he did, did not become a creditor of the bank for the amount of the check deposited. By the agreement, he was not to have credit for it until it was collected; and it was not collected until after the bank had closed its doors and had been enjoined from collecting any moneys. There can be no doubt that had the petitioner demanded the check of the bank at any time before the appointment of the receiver, he would have been entitled to his return, for he had a balance in the bank undrawn. He had not drawn against this check, and by the agreement was not entitled to draw against it.

The case, therefore, is taken out of what is undoubtedly the general rule, in respect to deposits made in banks which prove to have been at the time insolvent. If, by the deposit of the check, the relation of debtor and creditor for the amount had been created and the bank had acquired a right in the check, or its proceeds, the case would be different; and the petitioner would be compelled to prove his claim as a creditor and take his dividends with the other creditors. But here, if the amount of this check be retained by the court and distributed among the general creditors of the court, money not owned by the bank will be distributed to the creditors, and these creditors will receive so much more than the assets of the bank, at the time it stopped. The petitioner's right to the money appears to be clear, and I have no hesitation in directing that he be paid the amount of the check in question. But he claims also interest. To this I cannot accede. It would be unjust to the creditors of the bank out of the amount distributable among them, to pay interest on a sum of money received as this was. Any loss of interest arises from the misfortune of the petitioner, in that his money was mingled with the assets of an insolvent bank, and from his delay in taking steps to regain it. The petitioner also asks to be allowed the further sum of $275.68, being the cost of an action which, it appears, he instituted in the supreme court of the state to compel the payment of the same demand. The necessity or advantage of such a judgment, wholly ineffectual as it must be to control the action of this court, or to affect the liberty of its officers, is not apparent; nor is it seen how the creditors of the

Central Bank can be charged with the costs of obtaining the same. The demand, so far as interest and costs are concerned, is therefore disallowed, and the order of this court will be, that upon the petition and proofs, the amount of the check in the petition mentioned, to-wit, the sum of $3,125, may be paid to the petitioner, on his order of record herein, out of the moneys in court as assets of the Central Bank of Brooklyn.

Case No. 6,231.

In re HAVENS.

[1 N. B. R. 485 (Quarto, 126).] [3]

District Court, D. New Jersey. 1868.

BANKRUPTCY—ASSIGNEE—RESIDENCE OF.

Where it is shown that an assignee, chosen by the creditors, resides out of the district in which proceedings are being carried on, the court will not confirm the choice.

The creditors of [James W. Havens], the said bankrupt, having on the 7th of April last chosen James Newton, of Middletown, New York, as assignee, Mr. Register Johnson refused to confirm the choice, on the ground that the assignee resided out of the district and was beyond the reach of process of the court, and referred the matter to the court.

FIELD, District Judge. For the reasons stated by the register, the choice of assignee is not approved. The assignee must reside in the district in which proceedings are being carried on.

HAVENS (HUDDY v.). See Case No. 6,826.

Case No. 6,232.

The HAVRE.

The SCOTLAND.

[1 Ben. 295.] [1]

District Court, S. D. New York. July, 1867.[2]

COLLISION AT SEA OFF SANDY HOOK—OWNERSHIP—PLEADING—BOTH VESSELS IN FAULT—LOOKOUT—VESSEL UNDER SHORT SAIL—RIGHT OF MASTER TO BE PRESENT AT THE EXAMINATION OF HIS CREW AS WITNESSES.

1. Two sailing vessels, a bark and a ship, came in collision in the night, ten or fifteen miles southeast of Sandy Hook. Both were close hauled, the bark being on her port tack; and though the lights could have been seen at a distance of more than a mile, the lights of the ship were not seen till the green light was seen within a quarter of a mile off. The bark was under short sail, so that she could not tack, but only wear ship, and she did not change her course after discovering the light, till the collision. The ship saw the bark's green light ten or twelve minutes before the collision. She was on her starboard tack, and did not change her course till the collision. Her lookout, after reporting the light, went aft. The pilot who was in charge of her testified that he saw the bark's green light and then her red light, and he then went to the weather side to see if there were any vessels on that side, and when he came back, the green light was again in view, and it was too late to avoid a collision. The other hands on the ship testified that they saw the lights and their changes, but with slight variations. The ship made no change of her course, and struck the bark fourteen or fifteen feet from her stern, in such a way that a slight starboard movement of the ship's wheel would have avoided the collision. On the trial, objection was made on the part of the ship, that the libellant, who had libelled as owner of the bark, had failed to prove his title. The court having suggested that the pleadings in behalf of the ship did not set forth with particularity the way in which the fault of the bark caused the collision, it was insisted, on behalf of the ship, that the allegation was explicit enough, and that if it were not, no advantage could be taken of it, because no exceptions were filed. Depositions of the crew of the ship were read, from which it appeared that when they were being taken, the proctor for the bark objected to the presence of the master of the ship, on the ground that his presence might exercise an undue influence over the witnesses, and the commissioner excluded him. To this exception was taken. *Held*, that proof of the title to the bark by her alleged owner might be given after the trial.

[Quoted in The Mary C., Case No. 9,201.]

2. The libel and answer should set out clearly and explicitly, though briefly, the facts relied on, and that in collision cases this is especially important.

3. The court has the power, in any stage of the case, to require the parties to supply any defect in the pleadings, though counsel can appeal to the court for that purpose, only by exceptions filed at the proper time.

4. The commissioner was in error in excluding the captain of the ship from being present at the taking of the depositions of his crew. It was not only his privilege but his duty to be there, especially as he was a stranger contesting his rights before a foreign tribunal. He should not have been excluded unless his contumacy compelled that course.

5. The bark was in fault for not seeing the light of the ship sooner. Being on ground where vessels are numerous and there is great danger of collision, being under short sail and not able to answer her helm promptly, and being on the port tack, it was her duty to exercise unremitting vigilance in looking out for approaching lights. If she had done so, she would have seen the light sooner, and could have kept out of the way.

[Cited in The Sunnyside, Cases Nos. 13,620, 13,622.]

6. It was the duty of the bark, having the wind on her port side, to keep out of the way of the ship, which was crossing her track so as to involve risk of collision. She gave no sufficient excuse for not doing this.

7. The lookout of the ship was remiss in leaving his post after reporting the light, and the pilot in charge was also remiss in going to look out for other vessels.

8. Every vessel is bound to avoid a collision if she can, and the fault of one approaching vessel does not authorize another to run her down.

9. After the change in the bark's lights had occurred, which was alleged to have been seen from the ship, and the green light of the bark

[3] [Reprinted by permission.]

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

[2] [Reversed as to The Havre, in Case No. 6,233.]

was alone visible, the ship might have hove her wheel to starboard and avoided the collision, and as it was clear that the only way of escape for her was to starboard her wheel, and, if she had done it, no collision would have occurred, she also must be *held* in fault for not having done so, and the damages must be apportioned.

These two cases were cross libels, the one filed by J. H. Richardson, owner of the bark Scotland, against the Norwegian ship Havre, and the other by Thomas Thommesen and others, owners of the Havre, against the Scotland, to recover the damages occasioned to the two vessels by a collision between them, which took place on the night of January 20, 1866, at sea, about ten or fifteen miles southeast of Sandy Hook. Both vessels were bound to New York.

C. M. Da Costa and C. Donohue, for the Havre.

Bowdoin, Larocque & Barlow and W. Q. Morton, for the Scotland.

SHIPMAN, District Judge. Before examining the case on its merits, I notice two preliminary questions. The first is the objection raised on the part of the Havre, that the alleged owner of the Scotland has failed to prove his title. It is intimated by the advocate of the Havre that this is not a mere technical objection; that the omission of such proof on the part of the Scotland was not a mere inadvertence, but that this issue was avoided because it could not be proved that the libellant Richardson was the owner. On the other hand, it is claimed on the part of the Scotland that the failure to prove title was inadvertent, and that this proof can be supplied without difficulty. If this latter statement is correct, I should not be justified in dismissing a suit of this character where the fact can be easily supplied. Proof of title should be made, and I will permit evidence to be gone into on both sides, on this single point, hereafter. This cannot embarrass the owners of the Havre.

The other question arose out of a suggestion of the court at the trial, on the pleadings being read, that the answer of the Havre to the Scotland's libel, and the original libel of the former, did not set forth with sufficient particularity the manner in which the alleged fault of the Scotland caused the collision. The advocate for the Havre insists that the allegation is sufficiently explicit; and that, if it is not, no advantage can be taken of it because no exceptions were filed. I think the allegation in question is not in the general sense of the law of pleading sufficiently full and specific, but as the controversy, as developed on the trial, is of a simple character, the defect in the averment is not attended with any embarrassment. No amendment will therefore be required in this court. But to avoid misapprehension hereafter, it is proper to state in this place, that I by no means accede to the suggestion of the advocate of the Havre, that all defects of this character are to be overlooked by the court unless preliminarily excepted to by counsel. If counsel omit to file exceptions at the proper time, they are precluded from raising objections to the pleadings; but this court, at all times, upon its own motion, has power to compel the parties to conform their pleadings to rules laid down by the supreme court. Rule 23, in relation to libels, and rule 27, relating to answers, should be observed, as conformity thereto contributes to the clear and orderly proceedings in the case, and tends to simplify and facilitate the labors of the court. This court has more than once been embarrassed in the disposition of collision cases by the vague allegations of both libel and answer where no exceptions had been taken to either, and has, in one instance, dismissed a case on the ground that the pleadings as well as the proofs were not sufficiently explicit to found a judgment thereon. Of course it is well understood that the technical rules of special pleading at common law are not to be applied to a libel and answer in a suit in admiralty, but it is equally true that the libel, and the answer where it goes beyond a denial of allegations of the libel, should clearly and explicitly, though briefly, set forth the facts relied on. This is especially important in collision cases. Clear statements in the pleadings tend to produce an orderly arrangement of the proofs. The proofs then naturally crystallize around the allegations, which conduces to an easier and more lucid exposition of the material points in the controversy. To secure this result, the court has the power in any stage of the case to require the parties to supply any defects in the pleadings, though counsel can appeal to the court for this purpose only by exceptions filed at the proper time.

We come now to the merits of this case. The collision took place between nine and ten o'clock in the evening. The night was fair, starlight, though perhaps not with as perfectly clear atmosphere as is sometimes the case. There was a fresh breeze, blowing at the rate of ten or twelve knots. There was some sea, but not very heavy. The allegation in the Scotland's libel that it was blowing a gale, with a very heavy sea and a mist on the water, is not sustained by the proofs. The wind was about northwest by west. The Scotland was on her port tack, under short sail, and heading north by east and moving slowly, not more than three miles an hour. The Havre was heading about southwest on her starboard tack, under a heavier press of sail, and moving at the rate of eight knots. She was a ship of nearly one thousand tons burden, and the Scotland was a bark of nearly four hundred tons. The vessels had been on these respective tacks for some time preceding the collision, and were both close hauled. Both had green and red lights. The Havre discovered the green light of the Scotland about two points

on her lee bow, some two miles off, and about fifteen minutes before the collision. Those in charge of her movements assert that she did not change her course till the collision; that she was kept steadily on the wind to the last. The witnesses from the Scotland say that the Havre appeared to be passing her to leeward, and, when about abeam of the Scotland, luffed up into the wind and struck her, with her sails shaking. But this latter statement I do not credit. Upon no fair view of the evidence, as a whole, can it be entertained. I hold, therefore, as matter of fact, that the Havre kept her course by the wind from the time she discovered the Scotland's green light approaching her for about fifteen minutes, when she struck the Scotland fourteen or fifteen feet from her stern as the latter was crossing her track in front of her. This blow carried away a large portion of the Scotland's stern, and did considerable damage. It would seem that a slight starboard movement of the wheel of the Havre would have averted the collision. Whether this could and ought to have been done is the only delicate or doubtful question in the case. This point will be considered at length hereafter. I hold that the Scotland was in fault for not having discovered the green light of the Havre sooner. This discovery was not made until the vessels were very near. Capt. Maynard, of the Scotland, saw the Havre's light immediately after it was reported, and says it was then not more than an eighth or a quarter of a mile off—of course he would not place the vessels nearer together than they actually were, in his testimony—when the Havre's light was discovered. They were, therefore, without doubt, very near, in view of his statements. Indeed, they were so near when the Havre's light was first sighted as to produce some excitement, if not alarm, on board the Scotland. This is quite evident from the fact stated in the Scotland's proofs, that her second mate came running, or, to use a more expressive phrase of Capt. Maynard, came "rushing" aft as soon as the light was announced by the lookout. The second mate saw it, four or five points on the lee bow, and immediately ran aft to report it to the captain. Now, in the then state of the weather, and the positions and courses of these vessels, the green light of the Havre could have been discovered by the Scotland probably two miles, but, beyond all doubt, more than a mile off. Yet her captain says that in fact it was first seen at a distance at the furthest of not more than a quarter of a mile. This becomes a serious fault when we consider the situation and responsibility of the Scotland. In the first place, she was on ground frequented constantly by a large number of vessels seeking and leaving the port of New York, where there is great danger of collision, as is well known to navigators. In the second place, she was under short sail, moving at a low rate of speed, and therefore unable to obey her wheel promptly. Thirdly, being on the port tack, she was bound to keep out of the way of all vessels on the starboard tack which might be crossing her track so as to involve risk of collision. Act Cong. approved April 29, 1864, art. 12; 13 Stat. 60. In this condition, and with this responsibility on her, it was clearly the duty of the Scotland to exercise unremitting vigilance in looking out for approaching lights, that she might take timely measures to discharge her duty. If the proper vigilance had been exercised, she would have discovered the Havre's green light sooner, and could have kept out of the way without difficulty.

Now, assuming that the Scotland did not change her course at all, as her witnesses testify, from the time she discovered the Havre's green light, we have the case of two sailing vessels, in the open sea, crossing so as to involve risk of collision, and both holding their courses till a collision takes place. One should have kept out of the way while the other held her course, and the statute cited is explicit as to whose duty it was to give way—the vessel which had the wind on the port side. This was the Scotland. What excuse does she offer for not doing so? I have already pronounced her in fault for not sooner discovering the Havre's green light; but it is in evidence that she had shortened sail to such an extent that she could not tack, but only wear ship. What necessity there was for her reducing her canvas to the extent she did, does not clearly appear. As the proof stands, the wind was not sufficiently strong to have prevented her from carrying sail enough to enable her to execute any ordinary manoeuvre with reasonable promptness. There was no gale, nor any heavy sea. But the evidence fails to show that she was well manned. Though the proof is not entirely clear on this point, yet I infer that she had but five men, exclusive of the captain, two mates and steward, whereas she ought to have had eight. Her shortened sail and slow speed may have been owing to this deficiency in her crew. What she had may not have been able to work her in that breeze with the requisite sail to enable her to be handled with promptness and ease. But it may be said that, whether she was short-handed or not, she had a right to determine the amount of canvas she would carry and the speed she would make. The only remark I deem it necessary to make here is one already hinted at, and that is, that the fettered condition to which she was reduced imposed upon her the duty of exercising the most active diligence in early discovering approaching lights, so that she might take measures in time to discharge the obligations of a vessel on the port tack toward those advancing on the starboard tack.

I now come to another point in the case. It is a rule of prudence and sound sense,

often reiterated in judicial opinions, that every vessel is bound to avoid a collision if she can. The fault of one approaching vessel does not authorize the other to run her down because she happens, even through her own folly, to lie in her wake. I am well aware that where the law charges one vessel with the duty of keeping out of the way of another, the corresponding duty of the other to keep her course is to be rigorously enforced. But it is to be enforced with intelligence and in the interest of safety, and not to be enforced, or even permitted, blindly, to destructive ends. It is therefore proper, in view of the fact that the Havre clearly saw the Scotland for fifteen minutes before the collision, watched her approach, with more or less care, for two miles, and without the slightest change in her course, struck the latter only a few feet forward of her stern, to inquire whether she did her whole duty—in other words, whether the slight change in her wheel to starboard necessary, in order to have enabled her to clear the Scotland, might not, and ought not, to have been made? The witnesses of the Havre all, or nearly all, concur in stating that the Scotland presented her green light first, and continued to present it for some time. They differ as to the time this light first continued in sight, the lowest period being seven or nine minutes, and the highest, ten or twelve. This is not material. She continued for some time uniformly presenting her green or starboard light. It was, during all this time, supposed by the Havre that the Scotland was going to cross the former's weather-bow. Most of the witnesses also concur in stating that, at the end of the time named, the red light of the Scotland appeared. Some state that the green light did not entirely disappear, but grew dim—others that it entirely disappeared. The impression seems, then, to have prevailed on the Havre that the Scotland was falling off on her port helm to pass the former to leeward. Soon, however, her red light was lost, and the green reappeared. This, of course, indicated that the Scotland was then heading across the Havre's bow. The question already indicated here presents itself—could, and ought the Havre to have starboarded and fallen off so as to have cleared the stern of the Scotland? This, as I have once intimated, is the most difficult point in the case, and I have re-examined the evidence upon it with great care.

Mortensen, the mate of the Havre, after stating that he saw the green light ten or twelve minutes, says: "Next saw her red light and a little part of the green light, some two or three minutes. Then saw the green light again and shadow of the sail—its outlines. I could not (then) see the red light. The collision took place in one or two minutes." This witness adds that, after the green light reappeared, there was no time for the Havre to do anything. Rasmussen, a sailor and lookout on the Havre, after stating that he saw the green light for some time, says, "that he then saw the red light, the green partially disappearing; saw the red light and part of the green for about two minutes; then the red light disappeared, and the green again appeared in full view; then I saw the green light on our starboard bow; then the collision occurred."

Christiansen, another sailor on the Havre, says that he saw the green light for some time, then the red, with the green partially obscured, and, "I then lost sight of the red light and saw the green more plainly; then the Scotland luffed up forward of the Havre; then, for a couple of seconds, I saw nothing, * * on account of the intervening rigging of the Havre; then I saw two masts and topsails on the Havre's starboard bow; the vessels were then in collision." Jonassen, also one of the Havre's seamen, says: "As soon as I saw the green light alone for the second time, the collision occurred; the time was so short, I cannot tell exactly; perhaps it was a minute." The Sandy Hook pilot, who was on board and in charge of the Havre, testifies that he saw the green light some ten minutes, and supposed that the Scotland was going to cross his bow; then he saw the red light, the green wholly disappearing. He then supposed the Scotland was going astern of the Havre. He was then standing on the lee side. He walked across the ship to the weather side, to see if there were any vessels on that side, and when he came back the red light had disappeared, and the green one was in full view. He says that the Scotland was then so near that he could not clear, one way or the other. He says that the Scotland's luffing, by which her red light was hidden, and her green disclosed again, occurred while he was going to and returning from the weather side of the ship.

The witnesses for the Havre were intelligent, much more so than those of the Scotland, and their testimony bears marks of becoming moderation, caution and accuracy, and I cannot resist the conclusion, from their statements, that, from the time the green light began to re-appear, and the red light disappear, there was time for the Havre's wheel to have been starboarded, and that had this been done, she would have kept away, and cleared the Scotland. It is admitted on all hands that she was easily handled. She was under favorable speed for that purpose, and although she then carried a little weather helm, yet, according to the pilot, she carried a little more forward than aft sail. And he says that after the collision, he put her helm up and she went right off, though her forward sails were all gone. The difficulty with this part of her case is, that she had no one on the lookout at this critical moment. Her lookout, who had reported the light, had gone aft. The pilot had gone to the weather side of his ship to look after other possible vessels, a duty

which belonged to some one else. The "yawing" charged on the Scotland, and the discovery of her red light, was ample notice that there might be danger, and the utmost vigilance was incumbent on the Havre. Instead of her regular lookout being permitted to go aft, he should have been kept at his post, and a trusty officer or seaman, instead of the pilot, sent forward to look for other vessels, while the lookout watched and reported every change in the Scotland's lights. Had this precaution been observed—in other words, had the lookout kept his post, and reported every change in the Scotland's light as soon as each change was visible, I have little doubt that her wheel would have been put up in time to have saved the collision.

I am inclined to the opinion that the movement of the Scotland, by which her red light was disclosed to the Havre, took place when the order was given on board the former to wear ship. This was done just about the time she discovered the Havre's green light. Her witnesses say that the execution of this order had not been commenced when the captain ordered that she be kept close by the wind. Her witnesses also deny that any movement of the Scotland was made which could have disclosed her red light to the Havre. But I accept the statement of the Havre's witnesses that they did see the Scotland's red light. I think the latter's witnesses are mistaken, and that when the order to wear, or be ready to wear, ship was given, she was suffered, perhaps inadvertently, to fall off, so as to present her red light to the Havre, with her green partially obscured. The fact that her green light was not wholly hidden from the Havre, shows that she had not kept away to any great extent. Several of the witnesses of the Havre say that the Scotland could not have gone to leeward of her without falling off more. I think, therefore, that the variation in the Scotland's lights took place just about the time she discovered the Havre. Though this was but a brief time before the collision, I think that, even after these fluctuations had settled in presenting, at last, only her green light to the Havre, the latter might have hove her wheel a-starboard and avoided the collision. I can not doubt that after the Scotland did discover the Havre's light, the former kept close by the wind. I am unwilling to impute perjury to her witnesses on this point. Their salvation and that of their vessel depended upon adhering to that course. As to what they say they saw of the Havre's lights and movements, I place little confidence in it, for it is evident that there was alarm, if not panic, on board of the Scotland from the moment the second mate came rushing aft to report the discovery of the Havre's light. There was, however, no panic or alarm on the latter vessel. Her movements and those of her crew were under perfect control, and had her lookout been forward at the critical moment, where he ought to have been, and instantly reported the last change of lights on the Scotland, the Havre might, and I think would, have cleared her.

There would then have been no doubt as to what course to pursue, for to starboard her helm was the only road toward safety, from which the vessels were separated only by a few feet. I am not called upon to explain why the pilot of the Havre left the lee side of his ship and went to the weather side to look after other vessels, or why the lookout left his station on the forecastle and went aft, or why there was no attempt whatever on the part of the Havre to avoid the collision at the moment when it was imminent. There was no confusion on board of her; no one there was paralyzed by fear, and it is difficult to repress the suspicion that, after all, she mistook the speed at which the Scotland was moving, not supposing that she was under very short sail, and therefore naturally concluding that she was moving much faster than she really was in fact, the Havre supposed that by the time she struck the line on which the Scotland was sailing, the latter would be out of the way. This is the only way I can account for the failure of at least an attempt on the part of the Havre to clear the Scotland. It follows, from these views, that a decree must be entered against both vessels, apportioning the damages. It must be understood, however, that I do not assent to the propositions of the Scotland's advocates, that the Havre was bound to alter her course simply because a collision was probable. There was risk of collision apparent for several minutes before it actually took place. The responsibility of avoiding it rested chiefly on the Scotland. She was bound to keep out of the way, and the Havre was bound to keep her course until it was apparent that the collision could not be avoided without a change on her part; and I hold her responsible on the sole ground that after it was clear that the only way of escape was for her to starboard her wheel, she failed to do it, and that if she had done it, no accident would have occurred. I am less reluctant to come to this conclusion, from the fact that there was, as I think, a remission of diligence on the part of the lookout and pilot of the Havre at the critical moment when the most exacting attention was required.

I find one ruling of the commissioner who took the depositions in this case, which requires remark, and to which exception was properly taken. After the examination of one witness on behalf of the Havre, the proctor for the Scotland objected to the presence of the master of the Havre during the examination of his witnesses and crew, on the ground "that his presence might exercise an undue influence over them, and be-

cause of his tendency to interrupt." The commissioner, after some further debate between counsel, excluded him. This was an error. So long as the captain comported himself properly, it was not only his privilege, but his duty, to be present during the taking of the proofs. This was especially so in view of the fact that he was a stranger, contesting his rights in a foreign port, and before a foreign tribunal. He was the agent of his owners, as well as the master of his ship, and rested under a double responsibility. The fact that he was to be examined as a witness did not vary his rights or duties. If he interrupted the proceedings, he could have been admonished by the commissioner, and I doubt not the latter was able to keep order. He should never have been excluded from the room, unless his contumacy compelled that course. Strangers should be treated with forbearance, and their rights shielded in the courts of every nation, especially in courts of admiralty, where laws binding alike upon all nations are administered. After the proof of ownership on the part of the Scotland is furnished, let decrees holding both vessels in fault be entered, with an order of reference to a commissioner to report the damages.

[On appeal to the circuit court by the Havre, the decree of the district court was reversed as respects the Havre, in an opinion by Blatchford, Circuit Judge. Case No. 6,233.]

Case No. 6,233.

The HAVRE.

The SCOTLAND.

[16 Blatchf. 427.] [1]

Circuit Court, S. D. New York. June 24, 1879.[2]

COLLISION OF SAILING VESSELS—PRIVILEGED TACK.

Where there has been a collision between two sailing vessels, and one of them was on the privileged tack, and the other alleges that the former was in fault for keeping her course, she must show that there was time for the former, after the risk of collision was apparent to her, to avoid the collision by changing her course; and, in this case, the latter having been in peril, the failure of the former to take a step in extremis of that character, was held not to have been a fault.

[Cited in Farwell v. The John H. Starin, 2 Fed. 108.]

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

These were cross libels, filed in the district court, for a collision between the ship Havre and the bark Scotland. That court [Case No. 6,232] decreed that both vessels were in fault. The Havre appealed. The facts found by this court were as follows: "The ship Havre was, at about nine o'clock, p. m., of January 20th, 1866, proceeding on a voyage from Malaga, in the kingdom of Spain, to the port of New York. The position of the ship, at that time, was about thirteen miles south by east of the light-ship off Sandy Hook. She was then on pilot ground, and in charge of a licensed Sandy Hook pilot. All the officers of the Havre and her entire crew, which consisted of twenty men, all told, (such being a full crew for the said ship), were on deck, a lookout properly stationed, and her lights, as established by law, properly set and burning brightly. The night was clear and starlight, and a ship's light could be seen at a distance of from two to three miles. The wind was from west north-west to north-west by west, fresh, and the sea moderate. The Havre was heading about south-west, by the wind (i. e., close-hauled), and was on her starboard tack. She had been on such tack since about half-past eight p. m., and continued on that tack until the collision occurred. The Havre was under the following sails, viz., full maintop sail, two reefs in the mizzentop sail, one reef in the foretop sail, full foresail, foretopmaststay sail, and full mizzen or spanker. Her speed was about eight knots per hour. At the time and under the circumstances above referred to, the lookout on board the Havre reported a green light about two points on her lee bow, and the pilot and officers of the Havre immediately took its bearing, viz., south south-west, and distant between two and three miles. It proved to be the starboard light of the bark Scotland, on her voyage from Apalachicola, in Florida, to the port of New York. The Scotland was then on her port tack, and heading about north by east, by the wind, and moving at a speed of about two and a half knots per hour. The green light of the Scotland continued in sight for about ten minutes, when her red light came in view and continued in sight for about three or four minutes, when it suddenly disappeared and her green light alone remained in view, the Scotland luffing up in the wind and trying to cross the bows of the Havre, when the collision immediately followed, the Havre's jibboom striking about the middle of the starboard mizzen rigging of the Scotland. The Scotland then slewed round to the southward, and, after remaining in contact for some time with the Havre, got clear. From the moment the green light of the Scotland was first seen to the moment of collision, the pilot, the first officer and the lookout of the Havre continued to watch the said green light and the red light of the Scotland, as they respectively came into view, and, during all such time, the Havre was kept steady on her course. The Scotland was under shortened sail, and had on board a deficient crew, which only consisted of five seamen besides two mates and a cook, whereas she

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

[2] [Reversing Case No. 6,232, with reference to The Havre.]

ought to have had eight seamen. Had the Scotland continued her course when her green light was first seen, she would have cleared the Havre by crossing her bows and weathering her, and, had she continued her course when her red light came into view, she could have also then cleared the Havre by falling off a little to leeward, and passing astern of the Havre. Her second change of course, however, (by which she presented her green light again), luffing up in the wind, and trying then to cross the bows of the Havre, caused the collision. After such second change of course there was nothing which could have been done on board the Havre to avoid the collision, as but a minute or two elapsed between the change of course and the collision. The lookout on the Scotland was negligent in not discovering the lights on the Havre sooner than he did, and, as matter of fact, he did not discover them until within about one-eighth or a quarter of a mile off."

Joseph Larocque, for the Scotland.
Charles M. Da Costa, for the Havre.

BLATCHFORD, Circuit Judge. The libel against the Havre was filed February 5th, 1866. The libel against the Scotland was filed February 9th, 1866. They are cross libels for a collision which took place between the two vessels during the night of January 20th, 1866. The answers of both vessels were filed April 7th, 1866. The Scotland was bound from Apalachicola to New York; the Havre from Malaga to New York. The place of collision was in the Atlantic Ocean, from ten to fifteen miles southerly and easterly from Sandy Hook. The district court found the Scotland in fault for not having sooner discovered the green light of the Havre. The Scotland was on the port tack, heading north by east. The Havre was on the starboard tack, heading about south-west. The wind was about north-west by west. It was the duty of the Scotland to keep out of the way of the Havre. The Havre discovered the green light of the Scotland about two points on her port bow, some two miles off and about fifteen minutes before the collision. The Scotland did not discover the green light of the Havre until the vessels were not over a quarter of a mile apart. The Scotland was going not over three knots an hour, the Havre eight. The Havre struck the starboard side of the Scotland some fifteen feet from the stern of the Scotland. In the district court it was contended for the Scotland, that, while the Havre was passing to leeward of the Scotland, she luffed up into the wind from about abeam of the Scotland, and had her sails shaking when she struck. The district court discarded that view, and held, that the Havre kept her course by the wind from the time she discovered the green light of the Scotland, and that the Scotland was crossing the track of the Havre, in front of the Havre, when struck by the Havre. The district court held, that the Scotland, being on ground frequented by vessels, and being under short sail and moving at a low rate of speed, and, therefore, unable to obey her wheel promptly, and being on her port tack, was bound to exercise great vigilance in looking out for approaching lights, so as to be able to take timely measures to keep out of the way of all crossing vessels on the starboard tack; and that, if she had exercised proper vigilance, she would have sooner discovered the green light of the Havre, and could, without difficulty, have kept out of her way. But the district court held the Havre also in fault. From the time the green light of the Scotland was first seen by the Havre, it continued in sight for from seven to twelve minutes, no other light being visible from the Scotland to the Havre. During all that time the Havre supposed that the Scotland intended to go across the bow of the Havre, from leeward to windward. At the end of that time, the Scotland showed her red light to the Havre, whether with the entire disappearance of the green light or not is not quite clear. This produced the impression on board of the Havre that the Scotland had ported, to pass to leeward of the Havre. Soon afterwards, however, the red light of the Scotland went out of sight, and the green remained in sight, indicating to the Havre that the Scotland was not going to pass to leeward of the Havre. But the district court came to the conclusion, that, from the time the green light of the Scotland began to reappear and her red light to disappear, there was time to have starboarded the helm of the Havre; that, if this had been done, she would have fallen off to leeward and have cleared the Scotland; and that she was in fault for not having done so. The elements making up this fault on the part of the Havre were found by the district court to be, that the Havre was easily handled; that she was under favorable speed for the purpose; that she had no one on the lookout forward at the time the green light of the Scotland reappeared; that her lookout, who had reported the green light originally, had gone aft; that her pilot had gone to the weather side of the vessel to look after other possible sails; and that the coming into sight of the red light of the Scotland after her green light had come into sight, was notice that there might be danger and that the utmost vigilance was incumbent on the Havre. The conclusion arrived at by the district court was, that, if the lookout had kept his post and had reported every change in the Scotland's lights as soon as each change was visible, her wheel could and would have been put up in time to have avoided the collision. The district court while recognizing the duty incumbent on the Havre to keep her course, because it was the duty of the Scotland to keep out of the way of the Havre, dissented, likewise, from the proposition that the Havre was bound to al-

ter her course simply because a collision was probable. The view of the court was, that risk of collision was apparent to the Havre for several minutes before it actually took place; that the Havre was bound to keep her course until it was apparent that the collision could not be avoided without a change on her part; that she was to be held responsible on the sole ground that, after it was clear that the only way to escape was for her to starboard her wheel, she failed to do so; and that, if she had done so, no accident would have occurred.

A careful examination of the evidence makes it impossible for me to concur in the conclusions of the district court, as to the fault of the Havre. The Scotland has not appealed. The Havre has appealed. The decision below is, therefore, not in question so far as the Scotland was held in fault.

It is contended, for the Havre, that the time which elapsed between the showing of her green light by the Scotland the second time and the actual collision was so short, that, during that time, it was impossible for the Havre to perform any manoeuvre, either to avert the collision or to lessen its effect. As the Havre was on the privileged tack, it is incumbent on the Scotland to show that the Havre could have performed such a manoeuvre. Still more is this burden imposed on the Scotland when she admits her own fault by not appealing from the decree. I do not think the evidence shows that there was time, during the interval referred to, for the Havre to have effectually done anything to avoid the collision. Moreover, the Havre being on the privileged tack and bound not to do anything to baffle the Scotland in the discharge of her duty of avoiding the Havre, and the Scotland being in fault for the collision, the failure of the Havre to take a step in extremis, of the character insisted on, must be classed as an error of judgment only, and not as a fault. The responsible officers in charge of the Havre testify, that, being of opinion they could not avoid the collision by putting their helm either way, they held their course. Their testimony should have great weight, and there is no sufficient countervailing evidence.

Notwithstanding the stress laid by the court below on the remission of vigilance on the part of the lookout and of the pilot of the Havre, I do not think it appears that these circumstances contributed to the collision. After the first light of the Scotland was reported to and seen by the officers in charge of the Havre, there was continuous and adequate observation on their part of the various lights shown by the Scotland, especially in view of the fact that the Havre discharged her duty by keeping her course.

It is impossible to attribute any fault to the Havre in respect of the rate of speed at which she was sailing. Nor is it established by the evidence that the Havre luffed up into the wind or changed her course at all.

The libel against the Havre must be dismissed, with costs to her both in the district court and in this court. In the suit against the Scotland there must be a decree for the libellants for the amount reported by the commissioner as the amount of their damages, with interest as reported, and for the costs of the suit both in the district court and in this court.

Case No. 6,234.

HAWES v. ANTISDEL.

[2 Ban. & A. 10;[1] 8 O. G. 685.]

Circuit Court, E. D. Michigan. Feb., 1875.

PATENT—WANT OF NOVELTY — EVIDENCE—SUFFICIENCY.

1. In order to defeat a patent on the ground of want of novelty, the proof of prior use or previous knowledge must be such as to establish the fact clearly and beyond a reasonable doubt.

[Cited in Adams & W. Manuf'g Co. v. Rathbone, 26 Fed. 264.]

2. Where the proofs of prior knowledge and use of invention are contradictory, mere preponderance is not sufficient to invalidate the patent. The preponderance must be such as to remove all reasonable doubt.

[Cited in Rogers v. Beecher, 3 Fed. 640; Miller v. Smith, 5 Fed. 364; American Bell Tel. Co. v. People's Tel. Co., 22 Fed. 313; McDonald v. Whitney, 24 Fed. 602.]

3. The complainant's invention was for an "advertising hotel register," and the defendants, seeking to anticipate it, produced witnesses, who testified, from recollection, that the invention was in public use prior to the date when the complainant claimed to have invented it; no advertising hotel register purporting to antedate complainant's invention was put in evidence, and the witnesses were contradicted as to the character of the register claimed to have been previously in prior use: *Held*, that the evidence was not sufficient to overthrow the complainant's patent.

4. In a case where it is sought to establish the use of a book of a particular character at a certain time, the book itself, duly verified, would be the best evidence of the date of its use.

5. Letters patent No. 63,889, granted to Charles L. Hawes, April 16, 1867, for a "hotel register" *held* valid.

[This was a bill in equity by Charles L. Hawes against William W. Antisdel for the alleged infringement of letters patent No. 63,889, granted to plaintiff April 16, 1867, for an advertising hotel register. The defendant alleged that the idea patented was in common use before the date of the patent.]

J. J. Allen, W. W. Taylor, and E. C. Walker, for complainant.

Moore & Griffin, for defendant.

LONGYEAR, District Judge. The patent carries with it a presumption of novelty of the thing patented, and the burden of rebut-

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

ting that presumption is upon the defendant. In order to defeat the patent on the ground of want of novelty, the proof of prior use or previous knowledge must be such as to establish the fact clearly and satisfactorily, and beyond a reasonable doubt. Where the proofs are contradictory, mere preponderance is not sufficient to sustain the allegation. The preponderance in such case must be such as to remove all reasonable doubt.

In Wood v. Cleveland Rolling Mill Co. [Case No. 17,941], Mr. Justice Swayne said: "When the defence is made, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defence allowed to prevail only when the evidence is such as to leave no room for a reasonable doubt upon the subject."

In Parham v. American Button Hole, etc., Co. [Case No. 10,713], heard before Mr. Justice Strong and Circuit Judge McKennan, the latter, in delivering the opinion of the court, said: "The evidence must establish clearly the priority of a completed and useful machine over the complainant's, or it is unavailing—to doubt upon this point is to resolve it in the negative."

In Sayles v. Chicago & N. W. Ry. Co. [Case No. 12,415], Drummond, J., in a case nicely balanced on the evidence sustained the patent. In Crouch v. Speer [Id. 3,438], Nixon, J., held that the defendant not only assumed the burden of proof of his allegation of want of novelty, but that his undertaking was to show affirmatively prior knowledge and use under such circumstances as to give the public the right of a continued use as against the patentee, and that he fails to do this when his evidence is frequently contradicted, and is inconsistent with itself. These doctrines I believe to be well grounded in principle as well as established by repeated and uniform adjudications.

The invention in question is what is commonly known as the "Advertising Hotel Register," the book being constructed so as to have inserted advertisements at the top and bottom, and on the margin of each page, with a blank space for the registering of names of guests, or on each alternate page, leaving the opposite page blank for registering of such names, or on both pages of each alternate leaf, such leaf being sometimes made of bibulous or blotting paper.

The proofs showed that the complainant perfected his invention and put it into practical use, as early as in May, 1866, and it was to that date the proofs as to prior use and previous knowledge related.

No advertising hotel register book purporting to antedate complainant's invention was put in evidence. Such a book, duly verified, would be the best evidence possible. Each page would be an intelligent speaking unimpeachable witness to its own chronology, and the book itself the best evidence of the date of its use. The case is left to stand exclusively upon the recollections of witnesses, and at a distance in time from eight to twenty years, and unaided in any single instance by any contemporaneous memorandum or writing whatever. I shall recur to this peculiar aspect of the case in another part of this opinion.

The places where, and the persons by whom, such prior use and previous knowledge are alleged to have taken place and to have existed, and as to which proofs have been made, will be taken up in the order in which they were alleged in the amended answer.

1. Prior use in the Exchange Hotel, at Sturgis, in the state of Michigan, by E. W. Pendleton. Pendleton, with five others, testifies to the use of an advertising register in the hotel named, prior to May, 1866, viz., in 1864 and 1865, and nine witnesses testify to the contrary. That registers of some kind were used in that hotel during the years of 1864 and 1865, and that advertising registers were used in it after May 1866, the testimony on both sides is entirely agreed. The vital question is whether the registers used in 1864 and 1865 were advertising registers, or, what is the same thing, whether the conceded use of advertising registers commenced in that hotel before May, 1866. As to this question the testimony is in direct and irreconcilable conflict. The testimony was taken at a distance of time of from eight to ten years. The witnesses on both sides testify from memory alone, unaided by any memorandum or writing whatever of the fact itself or of concurrent facts. The uncertainty of memory as to dates under such circumstances is well understood; and where, as in this case, the event in question was not one calculated to fix itself in the memory of the persons called to testify, except Pendleton, on account of any interest it was to them, and those persons have equal means of knowledge, are of equal credibility, and apparently of equally sound memory, and they positively disagree, it may well be said in a case like the present that prior use is not made out in the clear and satisfactory manner requisite, as we have seen, in such cases.

Again, Pendleton was subpoenaed by complainant to produce all the hotel registers used in that hotel during the period in question. In response he produced a plain register commencing in April, 1861, and ending April 1, 1864, and also a portion of another, which he testified commenced, according to his best impression, December 20, 1866, and ended in July 1867; but for the period between April, 1864, and December, 1866, he produced no register of any kind; and of the register which he says he thinks, it is his impression, commenced December 20, 1866, there is, according to his judgment, one third missing. Now these are certainly very suspicious circumstances, especially in view of the fact, as appears by his testimony, that he was a defendant in one of the numerous suits then pending, in behalf of this same com-

plainant, for an infringement of the patent here in question. It is true, he attempts to explain the absence of the register, which he says he used (and which he says was an advertising register) during the period between the first register produced and the mutilated one, April 1, 1864, to December 20, 1866; but his explanations appear to the court to be mere guess-work, and are far from satisfactory. He speaks of it having been given to a boy, or, perhaps used up in the house to clean lamps with, but nothing with that degree of certainty requisite in such cases. And as to the missing portion of the register ending July, 1867, he is still more indefinite and unsatisfactory, and in fact offers no explanation whatever which can be considered as such in a case like the present. The importance of requiring strict proof that there was used in that hotel a register between the two produced, becomes the more apparent when we consider that the hiatus from April 1, 1864, the close of the register he does produce, to December 20, 1866, when he thinks the one produced (the mutilated one) commenced, is only two years and a little over seven months, and the length of the time the latter register continued after the latter date is only about six months, making in all just about three years, which is just the length of time the first register produced lasted, and he says they were just about of equal size, thus affording a strong presumption that if the missing portion of the mutilated register had been produced it would have covered the entire time it is pretended an advertising register was used. It is true, he says he thinks the last-named register was not entirely filled up; but the first and last leaves, from which Pendleton says he took his dates, are both missing, and his statement as to the book not being filled up to any considerable extent, especially in view of his interest in the controversy, must be taken with many grains of allowance. The time an advertising register was pretended to have been used (1864 and 1865) may be further accounted for by the use, between the first register produced and the mutilated one, of one of those small registers of one to three quires of paper he says he sometimes used between regular register books, probably while waiting for a new one.

Considering all the circumstances, the proofs fall far short of convincing my mind that there was a use of an advertising hotel register at the Exchange Hotel, in Sturgis, in the state of Michigan, as alleged, prior to the complainant's invention.

2. Prior use in the Michigan House, at Tecumseh, in the state of Michigan, by Mrs. W. H. Hoeg. Four witnesses testify to the use of an advertising register at the place named in 1855, and five, including the then clerk or manager for the proprietor, George R. Southworth, testify to the contrary. Southworth certainly had better means of knowledge, and would be more likely to remember what the fact was, than any of the witnesses testifying to such use at the date mentioned, except perhaps the witness Spafford, who testified that he, being a binder, procured the printing done and himself bound the book and put it into use there, while he was in charge of the hotel during a temporary absence of Southworth. But Southworth was absent only two or three months, and Spafford testifies that the register so put there by him continued to be used there after Southworth's return. So that if ever there was such a register at the time specified, it was there when Southworth returned and resumed the management of the hotel; and he testifies positively that there was no such thing there. He describes what he says was the only book used in the office, to his knowledge, and that was not an advertising register, or, in fact, a register at all as commonly understood. He described it simply as a book in which the names of guests were entered by the clerk and a minute kept of what they had at the hotel. The other four of complainant's witnesses corroborate Southworth, both as to the fact that no advertising register was used there during the time mentioned by Spafford, and as to the description of the book that was used.

In such a conflict of testimony perhaps nothing more need be said than that the case is such that there is such a want of clear and satisfactory proof of prior use and, to say the least, that it is involved in so much doubt that under the rules laid down it must be held that the allegation of prior use at Tecumseh is not made out. But perhaps the testimony of defendant's witness Spafford, and that of the others tending to corroborate him, ought to receive particular notice, because Spafford testifies that he got up and bound the book, and it is, therefore, not a mere matter of memory with him so far as the fact of such a book having been used there at some time is concerned; and for the further reason that if Spafford is to be believed in preference to Southworth and the witnesses tending to corroborate him, then it must be conceded that the allegation of prior use at Tecumseh is made out.

Spafford was first examined as a witness at Grand Rapids in a suit pending there involving the same issue, and subsequently at Detroit in this suit. His testimony at Grand Rapids was stipulated into this suit; and on a comparison of the two, and, in fact, of certain portions of each with other portions of the same, especially that taken at Detroit, I find his testimony in many respects inconsistent with itself, exceedingly uncertain, and in many instances palpably erroneous in respect to dates and events, so much so that the impression has been produced upon my mind, amounting almost to a conviction, that his testimony is wholly unreliable; and I am of the opinion that even if it had not been contradicted, it would, to say the least, have constituted a very unsatisfactory basis upon which to take away the complainant's prop-

erty in his invention. Were it not for extending this opinion to an unpardonable length I would detail some of the most glaring of these inconsistencies, uncertainties, and errors; but what has been already said must suffice.

When we add to the infirmities inherent in Spafford's testimony the direct contradiction of Southworth, who had full means of knowledge as to the main fact, and a greater interest than Spafford in the existence of that fact at the time, if it existed, Spafford's testimony becomes, in my estimation, utterly worthless. Spafford says Southworth paid him for getting up the book, and that the tailor and liveryman whose advertisements were inserted paid Southworth for the same. He thereby shows that if the fact existed at all Southworth was an actor in it equally with himself, and with a greater interest. In view of this, and of the additional fact, already alluded to, that if used there, it must have been under Southworth's immediate notice and supervision, and also that he describes the book that was used, Southworth's testimony is, to say the least, of as high a character and entitled to as much weight as that of Spafford. These two witnesses also stand before the court on an equality as to character and credibility. The character or reputation for truth and veracity of neither was impugned, and if the old adage "that a man may be known by the company he keeps" be true in this instance, they stand on a perfect equality as to general character by Spafford's own testimony, because he says they have been intimate friends and associates from schoolboys up.

As to the witnesses introduced by defendant to corroborate Spafford, Mrs. Hoeg, now Mrs. Stinson, who kept the house, was seldom in the office, and her recollection of such a book having been used there at any time during the few months she kept the house is, as it might be supposed to be, quite dim, shadowy, and uncertain; and it may be problematical, at least, whether her present interest in defeating complainant's alleged invention (her present husband having been sued for its infringement), has not had something to do in quickening the slight recollection to which she testified. And Gonzolus, who kept the house after Mrs. Hoeg, says in his testimony that at first his recollection of the fact was faint, but his memory was afterward revived—by what means he does not state. The testimony of the remaining witnesses for defendant is of a similarly uncertain and unsatisfactory character.

The proofs showed that the hotel building in question was consumed by fire in 1858, with its contents. The absence of the register or book used there at the time specified (1855) is, therefore, satisfactorily accounted for, and has no influence in the conclusion arrived at any further than hereafter noticed. It results that the allegation of prior use in the Michigan House at Tecumseh, in the state of Michigan, is not sustained.

3. Prior use in the Bentley House, at Dexter, in the state of Michigan, by Nelson J. Alport. Alport, with eight others, testifies to the use of advertising hotel registers, in the place named, prior to 1866, viz., in 1863, 1864, and 1865; and eight witnesses testify to the contrary. As in the instance of the alleged use at Tecumseh, so here, the hotel was destroyed by fire, after the alleged prior use, and the two register books claimed to have been so used there are represented to have been destroyed with the hotel. So that here, as in both the preceding instances, the case is left to stand exclusively upon the recollections of witnesses as to both the fact and the dates, and in this instance at ten and eleven years' distance of time.

Alport kept the Bentley House, first as tenant and then as purchaser, under one Hayes, the former owner and occupant, from the summer or fall of 1863, to January 1866, when he sold out to one Porter, who kept the house for a time, and it was finally destroyed by fire on Christmas night, 1866. Alport testified that when he went into the house in 1863, he found an advertising register there about half filled up, and that he used it for the purpose of a register till in 1864 or in 1865, when a man left another advertising register at the house, and that he used that one till he sold out to Porter in January, 1866, and left it in the house, there then being only about forty pages filled. Alport testified that Hayes, of whom he took and purchased the house, was dead, but it does not appear but that Porter, Alport's successor, was still living and within reach. Porter's testimony was not taken; but one Fenn, a person who was in the employ of Hayes at the hotel up to the time Alport took possession, and also of Bentley before Hayes, was called by complainant and testified that no such register was in the use there by Hayes or Bentley, and he describes the register which was used as a plain register. It is true Alport had the better means of knowledge as to his finding a register there and its character; but both these witnesses are about equally corroborated by others, and it must be borne in mind that Alport was directly interested to defeat complainant in this suit, for the reason that there was another suit pending against him for a like infringement. To say the most that can be said in its favor, the evidence of the existence of this supposed register of 1863 is still so contradictory and unsatisfactory that it seems to me an exceedingly unsafe basis upon which to defeat complainant's patent.

The evidence of the existence of the pretended second register used by Alport in the Bentley House is, if possible, still more contradictory and unsatisfactory. When Alport sold out to Porter, he or his wife bought a lot near the Bentley House on the same

street, and in the summer of 1866 built a new hotel, called at first the Grant House, and afterward the Dexter Exchange. In 1867 or 1868, a man left an advertising register with Alport, and it was used by him at that new house, and another was so left in 1870 or 1871. Both Alport and his wife describe the advertisements and the advertisers in the register of 1867, as almost identical with those described by Alport as contained in the pretended register of 1864. As to the existence of the register of 1867, there is an entire agreement in the testimony, and it must be regarded as established. There is much room for speculation, to say the least, as to whether the fact of the existence of the register of 1867 has not been made use of in connection with the uncertainty of the recollection of witnesses at so distant a period of time, and in regard to a matter in which most of them had no particular interest to impress their memories, to make out the existence of an advertising register in the Bentley House in 1864 and in 1865, and thus make the register of 1867 do double duty.

Alport testified that the man who left the register of 1864 said he lived in Tecumseh, and that the man who left the register of 1867 said he lived in Adrian. In a subsequent part of his testimony he seems to testify that the man who left the 1864 register said he lived in Adrian instead of Tecumseh. He also testified to a conversation with one Soulier about the man who got up and left the register of 1864, Soulier being somewhat acquainted with him; and Soulier, when put upon the stand, testifies that the man Alport talked with him about was the man who got up and left the register in 1867, and that he lived in Adrian. The man himself was not called.

Alport testified that Lutz and Harning, butchers, advertised in both the registers of 1864 and 1867. But Lutz testified, and other proofs corroborate him, that he did not come to Dexter, and was not in business there until the latter part of 1866, and of course could not have advertised in the register of 1864, as testified by Alport.

On his cross-examination Alport described the register of 1867, and the advertisements in it, giving the same descriptions he had given, in both respects, of the register of 1864, and then seeming to have noticed the identity of description, said it was the latter he supposed he was describing; and, in a subsequent part of his testimony, he attempted to give a different description of the register of 1867 and its contents, but in this he is not corroborated, he is in fact contradicted by other testimony in the case. These facts, when considered in connection with the circumstances next stated, tend to cast suspicion on his testimony. Alport having testified that he kept the Grant House and Dexter Exchange in the name of his wife, Mrs. Sarah B. Alport, the latter was served with a subpoena duces tecum, on behalf of the complainant, to bring with her all the hotel registers in her possession. She appeared in obedience to the subpoena, and was sworn and examined as a witness, but produced no registers, giving as a reason that Mr. Alport would not allow her to bring them. It is true she testified that the register of 1867, the one particularly desired, was not then in existence; but whether it was destroyed before or after Mr. Alport had given his testimony, and it had come out that it would be important and material to have the register of 1867 in court for the purpose of comparison with the description given by him of the one alleged to have existed in 1864, does not appear. All Mrs Alport can say is, that it was put in the kitchen "long ago" to be used for kindling.

The witnesses produced by defendant to corroborate Alport as to the existence of those alleged prior advertising registers, all testify from recollection, without any memoranda or writing whatever to aid their memory. Those called by complainant to prove the contrary, it is true, testify equally from memory alone, and are equally liable to be mistaken; but that does not help the defendant's case, because the burden was on him to make out his defence, by clear and satisfactory evidence, beyond a reasonable doubt; and, as we shall presently show, the testimony tending to prove the non-existence of those alleged registers is entitled to equal weight with that tending to prove their existence. It must therefore be held that the allegation of the answer of prior use of the alleged invention in the Bentley House at Dexter, by N. J. Alport, is not sustained.

4. Previous knowledge of the alleged invention by Spafford at Tecumseh, and Stiles at Jackson, both in the state of Michigan. Spafford's testimony as to alleged previous knowledge has been already considered and disposed of in connection with the alleged prior use at Tecumseh. Stiles' previous knowledge remains to be considered, and this rests on Stiles' testimony alone. This person when on the witness-stand manifested, especially on his cross-examination, a degree of recklessness, and want of appreciation of his duty as a witness and of the obligation of the oath he had taken, frequently expressed in exhibitions of contumely and of contempt for the party against whom he was called to testify, such as is seldom witnessed in a court of justice, and as destroys, in my estimation, all confidence in his honesty and truth as a witness. At all events when these infirmities in his testimony are considered in connection with his acknowledged exceedingly bad memory as to dates, where dates alone were important, and the absence of memoranda which he said he had and could produce showing the correct dates, I should feel far from justified in allowing the unsupported testimony of this man to outweigh the evidence of the patent of the novelty of the invention.

5. In addition to what has been already said, there are considerations of a general character which would have a tendency to force upon the mind almost irresistibly serious doubts of the truth of the defence set up, even if the evidence in support were uncontradicted and of a stronger character.

In the first place the defence was predicated upon alleged prior public and common use of the thing patented, and six different hotels and places were specified, while testimony was adduced as to only three hotels and places, and those, where the register or registers in use at the times specified, of whatever description, had been destroyed or could not be found.

In the next place defendant's testimony tends to show as strongly as it shows anything, that if these registers were in use at all prior to complainant's invention, they must have been in quite common use in this and other states, having been ordered by a single person a dozen at a time, and not less than a hundred having been manufactured by one person, and put afloat prior to the date of complainant's invention. And yet, not a book used or manufactured before that date was produced; and, considering the efforts made by this defendant to procure one, and the interest hotel keepers generally, or at least the large number of them against whom suits were pending for infringements, had to aid him in those efforts, it must be presumed that none could be found. The door was opened wide for the introduction of such a book in evidence if one could be found, and it was expressly left open by complainant's counsel at the hearing, and has remained open during the several months the case has been held under advisement by the court. This defendant, and those in the same interest with him—and their number and influence were not small—have not been wanting in their efforts to meet the challenge. They sent circulars and made inquiries far and wide, and offered a handsome reward for the production of a single advertising hotel register used or manufactured prior to the date of complainant's invention, and still no such book has been forthcoming. Plenty of old plain registers covering such prior dates could be found, but no advertising register; and plenty of advertising registers covering subsequent dates could be found, but not prior. The bare statement of these facts suggests to my mind a doubt, to say the least, whether there could have been a prior use or prior knowledge of the invention in question, as is alleged. To doubt in such case, as has been well said, is to solve the question in the negative.

Another consideration, and to which allusion has already been made, is, that a mere matter of dates is left to rest wholly upon the unaided memory of witnesses, who for the most part had no interest or motive in regard to the fact to impress their memory at a distance of time from eight to twenty years, and involving in most instances a difference of only one, two, or three years, whether it was before or after the date in question. A remark by Mr. Justice Swayne in his opinion in the case of Wood v. Cleveland Rolling Mills Co. [Case No. 17,941], is quite applicable here. In speaking of the proof required to sustain the defence of want of novelty, and which he speaks of as a defence usually set up in patent cases, he says: "The confidence of the attacking witnesses is often in proportion to the distance in time that one is removed from the other. Their imagination is wrought upon by the influence to which their minds are subjected, and beguiles their memory." When we add this to the fact that in every instance defendant's testimony as to prior use, weak as it is when standing alone, was contradicted by testimony entitled to equal consideration in every respect, there is really nothing left to sustain the defence. The rule of presumptions, that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, recognized by the supreme court in Stitt v. Hindekopers, 17 Wall. [84 U. S.] 384, insisted on by the defendant's counsel, is, of course, recognized by this court as binding upon it in cases to which it applies; but in this case I think it has no application. This is quite apparent when we look at the reason for the rule, as stated by the supreme court in the case last cited (page 391), which is as follows: "Because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed."

The conflict of testimony is not whether there was or was not a register or book of some kind used at each of the hotels in question during the periods of time covered by defendant's testimony, for the witnesses on both sides are all agreed that there was; neither is it, as to some of the places, as at Sturgis and Dexter, that there was or was not an advertising register used at some time by the person named in a hotel kept by him, for as to that the witnesses are also all agreed that there was. The conflict is simply as to the description or kind of register so in use, at such prior periods of time; and in respect to Sturgis and Dexter, as to the time when they saw an advertising register in use there, in a hotel kept by the persons named, whether in 1867 or from one to three years earlier. One set of witnesses testifies in the one case that the register so used was an advertising register, and in the other case that it was at the earlier date the advertising register was used; and the other set describes the former as a plain register, and that the latter was used at the later date. Each set testifies to an affirmative equally with the other, and neither has any advantage over the other, under the rule laid down in Stitt v. Hindekopers [supra].

Upon the whole consideration, it results, that there must be a decree for the complainant, according to the prayer of his bill. Decree accordingly.

[For other cases involving this patent, see Hawes v. Cook, Case No. 6,236; Hawes v. Gage, Id. 6,237; Hawes v. Washburne, Id. 6,242.]

Case No. 6,235.

HAWES v. CONTRA COSTA WATER CO. et al.

[5 Sawy. 287; 7 Reporter, 100.] [1]

Circuit Court, S. D. California. Oct. 30, 1878.[2]

STATE STATUTES — AUTHORITATIVE CONSTRUCTION-OBITER DICTUM—WATER COMPANIES—STATUTE CONSTRUED.

1. The construction by the highest court of a state of a statute of the state which does not trench upon any of the powers of the national government, or upon any right guaranteed or protected by the constitution of the United States, is authoritative and conclusive in the national courts.

2. Where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be regarded as an obiter dictum, and the judgment is authoritative on both points.

3. Under the clause of the statute of California authorizing the formation of water companies to supply cities with pure water, which requires the corporation to supply water free of charge for extinguishing fires, and other great necessities, corporations organized thereunder, after supplying certain preferred uses, are bound to the extent of their means, to furnish the cities supplied, with water free of charge, for irrigating public parks and squares, flushing sewers, and for all other municipal purposes, except for family and analogous uses.

[Cited in Reclamation Dist. No. 108 v. Hagar, 4 Fed. 369.]

[See note at end of case.]

In equity.

S. M. Wilson, for complainant.

L. D. Latimer and Vrooman & Davis, for the city of Oakland.

SAWYER, Circuit Judge. This is a bill in equity by [Loring P. Hawes] a stockholder of the Contra Costa Water Company, a corporation formed under the act of 1858, to supply the city of Oakland and other places with pure water, against the corporation, its officers, and the city of Oakland, to restrain said corporation from furnishing, and said city of Oakland from taking, water without charge for watering public squares, parks, or flushing sewers, or other like municipal purposes. The city of Oakland demurs to the bill. The only question presented on the merits, arises upon the construction of a provision in the fourth section of the act of 1858, under which the water company was organized, which, after giving precedence to certain specified uses, provides that corporations organized under the act, "shall furnish water to the extent of their means, to such city and county, or city, or town, in case of fire or other great necessity, without charge." St. Cal. 1858, p. 219. The question is, whether the water company, under the words, "other great necessity," is bound to furnish, without charge, water for irrigating public squares and parks, flushing sewers, and other like municipal purposes. The counsel for the city of Oakland insist that the construction of this act has been settled in favor of the city by the supreme court of California; and that this construction by the highest court of the state of a statute of the state, is controlling in the national courts. They rest upon this construction, and decline to regard the question as an open one, or to argue the point as an original proposition. This being a state statute in no way trenching upon any of the powers of the national government, or any rights guaranteed or protected by the constitution of the United States, a construction by the highest court of the state would be controlling and conclusive in the national courts, as has often been held by the supreme court. Walker v. State Harbor Com'rs, 17 Wall. [84 U. S.] 650; Bailey v. Maguire, 22 Wall. [89 U. S.] 230; Christy v. Pridgeon, 4 Wall. [71 U. S.] 196; Leffingwell v. Warren, 2 Black [67 U. S.] 603; South Ottowa v. Perkins, 94 U. S. 260; Railroad Tax Cases, 92 U. S. 576. The complainant insists that the construction relied on by the defendant is but a dictum, or if otherwise, that the supreme court had decided the same point the other way in a prior case, and that this court is authorized to exercise its own judgment in the matter, the point not being yet settled by the state courts. It, therefore, becomes necessary to inquire whether there has been an authoritative construction by the state courts of the words, "other great necessity." The first case cited is City and County of San Francisco v. Spring Val. Water Works, 39 Cal. 473. This was an action by the city of San Francisco against a corporation organized under the same act to supply San Francisco with water, in which the complainant, the city of San Francisco, sought to restrain the defendant from cutting off the city from the use of water without charge for watering the public plazas and all municipal uses other than extinguishing fires. The district court sustained a demurrer and dismissed the bill. In that case, the discussion and decision in the supreme court turned upon the language of another act, passed at the same session, granting certain rights to George Ensign and others, and known as the "Ensign Act" (St. 1858, p. 254), the rights under said act having become vested in the defendant in the action. The supreme court held that the rights of the parties must be determined by the provisions of the Ensign act; and that under its provisions, which are different from

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 100, contains only a partial report.]

[2] [Affirmed in 104 U. S. 450.]

those now in question, the defendant was only obliged to furnish water free of charge for the purpose of extinguishing fires until water should be introduced by some other party; and as it did not appear that any other party had introduced water, it was only required to furnish water free of charge to extinguish fires. Had this been all there was in the bill, the judgment of the district court would, doubtless, have been affirmed. But the bill also set up, as matter of estoppel, facts showing that the rights of the parties had been adjudicated against defendant in a former action. The court held this matter to be well pleaded, and if true, to constitute a valid estoppel, and apparently, on that ground, held that the demurrer should have been overruled. The judgment on this point was accordingly reversed, with directions to overrule the demurrer. But since there was an answer filed with the demurrer denying the matter of estoppel, the order denying a temporary injunction was affirmed. There was no construction whatever of the language of the act now in question, nor does it appear to have been considered or discussed by either court or counsel.

The case having been remanded to the district court, and the complaint having been amended so as to show that water had in fact been introduced by another corporation, the San Francisco City Water Works, whose rights had been assigned to defendant, another trial was had, and judgment again rendered for defendant, and a second appeal taken. On the first appeal, and on the first hearing of the second appeal, "it was assumed by court and counsel that the rights and obligations of the defendant were to be ascertained by reference to the act of April 23, 1858 (the Ensign act). City and County of San Francisco v. Spring Val. Water Works, 48 Cal. 509, 514. A rehearing having been granted, the opinion delivered on the first hearing of the second appeal is not reported. But on the rehearing, a new point was made that the Ensign act, upon which the former decisions turned, was unconstitutional and void; and this point the court sustained in an elaborate opinion. The defeated party not being satisfied, another petition for rehearing was filed; and the court again at the following term discussed the point at length in denying the petition—two of the justices delivering opinions maintaining the unconstitutionality of the act, and one justice a dissenting opinion. In these opinions the only points discussed are the unconstitutionality of the Ensign act; and the point, that, conceding it to be unconstitutional, the defendant was still liable to supply water without charge for all municipal purposes, except "sprinkling streets," as successor of the San Francisco City Water Works, under the city ordinances by which that corporation acquired its rights. The court did not discuss the meaning of the clause in the general act, "in case of fire, or other great necessity," nor do counsel appear to have discussed the meaning of that clause. At the conclusion of the opinion on the rehearing, it is said, it is true, that "tested by the general law under which the defendant was organized it is under no obligation to furnish water to the city and county free of charge, except for the extinguishment of fires during the pending thereof." The learned justice must have labored under some misapprehension here, for the phrase, "for the extinguishment of fires during the pendency of the same," is not in the general statute, but in the Ensign act (St. 1858, p. 255, § 3),—the statute held to be unconstitutional. The clause in the general act is "in case of fire or other great necessity." Id. p. 219, § 4. But, be this as it may, there is here no attempt to define the words "other great necessity." In the second opinion of the same learned judge—the opinion on denying the second petition for rehearing—the words "in case of fire or other great necessity," are casually referred to in discussing the point as to the liability of defendant under the former city ordinances as successor of the San Francisco City Water Works. But no attempt is made to construe them. 48 Cal. 525. The only other allusion to the phrase is by Mr. Justice McKinstry in his concurring opinion; and, apparently, for the purpose of cutting off any pretense that might afterward be made that the court had construed the clause. He says: "I express no opinion as to the precise meaning of the phrase 'other great necessity.' On the former appeal, and before I came to the bench, it was held by all the justices qualified to sit in this case, that these words did not include every municipal purpose. I shall assume that the construction given by the court is correct." 48 Cal. 531. I do not myself find any such express holding in the reported opinion on that appeal, or any allusion whatever to the clause. The justices probably entertained that opinion, but may not have found it necessary to express it in view of the point upon which the decision was rested. It is now insisted by the complainant, that since the judgment of the district court was affirmed, the judgment necessarily determines that the words, "other great necessity," do not embrace the municipal uses now being supplied to the city of Oakland free of charge as stated in the bill. It is evident from what has already been said, that the court did not intend to give a specific construction to the clause, "other great necessity." This inference arises from the questions actually discussed by both counsel and court, and the points expressly decided. Besides, that idea is expressly excluded by the language of Mr. Justice McKinstry. The matter, it must be confessed, is left in a somewhat uncertain condition, technically speaking; but upon a careful consideration of the several cases as reported the following seems to be the result. The city sought to restrain the water company from cutting off water free of charge

for all municipal purposes except extinguishing fires, and this was the question litigated; while the court was of opinion that there were some municipal purposes for which defendant was entitled to charge, and on that ground held the city not entitled to the injunction sought, without determining for what specific purposes a charge might be made, or for what specific purposes other than extinguishing fires, water must be furnished free of charge—that question not having been presented by counsel in their numerous and voluminous arguments. And so the court itself held, when the question was next presented in the case which will now be considered.

After the decisions in these cases, the Spring Valley Water Works threatened to shut off water before then supplied for watering plazas and like municipal uses, and the board of supervisors passed a resolution empowering and directing the mayor in that case to make connections with the pipes of the water company wherever water should be required for municipal purposes; and an ordinance was introduced with similar and further provisions, and passed to print. Whereupon the Spring Valley Water Works presented a petition to the supreme court alleging that it was only bound to supply water free of charge for extinguishing fires, and setting up the prior litigation before considered, claiming that the judgment in said case settled the rights of the parties in favor of the company, and that the matter was res adjudicata; also, the subsequent acts of the board of supervisors, including the threatened passage of the ordinance so introduced, and praying a writ of prohibition. The decision has not yet been reached in the official series of the California Reports, and I cite from the copy reported in 14 Pac. Law Rep. 218. (Since reported: Spring Val. Water Works v. City and County of San Francisco, 52 Cal. 112.) A certified copy of the petition and the printed arguments of counsel in the case have been furnished me. In deciding the case, the court briefly hold that the writ of prohibition retains its character in the nature of a prerogative writ to be issued in the sound discretion of the court, and that in this case it would not be a proper exercise of discretion to issue it. The opinion of the court then proceeds as follows:

"The parties have requested the court to place an interpretation upon the language of the fourth section of the act of 1858, which is as follows: 'And shall furnish water to the extent of their means to such city and county, or city, or town, in case of fire, or other great necessity, free of charge.' It is claimed by petitioner that it has been adjudged by this court, that the city and county is not entitled to water from the pipes and mains of petitioner 'free of charge' for any municipal purpose, except for the extinguishment of fires; that such is the effect of the judgment in City and County of San Francisco v. Spring Valley Water Works, 48 Cal. 493. A reference to the report of that case will show that the question discussed in the briefs, and the only questions considered in the opinions of the justices, was the validity or constitutionality of the 'Ensign Act.' It seems to have been assumed by counsel and court that a determination that the 'Ensign Act' was void must involve a complete reversal, and not a modification of the judgment of the district court. Counsel did not then indicate their respective views (in case it should be held that water corporations were not compelled to furnish water for all purposes), as to the purposes for which the company might charge for the water, and as to the purposes for which it might be compelled to furnish water free of charge. It is said, however, that inasmuch as the complaint was filed by the city and county to enjoin a threat on the part of the Spring Valley Water Company to cut off water for all purposes, except in case of fire, and as judgment was rendered for defendant, such judgment necessarily involved a determination that the company was entitled to refuse to furnish water free of charge for any other purpose than the extinguishment of fires. It is plain from the opinions therein rendered that no such result was contemplated by the judges. In the opinion, on rehearing, of Mr. Justice Crockett, concurred in by Mr. Justice Niles, and in this particular by Mr. Justice Rhodes, the obligation of the Spring Valley Water Works is described as being an obligation to furnish water free of charge 'in case of fire or other great necessity.' Page 527. And Mr. Justice McKinstry, in his concurring opinion (page 531), says: 'The general law required all water companies to furnish water to the extent of their means, and free of charge, to the city or town to which water was conducted "in case of fire or other great necessity." I express no opinion as to the precise meaning of the phrase "other great necessity."' On the former appeal, and before I came to the bench, it was held by all the justices qualified to sit in this case that these words did not include every municipal purpose.

"Under these circumstances, even if the technical effect of the judgment in City and County of San Francisco v. Spring Valley Water Works, is broader than the views expressed by the justices would warrant, I am of opinion that the case should be held to be authority only to the extent of a determination that the company is not bound to furnish water to the city free for all purposes. But the claim of the city and county, in the action of the City and County of San Francisco v. Spring Valley Water Works, was based on an assertion that the rights and duties of the defendant, so far as furnishing water to the city is concerned, were created and controlled by the Ensign act, and by the transfer from the city water works

to the Spring Valley Water Works; and that by virtue of said act and transfer the obligation was imposed on the Spring Valley Water Works to furnish water for all purposes. The pleading on the part of the plaintiff did not allege that there were any 'great necessities' for which the water should be furnished free, and in the absence of such allegation, the judgment of the court only determined that the city and county was not entitled, as it claimed, to free water for all purposes. The decision and judgment did, however, determine that the defendant was bound to furnish water to the city and county free of charge 'in case of fire or other great necessity.' The meaning of these words is still an open question." 14 Pac. Law Rep. 219, and 52 Cal. 118. Thus the court construes its own prior decisions, and declares that it did not intend to give an authoritative construction on the disputed point.

The court then proceeds to construe the phrase, "other great necessity," in connection with the other provisions of the act, and distinctly holds that, to the extent of its means, "it is the duty of the Spring Valley Water Works to furnish water free to the city and county in case of fire, and also in case it is demanded for irrigating the parks and squares, watering streets, flushing the sewers, and in case of any other demand based on a requirement which is incidental to the discharge by the supervisors of their duty as local legislators, except when it is to be used by human beings for family purposes;" but that said company "may charge the ordinary rates (when they shall have been fixed in the manner required by the general law) for water supplied for drinking and culinary purposes; for purposes of lavation, and for domestic uses to the inhabitants or occupants of various institutions, penal or charitable, established by or under the control of the city and county government, to the public schools, and to the public offices." 14 Pac. Law Rep. 220, and 52 Cal. 122. But it is now insisted that this construction is obiter dictum, and therefore of no controlling force, because the court having determined that there was no proper case for the issue of a writ of prohibition, it was not authorized to go further and determine the merits. I know of nothing to prohibit the court from determining every point that is properly presented by the record where it has jurisdiction of the case. The question as to the propriety of issuing the writ was not jurisdictional. The court had authority to issue the writ in a proper case, as it has to issue an injunction, or to cancel a deed in a proper case; and the question was, not whether the court had jurisdiction to issue a writ of prohibition, but whether the petition presented a proper case for its exercise. There were two grounds relied on to show that there was not a proper case for exercising the jurisdiction: (1) That the board of supervisors is a legislative body having a discretion to pass ordinances, and that the court ought not to interfere with its legislative discretion in advance on the hypothesis that it intends to pass an illegal ordinance, especially when it can not be known in advance what its intention as a legislative body is; (2) that the city had a right to the water claimed, and a right to take the measures alleged to secure it in case the petitioner should shut it off; and for that reason, also, there was not a proper case for the prohibitory writ. Both grounds were distinctly and squarely presented by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second. Or it might, if thought proper, have decided both, as it did. It is a matter of almost every day occurrence that the record presents two or more points, either of which, if sustained, would determine the case, and the court decides them all. In such case it can no more be said that one rather than the other is obiter. In this case the court was earnestly pressed by counsel on both sides to decide the case on the merits, and give an authoritative construction of the statute. The great anxiety was to ascertain the rights of the respective parties, and the mode was of no consequence. In fact, the great burden of the arguments of counsel was on the construction of the statute, and the court elaborately considered this one point, two justices discussing it fully in separate opinions, and saying very little on the other, one of them not referring to it at all. It was the very point upon which the earnest struggle hinged. It was the point most distinctly and thoroughly considered by the court; and it was distinctly and expressly determined. After the decision three elaborate printed arguments were filed in support of a petition for rehearing upon the second point by some of the ablest counsel in the state—one of seventy-one, one of thirty-two, and one of twenty-four closely-printed pages—one of the arguments being by counsel representing the individual stockholders, who appeared as amicus curiae. All of these discussions were upon the merits, the rights of the parties under the statute, the first point only being mentioned by the counsel in one of the arguments at the close, where, after finding the decision to be against their claim, they asked the court that a rehearing be granted in order that all the decision, saving that relating to the remedy might be withdrawn, leaving open the other questions on the construction for future discussion. Counsel in that case certainly did not regard the construction of the statute as obiter. The court denied the rehearing, and the decision stands as the solemn judgment of the court. The other point received and required very little attention from the court or counsel. To say now that the construction of the statute

was merely obiter, is to say that a vast amount of labor, research, energy, and anxiety was expended by counsel and court to no useful purpose.

Speaking of dicta, in Cohens v. Virginia, 6 Wheat. [19 U. S.] 399, Chief Justice Marshall says: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated." In the present instance the court did not go beyond the record, for the construction of the statute was distinctly presented by the record as one point for decision. "The question" was "actually before the court," "investigated with care, and considered in its full extent." It was the very point upon which nearly all the efforts and research of counsel and court were actually expended. The discussion did not, in any sense, serve to illustrate the other point. Indeed, it had no relation whatever to it. It was a distinct, separate, and independent point, and the only one in the case that counsel or parties practically cared anything about.

The form of the proceeding was merely the means to reach the end sought—of determining the rights of the parties under the act. The case comes fully up to the requirements indicated by Chief Justice Marshall to constitute an authoritative decision.

In answer to an objection that a point determined by the supreme court, relied on by the opposing party, was a mere dictum, I had occasion to say in Starr v. Stark [Case No. 13,317], "Both points are fairly and directly presented by the record, and the decision might as well have been put upon one as the other, and both are distinctly determined. We can, therefore, no more say that one was not directly adjudicated than the other."

I regard the construction put upon the clause in controversy by the supreme court, in the prohibition case cited, as authoritative, and being so, I rest my decision upon that case, without examining the question as an original proposition. It follows that the demurrer must be sustained, and the bill dismissed, and it is so ordered.

[NOTE. From this decree the complainant appealed to the supreme court, where, in an opinion by Mr. Justice Miller, the decree of the circuit court was affirmed, upon the ground that the appellant had shown no standing in a court of equity in himself to prosecute the suit. 104 U. S. 450. Conceding appellants' construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done." It was held that the directors were capable of acting more understandingly upon the matter than a single stockholder, who did not even show to the court that any efforts had been made upon his part within the corporation itself. The injury, if any existed, was to the interests of the corporation, and that body alone had a right to sue.]

Case No. 6,236.

HAWES v. COOK et al.

[5 O. G. 493; Merw. Pat. Inv. 244.]

Circuit Court, N. D. New York. July 9, 1873.

PATENT—WANT OF NOVELTY — WHO LIABLE FOR USE OF PATENT.

1. A hotel register in which the side margin is occupied with printed advertisements, while the middle is left vacant, to be filled from day to day with the names of guests, is the proper subject, if new, of a valid patent.

2. The objection that the patent should be for a design, or that the book should be copyrighted, overruled.

3. A claim for a "hotel register with the margin of its leaves occupied with advertisements," &c., *held* not to be limited to a book containing advertisements upon its side margins. Such registers are novel, although city directories have been published before with advertisements interspersed.

4. The keeper of a hotel who keeps such a register is a user of the invention, and liable as such.

[This was a suit by Charles L. Hawes against John L. Cook and others for the infringement of letters patent No. 63,889, granted to plaintiff April 16, 1867, for an advertising hotel register.]

HUNT, Circuit Justice. This is a suit in equity for an infringement of a patent for an advertising hotel register obtained by the plaintiff. The plaintiff's patent is proved, and the use by the defendants of a register upon a similar plan is also proved. The defendants object to a recovery by the plaintiff on the following grounds: (1) That the structure described in the specifications of the plaintiff's patent is not a patentable invention. (2) That the claim of the plaintiff is limited by its terms to the display of advertisements on the margin of the leaves of the book. (3) That the defendants are not users of the invention within the meaning of the law of patents. (4) That the patentee could properly claim nothing more than a new design, and should have taken his patent for the design under the act of March 2, 1861 [12 Stat. 246], or else had the book copyrighted. (5) The city directories put in evidence showed a prior use of the invention, and this patent is therefore void.

The case of this plaintiff against Washburne [Case No. 6,242] was tried one year since before Judge Woodruff, at the June circuit. A copy of his charge and of the points made is before me. That suit was for a violation of the same patent, and the facts in

evidence were the same as in this suit. Judge Woodruff had before him the precise objections that are now made, overruled each of them, held the patent to be good, and, under his charge, the jury found for the plaintiff. This furnishes an authority which is obligatory on me at the circuit, and, considering which, I find no difficulty in holding that the plaintiff must recover in this suit. Let a decree be entered for the plaintiff, with the usual order of reference to ascertain damages.

NOTE. It will be observed that the presiding judge, without expressing any opinion upon the merits of the case, placed his decision upon the ground that the court were bound by the rulings in the case of Hawes v. Washburne [supra], which was upon the same patent, and involved nearly the same questions.

[For other cases involving this patent, see note to Hawes v. Antisdel, Case No. 6,234.]

Case No. 6,237.

HAWES v. GAGE.

[5 O. G. 494; Merw. Pat. Inv. 244.] [1]

Circuit Court, N. D. New York. Oct., 1871.

PATENTS—INFRINGEMENT—SLIGHT VARIATION—DAMAGES—WHO LIABLE.

1. The specification of a patent for a hotel-register, in which the alternate leaves were devoted to advertisements, the patentee stated that the interleaves might be of bibulous or sized paper, the former being preferable, but in his claim he specified only bibulous paper; and it was *held* that he had secured to himself only such a register when the leaves were of the kind so specified.

2. It was left to the jury to determine whether the defendant had infringed the patent by using such a register with interleaves of a paper known as yellow medium paper and occupying a middle ground between bibulous paper and sized paper; and the jury found for the plaintiff.

3. In estimating the damages the jury should consider the amount which the plaintiff might have obtained from those who would have advertised in his register.

4. The keeper of a hotel who uses such a register trespasses upon the rights of the patentee, and is liable to him for the infringement.

[This was a bill in equity by Charles L. Hawes against William C. Gage for infringement of letters patent No. 63,889, granted to plaintiff April 16, 1867, for an advertising hotel register.]

James A. Allen, for plaintiff.

N. B. Smith, for defendant.

WOODRUFF, Circuit Justice (charging jury). This case, as presented by the counsel, is an instance of which we have very many in the administration of the law of patents, in which a patentee has come into court with a claim, which, in its immediate consequences to the defendant, and its direct pecuniary result to the plaintiff, seems of small importance. The amount of damages sustained by this plaintiff for the particular infringement, if it be an infringement, of his patent, which is the subject of complaint here, no doubt it has occurred to your minds would not be worth pursuing at the expense of a lawsuit. It cannot be upon any just estimate of this evidence that the actual damages sustained by this particular infringement here is at all adequate to the expenses of the trial; and the plaintiff's counsel says to you frankly that it is not that which is the object of this prosecution. The object is to establish his right, and place himself in a situation in which he can enjoy the fruits of his invention by establishing and bringing to the notice of the people who may attempt to use this invention that it is his property. And in this point of view these suits are often of immense importance to the plaintiff. By way of illustration I might call your attention to a patent with the subject of which you are all doubtless familiar. Elias Howe obtained a patent for what had never before been used in the construction of the sewing-machine—for a needle having its eye at the point; a very simple thing. He might have found an individual using one of these needles, and brought an action against him; but of what consequence would have been the damage in a single case? However, to Elias Howe it was of immense importance—an importance which was illustrated in the large fortune which I believe he realized as the result of his ingenuity; that the patent was his, and that all who attempted to use it might know that they were using a thing of which he was the patentee. That illustrates the importance of such cases, and what, I understand the plaintiff's counsel to concede, is the main object in bringing this action—to establish the right to that to which he claims his client is entitled under the laws of the United States; in which he should be protected that he might, as Elias Howe did, if it is but one cent from each needle, derive, as the product or the result of his invention, that one cent, and thereby by the accumulation of cents, derive the profit to which he is entitled.

Another suggestion, gentlemen. If the patent itself is of more or less importance, so long as it is useful, and so long as it is secured to the patentee by the laws of the United States, he is to be protected. If the patent is of small importance he is not so fortunate as the man who has made an invention of greater importance. But they are alike to be protected. A man that has a small farm is as much entitled to be protected in the enjoyment of it as a man who owns his thousands of acres. We do not deal with cases in courts of justice by comparisons of value or interest. We try to protect the poor as well as the rich. And if this patentee has realized profit, so that he can come here apparently relieved from the necessity of labor, it is a fortunate thing.

[1] [Merw. Pat. Inv. 244, contains only a partial report.]

We, however, have nothing to do with that question. For certain territory in this state the plaintiff has purchased the interest. If he has any rights he is to be protected, and you will protect him so far as the evidence calls upon you to do so.

I come, then, to consider what the patent is. Now, the plaintiff here claims that John L. Mitchell invented an improved hotel-register—and the granting of the patent itself is evidence that he did [2]—that it was new. The patent proves, in the absence of any countervailing testimony, that it was new, that it is useful; prima facie, it is to be deemed useful. The defendant was not precluded by it. He had a right to offer any testimony he chose to show that it was not useful. But if the patentee was the first inventor it will be your duty to find that it was new and useful on this evidence. Then, unless it is proved that it is of no utility whatever, and that, in the face of the judgment of the patent office of the United States on this subject, he is entitled to be protected in it according to its true interpretation.

According to the description given in his patent it is plain—and it is plain according to the examples produced here—that this was a thing intended to serve the purpose of furnishing, first, a new mode, plan, or device for furnishing to traders and men of business a novel and peculiar vehicle for advertising; one that should bring to the eye, as was supposed, of a great number of persons, especially transient persons, these advertisements; who would have before their eyes, it may be, the very thing advertised they had come to buy; they could not look over the register to see who had arrived, scarcely open its leaves for the purpose of registering their names, without their eye falling upon some advertisement, or some series of advertisements. In that way a notoriety would be given to the advertisements which it was supposed would be desirable. And it seems by the proof that they had found in practice a number of persons willing to pay for the insertion of their cards in the register the amounts that have been named—willing to pay for that as a useful mode of advertising their trade or business. In my judgment it is clearly apparent that the invention had another object in view. It was to furnish to some extent—greater or less—by this interposed leaf a blotter to the names that should be written, making the book very convenient to hotel-keepers, and also answering another purpose: To preserve the names thus written from being obliterated or effaced.

The patentee in his specification has chosen to describe this register as one in which the interleaf may be made of bibulous or of sized paper, the former being preferable. He prefers, he says, the bibulous paper, and yet he claims in the description of his patent that this book may be constructed and the advertisements displayed upon the interleaf pages made of one or the other. Now, if he had described the patent in that way, and it had been deemed valid for that purpose, it would have embraced a book that contains the interleaf with the advertisements, whether the interleaf was of bibulous paper or of sized paper with the advertisements thereon. But the law requires a patentee, in describing his invention, to give not only such description as will enable the people to make it, when its term of exclusive use has expired, but in order that the community may be apprised of precisely what he claims to be his invention, it requires him to state in distinct terms what he claims. By that he must stand or fall when he comes into a court of justice with his patent. If, through ill advice, or misapprehension, or ignorance, his claim does not cover all that he is really entitled to, the court and jury cannot help it. That is his misfortune. He must bear it. The law provides for his relief in another mode. On discovering that his claim does not cover all his invention, through some mistake or fraud, he can go back to the patent office, surrender his patent as imperfect, and take out another in the place of it that shall embrace the whole invention—a thing that is very commonly done. The patentee here has limited his claim. I don't say whether it is broader or narrower than that to which he was entitled, but it is limited, and he must stand by what he claims.

(The court here read the claim from the patent.)

Having thus stated his claim exactly no third party would suppose that he claimed an interleaf of sized paper, although he says that just such a book in other respects might be made of bibulous or sized paper. First he says he prefers bibulous paper, and then he says he claims bibulous paper. I say, therefore, that the true interpretation of this patent is that he has secured by it the right to the exclusive introduction or use of a hotel-register or interleaf with advertisements printed thereon, that interleaf being made of bibulous paper; and unless the defendant here has used just such a register the plaintiff is not entitled to recover. Now, it is not necessary, perhaps, for me to define to you what bibulous paper is. It is quite obvious. The term "bibulous" is to drink in—paper that will drink in moisture to which it is applied. It comes from the word bibo, meaning to drink in—absorb. If the patentee had had occasion to describe some portion of his structure, and had indicated in it that it was to be supplied with soft paper as distinguished from hard, nobody would have thought that he was entitled to be protected in the use of soft paper, because the manufacturer said he did not make paper called by that name. The patentee is not restricted to any technical name used by the manu-

[2] [Patent No. 63,924 was granted to J. L. Mitchell, April 16, 1867.]

facturer in designating the paper he manufactures. So that the question here in reference to the infringement is whether the defendant has used paper that, within the fair meaning of that term, is absorbent or bibulous paper. The specification seems to indicate that the patentee had in view a distinction between bibulous paper and sized paper. Therefore the testimony of Mr. Van Benthuysen on that subject is important. If I have understood him correctly he says that yellow sheet wouldn't be known as sized paper; that sized paper is understood as paper that is prepared in the mode that he described, with the animal-size spread upon the surface, and that when it is completed it is adapted for writing. Neither is it blotting-paper, as known to the art—that is, made in the manner which he described without any size to harden it. On the contrary, it is deemed desirable to make it as soft or spongy as it can be made, that its absorbing qualities may be as large as possible. But that this paper is known as yellow medium, and that it occupies, as he describes, a medium ground. In respect to its absorbent qualities he thinks it occupies a middle position between sized paper as known and blotting-paper as known in the trade.

Now, gentlemen, it will be for you to say upon this evidence and upon your observations of the paper and the tests that have been submitted to you of its absorbent qualities, whether the paper is bibulous paper. The counsel rightly insisted to you that courts and juries should not favor the avoidance of a patent by an immaterial variation. Quite otherwise; that when, in substance and effect, if the useful purpose for which this device or thing is intended is the same, it should be treated as an infringement; but if in substance and effect it is different, it is equally true, on the other hand, that it is no infringement. Therefore, I leave that question to you on the right of recovery, Is this in substance a bibulous paper? Its likeness in other respects is not called in question—that it is made a vehicle for advertisements to serve in that respect all the purposes for which the patent was designed. It is for you to say whether the variation in the particular style or kind of paper is substantial. If you find it is, then it will be your duty to find for the defendant. If not it will be your duty to find for the plaintiff in establishment of his patent. In that point of view the plaintiff will be entitled to such damages as he has proved. In such cases the law gives him, and it is your duty to find, the actual damage, nothing more. And the amount of damages actually sustained is perhaps susceptible of ascertainment by you in your judgment in view of all the facts proved. You have had an account of the profit which a party has realized at Lockport and certain other places, and may be expected to realize from the furnishing of such a book. I do not understand that it is claimed or suggested that anybody gets a profit from the hotel-keeper, and that meets a suggestion that has been urged upon your attention that the defendant here has allowed somebody to put a book upon his counter and then he has used it, made no profit on it himself. Why, gentlemen, that is the very thing that renders part of the utility of the mode of distribution for which this thing was invented. The object is to get a profit out of the advertisers. It is one of the inducements given to the advertisers. If this were a question of what damages you should give, as punitive or vindictive damages, this might be a very pertinent fact. But, gentlemen, that is not a question for your consideration here. All the plaintiff is entitled to by your verdict is the loss which he has sustained. If he has sustained any loss in this instance, it is supposed to be the loss of the chance to get the fifteen dollars or whatever other sum he could obtain from those various advertisers for inserting their names in this register. I think it appears that in a former year a book was placed in this same hotel under the patent in question. If that be so the proprietors of the Empire Hotel were not altogether ignorant of the nature of the thing they were using, and they were apprised by the heading of the book that it was not the same thing. However, this question of good or bad faith on the part of the proprietor is not before you. On the question of computation of the profits, the court is somewhat at a loss. But you have the materials, such as they are, furnished by the testimony; and in your sound judgment, if you find for the plaintiff under the views which I have suggested, you will give a verdict for the damages which the plaintiff has sustained, in your sound judgment, by the infringement."

The jury retired under the charge of an officer, and, after a short consultation, returned into court with a verdict in favor of the plaintiff. They assessed the damages at $28.44.

[For other cases involving this patent, see note to Hawes v. Antisdel, Case No. 6,234.]

Case No. 6,238.

HAWES v. The JAMES SMITH.

District Court, D. Massachusetts. 1858.

MARITIME LIENS—REPAIRS — CONTRACTED FOR BY THOSE IN POSSESSION.

The owner of the vessel in this case made a contract of sale by which the vendees were to have possession of the vessel, and, if not paid for within a certain time, possession was to revert to the owner. While in the possession of the vendees, repairs were put upon the vessel, and it was *held* that these constituted a lien upon her, which could be enforced after the original owner had resumed possession in consequence of a breach of the condition.

[Cited in 2 Pars. Shipp. & Adm. 146, to the point as stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 6,239.

HAWES v. MANN.

[8 Biss. 21.] [1]

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

CONVEYANCES — FEMMES COVERT — ACKNOWLEDGMENT OF DEED—ILLINOIS ACT OF 1869.

In Illinois, under the act of 1869, it is not necessary that a femme covert should acknowledge her deed in order to render it valid.

In equity. Bill to foreclose a mortgage. The facts of this case were, that O. L. Mann had subscribed for $20,000 of the capital stock of the National Life Insurance Company, and gave his notes for the full amount, secured by a mortgage on his wife's property. It appeared that she was unwilling to give the mortgage, but finally agreed to do so. Mann then took the mortgage to a notary public, who was his wife's brother, and he entered the acknowledgment in due form, though Mrs. Mann did not appear before him. A bill was filed to foreclose the mortgage, and Mrs. Mann, in her answer, set up the claim that the instrument was invalid, because it had not been properly acknowledged.

George W. Smith, for complainant.

Goudy, Chandler & Skinner, for defendants.

BLODGETT, District Judge. The question is, whether the mortgage was properly executed, so as to be binding on Mrs. Mann. I think this properly comes under the provisions of the act of 1869, which reads as follows: "Be it enacted, that any femme covert, being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of lands or other real estate, as aforesaid, shall be bound and concluded by the same in respect of her right, title, claim, interest or dower in such estate as if she were sole and of full age, as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing, may be the same as if she were sole." Ill. Pub. Laws 1869, p. 359.

Prior to this statute, a femme covert could only convey her real estate by acknowledging the deed before an authorized officer, and submitting to an examination separate and apart from her husband. The supreme court had repeatedly decided that the act of 1861 did not relieve her from that disability, and that she was still required to appear and be examined before an acknowledging officer as to her willingness to convey. The present law places the wife on the same footing with her husband. If, therefore, the mortgage had been given by Mann and his wife without acknowledgment, it was competent to prove the signature of both, and the instrument would be valid. It is no more necessary that a married woman should acknowledge than that a married man should, in order to make a valid deed. The same proof that would bind the husband will bind the wife. The statute was intended to give a married woman full and complete control over her property, and place her on the same footing as a femme sole. She might acknowledge it as if she was unmarried, and the signature could be proven against her the same as though she were so. The evidence shows that she had delivered it to her husband, and he in turn delivered it to the company, and she is bound thereby. A decree will, therefore, be rendered in favor of the complainant.

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

Case No. 6,240.

HAWES et al. v. MARCHANT et al.

[1 Curt. 136.] [1]

Circuit Court, D. Rhode Island. June Term, 1852.

BOND OF DEBTOR—VALIDITY OF—ESTOPPEL.

1. A valid promise not to arrest a debtor on the first execution does not, at law, avoid a bond given by the debtor for the prison liberties, when arrested in violation of such promise, which is collateral merely.

[Cited in Goebel v. Stevenson, 35 Mich. 184.]

2. A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties.

[Cited in U. S. v. Mynderse, Case No. 15,851; U. S. v. Humason, 8 Fed. 79; Hazard v. Griswold, 21 Fed. 182.]

[Cited in Patterson v. Gibson (Ga.) 10 S. E. 10.]

3. But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity.

[Cited in Lawrence v. Dana, Case No. 8,136; Brant v. Virginia Coal & Iron Co., 93 U. S. 336.]

[Cited in Audenried v. Betteley, 5 Allen, 386; Fall River Nat. Bank v. Buffington, 97 Mass. 500; Horn v. Cole, 51 N. H. 295; Davidson v. Follett, 27 Iowa, 220; Shapley v. Abbott, 42 N. Y. 444; Zuchtmann v. Roberts, 109 Mass. 54; Moore v. Metropolitan Nat. Bank, 55 N. Y. 43.]

This is an action of debt on a bond for the prison limits. Among other pleas the defendants [Henry Marchant and others] have pleaded, that before Marchant, the debtor and principal obligor, was committed to jail on the execution of the plaintiffs, they promised that if he would deliver to them a negotiable promissory note, for the sum of five hundred dollars, indorsed by a third person, they would not have his body taken on that particular execution; and that afterwards,

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

and before he was committed to jail, he tendered to the plaintiffs the note agreed on, and they refused to accept the same. To this plea the plaintiffs demurred, and the demurrer having been argued, the opinion of the court was delivered by—

CURTIS, Circuit Justice. This plea shows a promise, for a valuable consideration, not to commit the debtor to jail on this particular execution, which, according to the law of Rhode Island, was returnable at the end of six months from its teste, and upon its return unsatisfied, the creditor would be entitled to take an alias execution, to which the promise in question did not extend. In other words, the plea shows a valid promise, by the creditors, not to take the body of the debtor in execution until after the lapse of six months from the teste of the execution issuing on the judgment.

Two questions arise. The first is whether this promise operates to suspend the legal right of the creditors, so as to render its exercise a trespass, and to make the imprisonment of the debtor, on the execution, duress. And the second is, whether, if the imprisonment was thus illegal, the bond was void.

Upon the first of these questions I am of opinion that the promise of the creditors was merely a collateral engagement, which had no effect whatever upon the execution, or upon any right, or power, which by law arose from it. The case is analogous to those which have been decided upon covenants not to sue for a limited time. Such covenants are held not to affect the right, but to be collateral and independent, because, among other reasons, the damages for the breach of such covenants are not necessarily coextensive with the value of the right agreed to be suspended. The same is true here. There is no necessary connection between the damages suffered by Marchant in the exercise of the plaintiffs' right to imprison him during the six months, and the value to the plaintiffs of that right.

Moreover, the only ground on which a court of law ever holds that a collateral promise operates directly on a legal right, is to avoid circuity of action. For this reason, a covenant not to sue at any time, or in any court, may be pleaded as a bar. But no circuity of action would be avoided by allowing this promise to operate upon the right according to its terms. Marchant would still be able to sue for its violation, and recover such damages as he might show himself entitled to. Courts of law cannot, like courts of equity, compel the specific execution of these collateral promises. They can only adjudge damages, and where these are not necessarily coextensive with the value of the right enforced in violation of the promise, they must leave the parties to their separate actions in which their respective rights will be enforced, and thus, at last, complete justice will be done. It is otherwise in courts of equity, and in those classes of cases in which courts of law exercise a summary equitable jurisdiction, as in the discharge of bail and some few other instances. But this case comes within no such equitable jurisdiction of a court of law, and the action must be tried, and judgment rendered, upon the principles of the common law, according to which, a promise to suspend, for a limited time, the exercise of a legal right, cannot be pleaded as a bar, because it does not operate upon the right itself, but is merely collateral and executory, and though valid and binding, is to be enforced like other promises, by an action founded upon it, in which damages are recoverable, corresponding with the injury sustained by the breach of the promise.

After this plea had been decided to be bad, the case went to trial upon other issues, and the facts and questions on that trial appear in the opinion of the court.

CURTIS, Circuit Justice. The obligation declared on is a statutory bond. The officer by whom, and the occasion on which, it might be taken, the obligee, the precise condition, and the damages for its breach, are all prescribed by the statute of Rhode Island entitled "An act for the relief of poor persons imprisoned for debt." Dig. 166. It is to be governed by the laws applicable to such obligations, among which is the rule, that if a public officer, authorized to take a bond, has illegally exerted his official authority, and thereby compelled the obligee to enter into an obligation not required by law, it is not binding. This rule is settled by the highest authority.

In U. S. v. Tingey, 5 Pet. [30 U. S.] 115, the defendant, who was a surety of a purser in the navy, in a joint and several bond, pleaded that the condition of the bond differed substantially from the requirement of the act of congress, and that the same was extorted from the purser and his sureties as the condition of his retaining his office. The court held the plea good. In conformity with this are a great number of decisions, some of which are U. S. v. Gordon, 7 Cranch [11 U. S.] 287; U. S. v. ——— [Case No. 14,413]; U. S. v. Gordon [Id. 15,232]; U. S. v. Morgan [Id. 15,809]; Beacom v. Holmes, 13 Serg. & R. 190; Purple v. Purple, 5 Pick. 226. And the cases in which it has been held that, if the condition of a statutory bond contains stipulations which are not required by the statute, but separable from those which are required, the latter may be enforced and the former rejected, silently, at least, acknowledge the same rule, by requiring that the one should be separable from the other, and by denying all efficacy to those provisions which have been inserted without warrant of law. Among this latter class of cases are U. S. v. Bradley, 10 Pet. [35 U. S.] 343; U. S. v. Linn, 15 Pet. [40 U. S.] 315; Hall v.

Cushing, 9 Pick. 395; Van Deusen v. Hayward, 17 Wend. 67; Ring v. Gibbs, 26 Wend. 502; Shunk v. Miller, 5 Barr. [5 Pa. St.] 250. The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in Churchill v. Perkins, 5 Mass. 541, that where the plaintiff demands the fruit of an obligation obtained colore officii, it must be shown that the demand is justified by some authority of the office, otherwise it is against sound policy, and is void by the principles of the common law. By colore officii, however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid, simply because it contains something which the statute does not authorize. U. S. v. Bradley, 10 Pet. [35 U. S.] 364; U. S. v. Linn, 15 Pet. [40 U. S.] 290. Whether it can be enforced or not, depends upon the possibility of separating the part of the condition authorized and required, from the residue of the condition, where the condition is not wholly in conformity with the law, and that is the only objection to the bond.

Such being the rules of law, upon all the facts, if shown, there can be no doubt this bond was invalid. Marchant, having given bond with sureties in the form prescribed by the statute, that bond having been accepted by the keeper of the jail, and Marchant having been thereupon permitted to go out of the close jail, and to be and remain upon the enlarged limits, and enjoy, what is established by law to be the liberty of the yard, he had a right to continue to enjoy that liberty until the expiration of thirty days, the period prescribed by the statute; and any interference with that right by the keeper of the jail was unlawful. While in the possession of this right he was induced to enter the close jail by a request of the keeper, that he would return thither for the purpose of seeing one of the sureties on the official bond of the keeper, who was not satisfied of the sufficiency of the sureties on Marchant's bond; he was there detained in close custody, and denied the liberty of the yard, except upon the condition of furnishing another bond, with sureties satisfactory to the keeper, and, as the jury have found, the bond now in suit was executed by means of the duress thus exercised upon Marchant, the principal obligor. To this case the language of the court in U. S. v. Tingey, 5 Pet. [30 U. S.] 129, is exactly applicable: "There is no pretence to say that it was a bond voluntarily given, or that, though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, and extorted under color of office, against the requisition of the statute." In this case the bond was extorted against the requisition of the statute, for that conferred on Marchant, after the first bond was accepted, a right to the liberty of the yard, and made his subsequent detention in close jail illegal, and required the jailer not thus to detain him; and consequently the exaction of the second bond was contrary to the statute. A very able argument has been addressed to the court to prove that the creditors, the statute obligees, who did not in any way participate in this illegal exertion of authority by the officer, ought not to be affected thereby. It is said the jailer who takes the bond is a public officer, not appointed by the creditors, not in any just sense their agent, and that they ought not to be made responsible for his acts. This must be admitted. But there is a wide difference between being responsible for the unlawful act of another, and enjoying the fruit of his unlawful act. The former the law does not impose upon any one who has not, in some way, authorized the act, or voluntarily placed himself in a position to answer for it; but neither does it allow a third party to obtain the benefit of an unlawful act, simply by showing his own innocence and freedom from responsibility. The creditor can have no right of action in this case, save through the act of the jailer in taking this bond. It is true, the appointment of the jailer was an act of the law and not of the party; but the party can have no right in this bond, save through his act as a public officer, done in the lawful exercise of the powers confided to him; and having exceeded those powers, and compelled the execution of the bond by means of such excess, his act can confer no right on any one.

The view which has been taken renders it unnecessary to consider the question whether simple duress at the common law, operating only on the principal, can be taken advantage of by the sureties. The case of Huscombe v. Standing, Cro. Jac. 187, is certainly in point, and it has often been assumed to be good law. I am not prepared to say it is not so, though it must be admitted that it may lead to strange consequences, in a case where the surety pays the bond, and comes back on the principal to indemnify him, and thus the latter is effectually held for a debt, which, according to the case in Cro. Jac., does not appear to have been justly due, and which he was forced, by duress, to render himself liable for to the surety, who, at his request, enters into the obligation. But it is not necessary for me either to adopt or reject that decision. That was not a statutory bond, and the defence was only duress at the common law. Here the defence is as available to the surety as the principal, for it was by an illegal exercise of official authority that

their signatures were taken and obtained. So it was held in U. S. v. Tingey [supra], which was an action against a surety, and the same is true of Churchill v. Perkins [supra], and Beacom v. Holmes [supra]. See, also, Thompson v. Lockwood, 15 Johns. 256. But though upon the facts above referred to, this bond must be deemed to have been invalid, it remains to consider whether this defence is open to all these defendants. It appears that after the second bond was given, Burgess, one of the sureties on both bonds, called on the attorney of the execution creditors, and inquired if he was satisfied with the sureties on the second bond, and being informed that he was, said he would surrender Marchant on the first bond; he also said if the attorney was not satisfied with the second bond he would surrender Marchant on that. Soon after, he went to the jail, accompanied by Marchant, and surrendered him to the deputy-keeper, the jailer not being present. He was asked on which bond he wished to surrender him, and replied on the first bond. The deputy made the proper entry on the records, and thereupon Marchant and Burgess left the jail. It was admitted, at the argument, that, for some days after this, Marchant continued on the limits; but, being advised that the second bond was void, he left them, and has since been at large. The statute of Rhode Island grants to a debtor, imprisoned on execution, the privilege of the enlarged limits of the prison, "such prisoner first leaving with such sheriff, or keeper of the jail, a bond to the creditor, with two or more sufficient sureties," &c. When, therefore, Marchant, after his surrender upon the first bond, left the close jail, and went upon the enlarged limits, he claimed and exercised a privilege which could rest only upon the previous execution of a valid bond, pursuant to the statute; for the existence of such a bond was a condition precedent to the existence and enjoyment of that privilege.

Further; it was the duty of the jailer and his deputy not to allow a debtor on execution, who had not given such a bond, to go upon the limits, and the violation of this duty renders the jailer liable to the creditor for an escape. When Marchant was permitted, by the deputy-jailer, to leave the close jail, he suffered him to do that which was lawful, only if the remaining bond was valid, and he subjected his principal to pay the debt, if a valid bond, conformable to the statute, was not then left with the jailer. The question is, whether Marchant is estopped to deny the validity of the bond he left with the jailer. The law of estoppel by acts in pais has been greatly extended in modern times. Its operation is so just, that it commends itself to every fair mind; and it is sufficiently exact, certain, and safe, when kept within the limits of the principles upon which it depends. Those principles require that, to constitute such an estoppel, a party must have, designedly, made an admission inconsistent with the defence or claim which he proposes to set up, and that another party has, with his knowledge and consent, so acted on that admission, that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel.

The first inquiry, therefore, is whether Marchant has made an admission inconsistent with the defence he now proposes to set up. It is clear that he has; for he has claimed, and proceeded to exercise a privilege, which he had a right to exercise if he had given a valid bond, but which it was unlawful for him to exercise if he had not; this privilege he claimed of, and received from, a public officer, whose duty was violated by the grant of the privilege if a valid bond was not left with the officer, but who was obliged to grant it if a valid bond was left. His claim, therefore, was equivalent to an express affirmation that such a bond was left; for the officer was not called on to believe that he meant to commit an escape, or that he was doing any thing unlawful. The officer was warranted in the belief, and undoubtedly did believe, that what he was about to do was in the exercise of a legal right, founded on the existence of this bond, left with the jailer in compliance with the law; and this belief, being justly produced in his mind by the act of Marchant, it is the same as if a direct and positive affirmation had been made, in terms, by Marchant to the deputy-jailer, that he had executed a sufficient bond, according to law, to entitle himself to the liberty of the yard. It is clear, also, that after the deputy-jailer had acted on this belief, it must operate to the injury of his principal and himself to allow Marchant to show that the bond was invalid. Indeed, the alternative is whether Marchant should be held liable on this bond, the damages for the breach of which are the judgment, debt, and interest; or whether the jailer shall be liable for the same debt, so that, if the estoppel exists, it is no more than coextensive with the injury which would be suffered by allowing the defence to prevail. I have no doubt, also, that there is sufficient privity between the officer who takes the bond, and the creditors for whom it is taken, to have the estoppel enure to the benefit of the latter. It has already been held, that though the officer is not properly an agent of the creditors, yet their title depends upon the validity of his acts, and that if he so conducted, that the bond was invalid as between him and the debtor, it was also invalid as between the debtor and the creditor; and it is but an application of the same principle to hold, that if the bond has subsequently been made valid as between the officer and the debtor, the latter cannot make a defence to the bond; and it may be added that, to compel the officer to pay the debt by making a defence to the bond, would operate as a fraud on him, which is the basis of these estoppels in pais.

It remains to consider whether either of the

sureties is bound by this estoppel, and I am of opinion that Burgess is thus bound. The deputy-jailer was present when Burgess inquired of the attorney of the creditors if he was satisfied with the sureties on the second bond; when he informed the attorney, that if he was not thus satisfied, he would surrender Marchant on the second bond; when he was informed by the attorney he was satisfied with the sureties on the second bond, and when Burgess said he should surrender the debtor on the first bond. Soon after this he did surrender him, to this officer, in the absence of the jailer, and he stood by, and saw Marchant leave the jail, and gave no notice that the act, which the deputy-jailer had a right to believe was done upon his responsibility as one of the sureties on the second bond, was not so done. I have no doubt he then considered himself responsible. He had just before spoken, in the presence of the deputy-jailer, of surrendering Marchant on the second bond; he could scarcely have intended to surrender him on a void bond; and the deputy-jailer might fairly have understood, from what he there said, that there were two valid bonds, upon one or the other of which he intended to surrender the debtor, probably to put an end to this double liability, according as the attorney was satisfied with the one or the other; and when he did in fact surrender him on the first, and stood by, and, without informing the deputy-jailer that he considered the second bond invalid, saw Marchant claim and take, and the deputy-jailer concede, a privilege which rested upon the validity of the second bond, I am of opinion he became estopped from denying its sufficiency. He was silent when he should have spoken; and he cannot now speak. It might be otherwise, if this surety had not been upon both bonds, and had not had notice of the facts which rendered the second bond invalid; though in Petrie v. Feeter, 21 Wend. 172, a surety was held to be estopped by his representation to a person about to purchase a bond, from showing a payment made by the principal obligor. It is not necessary to go so far in this case, though I do not wish to be understood as questioning the correctness of that decision.

As to the remaining surety, I perceive no reason why he should be estopped; and the result is that under the agreement of the parties a verdict must be entered that the writing obligatory declared on, is the deed of Marchant and Burgess, and is not the deed of the remaining surety. And if, upon this verdict, the plaintiffs shall move to discontinue against the second surety and for judgment against the others, as they have given notice, I shall allow the motion upon the authority of Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46; Amis v. Smith, 16 Pet. [41 U. S.] 303; U. S. v. Linn, 1 How. [42 U. S.] 104; and a case decided at the last term of the supreme court. Coffee v. Planters' Bank, 13 How. [54 U. S.] 183.

Case No. 6,241.

HAWES et al. v. NEW ENGLAND MUT. MARINE INS. CO.

[2 Curt. 229.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

INSURANCE—EVIDENCE—MATERIALITY—FACTS REPRESENTED OR CONCEALED.

One conversant with the business of insurance, as an underwriter, or broker, and who, in the course of his employment, has learned that the existence of a particular fact, or of similar facts, affects the premium, may give that knowledge to the jury, to assist them in deciding the question of the materiality of that fact represented, or concealed by the assured.

[Cited in Lyman v. State Mut. Fire Ins. Co., 14 Allen, 335; Campbell v. New England Mut. Life Ins. Co., 98 Mass. 386; Luce v. Dorchester Ins. Co., 105 Mass. 302; Cannell v. Phoenix Ins. Co., 59 Me. 585.]

This was an action [by John Hawes and others] on a policy of insurance on freight and cargo of the ship Golden Light, from Miramachi to Liverpool, lost or not lost. The policy was obtained by a broker in Boston, under an order received from the owners by the telegraph, which instructed him to obtain insurance, and informed him, "the vessel sailed Wednesday last." The broker received the despatch, during the morning of Monday, the fifth day of December, showed it to the underwriter, and obtained the policy, which bore date that day. It appeared that the ship left the wharf at Miramachi, on Monday, the 28th of November, and was still in the river, when the despatch was sent by the owners, on the evening of the second of December, and was known to them, to be then aground at a bar, where it is not unusual for vessels of that size to take the ground when going out, and lie for a favorable wind and tide to float them over. But it also appeared that the ice usually makes in the river at about that date, that in point of fact it did make, and came down the river, and the ship was cut through and totally lost. The defendants contended that there was a material misrepresentation and also a concealment of material facts, each of which avoided the policy. And to show that the facts, that the vessel was still aground, on a bar in the river, at that season, were material, the defendants' counsel proposed to inquire of persons who were experienced in the business of insurance, whether these facts, if known to underwriters, generally, would influence the amount of the premium which would be demanded. This was objected to by the plaintiff's counsel.

Sohier & Welch, for plaintiffs.

Mr. Fiske, contra.

CURTIS, Circuit Justice. This has been a very vexed question both in the United States and in England; but I consider the bet-

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

ter opinion to be that the evidence is admissible. I do not allow you to ask the witness what he himself, as an underwriter, would have done; but whether from his knowledge of the business he is able to state that the facts in question would, or would not have an influence, with underwriters generally, in determining the amount of the premium. If his knowledge and skill in this particular business does enable him to state this, I think it is legal evidence. True, it is but an opinion; and so is nearly all evidence of value. If you inquire of a sugar broker, whether the existence of a certain quality in sugar, as, for instance, dryness, affects the value of the article in the market, you do but get his opinion, or judgment, that the existence of that fact has an influence with purchasers, generally, in determining the price. He may never have heard a buyer or seller say so in terms; but he may be as well assured that it does influence them, as if it had been frequently declared that it did so. Yet such and similar evidence is constantly admitted. Here the inquiry is, in substance, whether the market price of insurance is affected by particular facts. If the witness, being conversant with the business, has gained in the course of his employment a knowledge of the practical effect of these facts, or similar facts, upon premiums, he may inform the jury what it is. If he has not such knowledge he is not allowed to conjecture. He must speak from knowledge of the influence actually exercised by that or similar facts, in the course of business. He may have gained that knowledge in many ways. Perhaps he cannot tell how. The evidence having been admitted, the plaintiffs became nonsuit.[2]

Case No. 6,242.

HAWES v. WASHBURNE.

[5 O. G. 491; Merw. Pat. Inv. 244.]

Circuit Court, N. D. New York. June 22, 1872.

PATENTS—HOTEL-REGISTER — COPYRIGHT—LIABILITY OF USER—MEASURE OF DAMAGES.

1. A hotel-register of which the side margin is occupied with advertisements while the middle is left vacant to be filled with the names of guests, is the proper subject, if new, of a valid patent, belonging to the same class as patents for structures although it is not strictly a machine.

2. Such a register is not the subject of a copyright; neither is it true that a patent for it can be sustained only as a patent for a design. The device is novel although advertisements have been formerly inserted in books, directories, and newspapers, and placed upon fences and rocks by the wayside.

[Cited in Munson v. New York City, 3 Fed. 339.]

3. It was left to the jury to determine whether a hotel-register with advertisements placed upon the top and at the bottom of the pages is an infringement of such a patent, and their verdict was for the plaintiff.

4. The keeper of a hotel who uses such a register is liable as an infringer. He is not the less liable although he did not intend to violate the rights of the patentee, and desisted when notified.

5. The plaintiff is entitled to recover as damages not only the profit he might have made upon the book if he had sold it, but what he might have obtained from those who advertised in it.

[This was an action at law by Charles L. Hawes against Washburne to recover damages for the infringement of letters patent No. 63,889, granted to plaintiff April 16, 1867, for an "advertising hotel-register."]

WOODRUFF, Circuit Judge (charging jury). At first impression, gentlemen of the jury, this case may seem to be one of small importance. At first view it looks as though the plaintiff had come into court and prosecuted his action at large expense to recover damages, and when these damages come to be stated by the witnesses, they seem to be small. But the counsel for the plaintiff rightly states to you that that is not a just view of the controversy. Patents are granted for useful inventions which in their details, or the subjects of which considered singly, are of very small value oftentimes, and yet the exclusive right to make and use them as an aggregate in the United States is of very large value. And when such a patent is infringed the plaintiff has no alternative; if he suffers one to infringe with impunity his neighbor will infringe; he again being suffered to do so with impunity, the thing will pass into use and all the benefit of the invention is lost. That you will see illustrated if you suppose the case of the needle used in the sewing-machine; they are sold at a very small price—a few cents; and if you suppose, as may well have been true, that the patentee of this needle received a royalty of one cent each for all the machine-needles which were used, and he found a party infringing, using that needle, why, apparently, he would be suing the individual to recover one cent, when, in truth, he was suing to establish a right which to him, if he was protected in it, was a certain fortune. The same may be true of other things. If this is a valid patent and it has been infringed, it may be the condition of this plaintiff. He calls upon the court to protect his rights in order that he may have the benefit of the exclusive privilege of using and selling, which the patent law gives him. So that the case is not to be treated lightly, however insignificant in its first development it might seem.

The patent, in terms, is called a "hotel-register," constructed to receive and actually receiving advertisements about its margin. It is patented not as a book in the ordinary sense of the word, as a publication or printed material, and therefore not the subject of copyright. The law of copyright has no re-

[2] See 2 Duer, Ins. 683–787; 3 Kent, Comm. 284, note; 1 Arn. Ins. 574, and the cases cited.

lation to it. It is a patent for a structure, not according to the common acceptation of the word "machine," and yet belonging to the same class of patents—a book devised for a useful purpose. The use that it serves does not enter into the patent as forming one of the patentable qualities or as important. It is the structure as a new device or medium of serving the purpose for which it is made; it is that that is patented; it is not the purpose that is patented; and it consists, as I understand it, of the materials constituting, when made up a book in form, with a space arranged for the reception of names of guests at the hotel, and, combined with it, advertisements adapted by their position in relation to the page provided for the names of the guests at the hotel to give publicity to the names and business of those who may desire to use it to promote success in their business. Now, it is as a structure that it is patentable, and it is only as a structure that the patent law secures it to the plaintiff; and the question whether it is patentable or not does not admit on this trial. I apprehend, irrespective of the alleged defence, prior knowledge or prior use of question. The patent itself, prima facie, imports novelty, and it is to be taken, prima facie, as securing to the patentee the right to make that structure. Whether he can use it or not may affect the question of damages if it is infringed.

Well, gentlemen, there are two principal questions on which the defendant relies to protect himself against responsibility for the use which he has made of a similar book. One is that the patent describes the structure of the plaintiff as one containing a page prepared and fitted for the reception of names of guests at a hotel, and with advertisements arranged about its margin. Whether the book which the defendants used infringed the plaintiff's patent, is to be ascertained by inquiring whether or not it effects the same result in substantially the same way and by the same means. If it does, then, gentlemen, it is an infringement, although the form that is given to it, adopted by the defendants, is different. Mere form, mere order of arrangement, if it makes no substantial difference in the operation and effect produced, is not of the substantial nature of the invention, and will not protect an alleged infringer. As very justly remarked by the counsel for the plaintiff, it rarely happens that any useful invention is made and patented that ingenious men—sometimes ingenious and sometimes men of not so much ingenuity, for very little ingenuity would obviously be necessary for this purpose—set themselves to work to see if they, who perhaps never thought of or never would have conceived the idea but for the success which they saw attend the ingenuity and industry of another, set themselves to work to see if they cannot, by changing the form and making some slight change, reach the same result. It is more frequently illustrated and better understood when machines are brought before the court and infringements alleged. Some mechanical equivalent is shown that accomplishes the same result in substantially the same way, and not precisely alike in form. And often machines which are alleged to be infringements are so unlike in their apparent construction and appearance that it would seem almost preposterous to call them the same machines, and yet when tested by men who understand the particular act to which they relate, are found to be mere changes of form. Gentlemen, with these views I shall submit to you the question whether the shifting of the advertisements from any particular arrangement, as described in the plaintiff's book, is or is not accomplishing the same result and in substantially the same way and by the same means. And in that view you will look at the results; look at what the patent contemplates, the purpose in view; the presentation to the eye of the guest, who is about to write his name in such proximity that he will readily discover it, the name of the dealer in this, that, or the other article who may have there advertised. And you then consider whether putting it at the top of the page, the bottom of the page, the side of the page, enlarging it or spreading it along the side—as the counsel for the plaintiff calls the margin—whether that is doing substantially the same thing, and whether it is communicating to the eye of the guest the advertisement that has been inserted in substantially the same way, and thus, by what are substantially the same means, giving the advertiser the benefit of his advertisement and the guest the benefit of the information thus communicated. If you find that it is substantially the same thing, although differing in form, then it is an infringement of the patent.

The second consideration urged upon your attention by the counsel for the defendants is that there was no novelty in this invention; that the same thing has been done before in substance. Well, gentlemen, advertising is not new, and we may assume or suppose it quite possible that street-fences, and the rocks and fences along our highways and railroads are covered with them, and that our newspapers are filled, and that books that are published have, either at the beginning or end, and sometimes both, advertisements, which it is supposed that those who read the books may look at. So directories are produced, published long since, containing entries along every page, either by interleaving or by running an advertisement along the bottom or the top through the whole book in expectation that those who had occasion to consult the book would see it. Men have been industrious, and perhaps ingenious, in contriving modes of circulating information of that sort; but do you find in anything that is produced here a combination of a page prepared for the insertion of names;

names that are to be written; names that are to be examined to see what strangers are in town, or the like, with an advertising page arranged in this way? It seems to me that, in this respect, the directory bears no more analogy to this hotel-register than a newspaper or than the idea of advertising in the fields and on the fences and the rocks that are along the lines of our railroads and highways. If the plaintiff did substantially the same thing as had been done before, then his patent is good for nothing. Taking an old device and simply and only putting it to a new use is not patentable. But when a new combination is made, bringing about a new result, as here if it be true, bringing to the eye of the strangers that visit the town or city where it is kept, by a new combination, a new result is produced in communicating to them information and furnishing the advertisers with a chance and probability that they may thereby obtain patronage, then it becomes patentable. It would be a new structure, a new arrangement of the material for advertising, a new mode for bringing things together that are sought to be brought together for a useful purpose. Now that, gentlemen, is all that I deem it necessary to say in regard to the legal questions involved in the claim of the plaintiff, on the one hand, to maintain his patent and the allegations and claims that are set up by way of defence. If, under these views, you find that this plaintiff is entitled to maintain the right proposed to be secured to him by his patent, and that the defendants have infringed those rights, you then come to the redress to which the plaintiff is entitled. And on that subject the rule is entirely specific. He is entitled to recover the actual damages which he has sustained. I have had occasion to intimate to the counsel in the progress of the trial, in ruling upon certain questions raised, that the use of the patented invention without the consent of the patentee is not justified by any innocence of design on the part of the defendants, and the plaintiff does not come here to punish. He comes here to say that his rights have been violated, and to ask at the hands of the jury that he be indemnified for his loss. There are a great many instances in which men are bound to make that indemnity when they themselves have been guilty of no degree of moral turpitude. They have been incautious. They have suffered themselves to use what they had no right to use, and they must look for indemnity in their turn, for they have no one to look to but to those by whose procurement they were led into this trespass of the party's right. So that you have a single and precise rule by which to be governed. What loss has fallen upon the plaintiff by the use made by the defendant of the alleged infringing book? For the ascertainment of that you have to inquire not merely how much profit the plaintiff would have made if he had sold the book which he used. It is not necessarily the profit which the plaintiff might have made if he had sold the book which concludes the inquiry. One step is to be gained before that point is reached, and that is a conviction on your minds that, if the defendants had not used the book, the plaintiff would have made that profit. While on that subject we have this evidence, that at one time—how long a time I don't think the witness states—books of this description were made, as I think the witness stated, under this patent, and were used in Batavia; and he testified that such a book was used at this identical hotel.

Now, gentlemen, as men of good sense and judgment, you may consider whether it is probable that, if these books had not been gotten up and placed in this hotel, and used by these defendants, the plaintiff would and could have introduced his own book, and obtained in the ordinary course of his business, advertisements, and had the benefit which the party who did get up that book and did place it in that hotel probably gained. If you conclude, in view of the fact that this is a book in some general use, in view of the evidence that at Batavia it had been in use, and that in this hotel it had been in use; if you conclude that, had not these defendants received and used the books in question, the plaintiff would have had the benefit of that amount of profit by introducing there and in that hotel his own book; then, gentlemen, the amount of profit which he would so have realized is the just measure of his damages.

It appears by the evidence that two of the books were used there; the first book completely filled, and the second book used until the defendants received notice that it was a patented article; whereupon they discontinued its use. You will then have to consider in connection with those circumstances the complete use of the one book and the probability which I have suggested to you, that, had not that book been used, the plaintiff might have introduced one of his own, and then the partial use of the second, which involves, as you will perceive, the conclusion of all the advertisements and the reception of all the money, and just as effectually closing the door to the plaintiff to obtain those advertisements, whether the book was used one month or twelve, unless you conclude that he might have induced the same advertisers to pay him the same amount to insert their advertisements in his book and let the hotel take the book at an earlier date.

Now, gentlemen, I have said a good deal about what may seem to be a matter of no great importance. The amount of damages are small, must be small, in reference to the expenses and labor of litigation and the time of court, jury, witnesses, and parties spent in the investigation; but what is right to these parties must be done, whatever the result may be in that regard. The fact

that the defendants discontinued the use of the book is evidence that they were not intentionally setting the plaintiff at defiance or intentionally doing a wrong. If you find for the plaintiff it is for you to find the actual damages which he has sustained, and not damages designed as punishment to the defendants.

Mr. Macomber. I ask your honor to charge the jury that from the peculiar nature of this book, the peculiar relation which the landlord of the hotel sustained, having no interest in the advertisements, that he cannot, in a legal sense, be said to be the user of the book; that the persons using the book are, primarily, the advertisers through the means of the advertising agents who get up the book.

The Court. I cannot charge the first proposition, but must charge the contrary. The concluding sentence I do not regard as of any relevancy.

Mr. Macomber. I ask your honor also to charge the jury that the plaintiff's patent is not a combination, but is limited in its scope to the advertisements when they are on the page containing the names.

The Court. I have said what I deem to be proper on that subject. I decline to say further to the jury in that regard.

Mr. Macomber. I also ask your honor to charge the jury that, if the patent can be sustained at all, it must be under the act of 1861, as a patent for a design.

The Court. I decline.

Mr. Macomber. I desire to except to that portion of your honor's charge in which you instruct the jury that the patent was for a structure—in substance, that the patent was for a structure in the nature of a piece of mechanism, combining a means of advertising with a page for the insertion of names and dates. I also except to that portion of your honor's charge in which you substantially state to the jury that the method of advertising in directories in the various forms proved was not substantially the same mode.

The Court. I did not so instruct them.

Mr. Macomber. Then, of course, the exception goes for nothing. I understood your honor to express at least an opinion, and I desire an exception on that point.

The Court. If you insist upon that, sir, I will send for the jury and tell them that I did not express such an opinion or so instruct them. If you think the jury misunderstood me, as you seem to have done, I will send for them.

Mr. Macomber. No; I would not have your honor do that. Your honor will give me the benefit of an exception to your refusal to charge as requested.

The Court. I have noted them.

The jury rendered a verdict in favor of the plaintiff, and assessed his damages at $50.

[For other cases involving this patent, see note to Hawes v. Antisdel, Case No. 6,234.]

HAWK (PARKER v.). See Case No. 10,737.

HAWKE, The (UNITED STATES v.). See Case No. 15,331.

HAWKEYE STEEL BAR FENCE CO. (WASHBURN & M. MANUF'G CO. v.). See Case No. 17,218.

HAWKINS, In re. See Case No. 3,700.

Case No. 6,243.

HAWKINS v. COX et al.

[2 Cranch, C. C. 173.] [1]

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

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—ILLEGAL CONSIDERATION—LOTTERY.

1. The plaintiff cannot maintain an action upon a note given for the purchase of a ticket in a lottery prohibited by law.

2. A lottery for the sale of lots or lands, is within the prohibition of the Maryland act of 1792 (chapter 58).

[Cited in Smith v. Chesapeake & Ohio Canal Co., Case No. 13,024.]

Assumpsit upon a note given for the purchase of a ticket in a lottery, the prizes in which consisted of lands and lots.

Mr. Jones and Mr. Wallach, for defendant.

The note was given for an illegal consideration, namely, a ticket in a lottery prohibited by the act of Maryland of 1792 (chapter 58), the first section of which makes it unlawful for any person within the state, without the permission of the legislature, to propose to the public any scheme of a lottery to be drawn within the state, or of a lottery for the disposal of any kind of property within the state, under the penalty of £500. And by the second section, if any person shall sell, or offer to sell, within the state, any ticket in any lottery, not authorized by the legislature of the state, he shall forfeit £10 for every ticket so sold, or offered for sale. This act was adopted as the law of this part of the District of Columbia, by the act of congress of the 27th of February, 1801 [2 Stat. 103].

Mr. Law, contra, contended—

1. That this was not such a lottery as was contemplated by the first section of the act.

2. That the second section of the act does not prohibit the sale of tickets in any lottery not prohibited by the first section.

3. It does not make void the contract or the note.

4. The statute is not applicable to this district. A lottery now authorized by the legislature of Maryland would not be a lawful lottery here. Nor would a lottery now prohibited by the legislature of Maryland, be, for that reason, an unlawful lottery here.

THE COURT (nem. con.) was of opinion that the lottery was within the Maryland

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

statute of 1792 (chapter 58), which was adopted by the act of congress of the 27th of February, 1801, with the other laws of Maryland, and that the consideration of the note being unlawful, the plaintiff was not entitled to recover. Judgment for the defendants, on the case stated.

HAWKINS v. FIRST NAT. BANK OF HASTINGS. See Case No. 6,244.

Case No. 6,244.

HAWKINS v. HASTINGS BANK.

[1 Dill. 462;[1] 2 N. B. R. 337 (Quarto, 108).]

District Court, D. Minnesota. 1870.

BANKRUPTCY—CHATTEL MORTGAGE—FRAUD.

1. The statutes of Minnesota do not require a mortgage of chattels to be under seal, and such a mortgage executed under seal by one partner in the name of the firm, for money advanced to the firm, the other partner having subsequently given his parol assent thereto, is valid, and binds the firm.

2. A clause in a chattel mortgage by which the mortgagors were constituted the agents of the mortgagees, to dispose of the goods, and account for their proceeds, with no right or power to sell for their own use, is not inconsistent with the statutes of the state of Minnesota (Rev. St. p. 326, § 1), and does not render the mortgage fraudulent on its face.

[Cited in Johnson v. Patterson, Case No. 7,403.]

The plaintiff is the assignee in bankruptcy of the Messrs. Sproat; the defendant is the First National Bank of Hastings. The controversy concerns the validity of a certain chattel mortgage, made by the bankrupts (under the circumstances mentioned in the opinion of the court) to the bank.

C. K. Davis, for plaintiff.

L. Van Slyck, for defendant.

NELSON, District Judge. The mortgage is fair and valid upon its face. It is executed under seal by one partner, in the name of the firm, the copartner having subsequently given his parol assent thereto. There is nothing in the statutes of this state requiring such an instrument to be under seal, and the fact that a seal is attached, does not change its character or effect. 1 Metc. [Mass.] 515, and cases cited. Indeed, if a seal was necessary to the validity of such an instrument, we are satisfied that the rigid common law rule has been relaxed, and the doctrine fully sustained by modern decisions, that one partner can bind the firm by an instrument in writing under seal, when both are interested in the transaction, if there is a previous parol authority, or a subsequent parol assent to the act. 4 Metc. [Mass.] 548; Smith v. Kerr, 3 Comst. [3 N. Y.] 144; 4 Term R. 313; Skinner v. Dayton, 19 Johns. 513; 11 Pick. 400.

The consideration ($6,000) was advanced at the time the mortgage was executed, and credit was given upon the bank check book for the amount, less interest and stamps, and although some past due paper, held by the bank against the mortgagors and their father, was paid, I do not think there was anything in this particular branch of the transaction to indicate unfairness or dishonesty. The conditions of the mortgage are a little out of the ordinary terms of such instruments, but as the consideration was a present one, and the money received was immediately appropriated to the payment of actual indebtedness to other creditors, to an amount nearly equal to the consideration expressed, the instrument is not necessarily void on that account. The stipulations which are pressed by counsel, as indicating fraud per se, are as follows: "And it is further agreed between the parties hereto, that until said sum of $6,000 and interest shall be paid, the said parties of the first part shall remain in possession of said goods, as the agents of the party of the second part, and shall well and truly account to the said party of the second part, their assigns, monthly, for all sales made by them, of the aforesaid property, hereby mortgaged, until said sum of $6,000 shall be fully paid and satisfied, * * * the intention of the parties to this mortgage being that the sale of the property herein specified be absolute to the said party of the second part, until said indebtedness shall be fully paid, with interest; said parties of the first part only acting as the agents of the said party of the second part, in disposing of the goods hereinbefore mentioned, and accounting for the proceeds thereof, until said indebtedness is paid." These conditions do not render the mortgage void upon its face; if carried out in good faith, they certainly would not hinder, delay, or defraud creditors. The object, as expressed, was to subject the mortgaged property to the payment of the loan. This is the legitimate purpose of securities of this character, and as the mortgagors had the control of the stock of goods, there being no actual and continued change of possession, they could only rightfully dispose of it for the purpose of liquidating the secured debts. They could not sell for their own use; this would have been a fraud upon creditors, and if such permission was given by the terms of the instrument, or agreed and consented to by parol, the mortgage would be void. 4 Minn. 533 [Gil. 418]; 17 Wend. 492; 9 N. Y. 213; 13 N. Y. 577; 19 N. Y. 123; 2 Hill. Mortg. and cases cited. The possession of the mortgagors is explained by the very terms of the instrument, and is not inconsistent with good faith, within the meaning of section 1, p. 326, Rev. St. Minn. tit. "Fraudulent Conveyances and Chattel Mortgages." The mortgagees, however, must be bound by the agreement which they have entered into. They have created the mortgagors their agents, and authorized them to sell the mortgaged property, and account monthly for the

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

proceeds, until the debt is paid. So far as creditors are concerned, the relation of principal and agent must be sustained. The acts of the mortgagors, within the scope of their agency, must be regarded as the acts of the mortgagees, and proceeds of all sales made must be credited pro tanto towards extinguishing the debt. 28 N. Y. 360. The remaining property, or its proceeds, must go into the hands of the assignee. The books of the bank showed that the deposits made by the mortgagors, after the execution of the mortgage, and before they were closed up, exclusive of the six thousand dollars loan which had been placed to their credit, amounted to five thousand two hundred and fifty-one dollars and sixty-two cents; and although there is no direct testimony that these deposits were from the proceeds of the sales of this stock of goods, I think the presumption is strong that such was the case, as they were made in small amounts, from day to day, running through a period of nearly two months. However, the mortgage debt, in my opinion, would be extinguished, provided the sales, during the time the mortgagors were in possession, amounted to the debt and interest.

We shall refer the matter to a master and examiner, to take an account and ascertain the amount of sales, giving the mortgagee, in his report, a decree for the deficiency, if any should be found. Ordered accordingly.

[NOTE. This case was appealed to the circuit court, where the appeal was dismissed because the appellant had not complied with section 8 of the bankrupt act and general order No. 26. Case No. 6,245.]

Case No. 6,245.

HAWKINS v. HASTINGS NAT. BANK.

[1 Dill. 453.] [1]

Circuit Court, D. Minnesota. 1870.

BANKRUPTCY—APPEALS IN EQUITY CASES—HOW TAKEN—PRACTICE.

Appeals, in equity cases, under the bankrupt act [of 1867 (14 Stat. 517)], from the district to the circuit court, are regulated by section 8, and general order 26 in bankruptcy, framed by the supreme court; and where, in an equity case, the record did not show that an appeal was claimed, or notice given, and contained no bond, it was dismissed by the circuit court.

This was an appeal from the district court. In that court a bill was brought by the complainant, as assignee in bankruptcy, to set aside a mortgage made by the bankrupt to the respondent, and for an injunction to prevent proceedings under the mortgage. [Case No. 6,244.] The ground of the bill was that the mortgage is void because made in fraud of the bankrupt act. A motion was made to dismiss the appeal from the decree of the district court; and the general question was how cases of this kind should come from the district court to this court; and if by appeal, what steps are necessary. Section 8 of the bankrupt act provides that "appeals may be taken from the district to the circuit court, in all cases in equity, but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice thereof given to the clerk of the district court, to be entered with the record of the proceedings, and also * * * to the defeated party in equity within ten days after the entry of the decree or decision appealed from." As to appeals generally, see section 22 of the judiciary act, as modified by the act of March 3, 1803 (2 Stat. 244), these being the leading statutes respecting appeals in equity in the courts of the United States. The 26th general order in bankruptcy, framed by the supreme court, prescribes that "appeals in equity from the district to the circuit court shall be regulated by the rules governing appeals in equity in the courts of the United States," &c.

C. K. Davis, for complainant.

Smith & Van Slyck, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice (orally). Alluding to section 8 of the bankrupt act, part of which is quoted above, he observed, in substance, that it provided for a writ of error and for two classes of appeals. One class was appeals in equity causes proper, of which the district court was given jurisdiction in broad and plain terms by the first and second sections of the act. The other class of appeals related to controversies between creditors and assignees in relation to the allowance and rejection of claims, the procedure on appeal, in this class, when taken by the creditor being further regulated by section 24. This provision as to appeal is anomalous, since the general legislation of congress discriminates between writs of error and appeals; but within this class the present cause does not fall.

The bill filed by the assignee makes a case confessedly of equity cognizance, and comes within the class of appeals first mentioned.

Section 8 of the bankrupt act and general order 26 apply to it. Such a case must come into this court by appeal, and not by writ of error, and the appeal must be claimed and notice given as in other cases. In this case, the record does not show that any appeal was claimed or allowed, or any notice or security given. The motion to dismiss the appeal is therefore sustained. Motion sustained.

NOTE. Construction of section 2 and section 8 of bankrupt act: Ruddick v. Billings [Case No. 12,110], and note of reporter; Morgan v. Thornhill, 11 Wall. [78 U. S.] 65; Ex parte Alexander [Case No. 160], decided by Chase, C. J.; Langley v. Perry [Id. 8,067], decided by Swayne, J.; York's Case [Id. 18,139]; In re Hall [Id. 5,920.]

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

HAWKINS (LA BAW v.). See Cases Nos. 7,960 and 7,961.

HAWKINS (OLCOTT v.). See Case No. 10,480.

HAWKS (STARLING v.). See Case No. 13,311.

Case No. 6,246.

HAWKINS et al. v. THOMPSON.

[2 McLean, 111.] [1]

Circuit Court, D. Illinois. June Term, 1840.

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE — RELEASE OF INDORSER.

A release of a remote indorser by the holder of a note, is a discharge of the subsequent indorsers.

[This was an action at law by Hawkins and Davis against Samuel Thompson.]

Mr. Davis, for plaintiff.

Mr. Logan, for defendant.

BY THE COURT. This is an action of assumpsit brought against the defendant as assignor of a note given by John Acheltree to Francis B. Thompson, for seven hundred dollars, dated the 30th February, 1837, and payable the 15th May, 1838. The note was assigned by the payer to Samuel Thompson, the defendant, the 11th March, 1837, and by him to the plaintiffs the 29th January, 1838. The issue of nonassumpsit was filed, and notice that the following release would be given in evidence: "St. Louis, February 28th, 1838. Received of Francis B. Thompson, per the hands of his attorneys; one note on John Acheltree, of Maysville, Clay county, Illinois, for seven hundred dollars, due 15th May, 1838, in full of all claims which we have against him to this date; and we hereby release him from all such claims and demands, and from all responsibilities in consideration of the assignment of said note." Signed by the plaintiffs, by their agent. This being a negotiable instrument, the present plaintiffs, being assignees, had a right to sue the present defendant, their immediate indorser, or the payee of the note as a remote indorser. But the payee of the note was released by the plaintiffs from all responsibility under the assignment. And the question is raised whether this release does not, also, go to discharge the present defendant.

In the case of English v. Darley, 2 Bos. & P. 62, Lord Eldon said, "Had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser." And it has been declared that any credit given by the holder of a bill to the drawer, acceptor, indorser or promissor, is a consent to hold the bill upon their responsibility; and that the holder has no remedy afterwards but against them, where the circumstances of the transaction have rendered them liable absolutely. Shaw v. Grifith, 7 Mass. 494. In the case of Smith v. Knox, 3 Esp. 46, 48, Lord Eldon remarked, "It is said that the holder may discharge any of the indorsers after taking them in execution, and yet have recourse to the others. I doubt the law as stated so generally. I am disposed to be of opinion that if the holder discharge a prior indorser, he will find it difficult to recover against a subsequent one." And this is the doctrine in the case of Lewis v. Jones, 4 Barn. & C. 506, 515, note, where it is expressly said that the releasing an acceptor or other prior party to a bill or note would discharge a subsequent party. This is fully established in a great number of cases. Stewart v. Eden, 2 Caines, 121; 6 Dowl. & R. 567; 8 East, 576. Time given to a drawer, or prior indorser, would discharge all subsequent parties. But an acceptor or maker of a note can only be discharged by payment. All others are deemed sureties. 10 Barn. & C. 584. Chancellor Kent, in treating on this subject (3 Comm. 112), says, "The holder may give time to an immediate indorser, and proceed against the parties behind him. A prior party to the bill is not discharged by a release of a subsequent party. But the holder cannot reverse this order, and compound with prior parties without the consent of subsequent ones, for it varies the rights of the subsequent parties and discharges them." Sargent v. Appleton, 6 Mass. 85; Clopper v. Union Bank of Maryland, 7 Har. & J. 100.

From the above authorities it is clear that the release of a prior indorser, by the holder of a bill, discharges all subsequent indorsers. The release in this case was to the payee of the note, who was the first indorser, and the suit is brought against his indorsee, who assigned the note to the plaintiffs. It does not appear whether or not the defendant was an accommodation indorser; if he were, the injustice to him would be flagrant, by attempting to recover the amount of the note from him, after releasing the first indorser. As by the release the first indorser was discharged "from all responsibility in consideration of the assignment of said note," we think the second indorser is also discharged, and that the plaintiff cannot sustain his action, &c. Judgment.

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

Case No. 6,247.

HAWKINS v. WILLBANK.

[4 Wash. C. C. 285.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

PRACTICE—CONTINUANCE—SECURITY FOR COSTS.

If the defendant do not demand security for costs within a reasonable time, it shall not be a

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

ground for a continuance, that such security has not been given when the cause is called for trial.

[See Bennett v. Bennett, Case No. 1,317.]

When this cause was brought up for trial, the plaintiff's counsel informed the court, that he had but this day received from the defendant notice that security for the costs was demanded, which he could not give, as his client lived remote from Philadelphia.

BY THE COURT. A demand of security for costs, at so late a moment, ought not to delay the trial of the cause. Reasonable notice ought, in all cases, to be given. The cause ordered for trial.

Case No. 6,248.

HAWLEY v. BAGLEY.

PATENTS—DATE NECESSARY ON PATENTED ARTICLES.

1. It is necessary that each article should be stamped with the day of the month as well as the year, but if this is done it is sufficient, even if the word "patented" is abbreviated.

2. To entitle the plaintiff to recover, he must allege and prove facts showing that he has a title to recover, and the proof must correspond with the allegations. Where the declaration charged the defendant with having sold an "extension pen-holder," while the proof showed the patent to be for an "improvement in pens and pencil cases." *Held*, that the plaintiff could not recover.

3. In an action qui tam, under section 6 of the act of 1842 [5 Stat. 544], for a penalty, the proof must correspond with the allegations of the declaration. Where the declaration charged the defendant with having sold an "extension pen-holder" without stamping on it the date of the patent, while the proof showed the patent to be for an "improvement in pens and pencil cases." *Held*, that the plaintiff could not recover.

[Cited in Law, Dig. 584, 588, and 675, to the points as stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 6,249.

HAWLEY v. KEPP.

[2 Flip. 177.] [1]

Circuit Court, W. D. Michigan. April 13, 1878.

JURISDICTION OF CIRCUIT COURT — CONSTRUCTION OF ACT OF 1875, AND 11TH SECTION OF JUDICIARY ACT — GENERAL RULE AS TO NEGOTIABLE PROMISSORY NOTES—EXCEPTION TO SUCH RULE.

1. The mere fact that the subject-matter of a suit has been transferred for the purpose of giving jurisdiction to this court, will not defeat jurisdiction, provided there has been a bona fide sale and transfer by which the transferee becomes the real owner and thereby the party to the suit.

2. It is a general rule that suit may be maintained in the name of a person who is the holder of a negotiable promissory note, though he has no interest therein, provided it is brought for the benefit and by directon of the real owner.

3. But such rule cannot be applied when the question of jurisdiction is to be determined under the act of congress in question.

[This was a suit at law by George A. Hawley against John Kepp. Defendant pleaded to the jurisdiction, and plaintiff demurred.]

McLaren & Jennings, for plaintiff.
Mr. Hoyt, for defendant.

WITHEY, District Judge. Suit by plaintiff, a citizen of Illinois, against defendant, a citizen of Michigan, upon three promissory notes executed by Wm. Markus & Co., of Muskegon, in this state, payable to the order of defendant at the same place, and by him endorsed and delivered to Kauffman, who endorsed and delivered them to Ives & Son, of Detroit, and who, it is alleged, endorsed and delivered the notes to plaintiff. Defendant pleaded the general issue, and gave notice of special defense. He also interposed a plea in abatement, setting up that all the makers and endorsers of the notes are citizens of Michigan; that Ives & Son, while holders of the notes, brought suit on them in the state court at Detroit against the makers and endorsers, Kauffman and defendant, and obtained judgment for the full sum of the notes with interest. That after such judgment the suit was discontinued as to defendant Kepp therein, and later an order was obtained by Ives & Son granting them leave to withdraw the notes from the files; and still later they obtained an order vacating the judgment as to all the defendants therein except Kauffman. Thereafter this suit was brought by plaintiff, to whom Ives & Son endorsed and delivered the notes subsequent to the aforesaid proceedings. That plaintiff is not a bona fide holder and for a valuable consideration; has no property or interest in said notes or their proceeds, but his name is being used for the sole purpose of enabling Ives & Son to bring suit in this court, who are the real owners of the notes, and for whose interest and behalf this suit is prosecuted. To the plea in abatement a general demurrer has been interposed.

The question is one of proper parties to give this court jurisdiction. Prior to the act of March 3, 1875 [18 Stat. 470], defining the jurisdiction of the circuit courts of the United States, it was several times held by the supreme court that where the assignor of the subject-matter of the suit is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name used merely for the purposes of jurisdiction, the suit is then a controversy between the former or real plaintiff and the defendant, notwithstanding the assignment or transfer, and not between the plaintiff in the record and the defendant. Barney v. Baltimore City, 6 Wall. [73 U. S.] 280; Smith v. Kernochen, 7 How. [48 U. S.] 216, and other cases therein cited. If the rule applied before the act of 1875 is to govern, then, under the facts ad-

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

mitted by the demurrer, Ives & Son are real plaintiffs, and as they and defendant are citizens of the same state, this court has no jurisdiction. Ives & Son endorsed and delivered the notes after due to plaintiff without consideration, and for the sole purpose of enabling suit to be brought in this court, the interest in the notes and their proceeds remaining in Ives & Son. The law of 1875 retains, in substance, the provision of the 11th section of the judiciary act [of 1789 (1 Stat. 78)], that the matter in dispute must exceed the sum or value of $500, and that the suit must be "between a citizen of the state where it is brought and a citizen of another state." The change in language in the law of 1875 is this: It must be a suit "in which there shall be a controversy between citizens of different states." Under the facts stated in the plea in abatement, it is manifest the controversy is between Ives & Son and defendant, and not between the nominal plaintiff and defendant. But it is said the law of 1875 expressly excepts from the operation of the clause quoted above, "promissory notes negotiable by the law merchant, and bills of exchange." The language is: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover them if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

Is this case within the exception? It would be if the suit was one in which there is a controversy between citizens of different states; that is fundamental. In suits of this nature two things are absolutely necessary to give jurisdiction to this court, no matter what other considerations may be involved: 1. The matter in dispute must exceed five hundred dollars exclusive of costs. 2. The subject-matter of the suit must involve a controversy between citizens of different states. One of the things are wanting in this suit, for the controversy is really between Ives & Son and defendant, both citizens of Michigan.

The mere fact that the subject-matter of a suit has been transferred for the purpose of giving jurisdiction to this court, will not defeat jurisdiction, provided there has been a bona fide sale and transfer, by which the transferee becomes the real owner and thereby the party to the suit. Barney v. Baltimore City [supra]. Again, it is a general rule that suit may be maintained in the name of a person who is holder of a negotiable promissory note, though he has no interest therein, provided it is brought for the benefit and by direction of the real owner. 15 Wend. 640; 11 Wend. 27. But such rule cannot be applied when the question of jurisdiction is to be determined under the act of congress in question.

Demurrer overruled, and judgment on the plea in abatement, dismissing the cause for want of jurisdiction.

Case No. 6,250.

HAWLEY v. MITCHELL et al.

[Holmes, 42; 4 Fish. Pat. Cas. 388; 1 O. G. 306.][1]

Circuit Court, D. Massachusetts. March, 1871.[2]

PATENTS — PURCHASER FROM LICENSEE TO MAKE AND USE—RIGHTS OF SUCH PURCHASER—EXTENSION OF PATENT.

The purchaser of a patented machine from the grantee of the exclusive right to make and use, and license others to use, such machines within a specified territory during the original term of the patent only, acquires by his purchase no right as against the patentee or his assigns, to continue the use of the machine after an extension of the patent.

[Cited in Hill v. Whitcomb, Case No. 6,502; American Cotton-Tie Co. v. Simmons, Id. 293; American Cotton Tie Supply Co. v. Bullard, Id. 294; Webster v. Ellsworth, 36 Fed. 328; Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 25.]

[Cited in Burke v. Partridge, 58 N. H. 354.]

[See note at end of case.]

J. E. Maynadier, for complainant.

F. A. Brooks, for defendants.

[3] [This was a suit in equity for an injunction and an account brought against Eben Mitchell, Charles Butters, and Henry Rust, copartners under the firm-name of Mitchell, Butters & Rust, by the complainant Robert B. Hawley, assignee by mesne assignment, under date of March 19, 1870, of the extended term of letters patent No. 9,700, for certain new and useful improvements in machinery for sizing and felting hats, granted to James S. Taylor on the 3d day of May, 1853. The defendants were the successors in business of the firm of How & Mitchell; and it was admitted at the hearing that the machine complained of had been purchased by How & Mitchell of one A. L. Bayley in the year 1864, being made by him under a joint license from the patentee Taylor and one Sturdevant, who at the time when the license was executed owned an undivided interest in the patent. This license gave Bayley "the exclusive right to make and use, and to license to others the right to use," the patented machine in the states of New Hampshire and Massachusetts during the remainder of the original term of the patent, but provided that said Bayley should not "in any way or form dispose of, sell, or grant any license to use the said machines beyond the 3d day of May, 1867." The sale of the machines was accompanied with a written license from Bayley to How & Mitchell, giving them "the right to run and use" the same in the town of Haverhill, Massachusetts.

[It was conceded by complainant that

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

[2] [Affirmed in 16 Wall. (83 U. S.) 544.]

[3] [From 1 O. G. 306.]

How & Mitchell acquired all the rights in the machines in question which it was in the power of Bayley to confer; but it was claimed that as the license gave Bayley no power to sell machines, and expressly limited to the original term of the patent the license to use which he was empowered to grant to others, he was absolutely powerless to vest in any person such a right to any of the machines as would authorize that person to continue its use under the renewed term; and the general proposition was urged that under the renewed term of a patent a machine can lawfully be used, without license from the owner of such renewed term, only when the machine has passed "outside of the monopoly," and become during the original term like personal property of any kind—that is to say, when the patentee has, during the original term parted with his whole monopoly as to the particular machine, and that to this end it is essential that the purchaser acquired not only the right to use but the right to sell. On the other hand, it was contended that the limitation in the grant to Bayley did not affect defendants' right to continue the use of the old machines, since this right was absolutely independent of the intention of the patentee, being reserved by force of the law relating to extensions, the law itself, as interpreted by the courts, declaring it to be the right of any person in the lawful use of a patented machine at the expiration of the original term of the patent, to continue such use under the extension. It was denied by the counsel for the complainant that the cases of Wilson v. Rousseau [4 How. (45 U. S.) 646], Chaffee v. Boston Belting Co. [22 How. (63 U. S.) 217] and the other cases cited in support of this doctrine, were in point, since in all these cases the various parties defendant had possessed an absolute ownership in the machines complained of, which took them out of the monopoly and removed them from the protection of the patent laws.] [3]

SHEPLEY, Circuit Judge. Letters-patent of the United States were duly issued to James S. Taylor, on the third day of May, 1853, for new and useful improvements in machinery for sizing and felting hats, which letters-patent were afterwards renewed and extended according to law, for the further term of seven years from the third day of May, 1867.

In November, 1860, during the term of the original patent, the patentee conveyed to Abner L. Bayley "the exclusive right to make and use, and to license to others the right to use, the said machines in the states of Massachusetts and New Hampshire, and in no other place or places, during the remainder of the original term of said letters-patent. Provided, that the said Bayley shall not in any way or form dispose of, sell, or grant any license to use the said machines beyond the third day of May, A. D. 1867."

The conveyance to Bayley contains this further provision:—"It is further agreed and the right is hereby granted to the said Bayley to use any and all improvements that we may make upon the said machines, with the free and unrestrained right to use the same upon any and all machines that he may use or cause to be used in the said states of Massachusetts and New Hampshire. Should the said letters-patent be extended beyond the third day of May, A. D. 1867, then it is understood and agreed that the said Bayley shall have the right to control the same in the same states of Massachusetts and New Hampshire: provided, that he shall pay to the said Sturdevant and Taylor, or their heirs or assigns, a fair and reasonable compensation for the same, or on terms as favorable as may be offered by any other person or party."

On the eighteenth day of March, 1864, Bayley sold to How & Mitchell two sets (four machines), with the right to run, and on the same day gave them a written license to run and use two sets (four machines), for felting hats, in the town of Haverhill, under Taylor's patent bearing date May 3, 1853. Mitchell, one of the defendants, was a partner in the firm of How & Mitchell; and the other two defendants, Butters & Rust, with Mitchell, are the successors in business of the firm of How & Mitchell, and at the time of filing the bill were using and operating the same four machines in the same place and in the same manner, as before the extension of the term of the letters-patent.

It has been decided in numerous cases, that where a machine is the subject of letters-patent, and is in lawful use by any party at the expiration of the original term of the patent, such party may continue to use the identical machine as long as it shall last, notwithstanding the extension of such letters-patent beyond the original term.

Have the defendants in this case acquired such a title to these machines that the machines themselves have passed outside of the monopoly, and the defendants have acquired the right to use them without regard to the patent, or after the expiration of the original term? This depends entirely upon the question, whether Bayley, their grantor, had any such rights; for he clearly could not convey any greater rights than he possessed. If he was a territorial assignee of the patent for a specified territory, the machines sold by him passed out of the monopoly: the royalty of the patentee had been paid, and the property sold passed from under the protection of the patent laws of the United States, and was subject, like other property, only to the operation of the laws of the state. Bloomer v. McQuewan, 14

[3] [From 1 O. G. 306.]

How. [55 U. S.] 549; Wilson v. Rousseau, 4 How. [45 U. S.] 646; Chaffee v. Boston Belting Co., 22 How. [63 U. S.] 217; Goodyear v. Beverly Rubber Co. [Case No. 5,557]. The same principle has been recently affirmed in this court in the case of Adams v. Burks [Id. 50], at this term of the court.

No words of limitation, however clearly expressed, confining an assignee's right to the original term, will have any effect to deprive the assignee or his assigns of the right to use, during the extended term of the patent, machines lawfully constructed and used by them during the original term. But this right applies only to machines which have passed outside of the monopoly by a lawful sale of the whole monopoly in the particular machine during the original term.

Bayley was only a licensee, and not an assignee for a particular territory of the whole monopoly of the patent. He never acquired the right to sell a single machine. By the terms of the license to him to make and use, and to license to others the right to use, the patented machines, it is expressly provided that he shall not, in any way or form, dispose of any license to use the machines beyond the third day of May, 1867. He was only a licensee. His title was carefully restricted. He had no power to sell a machine so as to take it out of the monopoly of the patent. Had he been a territorial assignee and possessed the power to sell the patented machines, the purchaser would have acquired a title which would have been outside of the monopoly, and would have acquired the absolute right to use the machines during the extended term; and this notwithstanding any covenants Bayley might have made not to convey such a title. Under such circumstances, the patentee must have sought his remedy against Bayley on his covenants. An examination of this contract shows clearly that it was carefully drawn by the parties to guard against such a result. Nothing can be more evident than the purpose expressed in this instrument, to put it out of the power of Bayley to give any title to the machines. The very act of sale was a violation of the contract and an act of infringement. The purchasers were bound to examine the title of their grantor. The most cursory examination of the nature of his interest would have shown them he had no right to do more than license them to use the machines, and that not beyond the third day of May, 1867. Decree for complainant.

[NOTE. Upon an appeal by the defendants to the supreme court this decree was affirmed in an opinion by Mr. Justice Clifford. 16 Wall. (83 U. S.) 544. It was held that the grantor under whom the defendants claimed never acquired the right to sell the machines and give their purchasers the right to use the same beyond the term of the original patent. Notice of his title to the purchaser is not required, as the law imposes the risk upon him, as against the real owner, whether the title of the seller is such that he can make a valid conveyance. "Nemo dat quod non habet." The terms of the license were sufficient to put the purchasers upon inquiry. The court called attention to the distinction between the grant of the right to make and vend the patented machine, and the grant of the right to use it, citing Bloomer v. McQuewan, 14 How. (55 U. S.) 539.]

HAWLEY (MOLSON v.). See Case No. 9,702.

Case No. 6,251.

HAWORTH v. NYSTROM.

[8 Wkly. Notes Cas. 204.]

Circuit Court, E. D. Pennsylvania. May 13, 1879.

COPYRIGHT—JURISDICTION.

Where the question of copyright is merely incidental to a dispute about a contract for the original composition of a literary work, the United States courts will not entertain jurisdiction.

Sur demurrer to bill. Bill in equity, filed by Haworth against Nystrom, both citizens of Pennsylvania, averring that the defendant, who was a civil engineer, had contracted with the complainant to prepare and furnish a report upon the Philadelphia water supply, the MS. to be signed by the defendant and two associates, and to be delivered "ready for printing;" that the consideration agreed upon for such service was $600, all of which, except a balance of $6.60, had been paid during the preparation of the report; that when the report was virtually finished, and nearly all printed, the defendant delivered to plaintiff an incomplete proof, with a bill for $25.00, less the amount already paid, for the services of himself and his associates, this claim being founded upon an alleged parol alteration of the contract, which alteration plaintiff denied; that upon the complainant's refusal to pay the increased demand the defendant, Nystrom, without the knowledge of the plaintiff, copyrighted the report in his, Nystrom's, name, and thereby prevented the complainant from using the same, although the latter was equitably entitled to the copyright; and that the defendant admitted the title to said report to be in the complainant, and his willingness to assign the copyright to the latter upon payment of the balance claimed. The bill prayed that the defendant be enjoined from publishing the report or assigning the copyright to any other person than complainant. Demurrer for want of jurisdiction.

Mr. Williams, with him R. P. White, for the demurrer.

The question, though nominally about a copyright, is really whether the original contract was changed. The demurrer admits the facts stated, but not the legal inference that the right to an assignment of the copyright is in complainant. The facts admitted show merely a dispute about a contract, and jurisdiction cannot be given by introducing

the collateral fact that a copyright was taken out.

A. Sidney Biddle, contra.

The demurrer admits the facts, and among them the allegation that the original contract was the actual subsisting one, for the bill denies any alteration in the terms of that agreement. Admits this, and the necessary inference is that the right to copyright was Haworth's. It was just as much his, on these admitted facts, as if, after delivery and payment in full, a stranger had stolen a copy and had it copyrighted, falsely pretending that the work was his property. Would this court have entertained jurisdiction in such a case on a bill filed by the true owner? If it would, it should do so here. The fact of a dispute about the terms of the contract is immaterial, for the pleadings show an admission of the true contract by the defendant, and upon those pleadings Nystrom should be regarded as an utter stranger who had purloined a copy and copyrighted it without color of title.

BUTLER, District Judge. The only case set out in the bill, as we understand it is that predicated on the defendant's failure to perform his contract therein stated, and as both parties reside in Pennsylvania, this court has no jurisdiction of that.

The argument that the plaintiff may be regarded as standing on the copyright named as owner thereof, seeking relief against the defendant for infringement, is very ingenious, but cannot be accepted as sound. The demurrer must be sustained and the bill dismissed, without prejudice.

HAWORTH (PARKER v.). See Case No. 10,738.

HAWS (HAMMOND v.). See Case No. 6,002.

HAWSMAN (SCOTT v.). See Case No. 12,532.

HAWTHORNE (UNITED STATES v.). See Case No. 15,332.

HAWXHURST (WALKER v.). See Case No. 17,071.

Case No. 6,252.

In re HAY.

[6 Chi. Leg. News, 256.]

District Court, N. D. Illinois. 1874.

HUSBAND AND WIFE — RIGHT OF WIFE TO EARNINGS—ILLINOIS STATUTE.

[1. A married woman is entitled, under the Illinois statute of 1869, to retain as her own, commissions earned in making sales for her husband, under a contract of agency with him.]

[2. The provision in the statute that it shall not be construed to give the wife any right to compensation for any labor performed for her husband or minor children, is inapplicable to cases where there is a special agreement between the husband and wife.]

In the matter of the bankruptcy of Jonathan Hay, of Freeport, Ill. On the petitions of Elizabeth and Ada Hay, wife and daughter of the bankrupt, for a return of an upright Steinway piano and several articles of personal property, which they claim as their private property, and which were taken under a warrant of seizure against the estate of the bankrupt.

Alta M. Hulett, for Mrs. and Miss Hay.

John M. Bailey represented the bankrupt's assignee.

Held by BLODGETT, District Judge:

That it appears clearly and conclusively from the evidence that Elizabeth Hay had been doing business separate and apart from the business of her husband for several years; that that business depended for its success upon Mrs. Hay's individual skill and energy, and consisted principally in the sale of sewing machines and musical instruments; that she had been remarkably successful in business, and by her energy, enterprise, and business tact, acquired credit in her business; that it was notorious that she was carrying on an independent business, and that she had supported not only herself and children, but her husband also, her husband having shown no remarkable ability in any direction except in the way of contracting debts. Mrs. Hay had also been for several years the owner of the homestead occupied by her family, and the title stood in her name. In the beginning of the year 1869 Jonathan Hay was indebted in large amounts, and all of Mrs. Hay's private property, acquired by her individual skill and labor, was sold to satisfy the claims of her husband's creditors, as prior to the year 1869 the earnings of the wife belonged absolutely to the husband.

In 1869 the law was passed giving to married women their earnings absolutely. And Mrs. Hay again went to work. Her husband had no property whatever, and had made a failure of every business which he had undertaken. In the fall of 1871 Mr. Hay desired to open a music store, and to enable him to do so Mrs. Hay furnished him $1,000—money which she had borrowed, giving a trust deed on her house to secure its payment. When Mr. Hay went into business, Mrs. Hay acted as his agent in the sale of sewing machines and musical instruments; and there was an express understanding and agreement that she should receive a specified commission on each sale made by her. The court remarked that this understanding was unnecessary, as the law gave her earnings with or without the husband's consent, and that the transactions must be regarded as if made by Jonathan Hay with a third party. The court also held that the proviso to the act of 1869, "This act shall not be construed to give the wife any right to compensation for any labor performed for her hus-

band or minor children," did not affect the questions in this case, but was only applicable to cases where there was no special agreement between a husband and wife as to her compensation, but that she having the right to her earnings could agree to work for her husband about his business as well as for a stranger. In July, 1873, Mrs. Hay purchased of her husband ten sewing machines, paying him therefor $500 in cash, the money paid being borrowed on Mrs. Hay's individual credit, of a relative. The court said that, as there was no fraud alleged, none could be presumed, and that the purchase was fair and open, made in the usual course of business, and must be so regarded. He, therefore, was of opinion that the property belonged to Mrs. Hay, and an order was entered directing the assignee to return it to her. This decision is important, as the question whether a married woman was entitled to compensation for services performed for her husband as agent has never before been judicially passed upon.

Case No. 6,253.

In re HAY et al.

[2 Lowell, 180;[1] 7 N. B. R. 344.]

District Court, D. Massachusetts. Oct., 1872.

BANKRUPTCY — DESIGNATION OF MONEY AS "NECESSARIES."

The assignee in bankruptcy may designate a sum of money as "necessaries," under section 14 of the act [of 1867 (14 Stat. 522)].

[Cited in Re Thompson, Case No. 13,938.]

[In bankruptcy. In the matter of Ira Hay and others.]

A. V. Lynde, for bankrupt.

Boardman & Blodgett, for assignee.

LOWELL, District Judge. The question presented in this case is, whether the assignee has power to allow the bankrupt any part of a sum of money which was in the possession of the latter as his separate property when the joint petition was filed. Section 14 excepts from the operation of the assignment the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart; having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of $500, &c. In Thornton's Case [Case No. 13,994], arising in the Cape Fear district of North Carolina, it was held that money might be set apart. Brooks, J., considered the purpose of the law to be to furnish temporary support to honest bankrupts, whose property had been all surrendered to their assignee; and that this object would be defeated in some most meritorious cases, if money could not be considered a necessary. In two other cases the contrary has been held, on the ground, as I understand, that "articles and necessaries" must be taken to refer to things ejusdem generis with household and kitchen furniture, such as fuel and provisions. In re Lawson [Id. 8,149]; In re Welch [Id. 17,366].

I am of opinion that a fair construction of the act may include money as necessaries, for the reasons given by Judge Brooks. The law intends to encourage a full disclosure and surrender of all property, and to provide for the immediate wants of the bankrupt, whether he happens to be a householder or not; and that an insolvent should by accident or design have acquired a full stock of necessary furniture, fuel, provisions, and the like, should put him in no better situation than one, with equal needs, who has not had equal foresight or good fortune. Considering the intent of the statute, I am of opinion that money necessary for the support of the bankrupt is within its terms. Under a statute giving the admiralty court jurisdiction of suits for necessaries supplied to a foreign ship, money lent to the master to buy necessary supplies has been held within the law, not by subrogation, but as being described by the language. The Sophie, 1 W. Rob. Adm. 368; The Onni, Lush. 154. True, the assignee cannot see that the money is applied to the purchase of necessaries; but in case of the need which the law supposes will be proved by him to exist, and which it refers to in speaking of the condition and circumstances of the bankrupt, it may be presumed that the sum supplied will go to his use and that of his family.

The most decisive authority remains to be cited. The bankrupt act of 1841, § 3, [5 Stat. 440], was identical with the act of 1867, so far as this case is concerned, the one being literally copied from the other; and Mr. Justice Story decided that the assignee could set apart a sum of money to a bankrupt, wherewith to pay his board and that of his family. In re Grant [Case No. 5,693]. He further held that the court could not make the allowance in the first instance, for that it was wholly within the authority of the assignee; subject, of course, to an appeal to the court; though the learned judge does not mention that, but it is provided for in that statute as in this.

I give no opinion whether the condition and circumstances of the bankrupt in this case will require the assignee to set apart any, and if any what, sum of money; but decide that this matter must first be determined by him, subject to my final decision if his determination should be excepted to.

I do not mean to say that this question of fact and discretion might not be submitted to the court by consent of both parties; but I do not understand it to have been so submitted in this case.

Ordered: that the assignee may designate

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

and set apart to the bankrupt, N. C. Stowe, such sum, not exceeding $500, if any, as he shall find to be necessary, under section 14 of the bankrupt act; subject to exceptions and the final determination of the court, as provided by said section.

NOTE. The assignee refused to make an allowance to this bankrupt or either of his partners; and, upon appeal from this decision, there was evidence tending to show that each of the bankrupts had earned something since the bankruptcy, and two of them had no family dependent on their exertions, and were skilled workmen in their business of boot and shoe manufacturers; that the wife of the third had some little property; that the assets were small compared with the debts, the case presenting the appearance of a consumption of the capital for the pensonal expenses of the partners. The judge sustained the action of the assignee. In a case brought up a few days later (In re Steele [unreported]), the testimony was that the bankrupt and his family had suffered much from illness about the time of the bankruptcy; that much of their clothing and bedding had been destroyed for fear of infection; that a settlement would probably have been made with the creditors, if the negotiations had not been broken off by the illness of the debtor. He was an old man, and his assets were considerable. An allowance of money was ordered.

Case No. 6,254.

HAY v. ALEXANDRIA & W. R. CO.

[1 Hughes, 168.] [1]

Circuit Court, E. D. Virginia. March, 1877.

EQUITY—BILL TO SET ASIDE SATISFACTION OF JUDGMENTS.

1. The complainant had purchased all existing judgments against the defendant railroad company; and afterwards purchased all the company's property sold under a trust deed junior to the judgment liens; and then marked as satisfied the judgments he held, on the proper dockets. In a subsequent litigation the deed of trust and his purchase under it were adjudicated to be illegal and void. He thereupon filed a bill in chancery against the company, praying that his satisfaction marked against the judgments might be set aside, that the defendant be decreed to pay the judgments, and that he might have general relief.

2. A demurrer to this bill, on the ground that he had full remedy at law, and that therefore a bill in equity did not lie, was overruled.

In chancery. The complainant [Alexander Hay] had purchased sundry judgments, which were all that were outstanding, against the defendant company [the Alexandria & Washington Railroad Company], which were duly recorded on the judgment docket in the proper clerk's office designated by the laws of Virginia. These judgments were superior to a deed of trust subsequently executed upon the property of the company. With the purpose of reorganizing the company on a new basis, the complainant afterwards purchased all its property at a sale made by the trustees under the deed of trust. Having thus become sole owner by this purchase, he made in writing a memorandum on the proper record in the proper office of the court, declaring that the judgments which he had purchased were satisfied. He did this in full faith that the sale to him under the deed and his title by purchase were valid. This deed and sale were afterwards attacked, and, after a course of litigation, were pronounced by the supreme court of the United States invalid and null. The complainant now brings his bill in equity, reciting in detail the facts just set forth, and praying that the satisfaction entered upon the judgments which he had purchased be set aside; that the defendant be adjudged and decreed to pay him the amounts of the judgments with interest; that the judgments be decreed to be a lien upon the property of the defendant, as of the date when the satisfaction was entered; and that other and further relief be granted as the nature of his case requires. To this bill a general demurrer was interposed; the demurrant insisting, generally, that there was no jurisdiction in equity, because the complainant had full and compact remedy by action at law against the company.

H. H. Wells, for complainant.
S. Ferguson Beach, for defendant.

HUGHES, District Judge. The only remedies at law are, action upon the judgment, scire facias to revive the judgment, issuing execution thereon, and motion to set aside the satisfaction. In regard to the first three remedies, the plaintiff would be met with the record of satisfaction, and this being a matter of record could not be avoided by pleading at law. "There can be no averment in pleading against the validity of a record, though there may be against its operation." Chit. Pl. 481, 354; Biddle v. Wilkins, 1 Pet. [26 U. S.] 692. It needs no citations of authority to support the proposition, that a record cannot be revised or contradicted by parol proof. It is not competent in an action at law on a specialty, for the defendant to avoid it by pleading that it was obtained by fraudulent misrepresentations made by the plaintiff. 2 Rand. (Va.) 426; Taylor v. King, 6 Mumf. 358. Certainly a record stands upon as high a ground as a specialty. As to actions on contracts, this rule has been changed by special statute in Virginia, but such statute does not affect a record. A motion may be made to quash an execution because a court has control over its own process, but a motion to set aside a satisfaction is entirely different. Such a record is not the action of the court, but of the party alone. But even on a motion to quash an execution if it involves the question whether satisfaction is properly entered, it is a case proper for a court of equity. In Crawford v. Thurmond, 3 Leigh, 85, when an execution had been indorsed for the benefit of Crawford by Shroder, the owner of the judgment, and the judgment was satisfied of record by Shroder, a bill was filed

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

in equity by the debtor to enjoin the execution. It was objected that there was an adequate remedy at law by motion to quash. The court says, page 88: "Now I do not say that the county court sitting as a court of law, could not upon motion in a summary way try these questions; but I do say, that in that mode it could not have afforded a safe or available tribunal for the trial of them, as a court of equity upon regular pleadings and proofs. And this consideration, it will be recollected, forms one of the grounds of equity jurisdiction. But there is another and perhaps stronger ground. The indorsement of the execution for Crawford's benefit gave him nothing but an equitable right, which could have no weight in a court of law, belonged exclusively to a court of equity, and must finally have brought the cause there for a decision. It must be seen in the case at bar, that the questions involved are of such a nature as could not be tried summarily upon motion, certainly in not as safe and available a manner as in a court of equity. Besides, as to two of the judgments, the complainant has only an equitable right. The satisfaction entered on record must, as to all parties who stand in the situation of innocent purchasers for a valuable consideration, be deemed valid and effectual." 1 Johns. 560.

The judgment is not merely an evidence of indebtedness. It is a security upon the property, and to preserve this security the complainant is entitled to have the record of satisfaction annulled. This cannot be done by a court of law. In Wardell v. Eden, 2 Johns. Cas. 121, the supreme court of New York set aside the satisfaction of a judgment obtained therein, upon motion; but there was no question of fact involved in the case, and no necessity for such an examination of facts as would require the machinery of a court of equity. In Beebe v. Bank of New York, 1 Johns. 550, in considering the effect of such action as to subsequent creditors, the court of errors says: "The supreme court, in vacating the satisfaction of the judgment in Wardell v. Eden, exercised a jurisdiction until very recently within the acknowledged province of a court of equity alone." In Phillips v. Clagett, 11 Mees. & W. 84, the court says: "A court of law has no jurisdiction to set aside a release which is good in law." The act of congress relating to the jurisdiction of a court of equity is but declaratory of the then existing rule, and recourse is to be had to the principles of English equity, not to the laws of the state. Cases in Brightly, Fed. Dig. 283. In order to oust the jurisdiction, the remedy must be as plain, adequate, and complete at law as in equity. [Garrison v. Memphis Ins. Co.] 19 How. [60 U. S.] 312; [Boyce's Executors v. Grundy]. 3 Pet. [28 U. S.] 210; [Wylie v. Coxe] 15 How. [56 U. S.] 415; 1 Story, Eq. Jur. § 33; Olrichs v. Spain, 15 Wall. [82 U. S.] 222. The fact that the state laws give a legal remedy upon an equitable title does not oust the jurisdiction of the United States circuit court. Brightly, Fed. Dig. 283. The demurrer is overruled.

[This suit then went on until 1881, when a decree was rendered setting aside the "satisfactions" and reinstating the judgments. Case No. 6,255a. For another case bearing on this litigation, see 20 Fed. 15.]

Case No. 6,254a.

HAY v. ALEXANDRIA & W. R. CO. et al.

[4 Hughes, 331.]

Circuit Court, E. D. Virginia. Jan. Term, 1882.

FEDERAL COURTS — JURISDICTION OVER NONRESIDENTS OF THE DISTRICT — SUITS TO ENFORCE LIENS ON PROPERTY IN THE DISTRICT — COMITY.

[1. Where a suit in the nature of a general creditor's bill was brought against a railroad company whose road lay wholly within the Eastern district of Virginia, *held* that the circuit court for that district, by following the provisions of the eighth section of the judiciary act of 1875 [18 Stat. 472], relating to service on nonresidents in suits to enforce liens upon property lying within the district where the suit is brought, could obtain jurisdiction of the District of Columbia (formerly the city of Washington), which was named as a defendant, and which claimed a lien on the road by virtue of a trust deed given to secure it for guarantying certain bonds of the railroad company, and also of the trustees in said deed who were residents of said District of Columbia.]

[2. It being charged in the bill that the act of the city of Washington in guarantying the bonds was ultra vires, and that the trust deed was therefore void, *held*, further, that the court had jurisdiction of the controversy, under section 1 of the act of 1875, as being one arising under a law of the United States, namely, the charter granted by congress to the city.]

[3. The pendency in a state court of a suit to determine the question of priority, as between two certain liens upon a railroad, will not prevent a federal court, on the ground of comity, from assuming jurisdiction of a general creditor's bill brought to determine the priorities as between all lien holders, including many not parties to the previous suit.]

In chancery.

[This was a suit in the nature of a general creditor's bill brought by Alexander Hay against the Alexandria and Washington Railroad Company and others.]

HUGHES, District Judge. This is a bill in the nature of a general creditor's bill, brought to settle the priorities of all liens upon the property of the Alexandria & Washington Railroad Company, for the sale of the same, and administration of the proceeds. In the year 1881, the complainant in this suit recovered a decree in chancery and a judgment at law in this court against the Alexandria & Washington Railroad Company, reviving old judgments which had been recovered in a court of the state of Virginia in 1857, 1858, 1859, and 1860, for the aggregate amount of nearly $29,000, with costs, and interest from the dates of the original causes

of action; the whole amounting now to about the sum of $80,000. This bill was filed on 24th of December, 1881, and proposes to set out in detail, besides the judgments and decrees obtained by the complainant, all the liens now resting on the property of the said company. It makes parties defendant of all the creditors holding these several liens. It avers in terms that there are no other lien creditors than those whose liens are enumerated seriatim. It makes also party defendant the Alexandria & Fredericksburg Railway company, which is alleged to have the property of the said Alexandria & Washington Company in custody as lessee or otherwise. Among those made parties defendant to the bill is one Joseph Thornton. Among the creditors claiming to hold liens, and made defendants to the bill, is the District of Columbia (formerly the city of Washington), and J. H. and A. T. Bradley, trustees in a deed made by the Alexandria & Washington Railroad Company, to secure the said District of Columbia for guarantying certain bonds or certificates of the said company. In consequence of some defect in, or delay in recording, the said deed of trust, another deed was afterwards made between the same parties confirming and ratifying the original deed. This would therefore seem to be in effect a general creditors' bill; though it does not contain a clause couched in the very words ordinarily employed in the draft of general creditors' bills, to the effect that the bill is brought on behalf of the complainant and of all other creditors of like character who may come in and take part in the suit.

The bill alleges that the defendant the Alexandria & Washington Railroad Company is utterly and absolutely insolvent; that it owns no other property but the road-bed extending from the south end of the Long bridge crossing the Potomac river opposite Washington, some four or five miles to the vicinity of Alexandria; and that it is indebted in an aggregate sum of about four hundred thousand dollars. Some of the lien debts enumerated in the bill as resting upon this road, have been ascertained and adjudicated as against the Alexandria & Washington Railroad Company, and as between the particular parties to the record, in a suit in chancery which was brought in 1857, in the circuit court of Alexandria county, entitled "The Alexandria & Washington Railroad Company vs. Fowle, Snowden & Co. et al." That suit was originally brought by the said railroad company, but was afterwards proceeded with under a cross bill filed in the same proceeding by J. H. and A. T. Bradley, the trustees, as heretofore mentioned, in the deed or deeds from the said company, given to secure the corporation of the city of Washington (now the District of Columbia) for the city's guaranty of the company's bonds. These debts resting as liens upon the Alexandria & Washington Railroad, thus for certain purposes ascertained and adjudicated, are set out in the bill here; and the holders of them made parties defendant to the suit here. On the second day of the January term, 1882, of this court, the complainant in the bill here, came into this court, and moved for a receiver, and also moved that notice of the motion be ordered to be given to all parties interested, and that it would be heard on the 7th of the same month. The latter motion was granted. On that day, at the instance of some of the defendants, the motion for a receiver was continued to the 17th of January, and on that day Thornton, one of the defendants, filed a plea to the jurisdiction, and there was a hearing of the motion, on elaborate argument extending to the 18th of the same month. On this latter day, for reasons stated orally from the bench, this court decided to grant the motion for a receiver, and took time to put those reasons in writing. A receiver was accordingly appointed on the 19th of the same month, and this opinion in writing is now filed, again setting out the grounds of the action then taken by the court. The objections urged against the appointment of a receiver were embodied in Joseph Thornton's plea to the jurisdiction of the court. This plea denies the power of the court, both over necessary parties, and over the controversy. Joseph Thornton claimed to appear only for the purpose of filing this plea. I believe that there was no denial of a proper service of process upon all who were named as parties defendant to the bill residing in this district, and of notice of the pending of this suit to all parties residing elsewhere.

The plea alleges in substance that the bill joins as codefendants persons who are not subject to the jurisdiction of this court; namely, 1st, the District of Columbia, a municipal corporation created, organized, and established by and under the laws of the United States, &c., &c.; and, 2d, Joseph H. and A. Thomas Bradley, trustees, &c., who are citizens of the District of Columbia; and that the presence of these persons as parties is essential to the settlement of the equities in this cause. The plea further avers that the subject-matter of the said bill, and the matters in controversy therein, were at the time of the filing of the said bill, and still are, pending, and yet undisposed of, in the circuit court of Alexandria county, a court of competent jurisdiction, in the suit of the Alexandria & Washington Railroad Company vs. Fowle, Snowden & Co., the record of which cause is now here shown to the court. It was not pretended that the Alexandria & Washington Railroad Company is not hopelessly insolvent, and that the situation of its affairs is not such as imperatively to demand the appointment of a receiver. The only objection urged was, that this court could not legally appoint a receiver, for want of jurisdiction over the parties and of the controversy.

These objections are fairly presented in the

plea of defendant Joseph Thornton; and so my task is simply that of dealing with the objections set forth in that plea.

First, as to the parties. It is true that the District of Columbia is a corporation not within the jurisdiction of this court for ordinary purposes. The same is the case as to the two Bradleys, trustees; who are inhabitants of the District of Columbia, and who are not inhabitants of the Eastern district of Virginia. And this corporation and these trustees are parties necessary to any suit for the settlement of the priorities of liens upon the Alexandria & Washington Railroad. It is to be observed, in limine, that the property bound by the mortgages, judgments, and decrees standing against the Alexandria & Washington Railroad Company is exclusively, or almost exclusively, real estate, and that this real estate lies wholly in the Eastern district of Virginia; moreover, that the object of the present suit is to subject this real estate, lying exclusively in this district, to the liens enumerated in this bill, according to such priorities as the court may settle by its decree; one of them being the lien claimed by the District of Columbia under a deed in which the Messrs. Bradley are trustees.

The 8th section of the judiciary act of March 3, 1875,—[18 Stat. 472], 1 Supp. Rev. St. U. S. p. 176,—provides, that when in any suit in a circuit court of the United States, to enforce any equitable lien upon, or remove any cloud upon the title to, real or personal property within the district where such suit is brought, one or more defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, &c., by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, &c., &c., or, where such personal service upon such absent defendants is not practicable, then, order of publication shall be made, &c., &c.; and then it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of the suit, &c., &c.; but such adjudication shall affect only the property within such district. The terms of this law have been thus far complied with, and the order of court requiring notice of the motion for a receiver to be served upon the defendants has been served, in this suit, upon the principal officers of the District of Columbia, and upon the Messrs. Bradley, who are inhabitants of that District. This bill, moreover, charges that the District of Columbia (when known as the city of Washington), in guarantying bonds of the Alexandria & Washington Railroad Company, was ultra vires, and null and void, and that the deed of trust made by the company to the Messrs. Bradley, as trustees, to secure such guaranty, is therefore a nullity, and is consequently not a lien upon this railroad. The first section of the judiciary act, just referred to (1 Supp. Rev. St. p. 173), provides "that the circuit courts of the United States, shall have original cognizance, concurrent with the courts of the several states, of all suits at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and arising under the constitution or laws of the United States, or," &c., &c. Thus it seems clear to me, that in respect to the property of the Alexandria & Washington Railroad Company, on which the District of Columbia claims a lien, this court has jurisdiction, under the 8th section of the judiciary act of 1875, to summon the District and its trustees before it; and it seems equally clear that in respect to the right and power of that corporation to have guarantied the bonds of the railroad company, a right which depends exclusively upon the provisions of its charter derived from congress, this court has jurisdiction under the first section of the judiciary act of 1875; it being an elementary principle of law that, whereas a natural person may do whatever is not forbidden by law, yet a "corporation can do only what is authorized by its charter." Railroad Co. v. Harris, 12 Wall. [79 U. S.] 81. I think it clear, therefore, that, for the purposes of determining the liens resting upon the property within this judicial district belonging to the Alexandria & Washington Railroad Company, this court has jurisdiction by personal service of process, wherever found, on the District of Columbia and the Messrs. Bradley, as parties defendant in this suit, and that this branch of Joseph Thornton's plea to the jurisdiction must be overruled.

I come now to the other branch of the same plea, namely, that which makes objection that the circuit court of Alexandria county has already possession of the controversy of which this court is asked by this bill to take cognizance, and of the subject-matter, or property, which is the object of the controversy. It is useless to say that the property of the Alexandria & Washington Company, the corpus, or res, sought to be subjected, is not yet in the custody of any court, but, as alleged, is in the possession and use of the Alexandria & Fredericksburg Railway Company, under lease or contract. If the property itself were actually in the corporeal possession of the state court, in the person of a receiver or other officer, that would be conclusive; and this court would and could not interfere; but, as that is manifestly not the fact, my only remaining duty is to inquire whether the controversy exhibited by this bill was already within the cognizance of the state court when this bill was brought; for, if it was, then that fact would be equally conclusive against the jurisdiction of this court.

In order that the controversies of the two suits shall be identical, the parties to them must be the same, and the objects of the

suits, and the issues in them, the same. The mere fact that there is but one property subject to the respective decrees in the two suits is not sufficient to identify them. I have already said that the bill here is, in its essential nature, a general creditors' bill, seeking to bring all lienhold creditors of the Alexandria & Washington Railroad Company before the court, in order that their claims shall be marshaled, and the priorities attaching to them settled, and bringing in also the Alexandria & Fredericksburg Railway Company, which has possession of the res in controversy, under lease or contract, in order that the decree of the court, when rendered, may be effectual, and that the proceeds of the sale of the property of the Alexandria & Washington Railroad Company, when realized, may be distributed with due regard to the rights of all parties in interest. A bill with fewer parties and less ample scope would not be effectual for a proper adjudication of the affairs of this company. The inquiry, therefore, is whether the suit in the state court, the record of which is exhibited with the plea of the defendant Thornton, is a suit in which all lienholders are parties, and in which the custodian under lease, of the property that is sought to be subjected to the liens resting upon it, is before that court. An inspection of the record of the suit in the state court discloses the fact that Alexander Hay, the complainant in the bill here, who claims to hold a lien for some eighty thousand dollars, is not a party there. It discloses that neither Walter Lenox, in his character as trustee, nor any one of the beneficiaries of the deed of which he is trustee, representing a lien of some sixty thousand dollars, is a party there; nor is the deed itself, which Lenox represents, made a part of the controversy by either the bill or cross bill in that suit; nor is the Alexandria & Fredericksburg Railway Company, which has contract rights in, and actual possession of, the property of the Alexandria & Washington Railroad Company, a party to that suit. Obviously and conspicuously, therefore, the parties to the suit in the state court are not the same as those here; and there would seem to be such a deficiency of parties to that suit, for the purposes of complete justice, that though it has been pending for nearly twenty-five years, and the Alexandria & Washington Railroad Company has been notoriously insolvent for at least half the time, no receiver has been appointed by that court in that suit, though it has been asked to do so.

So much as to parties. In respect to the controversy, the two suits differ from each other even more widely. The original object of the suit in the state court, which was brought by the Alexandria & Washington Railroad Company, was to obtain an adjudication upon the relative priorities of the lien of the city of Washington, and that of Fowle, Snowden & Co. It made only those creditors and their respective trustees parties defendant, who all answered. The trustees in the deed (or deeds, for, though there were two, in fact there was virtually but one) under which the District of Columbia claimed, being already defendants in the suit, then filed a cross bill, setting out their own case, and making no new parties defendant, except James S. French individually, who was already party to the record as president of the Alexandria & Washington Railroad Company. There were numerous judgment liens then outstanding against the company; among them, some of those which were the origin of the claim of the complainant here, Alexander Hay. But the holders of these liens were not made parties, either by the original or the cross bill. There was a deed of trust already mentioned, in which Walter Lenox was trustee, made for securing thirty thousand dollars. Neither Lenox, as trustee, nor any of his beneficiaries, were made parties. Neither the original nor the cross bill contained the usual clause of a general creditors' bill, either in form or substance; nor was either bill, in scope or aim or purpose, a bill for marshaling all creditors and their claims, or for ascertaining all liens and their priorities. The cross bill contained no other prayer for sale, than one for its own special benefit, which was in these words: "Your orators further pray that the said deeds of trust to the said J. H. and A. T. Bradley may be decreed and declared to create a lien on the property and franchises of the said Alexandria & Washington Railroad Company, prior to any other incumbrance, and that the said lien may be enforced against the said property and franchises so conveyed, and the proceeds arising from a sale thereof may be applied to the reimbursement and relief of your orators, on account of their guaranty of," &c., &c. "And your orators further pray for such other and further relief as may be consistent with equity," &c., &c. The decree was, of course, only such as would be responsive to the specific prayers of one or the other of the bills, and as could be given between the particular parties to that record. It was pronounced May 25th, 1859. An appeal was taken to the supreme court of appeals of Virginia, and the questions submitted to the appellate tribunal were simply questions as to the relative priorities of two only of the liens now resting upon the property of the Alexandria & Washington Railroad Company. It is plain, therefore, that the controversy in the state court was much narrower than, and widely different from, the controversy in the suit here; and so, the second branch of the defendant Thornton's plea must be overruled.

On the whole, I see no objection, either on the score of jurisdictional right, or of judicial comity, to my allowing this proceeding to go on, and to the appointment of a receiver in this suit at once. Surely, the necessity for the appointment of a receiver is sufficiently urgent, and it seems to me that the suit in the state court is not such as to authorize such a measure on its part. Indeed, some of the questions which form the principal grava-

men of the suit here could not be raised by the parties who are the domini litis in the state court. One of the objects of this suit is to invalidate the lien in favor of the District of Columbia; whereas, the trustees and beneficiaries in both the Kinzer and the Lenox deeds, if the allegations in the pleadings and exhibits be true, are estopped by express stipulation from contesting its validity. Moreover, the objects of this suit could not be accomplished by the suit in the state court until the proceedings there were so amended as to make the complainant here a party there; and even though this were done, and Alexander Hay were brought into that litigation, he would have a right, under the laws of the country, to remove so much of the controversy as affected his own rights into this court. He has a constitutional right (jurisdictional conditions permitting) to have any decision affecting his interests, by an inferior court, reviewed by the supreme court of the United States, rather than by the supreme court of the state of Virginia; and I presume, from the fact of his bringing this suit here, that he desires to avail himself of that right, and would, if he were made party to the long pending litigation in the state court, at once remove the controversy into this court. Even, therefore, if the proceeding in the state court were so amended, by the addition of parties and otherwise, that it would be adequate to the ends of complete justice between all persons holding liens upon this railroad, yet nothing could be gained by this court's desisting from further proceedings in this suit; for the complainant here, on being brought into the suit there, would have a right to remove that suit here, which I have a right to presume that he would exercise. It is plain, therefore, that nothing but delay would result from staying the proceeding in this court; and sincerely declaring that, if the case were such as really to raise the question of judicial comity, I would cheerfully defer to the jurisdiction of the state court, I have no hesitation in proceeding in the case, and appointing a receiver.

A true copy.
Teste.
[Seal.] M. F. Pleasants, Clerk.
By John S. Fowler, Deputy Clerk.

[See Case No. 6,255a.]

Case No. 6,255.

HAY v. The BLOOMER.

District Court, D. Massachusetts. March, 1859.

FOREIGN SEAMEN—SUITS FOR WAGES — CONSENT OF FOREIGN CONSUL.

SPRAGUE, District Judge. The usual course in the case of libel by a foreign seaman against his vessel is, to direct the clerk to inform the counsel of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and unless there are strong circumstances in the case, the court would not proceed in rem against a foreign vessel, without the consent of the commercial representative here of the foreign government of the country where she belonged.

[Cited in 2 Pars. Shipp. & Adm., on the question whether a foreign seaman is entitled to sue in this country if discharged here by his own wish or with his consent, and to the point that, "our courts go somewhat further than the English courts in requiring the assent of the minister or consul of the foreign country to which the parties belong."]

[Cited in The Becherdass v. Ambaidass, Case No. 1,203.]

[Nowhere more fully reported; opinion not now accessible. Quotation from opinion on points decided is taken from 2 Pars. Shipp. & Adm. 228, 229, note.]

Case No. 6,255a.

HAY v. WASHINGTON & A. R. CO.

[4 Hughes, 327.]

Circuit Court, E. D. Virginia. Jan. 11, 1881.

JUDGMENTS — CANCELLATION — NUDUM PACTUM—EQUITABLE RELIEF—ESTOPPEL.

[1. The owner of certain judgments against a railroad company purchased the road at trustee's sale. The price bid was not sufficient to cancel prior liens, and nothing was left to credit upon the judgments. He nevertheless marked the judgments cancelled, in order to clear the title of the property, and then conveyed it to a new company. Afterwards, the trustee's sale was annulled, and the new company dissolved. *Held*, that the cancellation, being without consideration, and made on the faith of the validity of the purchase, was nudum pactum, and that, after the avoidance of the sale, equity would again set up the judgments in favor of the owner.]

[2. The fact that the owner of the judgments, after ther cancellation, and before the sale was annulled, spoke of the judgments as having passed to the new company, and disclaimed any interest in them, did not estop him from again setting them up after the avoidance of the sale, and the dissolution of the new company.]

[This was a bill in equity by Alexander Hay against the Washington & Alexandria Railroad Company for the purpose of again setting up certain judgments against the defendant, which he had previously marked cancelled, under a misapprehension of his rights.]

HUGHES, District Judge. The complainant bought the Alexandria & Washington Railroad at a trustee sale, and on the faith of the purchase, and of his being owner of the road, he marked the judgments which are the subject of this suit as satisfied. It is positively proved that he received no pecuniary consideration for so marking them. It is not pretended that he received payment of the moneys due by these judgments. The bid of purchase money at which the property was knocked down to him at the trustee's sale was less than the debt under the trust deed for which the property was sold, and none of it could be credited on these judgments. There was no consideration passing to complainant for his satisfaction of the judgments. He marked them satisfied because of his becoming the owner of the prop-

erty bound by the judgments, in order to clear the title. If the sale was not good, and he not the owner of the road, then the cancelling of the judgments by him was without consideration, and nudum pactum; and it is too well settled to require any citation of authorities, that equity may enquire into the fact of such a payment as this, and give redress where it is shown that no payment was really made. See, however, French v. Hay, 22 Wall. [89 U. S.] 237, 238, where this particular transaction was considered by the supreme court of the United States, and Renick v. Ludington, 15 W. Va., 323.

It is contended, however, by the defence, that the complainant for several years afterwards held out to the world that he had merged these judgments into the stock of the Washington, Alexandria & Georgetown Railroad Company, a new company which he and others formed after purchasing the railroad; that such new company assumed the ownership of the judgments, and in a settlement with the original Washington & Alexandria Railroad Company, the defendant here (after the Virginia courts had nullified the sale), included these judgments as part of the settlement which took the form of a final decree in the suit in the state court. The defendant proves that the complainant did on several occasions speak of these judgments as having passed to the new company, and did consistently disclaim any interest in or ownership of them while the new company existed; but I do not see in any of their proofs on this subject any evidence that the complainant was speaking or acting otherwise than on the faith that his purchase of the road was valid, and that his cancellation of the judgments in favor of the new company was for the purpose of releasing that particular company from the debts due upon the judgments. There is no proof of any such declarations made by him after the annulment of the sale and extinction of the new company. If the old company placed any reliance upon declarations of the complainant made while under the delusion that his purchase was valid, and the new company a legal corporation, it acted in its own wrong; the complainant is no more estopped by such declarations than he is by his having marked the judgments as satisfied; and the defendant's damage (if any it has sustained) is damnum absque injuria.

As to the claim of defendants that these judgments were included in the general settlement of accounts which took place at the close of the controversy between the old and new company which was effectuated by the decree of the state court, which ended that controversy, no proof is offered showing specifically or directly either that those judgments did enter into that settlement, or that the complainant was in any way a party to the settlement. No proof is furnished of what the claims and counterclaims were, that were the subject of that settlement. No itemized statement, if one ever existed, is given in the proofs, of the things settled on the occasion. The court is left in total ignorance of the matters which were included in that composition. The old company claims to have "'assumed" that the judgments were embraced; but, if so, the assumption is not shown to have been conceded by the new company, or by the complainant, the minds even of the two companies are not shown to have met on that assumption; and, in the absence of proof, the court is not at liberty to adopt an assumption having no status save in the mind of one party to the settlement. The marking of the judgments as satisfied did not, under the circumstances, extinguish them. They stand as liens against the property of the old company until it proves affirmatively that they have been paid in some way by itself. That proof is wanting in the case. The complainant proves that he has never been paid a dollar upon them by any company or person whatever. I do not see, therefore, how I can deny him a decree; and I will sign one setting up these judgments, and requiring the defendant company to pay them.

A true copy.
Teste.
[Seal.] M. F. Pleasants, Clerk.
By John S. Fowler, Deputy Clerk.

[See Case No. 6,254a.]

Case No. 6,256.

Ex parte HAYDEN.

[3 App. Com'r Pat. 354.]

Circuit Court, District of Columbia. Aug. 8, 1860.

PATENTS—FAILURE TO STATE CLAIM WITH PARTICULARITY—DELAY IN MAKING AMENDMENT—PATENT FOR EACH IMPROVEMENT TO A MACHINE—IMPROVEMENT IN CLEANING COTTON.

[1. The failure of a prior application to state the claim with sufficient particularity to show novelty, while an excuse for its rejection, will not show a change in the patentable features of the invention when it appears that the precise form and arrangement of parts without addition or subtraction are in the machine described in the amended specifications.]

[Cited in Hussey v. Bradley, Case No. 6,946.]

[2. Where the patent office has received an amended specification, and acted upon the merit of the case, a delay of three years in making the amendment is no ground for its rejection, especially where the prior application was better suited to cover the patentable features of the machine.]

[3. An inventor may make each improvement to a machine the subject of a separate patent.]

[4. Hayden's claim of an improvement in cleaning cotton, consisting of a trunk divided horizontally with a screen of woven wire, with cells or compartments under such screen to catch the dirt, and so small as to break the current of air under the screen when the cotton is blown through such trunk over the screen, is not anticipated by Smith's invention, in which both the cotton and dirt are carried through the trunk, and winnowed in a chimney with a wire screen at the top.]

[Appeal by Isaac Hayden from the decision of the commissioner of patents denying a patent to him for an improvement in cleaning cotton.]

MERRICK, Circuit Judge. The law of patents contemplates that the utmost tenderness is to be shown to the mistakes and inadvertencies of inventors in the preparation of their claims and in the obtaining of their patents, it being well understood that their minds are engrossed with the valuable ideas which have agitated them, and that they are therefore much more apt to fail in full and exact explanation of them than those who, carefully trained to deal with the thoughts of others, have learned the art of perspicuous description. Hence the commissioner of patents is charged with the duty of notifying an applicant whenever his specifications are defective and insufficient, and is required to give him briefly such information as may be useful in judging of the propriety of reforming his claim and specification. And after a patent shall have been granted, and it shall prove inoperative and invalid by reason of a defective or insufficient description or specification, and the error has arisen by inadvertency, accident or mistake, the party is at liberty to surrender the patent, and have it reformed so as to protect him to the full extent of his actual discoveries. And so far has the supreme court carried its benign construction of the law as to allow a party to claim upon a reissue that which in his original application he had disclaimed. Reading the original and amended specifications in the spirit of those liberal and just provisions which utterly repudiate the idea that the public shall take any advantage of the ignorance or inadvertence of its benefactors, I am constrained to differ from the office as to the construction which it has placed upon the original and amended specifications in the present case and to hold that every material feature in the reformed claim is abundantly indicated by the original description and fully justifies the applicant in the changes he has made for the purposes of technical accuracy and distinctness. It appears to me impossible to read the first five lines of the second page of the original (to wit: "The fine sand which is removed by my apparatus has heretofore been retained in the cotton, and even carried into the spinning apparatus. The cotton, after being passed through a beater or opener, has heretofore been conducted on an endless apron directly to the lapping cylinder," and the three first lines of the third page, to wit: "The cotton to be cleaned is taken from the beater or opener and passed through the entire length of the trunk (a, a) by means of a current of air blown through the same"), without perceiving that the applicant contemplated using his peculiarly arranged trunk in connection or combination with the well known beaters, pickers or openers of the cotton mill. So with regard to the arrangement of the wire screen, the dimensions and construction of its meshes, and the small compartments into which the space of the trunk beneath was to be divided, and the object and purposes of those subdivisions, were also shown, viz.: they were to be sufficiently narrow to break the current of air underneath, with the exception that he did not define by measurement, as in the amendment, the size of these compartments; that he may not have understood as fully as to present the extent or amount of the advantages which were to flow from this arrangement of parts, and therefore not have expressed them so fully as he now does, might be some excuse for the total rejection of his claim as first presented, but surely these facts do not amount to any change of the patentable features of his invention when it is apparent that the precise form and arrangement of parts without addition or subtraction are in the machine now which were described in the specification of 1854.

Neither do I consider it a valid objection to the claim, under all the circumstances of this case, that there has been a delay of three or more years in making the amendment, inasmuch as the office has received the amendment and acted upon the merits of the case, and it may well be questioned whether the form in which the first claim of the original specification was presented was not better suited to cover certain patentable features of his case than the form he has chosen in the amended application, for in that he very distinctly claims as points of novelty the arrangement within the trunk, itself admitted to be old, of the wire net work in combination with the small compartments for cutting off the current of air from the trash and dust while it was unobstructed in its winnowing force upon the cotton itself, while the language of the present claim might leave the inference that the point of novelty rested alone in the definite combination of that trunk, so constructed with the beater or picker, and did not cover also the novel combination of the parts of the trunk. Judge Grier, in the circuit court of Pennsylvania, in the case of Rich v. Lippincott [Case No. 11,758], and Judge Nelson, on the New York circuit, in Gaylor v. Wilder [10 How. (51 U. S.) 477], both held that where a party by a mistaken rejection of his claim had been induced to withdraw his application and get a return of $20, as the law provides, and acting purely under his mistake of his rights occasioned by the error of the office, suffered his invention to go into public use for several years, and afterwards, upon discovering his mistake, applied for and obtained a patent, he had not by the withdrawal under such circumstances abandoned his right; but that his second application related back by operation of law to the date of his first application, so as to cut away the forfeiture which otherwise would have happened by the long intermediate public use.

In this case there having been no withdrawal the party may well be pardoned his delay for the reasons I have suggested. But the office has further insisted that the present application cannot be granted because the claim is anticipated by the patent of December 1st, 1857, for the same invention. It is true that the applicant has in both specifications described the same machinery and combination of parts. It is further true that the matter patented in December, 1857, was embraced substantially in his original application of December 11th, 1854, for his third claim there was for "lacquering or varnishing the webbing as set forth;" and the claim of the patent of 1857 is "for covering the partitions of an elongated trunk or box for cleaning cotton and other fibrous substances with woven wire having the scores formed by the weft crossing the warp of said wire screen filled with metal or cement, the whole combined in the manner and for the purposes set forth." It is obvious upon reading the whole specification and the claim as summed up in that case that the patent is there limited to the bath of metal or cement with which the wire screen is treated so as to prevent the particles from catching and clogging the wires at their points of crossing. By the grant of that patent the party obtained what he had a right to—protection for that distinct feature of novelty without imperiling it by union with others of doubtful character. It is the privilege of the party to unite as many improvements in one patent as he pleases, but the right to make each improvement the subject of a separate patent has never been denied, and whenever the features of novelty are numerous, prudence will suggest that the danger of making a patent too broad by uniting questionable with plainly novel claims be avoided by taking separate patents. But the claim of the present application does not touch the point of novelty covered by the patent of December, 1857, for the third claim of the original specification above quoted was cancelled in June, 1855, and the claim of the application now pending is limited by the following words: "What I claim in a trunk for cleaning cotton and other substances is dividing it horizontally or centrally with a screen of woven wire or twine with cells or compartments under said screen so small as to prevent or break the current of air under said screen, substantially as described, in combination with a machine substantially such as is described in this specification for opening the cotton and blowing it through said trunk over the screen substantially as described."

Besides the objections already noticed the office has relied upon the patented cotton cleaner of Waterman Smith of January 3rd, 1854, for an anticipation of the present claim. The leading ideas and arrangement of operative parts in the two machines are so essentially different that I am unable to discover any similarity between these contrivances. In Smith's patent there is a trunk provided with a screen along which the cotton passes from the picker; but here the resemblance ceases, for the design and arrangement of Smith's is for the purpose of conveying the cotton and the dust all together through the whole extent of the trunk and to discharge them confusedly into a chamber against a chimney provided with a wire screen, the cotton to be whirled about the chamber and the fine dust to pass up the chimney and escape out in the open air, whereas the design of Hayden's contrivance is to maintain the current of air upon the light cotton in the upper half of the trunk and to provide ever-recurring small receptacles along the course of the trunk into which the dust and small particles may be precipitated by the force of gravity, and there remain protected by the sides of these receptacles from the current of air above, which would, if admitted to them, cause them to rise and mingle again with the cotton, thereby undoing at the remote end of the trunk the beneficial work effected at an interior portion thereof. Smith's contrivance leaves the cotton as full of dust when it leaves the trunk as when it entered, more loosely and widely distributed in the mass perhaps; but Hayden's invention contemplates that the trunk itself shall operate a final divorce between the good and the bad, and that every particle once separated shall be forever isolated from the good fibre which leaves the mouth of the trunk freed of its offensive companions.

The other references which were given by the office in its letter of rejection of January 22, 1855, seem to be directed mainly to the third claim of the original specification, which is not now in issue, so far as they have any bearing at all upon the case, and therefore do not need any extended notice. The reference to Use's Dictionary at page 508 shows merely a trunk provided with a grating of cross bars, but no screen of wire work and no series of small receptacles beneath the grating, as in this case, and is therefore no answer to the present combination.

It may be further observed that the several affidavits of practical men filed in the case show the great utility of the applicant's contrivances in the manufacture of cotton, and that he has made by his ingenuity valuable additions to the stock of human knowledge. And now being of opinion that there is error in each and every of the objections urged by the office against the present application, and that these objections have been duly presented for revision by the reasons of appeal, I do hereby certify to the Hon. Philip F. Thomas, commissioner of patents, that having assigned the first of August for hearing said appeal, I have fully considered the decision of the office, the reasons of appeal, and the response of the office to those reasons, and finding said decision erroneous, upon the several points herein at large set

forth, I reverse said decision and hereby adjudge and direct a patent to issue to the applicant upon his amended specification as prayed.

[See Case No. 6,260.]

Case No. 6,257.

In re HAYDEN.

[7 N. B. R. 192.] [1]

District Court, S. D. New York. March 13, 1872.

BANKRUPTCY — RECEIPT OF MONEY AFTER FILING OF PETITION AND SERVICE OF INJUNCTION—CONTEMPT.

1. A bankrupt, who receives money from his debtor after the filing of a petition in bankruptcy and service on him of the usual injunction is guilty of contempt, but where he afterwards turns over to the assignee all his assets, the contempt is purged, even though he may have spent part of the money thus collected. The estate loses nothing, because payments made to the bankrupt by his debtor after the filing of the petition, are invalid as against the assignee.

2. Motion to punish the bankrupt for contempt, for violating injunction, denied.

[In bankruptcy. In the matter of J. P. Hayden.]

Putney & Adams, for the motion.

A. A. Redfield, opposed.

BLATCHFORD, District Judge. There was undoubtedly a violation of the injunction committed by the bankrupt, but on the whole evidence I cannot say that it was of such a wilful character that I ought to visit it with punishment, either personal or pecuniary. The payments made to the bankrupt by his debtors after the filing of the petition in bankruptcy were invalid as against the assignee. The assignee has, therefore, lost nothing. It is shown that the bankrupt has turned over everything he has to the assignee, and that he has no property or money. I by no means mean to hold that it is lawful for a debtor proceeded against in involuntary bankruptcy, and enjoined in the usual form under section forty, to spend money even for the purposes for which the debtor in this case spent the money which he collected after the injunction was served on him. There was a contempt in this case, but it is satisfactorily purged. The motion is denied.

Case No. 6,257a.

HAYDEN v. ANDROSCOGGIN MILLS.
HAYDEN v. BATES MANUF'G CO.

[See 1 Fed. 93.]

HAYDEN (The COLONEL HOWARD v.). See Case No. 3,026.

[1] [Reprinted by permission.]

Case No. 6,258.

HAYDEN et al. v. The C. W. COCHRANE.

[3 Woods, 304.] [1]

Circuit Court, E. D. Texas. May Term, 1879.

SALVAGE—BASIS OF AWARD.

1. Where a bark laden with cotton, and anchored outside the bar, took fire, and as the only means of saving ship and cargo she was towed by salvors into shallow water and filled and sunk, and her hull and cargo were afterwards sold in that condition: *Held*, that the sum which they brought at the sale was the measure of the salved property, and that salvage should be allowed on that basis.

2. The amount allowed in the case to the salvors stated.

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

[This was a libel by John H. Hayden and others against the bark C. W. Cochrane and cargo.] On January 9, 1879, the bark C. W. Cochrane was lying off the bar at Galveston, in about six fathoms and a half of water, engaged in taking in a cargo of cotton from lighters. The bark was worth $70,000, and had taken aboard 2,600 bales of cotton, worth $104,000. About one o'clock p. m., of the day just mentioned, the cotton stowed in the lower forward hold was discovered to be on fire, in a part of the ship which was inaccessible. The master was absent, but the first officer who was in charge of the vessel, closed all vents so as to keep down the fire, and set signals of distress. When the fire was first discovered, the first officer had with him six men of the crew and five stevedores who had been engaged in stowing the cargo. Several steam tugs and lighters answered the signal, and came to the assistance of the bark. These were steam-tugs Buckthorn, Joy, and the steam-lighter Ella Knight. They all tried to subdue the fire by pumping water into the hold of the bark. About 10 p. m. the master of the bark arrived. On consultation, the master decided that the only way to save the bark and cargo from total loss was to tow her into 20-feet water and fill her. This was done. The lighter Ella Knight and the tug Joy towed the bark shorewards to a place where there was about 20 feet of water and a mud bottom, where she was anchored. The steam-tugs and the steam-lighter Ella Knight resumed the work of pumping water into the hold of the bark.

On the morning of January 10, the day after the bark had been anchored as aforesaid, the weather became unfavorable, the wind sprung up from the southeast, causing a heavy sea, which grew worse all day and the following night, rendering it extremely hazardous for the vessels to lie alongside the bark on account of the rolling and pitching of the craft, and their concussion with each other. Another source of danger to the vessel and the men employed about the bark,

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

arose from the fact that the fire inside the bark might at any time burn off the masts below decks, and they were liable to be dislodged by the pitching and rolling of the bark, and to fall on the vessels alongside, in which case the vessel struck would have been sunk or badly damaged. About 1 o'clock a. m., of January 10, the master of the bark left her and came to Galveston to get further assistance. On arriving, he requested Captain Guthrie to remain on board the bark and give the mate, Davis, such advice and assistance as he could, and he remained and acted accordingly. At 2 o'clock p. m., of January 10, the weather was so rough that the smaller boats, Joy and Index, were compelled to draw off, and at 4:30 p. m., the Maddox was compelled to do likewise. The Ella Knight remained until 6 p. m., when she too cast off, first taking on board the master and crew of the bark and the stevedores. At the request of the master of the bark, she came to anchor a short distance from the bark, and remained there all night with steam up, with the purpose to render further assistance in case opportunity should offer, but the wind did not abate till morning. When the Ella Knight left the bark on the evening of the 10th instant, she was resting on the bottom with 16 feet of water in her hold. All the steamers and men engaged in the attempt to rescue the bark and her cargo, worked under the direction of the bark's officers, and at their request, and did all that was possible to be done to accomplish their purpose. The bark's crew and the stevedores worked on board the bark, stripping her of her rigging and other property and passing them on board the Ella Knight. Fifteen bales of cotton were transferred in this manner.

On January 12, the steamer Star went to the wreck, which was still burning, and put out the fire which was confined to the hull above the water line. The bark had filled with water. The services rendered the bark resulted in placing her where she could be wrecked and her cargo taken out, and this was all that it was possible to accomplish. If she had burned and sunk where she took fire, she would have been a total loss. The Ella Knight, in performing the service stated, had one of her guards split, to repair which would cost from $100 to $200. The value of the Ella Knight's service in her ordinary business at that time was $350 per day. A number of stevedores, who had been engaged in stowing the cargo of the bark, assisted in getting out about sixty bales of cotton and in stripping the bark of her rigging and passing the cotton and rigging over to the Ella Knight, whereby they were saved. The hull of the bark as she lay submerged, and the cotton in her hold, and the tackle, rigging, boats and cotton saved from the bark were all sold by order of the district court. After paying costs, there was paid of the proceeds of these sales, into the registry of the court, the sum of $15,596.08. The claims of all salvors have been adjusted, except the demand of the Ella Knight, the pilot, Captain Guthrie and the stevedores above mentioned.

Robert G. Street, George Flournoy, and J. Z. H. Scott, for libelants and interveners.

T. N. Waul and H. C. Pratt, for claimants.

WOODS, Circuit Judge. I think it is clear that the service rendered by the Knight, by Guthrie and by the stevedores above mentioned, was a salvage service. When a ship or its lading is saved from an impending peril by the service of any person who is under no obligation to render the service, it is a salvage service. The peril of the property saved, the hazardous nature of the service, are considerations which go to the amount of the salvage. In this case, the value of the property salved is measured by the amount paid into the registry of the court, the proceeds of its sale. The cotton and the tackle, boats, etc., taken from the bark and brought into the city are, of course, salved property. According to the agreed facts, had it not been for the services of the libelants and others, the bark and her entire cargo would have proved a total loss. Through the exertions of the salvors the bark and her cargo remaining on board, was placed in such a position that it brought at public sale $14,275. The fact that it was submerged does not make it any the less a fact that it was saved. By the efforts of the salvors it was rescued from the peril which threatened it, and brought to a position of safety. The proceeds of its sale show what was saved, and upon that amount the salvage should be allowed. The salvage service was faithfully rendered, and was attended with some, though not a high degree of danger. After some consideration, I think that the following allowance of salvage should be made:

To the Ella Knight and crew.....	$1,500
To Captain Guthrie.....	100
To each of the stevedores mentioned in the agreed facts.....	20

And it is decreed accordingly.

Case No. 6,259.

HAYDEN v. DAVIS et al.

[3 McLean, 276.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

BILLS AND NOTES—VOID INSTRUMENT.

1. Where a bank is prohibited by law from issuing any bill or note not payable on demand and without interest, under a penalty, any instrument issued in violation of the act is void. [Cited in Cooke v. State Nat. Bank of Boston, 52 N. Y. 103.]

2. An acceptance of a draft is within the law.

3. A parol bond to indemnify the person who signed such draft is void, because it is connected with a void instrument.

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

4. The bond was executed in Michigan, but it related to a New York transaction, which was void by the laws of that state, and this vitiates the bond.

[Cited in Leavitt v. Palmer, 3 N. Y. 26.]

At law.

Mr. Romeyn, for plaintiff.
Mr. Emmons, for defendants.

OPINION OF THE COURT. This suit is brought on a bond given by George W. Tracy, George Davis, and Charles A. Hopkins, in the penal sum of twelve thousand dollars, dated the 5th of July, 1841, conditioned, that the obligors shall pay, or cause to be paid, certain drafts or bills of exchange drawn on the cashier of the Phenix Bank of Buffalo, part drawn by the plaintiff in favor of Lewis Eaton and others—part by Lewis Eaton in favor of plaintiff—which drafts amount to the sum of five thousand eight hundred and ninety-eight dollars, payable at future and different periods; which drafts were given in payment of a contract made the 6th of June, 1840, between D. Balentine, by T. Treadwell, his attorney, of the one part, and R. N. Hayden and one Lewis Eaton, of the other part, for the sale and purchase of one thousand three hundred and thirty-one shares of stock in the Bank of Constantine, in the state of Michigan, and shall fully discharge the said R. N. Hayden from all liabilities for or on account of the same, and shall fully indemnify and save harmless the said R. N. Hayden of and from all suits, &c. then the obligation to be void, &c.

The defendants pleaded that it was agreed the above drafts should be accepted by the Phenix Bank of Buffalo, before they were received in payment for said stock; that they were so accepted by A. K. Eaton, cashier, and Lewis Eaton, president, which was in violation of law, &c. Plaintiff replied, that the contract of purchase was made at Constantine, in Michigan, and was transferred to plaintiff and Eaton by Balentine, at the above place; that five thousand dollars were paid by plaintiff and Eaton to the said Balentine in part; and for the residue of said consideration the drafts were executed and delivered to Balentine, which remain unpaid; that the said plaintiff and Eaton, at Buffalo, at the instance of the defendants and George W. Tracy, assigned and transferred all of the stock to defendant Hopkins, and the same was thereupon accepted and received by the said Hopkins; and the plaintiff further avers that as the consideration of the said transfer and sale, it was then and there agreed that the said defendant and the said Davis should pay said drafts, and should execute their bond therefor, &c. To this the defendants demurred. The pleadings raise the question, whether the drafts, for the payment of which the bond was executed by the defendants, were legal.

In the General Statutes of New York (page 63, § 4) it is provided, that "no banking association, or individual banker, as such, shall issue or put in circulation any bill or note of said association or individual banker, unless the same shall be made payable on demand, and without interest. And every violation of this section by any officer or member of a banking association, or any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court," &c. Id. p. 73, § 4. A construction was given to this statute, in Smith v. Strong, 2 Hill, 241, in which it was held that an acceptance made in violation of it was void. The law being a general one, all are bound to take notice of it. And on general principles there would seem to be no doubt, that any contract expressly prohibited by law is void. Bensley v. Bignold, 5 Barn. & Ald. 335; Com. Cont. 66; Langton v. Hughes, 1 Maule & S. 593; Bell v. Scott, Id. 751; Chit. Cont. 420, 422, 423; Story, Confl. Laws, § 247. The bond is not for the payment of money, but to indemnify the plaintiff against the above drafts. On a mere bond of indemnity, no action can be sustained until the party is damnified. The drafts are unpaid, and it does not appear from the pleadings how and to what extent the plaintiff has been injured by drawing and being connected with the drafts. But do the invalidity of these drafts avoid the bond? Of this there would seem to be no doubt, if the bond grew out of or was connected with the drafts. The rule is, that "where the contract grows immediately out of the illegal act, or is connected with it, justice will not lend its aid to enforce it." Toler v. Armstrong [Case No. 14,078], and authorities above cited. The bond was executed in Michigan, but it relates to a New York transaction, which is void by the laws of that state, and this vitiates the bond. The demurrer to the replication is sustained.

Case No. 6,260.

HAYDEN v. JAMES.

Circuit Court, District of Columbia. 1860.

PATENTS—WITHDRAWAL UNDER A MISTAKE—ABANDONMENT—DISCLAIMER—TESTIMONY AS TO UTILITY — JOINDER OF IMPROVEMENTS IN ONE PATENT.

1. If a party, upon a mistaken rejection of his claim by the patent office, withdraw his application, and receive the return fee of $20.00, and acting under such mistake of his rights, occasioned by the error of the patent office, suffer his invention to go into public use, even for several years, and afterward, upon discovering his mistake, apply for and obtain a patent, the withdrawal under such circumstances will not be an abandonment of his right; but the second application, by operation of law relates back to the date of the first application, so as to cut off the forfeiture which otherwise would have happened by the long intermediate public use.

2. The disclaimer of part of an invention, provided such disclaimer arose from inadvertency, accident, or mistake, will not prevent the pat-

entee from embracing the part so disclaimed in a reissue of his patent.

[Cited in Hussey v. Bradley, Case No. 6,946.]

3. Upon the application for a patent, the testimony of practical men as to the utility of the invention is entitled to consideration.

4. A party may unite as many improvements having relation to the same thing in one patent, as he pleases, but he may make each improvement the subject of a separate patent if he chooses.

[Cited in Law, Dig. 153, 249, 311, 503, to the points as stated above. Nowhere more fully reported; opinion not now accessible.]

[See Case No. 6,256.]

HAYDEN (MANNING v.). See Case No. 9,043.

Case No. 6,261.

HAYDEN v. SUFFOLK MANUF'G CO.

[4 Fish. Pat. Cas. 86; Merw. Pat. Inv. 664.] [1]

Circuit Court, D. Massachusetts. Oct., 1862.[2]

PATENTS — PATENTEE MUST BE FIRST INVENTOR — CLAIM OF LETTERS PATENT — SPECIFICATION — IMPROVEMENT IN COTTON CLEANERS — WEIGHT OF TESTIMONY OF WITNESSES — PERFECTED INVENTION — SCOPE OF DAMAGES FOR INFRINGEMENT — VERDICT — EFFECT UPON RIGHT TO USE INFRINGING DEVICES.

1. To entitle him to any exclusive privilege, a patentee must not only be an original inventor, but the first inventor.

2. The claim of letters patent is the conclusion, which sets forth distinctly what is the invention which the inventor asks to be secured to him by his patent.

3. The preceding specification is referred to, and examined, in connection with the claim only to explain the latter, and ascertain its true extent.

4. The claim being for scores filled with metal or cement, and the use of shellac varnish having been spoken of in the specification, the varnish thereby becomes the equivalent of the cement for the purpose of filling the seores.

[Cited in Consolidated Roller Mill Co. v. Coombs, 39 Fed. 33.]

5. A claim for "covering the partitions of an elongated trunk with woven wire, having the scores filled with metal or cement," is not infringed by the use of a similar elongated trunk with its partitions covered with a screen of woven wire, the scores of which were not filled with metal, cement, or their equivalents.

6. Two things are to be regarded in weighing the testimony of all who testify: the ability of the witness to tell the truth, and his disposition to tell the truth. These do not always go together.

7. The ability to tell the truth, as to past transactions, may depend upon the accuracy of the observation, or of the knowledge at the time; upon the occasion that the party has had to keep it in his mind and memory since; and in the tenacity of his memory.

8. When the testimony relates to machinery, the question whether the person had a full knowledge at the time may depend upon his habit of accurate observation, his opportunity of observing the particular structure or machine, and his intelligence or understanding of it.

9. If the testimony as to want of novelty leaves the question in entire doubt, the party whose duty it is to prove it has not maintained the burden of proof.

10. Where varnish was applied in a prior machine, for the purpose of filling the scores, the presumption would be, if the party was competent, that he accomplished the purpose; otherwise, if the varnish was applied for another purpose, the filling of the scores being incidental only.

11. A perfected invention is one which is brought to such a condition as to be capable of practical use.

12. An experiment, or series of experiments, ending in experiment and abandoned, is not a perfected invention that can defeat a subsequent patent obtained by another inventor.

13. If experiments tend to a certain point, but there is no certainty to what extent they went, the subsequent conduct of the parties who made the experiments may aid in determining what they accomplished.

14. The greater the importance of the invention, the less the probability that, if achieved, it would have been laid aside.

15. Where a useful machine is sought to be invalidated by an old machine, made years ago, the testimony should be examined with care and caution, to ascertain whether the prior machine was actually and substantially the same.

[Cited in Cook v. Ernest, Case No. 3,155; Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 905.]

16. Although the plaintiff's patent creates a prima facie case for him, as to the validity of the patent, it creates no presumption that any person has infringed upon it.

17. A verdict for damages gives no right to the defendants to use the infringing devices.

[See note at end of case.]

18. The damages should have reference to the scope of the invention of the plaintiff, and the extent to which it enters into the infringing machine.

[See note at end of case.]

This was an action on the case, tried before Judge Sprague and a jury, which was originally brought to recover damages for the infringement of letters patent [No. 18,742] for "improvement in long trunks for cleaning cotton," granted to plaintiff [Isaac Hayden] December 1, 1857, and also of letters patent [No. 29,971] for "improvement in cotton cleaners," granted to plaintiff, September 11, 1860.

Upon the trial, the plaintiff having put these patents, marked "B" and "C" respectively, in evidence, and having introduced evidence tending to show an infringement of both, the defendants introduced, by way of defense, a copy of letters patent [No. 16,833] for machinery for cleaning and separating cotton, wool, fur, and other fibrous materials, marked "A," also issued to the plaintiff, and bearing date March 17, 1857. It was agreed by the parties that these several letters patent were applied for in the following order:

C, applied for December 11, 1854.
A, " for November 1, 1855.
B, " for June 15, 1857.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 664, contains only a partial report.]

[2] [Affirmed in 3 Wall. (70 U. S.) 315.]

Evidence was introduced on both sides, tending to show that, prior to the alleged invention or inventions of the plaintiff, cotton had been cleaned by blowing it from an opening machine, through long trunks of various lengths, from twenty to one hundred feet long, provided with a screen or grating, sometimes consisting of wooden bars and sometimes of a plate of metal, perforated with holes half an inch wide and two inches long; that some portion of the dirt and waste fibre, as well as some of the good fibre of cotton, fell through the openings in such screens or gratings, and descended into compartments below the screen, formed by cross partitions placed at varying distances, from three to five feet apart; but the plaintiff claimed, and offered evidence tending to show, that the improvement which he claimed effected the separation and retention of foreign substances and waste fibre more completely and successfully than the old trunks, and produced new results that had not been before produced, and thus produced the benefits and advantages set forth in his several specifications by means of the several improvements therein claimed. And thereupon the defendants requested the court to rule upon the several letters patent, A, B, and C, as follows: First, that the patent of December 1, 1857 (B), covered an elongated trunk, having partitions covered by a woven wire screen, whose crossings are filled with metal, cement, or shellac varnish, or any other varnish that will answer the purpose, such trunk to be used for the purpose of cleaning cotton, in connection with any opening and beating machine which can be made to produce either a blast or suction, with or without the aid of a fan, to assist in passing the cotton through the trunk over the screen. Second, that the patent B was inoperative and void; because the thing therein described and claimed was fully described, but not claimed, in patent A, and was, therefore, by the legal operation of patent A, surrendered to public use, if it was the invention of the plaintiff, before patent B was applied for. Third, that patent B was inoperative and void, because it described and claimed what was also embraced by the claim of patent C.

The court, in accordance with the first prayer of the defendants' counsel, did rule upon the construction of the said patent B as follows, namely, that the patent of December 1, 1857 (B), covered an elongated trunk, having partitions covered by a woven wire screen, whose crossings are filled with metal, cement, or shellac varnish, or any other varnish that will answer the purpose; such trunk to be used for the purpose of cleaning cotton, in connection with any opening and beating machine which can be made to produce either a blast or a suction, with or without the aid of a fan, to assist in passing the cotton through the trunk over the screen. But the court refused to rule the patent B to be inoperative and void by reason of the legal effect of the patent A. And the court further ruled, that the patent of September 11, 1860 (C), embraced what was already covered by the patent of December 1, 1857 (B), but refused to rule that patent B was inoperative and void by reason of the legal effect of patent C. And thereupon the patent C, after the evidence on both sides was closed, and before the case went to the jury, was withdrawn from the case by the plaintiff's counsel, and the jury found a verdict for the plaintiff upon the patent of December 1, 1857 (B).

The claims of these several patents were as follows:

Patent A, March 17, 1857: "Increasing the area of the trunk above the screen, or making it larger towards its rear end, by increasing its height or width, or both, as may be desirable, so that the blast of air which conveys the materials into or through the trunk will move gradually slower, so as to allow the light and fine, or such portions as are intended to be separated, time to be precipitated and pass through the screen before the air which holds them in suspension escapes from or passes out of the trunk. Second. And in combination with a trunk made gradually larger toward its rear end, as above claimed, I claim a screen of woven wire or twine arranged upon a series of partitions, as set forth."

Patent B, December 1, 1857: "Covering the partitions of an elongated trunk or box for cleaning cotton and other fibrous substances with woven wire, having the scores formed by the weft crossing the warp of said wire screen filled with metal or cement; the whole combined in the manner and for the purposes set forth."

Patent C, September 11, 1860: "A trunk for cleaning cotton and other substances, divided horizontally or centrally with a screen of woven wire or twine, with cells or compartments under said screen, so small as to prevent or break the current of air under said screen, substantially as described, in combination with a machine substantially such as is described in this specification, or its equivalent, for opening the cotton and blowing it through said trunk over the screen, substantially as described."

Henry F. Durant and William Whiting, for plaintiff.

Causten Browne, George T. Curtis, and Caleb Cushing, for defendants.

SPRAGUE, District Judge (charging the jury). This is a suit upon a patent which the defendants are alleged to have used, thereby violating the exclusive rights which the plaintiff claims.

A patent right, gentlemen, is a right given to a man by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property, and no more so; and questions respecting it are to be tried

in a court of justice in the same manner as all other rights which may have been infringed. They are to be decided according to the law and the evidence.

There are three general questions, gentlemen, that may arise. The first necessarily is whether this patent is valid. If it be, then the question arises, whether the defendants have infringed; and if so, the next question is as to the amount of damages.

The first and great question, which has occupied the greatest part of the time, is of the validity of the patent. The plaintiff having obtained a patent from the government, it is incumbent on him, in the first instance, to produce the evidence of his having that grant to the exclusive privilege—to the invention; and when he produces that evidence he has performed that duty; he has laid before you his patent, and the presumption is that it is a valid one.

It makes a prima facie case for the plaintiff in the question of title. The defendant then undertakes to overthrow it by showing some reason why it ought not to have been granted to him—why, therefore, it is not valid in law. The reason assigned here, gentlemen, is that the plaintiff, Hayden, the patentee, was not the first inventor of the thing patented; and that is the sole ground upon which it is contended that this patent is not legal and valid.

To that, then, you will direct your inquiry in the first instance—was Hayden the first inventor? Because if he was not, whether or not he himself knew that it existed before, if in fact it was before known, although he may have been an inventor, an original inventor, yet, if he was not the first inventor, it would not give him any exclusive privilege. The public had a right to it before he invented it; he was not the first inventor, and the officers of the government had no authority, by law, to grant exclusive right to an individual of that to which the public had a previous right.

Was he then, gentlemen, the first inventor? The burden of proof to show that he was not, is upon the defendants, and they must maintain the allegation by a preponderance of the evidence to be entitled to the verdict.

There are, then, two instruments; first, the machines used at Chicopee, and then those used by the Suffolk Company. With regard to the trunks used at Chicopee, I do not understand that it is contended by the counsel for the defendants that they were the same as the plaintiff's; so as to invalidate the plaintiff's patent; but they are relied upon as showing that certain steps were taken anterior to the plaintiff's patent, which diminish any merit or claim that he may have by virtue of his patent, by narrowing down the extent of his invention. The plaintiff's invention is said to have been completed—and I believe there is no controversy upon that—in 1853. Those trunks, at Chicopee, were prior to that.

Now, gentlemen, it is necessary for you to determine, in the first place, what those trunks were, and for that purpose you should examine the evidence. There is controversy in the evidence as to what they were. It is for you to determine whether they did contain the wire screen or not; and how far it was similar to the wire screen which the plaintiff sets forth in his patent; and which constitutes one of the material parts in his invention. And so far as you find that it was similar—that there was a wire screen in those trunks, and so far as you find that they were substantially like the plaintiff's—so far as you find them alike, so far the invention had gone into use; the invention of the wire screen in trunks for cleaning cotton. But, as I observed before, it not being contended that they were so like the plaintiff's as to invalidate the patent, I have no occasion to dwell upon whether the plaintiff's patent is invalidated or not.

You come then, gentlemen, to the machine from the Suffolk Company, about which the great question has been raised in regard to priority. Now, then, you are to compare two things; and the first step toward making a comparison is to ascertain what the two things are which you are to compare together. The thing secured by the plaintiff's patent is to be compared with the trunk used by the Suffolk Company; there being no controversy as to the dates here, as the trunk relied upon was used prior to the invention in 1853.

It is necessary, then, for you carefully to examine and see what the plaintiff's patent is for, and what it secures to him.

This patent, gentlemen, is divided into two parts—the specification and the claim; the claim being the conclusion which has been referred to, and setting forth distinctly what it is he claims as his invention, and asks to be secured to him by his patent. The specification, which precedes that, is referred to, read and examined, in connection with the claim, only to explain the claim and ascertain its true extent. We look at the claim in the first instance—which is this: "Covering the partitions of an elongated trunk or box for cleaning cotton, or other fibrous substances, with a screen of woven wire, with the scores crossing the wire filled with metal or cement—the whole combined in the manner and for the purposes set forth in the specification."

Now, gentlemen, you will analyze this and examine it; and see what are the essentials of the invention which is thus secured to him.

In the first place, there is an elongated box or trunk. In the next place, there are at the bottom of that, partitions. In the third place, covering those partitions, is a screen of woven wire, and then a particular characteristic given to that description over and above the description of its being one of woven wire, by saying: "Having its cross-

ings filled—having its scores filled with metal or cement." Then, gentlemen, those three things having been enumerated, it goes on to say, "the whole combined in the manner and for the purposes set forth in the previous specification."

As to the box, gentlemen, the only description of the box given, is, that it is a trunk, an elongated trunk for the purpose of cleaning cotton or other fibrous substances. I have not been requested to undertake to explain to you what an elongated trunk is. I have no occasion to go further than to leave it to your own judgment to determine what that description of a trunk is.

I am not aware that there is any particular controversy or question about the partitions underneath, nor any particular desire that the court should give you any explanation as to the meaning of the patent in relation to those partitions. The screen, then, of woven wire, is to cover this; and that screen must have its scores filled with metal or cement. And here, gentlemen, there is a reference, as there is throughout, to be had to the specification that precedes, which specification undertakes to set forth what the invention is, and to give instructions how to make an instrument—the improvement which the plaintiff says that he has made. I have not examined the drawing, but you can do so if it throws any light upon the question. In that part of the specification which speaks of filling the scores, he says it may be done with metal, and then says by metal of a certain description, and he then says how it may be applied—by dipping the wire in it. It says further, that shellac varnish may be used—a varnish made of shellac and alcohol; therefore, gentlemen, as it is said expressly in the specification that varnish may be used for filling the scores, it makes the shellac varnish equivalent to the cement, as an equivalent mode of filling the scores; and not only expressly says that it may be used, but gives instructions as to the better mode of applying it, in order to fill the scores if that mode be adopted. It tells in what the shellac should be dissolved, and if only the upper side of the screen is to be covered by the varnish, in order to fill the scores, how it should lie, horizontally, and the first coat should be put on by brushing across, and the next coat by brushing lengthwise, and directions to accomplish the end by filling the scores if that material should be adopted by the constructor. And that is an essential part of this invention, so that if a person should use the elongated trunk, with its partitions covered by a screen of woven wire and combined in the manner set forth, and the scores of that screen were not filled with metal, cement, or what is equivalent to that as set forth in the patent for filling them—then it would be no violation of the plaintiff's patent. And so, if any other person has made such an instrument before it would not invalidate the plaintiff's patent. This is not controverted, and I lay it down to you as the law applicable to the case.

Now, gentlemen, the plaintiff's machine, as described in his patent, is to govern you; any machines or models produced are only to illustrate what is in the patent; if they differ, the patent is to govern, for all that is secured or patented is that which is in his patent, and it secures all that is in his patent.

When you have satisfied yourselves, gentlemen, as far as is necessary, what the plaintiff's invention, as secured by his patent is, you will then turn your attention to see what was the prior machine which is said to have existed, so as to invalidate his patent, for want of novelty—and that is, the Wright trunk.

Now, gentlemen, a difficulty presents itself in that investigation, and that is, you have not that trunk here—no patent for it. Where a question arises as to what a machine or structure was at a former period, and especially which goes back for years—and, in this instance, I think about seventeen years—I think to about 1845; but whether old or recent, when you have to compare two things, one of them a structure or machine, it is a great satisfaction to have the structure or the machine before you, if it is a possible thing; or if it be of a size and character that it can not be brought into court, to have it now existing, so as to be open to examination, so that those persons who are interested in knowing what it is, having access to it, can make, by measurements or inspection, an exact model of what it is, and bring it into court, and show you what the thing is exactly. But, gentlemen, that trunk has passed away; it is not now, so far as the evidence goes, in existence, and that means, therefore, for ascertaining the character of it does not exist.

The next means would be a model that had been made of a former machine, or structure, at the time it did exist. You have no such model. Then a written description made at the time for the purpose of accurately delineating and setting forth what the machine or structure was; as in a patent or other description made for some important purpose—it is all very important, if you can have it. The importance of it is in this, gentlemen, not only that it would contain a full, and it may be presumed an accurate description and delineation of the machine or structure; but that it was made at the time when it was certainly known what it was, and for the purpose of being a delineation, and has been subject to no change since; that is the importance of it, that when it is thus embodied in a model or in a written description or drawing, it remains unaffected by subsequent events. But in the want of such testimony, we must resort to the best that exists; and that is the memory of man.

Now, gentlemen, it is for you to weigh the evidence of every kind, and the evidence de-

rived from the testimony of witnesses upon the stand, taking into view, of course, all the circumstances, the facts which can enable you to form a correct judgment of the weight of the evidence, and how far you may rest upon it, satisfactorily. Two things are to be regarded in weighing the testimony of all who testify—the ability of the witness to tell the truth, and his disposition to tell the truth. These do not always go together. The ability to tell the truth as to past transactions, or those events that have transpired, may depend, in the first place, upon the accuracy of the observation, and in the accuracy of the knowledge at the time; then upon the occasion that the party has had to keep it in his mind and memory since; and in the tenacity of his memory, is his ability. His disposition, his moral integrity, or freedom from bias, may lead him to testify one way or the other.

Now, the accuracy of knowledge at the time, as well as the ability of the man to testify the truth, depend very much upon the subject-matter. Some things that men have a full, clear, and perfect knowledge of at the time they transpire, may not be of that interesting character that they retain them in their memory. There are other things of which their knowledge at the time may not be perfect; and when you come to the question of machinery, a question of structure, the question whether the person had a full knowledge at the time may depend upon his habit of accurate observation, and his opportunity of observing the particular structure or machine, and his intelligence or understanding of it. For if he had not a clear idea at the time, of course he can not have immediately afterward a very clear idea to communicate to others. You will consider, therefore, in weighing the evidence as to what it is that the witnesses undertake to describe, how far you can rely upon their memory in undertaking now to say what that was; so that you can ascertain the instrument, the operations and effects, so as to compare that with the plaintiff's machine.

Now, unfortunately, gentlemen, the witnesses differ in relation to this trunk at the Suffolk Mill. They differ, in the first place, as to the trunk itself. The whole structure would present itself differently to the eye of him who went into the room and looked at it attentively, or only gave a passing glance at it.

The witnesses for the defendant say that it was of the form of that which you have had, that it was in this room, building No. 3, connected with the opener; the opener facing to the westward, and the trunk extending at an angle from that toward the western wall, at the left, I think, some twenty-five feet, and then passing up in a curve through the ceiling into the room above, and then going horizontally eastward. That is the description of the external appearance of the trunk as given by the witnesses for the defendant.

The plaintiff's witnesses say that the trunk there was different; that, in the first place, the opener did not face to the westward; but eastwardly, toward the partition; and that the opener was only a few feet, or not far from that partition; that then the trunk from that went eastwardly, toward the partition, a few feet, and then went up in a curve more or less regular, then straight, and then another curve, extending along under the ceiling of the same room, westwardly, and then went up in a curve to the room above, and then horizontal, eastwardly, to cross over. That, I believe, is substantially the testimony of the witnesses for the plaintiff.

Here you are met, gentlemen, with apparently a conflict of testimony, which, so far as you deem important, you will compare, examine, and weigh, and say which, on the whole, you think preponderates. Then when you go to the internal structure, what was inside of it, there was a conflict of testimony between the witnesses. The defendants say that there was a wire gauze screen. The plaintiff's witnesses say that there was no wire screen there, or if any there, a very short distance from the opener toward the wall.

Now, gentlemen, that conflict of testimony you are to examine and consider, and say what is established—whether the inconsistencies in the recollection of the witnesses establish any thing; and if any thing, what?—or whether it leaves it in entire doubt; and if leaving it in entire doubt, then the party whose duty it is to prove it to you has not maintained the burden of proof.

Then there is another question that comes up. If that trunk had such a screen—had a screen of woven wire—were the scores filled with metal, or varnish, or cement, as required by the plaintiff's patent to make his instrument? And, gentlemen, instead of repeating the metal or cement, I shall hereafter speak only of the varnish, because that is the only thing that is in controversy, and the only thing that is alleged to be used, and therefore the metal need not be repeated.

Now, gentlemen, the plaintiff's witnesses say that there was no screen there, or a very short one, and they do not speak particularly as to the varnish in the screen, because they did not see it. The defendants' witnesses speak of the varnish, and it is for you to consider the force and effect of that testimony. What is proved? The proposition is that the scores were filled—that is the thing you are to inquire about, whether the scores of that screen were filled with shellac varnish. I say shellac varnish, because it is not contended that there was any other varnish used; and if there were, there is no proof of any other varnish used that answered the purpose.

Now you will observe in the claim, in the first place, it is said metal or cement; in the specification a certain thing is mentioned as equivalent to the metal, or what is set forth as equivalent—shellac varnish, or other kinds

of varnish that will answer the purposes of filling the scores to prevent the fiber of the cotton from sticking and hanging. What other kinds of varnish would accomplish that, gentlemen, we have had no evidence; and, therefore, if some other kind of varnish were used than shellac varnish, we have no evidence whether that kind, whatever it may have been, would have been of that kind of varnish named in the specification which would accomplish the object sought. You will look, then, to the evidence, gentlemen, in the first place, and see whether there was any direct evidence that the scores were filled; and now by direct evidence I mean by evidence of the person who says that he looked at the scores and saw that they were filled, or that they had been filled; saw that at the time when he looked at them that they were filled with shellac varnish. There is no such person here, that I recollect, who undertakes to say, that looking at that screen he saw that those scores were filled with shellac varnish. How then, gentlemen, is it sought to establish that it was? It is from the evidence that the varnish was put upon the screen. Well, then, the inquiry is, was varnish put upon the screen? That is one inquiry. If it was, in what manner was it put on, and to what extent? and is it shown to you so that you are satisfied that it did accomplish the purpose of filling the scores? Because if it did not accomplish that purpose, then the scores were not filled; and if the scores were not filled, it is not the plaintiff's screen.

You must look at the evidence, therefore, and satisfy yourselves. It is said by some of the witnesses (I do not mean to detail the evidence), whether more than one I do not recollect, because it is not my purpose to detail the evidence, that three coats were put on. In what manner? Well, gentlemen, you will look at the evidence and see. In the first place, were there three coats, and in what manner were they put on?

Now, gentlemen, it may be material—you are to determine how far it is material—to consider whether there is any evidence that the varnish was put on for the purpose of filling the scores, or for some other purpose.

If the varnish was put on for the purpose of filling the scores; if that was the purpose and object in the mind of the party who directed it to be put on, there would naturally arise a presumption that if the party was competent for his work, that he accomplished the purpose for which he did it; but if there was no such purpose, and that this was only an accidental result of putting it on for some other purpose, then you will judge whether there is any presumption that that was the accidental result, from the fact that it was put on. It may have been the result, although not intended, and that is for you to determine in considering the weight of evidence. If you take that into view you will see how far the presumption arises, and look at the purpose there was in putting on the varnish.

Now, gentlemen, you will consider whether it is proved to you that the scores were filled with varnish, and if proved to you that they were filled with varnish, is it proved to you that it was shellac varnish; and you will go back and see what the testimony is in that respect, and see whether there are witnesses that spoke of it; what were their means of knowledge, at the time, of what kind the varnish was; whether you can rely upon their memory, at this time, to tell you what the varnish was, so as to satisfy you that the scores were actually filled, and with shellac varnish.

That, gentlemen, I leave to you for your determination whether that has been established. If it is not by the preponderance of evidence, then that essential part of the plaintiff's patent did not exist upon the Suffolk machine.

Gentlemen, I have thus far proceeded in calling your attention to matters to aid you in ascertaining what the structure was in the Suffolk Mills—in making a comparison between the invention that is patented, and the machine that is said to have previously existed, in order to ascertain whether they were substantially the same. Other things may be taken into view beside the mechanical structure, the mode of operation and the effects produced.

And then, gentlemen, you have to go back and ascertain the mode of operation, and the effects; particularly the mode of operation, if the structure differs.

Accordingly as the mechanical instrument is changed, its operation is changed, and the effects; and you must go back in order to make a comparison, and look at the evidence to see what were the effects of Mr. Hayden's trunk. All the time I speak of Mr. Hayden's trunk, I mean his trunk as set forth in the patent. You have the evidence of that, but I will say you must look at the evidence and see what were the effects of his patented machine; and then look at the Suffolk machine, and see what were the effects produced by that, and then, comparing the two, you will be aided in forming a judgment whether they were substantially the same, or not; and to what extent they were similar, and to what extent they differ. If the effect is the same, there is no presumption that there is a difference in the structure. If the effects are different, it is a matter to be weighed by the jury how far is the difference between the causes, where they produce different effects. Although there has been, gentlemen, a great deal of evidence in that respect, as to the effects produced, I shall not go into the details of the evidence, for the remarks made as to the character and the weighing of evidence, apply to this as to all other parts of the case.

There is another thing to be taken into your consideration, gentlemen. Supposing that so

far as the testimony has been presented to you, the trunk and its contents in the Suffolk Mill were apparently the same as the plaintiff's, another question may arise still—whether that was what may be denominated a perfected invention? Because if it were not, then it was not prior in the eye of the law, so as to defeat a subsequent inventor—and by a perfected invention, I mean one that is brought to such a condition as to be capable of practical use. Now, gentlemen, by that test, was that trunk at the Suffolk Mills brought to such a condition as to be of practical use? If it was an experiment, or a series of experiments, and ended in experiment merely and then abandoned; then, gentlemen, it was not perfected in the eye of the law, so as to invalidate a subsequent patent obtained by another inventor. And in this view, therefore, gentlemen, to ascertain whether it was perfected in the sense I have explained to you, you will go back and see what the evidence is of its effects and application; and here is a conflict of evidence for you to examine, to weigh, and consider.

In determining the question, whether the mode of operation was the same, you will look not only at the evidence of the invention; you will look at the structure, the evidence of the structure; the evidence of the mode of operation; the evidence of the effect produced—that all goes to show whether it was an invention completed, perfected so as to be capable of practical use.

There is another thing, gentlemen, which you are to take into view, and which may have a bearing upon this question of its being a perfected machine, or not—primarily, has a bearing upon the question of what the machine really was that was there; and whether it was a perfected invention—and that is, its abandonment. It is a matter for you to weigh. If there were experiments made, gentlemen, and they tend to a certain point, and there is no certainty to what extent they went, then the subsequent conduct of the parties who made experiments, and were interested in it, may aid you in forming an opinion of what they accomplished. If they preserved it as a thing valuable, it has a weight in one direction as showing that they had accomplished something. If they did not preserve it but abandoned it—the evidence is to be weighed whether it was abandoned or not; whether a success had been obtained in any thing that was worthy of preservation, or could accomplish a practical and useful purpose; and the weight of this you will probably know is in proportion to the importance of the thing. There may be an invention, gentlemen, of so unimportant a character, that although it be really an invention, something of practical use, it may be in relation to a subject matter of so little importance, or of transient interest, that the occasion may pass by and it may be laid aside and never used afterward, because there is no occasion for it, as there are many patents for articles of dress of the day, which are patented for the day, while the fashion lasts, and pass away when the fashion passes away. On the other hand, if the invention be of something which can be of great practical importance, an enduring importance, then you will consider how much stronger will be the incentive to success in perfecting that which would have been of importance; and the greater the importance of the invention, the less probable that if achieved it would have been laid aside and not extended itself to others interested in its use.

Gentlemen, this is, as I have already mentioned to you, a question of what existed some seventeen years ago. Now, I think it proper to say to you, that where an invention of any useful machine or structure, or improvement in any machine, is shown to have been made, and it is sought to be invalidated by an old machine made years ago, the jury should examine the testimony and the evidence with care and caution, so as to be satisfied that that which is said to have existed, was actually and substantially the same.

The rule of law is a reasonable one; at all events it is a rule of law, that a party who sets up such an old instrument that has passed away, has upon him the burden of satisfying the jury upon a preponderance of evidence that it is substantially the same as what has taken place, before they will set aside the patent. If they are so satisfied by the evidence, that it was substantially the same and known before, then it is their duty so to say when considering the patent.

I come now, gentlemen, to another thing. If you are satisfied that the plaintiff was not the first inventor, then his patent is invalid, you have no occasion to go further, and must return a verdict for the defendants. If you are not satisfied, gentlemen, you come to another question: Whether the defendants have used the thing patented—whether they have infringed. And here the burden of proof is upon the plaintiff; because although the plaintiff's patent creates a prima facie case for him, as to the validity of the patent, it creates no presumption that any person has infringed upon it. And there is an admission, in this case, gentlemen, as to what the defendant uses, and has used, and did use, at the time before this action was brought; and there is also testimony in the case, of the character of the trunk, particularly as to one of the trunks, by Mr. Crane, of Lowell. He testifies that he made a trunk, which was sold to the defendants, and that it was made exactly as Mr. Hayden's trunk was; that it was sold to the defendants, and has been used by them since. You will, therefore, consider whether it is proved to you, whether the defendants have used the plaintiff's invention, or not. If they have not, why then the verdict must be for the defendants. If they

have, then you come one step further, and your duty will be to inquire what damages shall be given to the plaintiff for the infringement of his right. There was an agreement as to the time when they began—from June 30, 1858, to the day of the writ, April 13, 1861, for trunks—these dates, gentlemen, will be material to carry with you. Now, gentlemen, if you find this patent of the plaintiff has been infringed, you will inquire about the amount of damages. The general rule is that you will give to him the actual damage he has sustained, then you will look at the length of time, in the first place, that they have used the trunks. And here it is material to bear in mind that your verdict, if you give a verdict for the plaintiff, in damages, covers only the use from the beginning stated in June 1858, up to the date of the writ, in April, 1861. If the defendants have used the machine since, they are liable over and above what you will give in your verdict to pay the plaintiff for such use since. Your verdict will cover no use except up to the time of the date of the writ—that was all that was sued for; and, therefore, for all since that time, the defendants are liable in another suit by the plaintiff. You are also to remember that if you render a verdict for the plaintiff, it will not give to the defendants any right to use any of these trunks hereafter. It is not like a license to use a trunk during the existence of the patent, but so far from being any right to use them hereafter, the plaintiff may apply to this court for an injunction—that is, for an order of court to prevent their using them. That will be his right if the infringement is established, and you are then to give damages from June, 1858, to the date of the writ, for the use during that time, and such actual damages as the plaintiff has sustained.

Now you have heard from the counsel various means for ascertaining it. You are to take the whole evidence, so far as it is applicable to that question, and inform your judgment from the whole. There is some evidence derived from General Oliver and Mr. Southworth, of the use, by the Atlantic Company, in Lawrence, and the company over which Mr. Southworth presides, in Lowell, of this machine of Mr. Hayden's, by his consent, under particular circumstances, and its being subsequently referred to them, in connection with Mr. Thatcher, to determine what compensation should be paid. I understand, whether I am right or not, that that was in compensation for the use of it, as a license, during the existence of the patent, to use the thing; and they fixed upon a certain compensation which was named to you by General Oliver. That was not, as Mr. Southworth says, satisfactory to Mr. Hayden, and is not taken as any price that he fixed, or any agreement that that was a fair compensation to use his patent for the length of time, or a fair compensation for the circumstances under which he began to use it. But as that is evidence in the case, you will take it into view, and give it such weight as it deserves in estimating the damage to the plaintiff. Then you will look at the value of the thing used, to ascertain that value, by all the evidence that there is in the case as to its character and performance and effects. Look at the value of that which the defendants have used as belonging to the plaintiff, and that may aid you in forming a judgment of the actual damage the plaintiff has sustained.

And here, gentlemen, I will remark, that you are to look at this in ascertaining the actual damage, as you would in any other case of property belonging to one man that has been used by another, to ascertain how much of the rights of one man have been appropriated, temporarily, by another; how much actual damage is sustained by the party whose right has been infringed—to look at it calmly and coolly, as you would in relation to any other.

And, incidentally, it has been mentioned in the course of the examination with respect to the position of the plaintiff, and the capital of the defendants. The learned counsel have not presented you that as a ground for an increase or diminution of damages; but as these things have come out, I may suggest what your own good sense, no doubt, will suggest, that it is wholly immaterial what is the character or condition of the plaintiff or defendants. You do not know, gentlemen, because there is no evidence in the case, and the evidence could not be brought into the case to show you, whether the plaintiff is a poor man or a rich man. You do not know whether the defendants are poor or rich. It is said that their capital is six hundred thousand dollars. Whether they have lost all that by unfortunate operations and are now worth nothing, or whether they have doubled it, you do not know, gentlemen; and the reason you do not know is, that it is not a proper thing to be taken into account in the case. It is not evidence in the case as to the character or condition of the one party or the other. You are to give the same verdict against these defendants, whether it would ruin them, because they are not able to pay one hundred dollars, or five dollars, or whether they were worth a million; and you are to give Mr. Hayden the same amount in this case, whether he is worth nothing, or whether he is worth millions of dollars; equal justice, in both cases, covered by the consideration of the actual damage sustained. You rest, gentlemen, upon your judgment, not on any matter of imagination or feeling; but in exercising your reasoning coolly, your sound judgment will, no doubt, arrive at a satisfactory conclusion, as in all other parts of the case.

I have been requested to say one thing which I believe, however, has been already involved in what I have said. If you come to the question of damages, gentlemen, in considering

that Mr. Hayden is to be paid the actual damage he has sustained by the defendants having used what he invented, and, therefore, you are to determine what he did invent. If the wire screen was used before his invention in the trunk, and he did not invent that use of it in that combination, you may take that into view. If the addition was only of the varnish, for example, or for any one particular, you will take that into view. If he invented the whole, the application of the wire screen, as well as the mode of preparing the screen by filling the scores, you will take that into view. You will take into view what it is that the plaintiff did invent, and what it is of Mr. Hayden's that the defendants have used, as shown by the evidence in the case, in determining what the amount of damage has been.

The jury returned a verdict for the plaintiff; damages, $1,744, equivalent to about $150 per annum for the use of each machine, or two and eight-tenths cents per spindle per annum.

[NOTE. A writ of error was then sued out by the defendant, and the judgment was affirmed by the supreme court in an opinion by Mr. Justice Nelson, who said that no dedication of the first invention to the public resulted from the claim in the second application. Where there is no established license fee, general evidence may be resorted to in order to get at the measure of damages. Damages should not be awarded for the whole term of the patent, but only for the period of the infringement. Such recovery does not vest the infringer with the right to continue the use. 3 Wall. (70 U. S.) 315.

[For other cases involving patents Nos. 18,742 and 29,971, see Hayden v. Great Falls Manuf'g Co., 3 Fed. 519, and Hayden v. Oriental Mills, 22 Fed. 103.]

HAYDEN (UNITED STATES v.). See Case No. 15,333.

HAYDOCK (COBB v.). See Case No. 2,923.

Case No. 6,261a.

In re HAYES.

[15 Reporter, 259;[1] 29 Int. Rev. Rec. 46.]

Circuit Court, D. Massachusetts. Jan., 1883.

ARMY AND NAVY—ENLISTMENT—MINOR—HABEAS CORPUS.

Enlistment in the naval service of the United States of a person twenty years of age without the consent of his parents is invalid, and his discharge will be ordered, upon habeas corpus proceedings, on refunding the advance made at the time of enlistment.

This was an application to the circuit court for the district of Massachusetts for a writ of habeas corpus brought by the mother and only surviving parent to obtain the discharge of her son, who was enlisted into the naval service of the United States, without consent of his mother, at Boston, when twenty years of age.

[1] [Reprinted from 15 Reporter, 259, by permission.]

It was argued for the petitioner that sections 1418–1420 of the Revised Statutes of the United States did not authorize the enlistment of any minors without consent of parents or guardians, and that this case was controlled by the decision in McNulty's Case [Case No. 8,917].

On behalf of the respondent it was argued by the United States attorney that, under sections 1418–1420, "other persons" included minors between eighteen and twenty-one years of age, and that such persons could be enlisted, by necessary inference, without consent of parent or guardian; that congress must have intended either that no minors between eighteen and twenty-one should be enlisted (which seemed impossible), or else that they could be enlisted without consent of parent or guardian; that a strong argument was found in the fact that consent was required for enlistment of all minors into the army, and if congress had intended to require it in case of the navy, it would have done so; and that McNulty's Case [supra] was that of enlistment into the marine corps under the act of 1858, which contained no provision as to "other persons," and under which it seemed evident that no boys above seventeen years of age were to be enlisted at all.

NELSON, District Judge, in delivering the opinion of the court, said that "other persons," in section 1419 [Rev. St. U. S.], meant persons capable of making such a contract, and that McNulty's Case [Case No. 8,917] was conclusive on him on this, and he declined to follow Collins' Case, 25 How. Pr. 157, in which the enlistment under the precise facts of the case before him was held valid. The minor was ordered to be discharged upon refunding to the United States the amount of the advance made upon enlistment.

Case No. 6,261b.

HAYES v. BICKELHOUPT.

[19 O. G. 177.]

Circuit Court, S. D. New York. Nov. 10, 1880.

PATENTS—EQUITY PLEADING—MULTIFARIOUSNESS.

[Bill for infringement of 33 claims, in 4 several patents, *held* demurrable for multifariousness. Hayes v. Dayton, 8 Fed. 702, followed.]

In equity.

J. H. Whitelegge, for plaintiff.
A. V. Briessen, for defendant.

BLATCHFORD, Circuit Judge. The bill in this case is exactly like the bill in Hayes v. Dayton [8 Fed. 702], just decided, except that it leaves out reissues Nos. 8,676 and 8,689 and their several originals and concerns only thirty-three claims in four several patents. The bill is demurred to. The demurrer states the cause of demurrer to be that the bill "is multifarious, and separate and

distinct causes of action are united therein which ought not to be joined or united, to wit: that said bill of complaint sets forth many separate and distinct letters patent, for infringement of which suit is brought, but shows no reason for uniting these separate and distinct causes of action in one suit against this defendant." The demurrer appears to be sufficient in form to raise the question considered and decided in Hayes v. Dayton, and for the reasons assigned in the decision in that case, the demurrer is allowed, with costs.

Case No. 6,262.

HAYES v. The J. L. WICKWIRE.

[27 Leg. Int. 67;[1] 7 Phila. 594.]

District Court, E. D. Pennsylvania. 1870.

WRONGFUL DISCHARGE OF SEAMAN—DAMAGES—DESERTION—FOREIGN VESSEL.

1. The unjustifiable discharge of a mariner in a foreign port, entitles him to wages; and to damages also, if accompanied with oppression.

2. The temporary absence of a mariner from his ship, occasioned by imprisonment upon a charge of a trivial offence, is not a total desertion.

3. The court will not, ordinarily, interfere in a dispute between the master and seaman of a foreign vessel, before the voyage is ended, without the concurrence of the consul.

In admiralty. This case arose upon a libel for wages and damages, allowed by the court upon the certificate of the British consul being filed, that there was, in his belief, sufficient cause for such process. The facts were, briefly stated, as follows:—Libellant was a British seaman, shipped in Great Britain for the round voyage to Philadelphia and back to a port in Europe. After the ship's cargo was discharged at this port, the seaman went ashore one evening, was arrested by the local authorities for an alleged breach of the peace, &c., while in the city, and locked up for four days. Upon being discharged from prison, he immediately returned to the barque, with a certificate from the prison-keeper of the cause of his detention. The master, Murray, had meanwhile, at the expiration of forty-eight hours absence from the barque, duly entered Hayes upon his log-book as a deserter—upon a charge of total desertion; and, when he reported himself upon the barque again, with the cause of his detention, the master declined to receive him on board; to recognize him as one of his seamen; to pay him his wages, or to give him his clothing.

The British consul was next appealed to; and, after an informal hearing of the master and mariner, at a time suggested by the master, decided that it was not a case of total desertion; and instructed the master that he should allow the mariner to return to his duty on the barque. This the master again refused to do. The mariner then took boarding at a seamen's boarding house and libelled the barque.

Mr. Mitcheson, for libellant, contended that the libellant, having been wrongfully discharged before the termination of the voyage, and having been prevented from reshipping, through the master's detaining his pay and clothing, was entitled to his wages until reshipped; to his expenses for boarding whilst on shore; and to damages.

Mr. Coulston, for defendant, contended that libellant should only be allowed wages up to the time he left the vessel;—less the expense and increased wages incident to shipping another seaman in his place.

CADWALADER, District Judge, held that the consul was right; and that the course of the master having been arbitrary and despotic in the detention of the seaman's clothing, &c., libellant was entitled to wages up to the time of decree; expense of boarding for twenty days, with damages for detention of his clothing, and for the clothing if not returned. Decree accordingly.

[1] [Reprinted from 27 Leg. Int. 67, by permission.]

HAYES (SYKES v.). See Case No. 13,709.

Case No. 6,263.

HAYFORD v. GRIFFITH et al.

[3 Blatchf. 34.][1]

Circuit Court, S. D. New York. Sept. 20, 1853.

ADMIRALTY—APPEAL TO CIRCUIT COURT—SECURITY FOR COSTS—FUNDS BELONGING TO CASE.

1. An appeal from a decree of the district court in admiralty to this court is not regular unless the appellant gives sufficient security to answer the costs in case of affirmance.

2. Such security is necessary to the regularity of the appeal, even though execution has been issued on the decree in the district court, in the absence of the security required to operate as a supersedeas.

3. An appeal to this court from the district court, when regular, brings with it into this court all the funds, if any, belonging to the case; and, in case of an appeal from this court to the supreme court, the funds still remain in this court.

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

This was a motion on the part of the appellees, the respondents [Walter S. Griffith and others], to dismiss an appeal taken to this court by the libellant [Charles Hayford] from a decree of the district court dismissing the libel. The ground of the motion was, that the appellant had not given the necessary security on his appeal.

Erastus C. Benedict, for libellant.

Cornelius Van Santvoord, for respondents.

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

NELSON, Circuit Justice. This suit was brought in the court below by a seaman to recover his wages. According to the 45th rule of the district court, he was not required to give, in the first instance, before instituting his proceedings, security for the costs that might be awarded against him by the court below, or by this court, on appeal. By that rule, the court, on motion, may, for adequate cause, order the usual stipulation to be given.

The counsel for the appellant supposes that, under the 133d rule of this court, the only consequence of neglecting to give the security is the issuing of execution against his client, the appeal remaining otherwise in full force. That rule provides, that the appellee may move this court to have the decree in the court below carried into effect, subject to judgment of this court or of the supreme court on appeal, upon giving his own stipulation to abide and perform the decree of such courts; and that this court will make such order, unless the appellant shall give security, by the stipulation of himself and competent sureties, for payment of all damages and costs on the appeal in this court, and in the supreme court, in such sums as this court shall direct. And the 153d rule of the district court provides that, when an appeal shall be entered, the appellant shall, within ten days thereafter, give security for damages and costs; and that, if security shall not be given within that time, the decree may be executed as if there had been no appeal, unless further time be allowed by the court.

Execution has been issued in the district court in this case under the 153d rule, and returned nulla bona, and this is supposed by the counsel for the appellant to be the only penalty for neglecting to give the security. The error of the counsel is in overlooking the acts of congress on the subject. The act of March 3, 1803 (2 Stat. 244, § 2), provides that, from all final decrees in the district courts, where the matter in dispute, exclusive of costs, exceeds the sum of fifty dollars, an appeal shall be allowed to the next circuit court, and that such appeal shall be subject to "the same rules, regulations and restrictions as are prescribed in law in case of writs of error." These rules and regulations are found in the 22d, 23d, and 24th sections of the judiciary act of September 24th, 1789, and in the act amending the same, passed December 12, 1794 (1 Stat. 84, 85, 404). Taking them together, an appellant, in order to make his appeal regular, and entitle himself to a hearing in the court above, must either give good and sufficient security to prosecute the appeal to effect, and answer all damages and costs on affirmance of the decree, or, if he does not wish to supersede execution, sufficient security to answer the costs in case of affirmance. The San Pedro, 2 Wheat. [15 U. S.] 132; Conkl. Adm. c. 12. The rules referred to, both in the district and circuit courts, were adopted for the purpose of carrying these acts into effect in cases where the appellant has neglected to give the security required to operate as a supersedeas. After the lapse of the ten days, if no security has been given for the damages and costs, provision is made for issuing an execution; but, in the case of an appeal, as in the case of a writ of error to the district court, the appeal is not regular unless security is given at least for the costs. The two, in this respect, stand upon the same footing.

There was a tender in the district court by the respondents, and the money was brought into court to abide the final decree. As we shall dismiss the appeal for irregularity, the appellant can apply to that court for the money. Where the appeal is regular, so as to bring up the case into this court, the funds belonging to the case must be transferred to this court with the papers, as the court below has no longer any control over them; and any discharge by that court or any of its officers, of the persons in whose custody the funds may be, is a nullity. This court, from the time the appeal takes effect, is responsible for the safe keeping of the funds, and for their application in behalf of the party who shall ultimately be found to be entitled to them. The court below has no longer any jurisdiction over the case, or any of its incidents; and it is the duty of the clerk of this court, in cases upon appeal, where there is a fund in the court below, to obtain a transfer of the same, and to inquire into its state and condition, and report the same to this court, in pursuance of the 223d rule of the district court, which has been, with others, adopted as the rule of this court on the subject. See rule 136 of this court.

The practice is different in case of a further appeal from this court to the supreme court. Then, the property or funds, and all other securities given by the parties to abide the final decree, remain in the circuit court, because the supreme court does not execute its own decrees, but sends its mandate to the circuit court. The funds remain where the decree is to be executed.

[See Case No. 6,264.]

Case No. 6,264.

HAYFORD v. GRIFFITH et al.

[3 Blatchf. 79.] [1]

Circuit Court, S. D. New York. Oct. 19, 1853.

ADMIRALTY—PROCTOR'S FEE—DISMISSAL OF APPEAL FOR IRREGULARITY.

1. A docket fee of $20 to the proctor is taxable under the 1st section of the act of February 26, 1853 (10 Stat. 161), on a final disposition by the court of a cause on the calendar.

[Cited in Coy v. Perkins, 13 Fed. 112. Followed in The Alert, 15 Fed. 620. Approved in Goodyear v. Sawyer, 17 Fed. 13. Dis-

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

tinguished in Mead v. Platt, Id. 836. Cited in Wooster v. Handy, 23 Fed. 55; The Anchoria, Id. 671; Louisville & N. R. Co. v. Merchants' Compress & Storage Co., 50 Fed. 452, 453.]

2. So *held*, in a case where an appeal in admiralty was dismissed, with costs, for irregularity, without being heard.

[Cited in The Bay City, 3 Fed. 48; Coy v. Perkins, 13 Fed. 112; Andrews v. Cole, 20 Fed. 410; Wooster v. Handy, 23 Fed. 54; Louisville & N. R. Co. v. Merchants' Compress & Storage Co., 50 Fed. 452, 453.]

This was an appeal from the taxation of costs. A libel in personam had been filed in the district court [by Charles Hayford against Walter S. Griffith and others (case unreported)]. From a decree there against the libellant he appealed to this court. But, on taking such appeal, he gave no security for the costs of the appeal. On that ground, this court, on motion, dismissed the appeal before hearing, with costs. See Hayford v. Griffith [Case No. 6,263]. On the taxation of the respondents' costs, the clerk allowed and taxed an item of $20 as a docket fee to the proctor for the hearing. From such taxation the libellant appealed, claiming that no docket fee was allowable under the 1st section of the act of February 26th, 1853 (10 Stat. 161), because the case had never been heard on appeal. The cause was on the calendar for hearing at the time the appeal was dismissed on motion.

Charles L. Benedict, for libellant.
Cornelius Van Santvoord, for respondents.

THE COURT held that the docket fee of $20 was allowable on a final disposition by the court of a cause on the calendar.

HAYMAN (ASH v.). See Case No. 572.

HAYMAN (ELLIOT v.). See Case No. 4,388.

Case No. 6,265.

HAYMAN v. KEALLY et al.

[3 Cranch, C. C. 325.] [1]

Circuit Court, District of Columbia. May Term, 1828.

CREDITOR'S BILL—ANSWER—STATUTE OF LIMITATIONS—TRUSTEES.

1. In a suit upon a creditor's bill charging the real estate of the intestate for deficiency of the personal assets, the answer of the administrator, and his account settled with the orphans' court, are prima facie evidence of the insufficiency of the personal estate, against the answers of the infant defendants, who do not pretend to any personal knowledge upon the subject.

2. An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed.

3. It is no bar in equity, to the statute of limitations, that the plaintiff could not proceed against the real estate until the personal was exhausted, or the deficiency of personal assets ascertained.

4. If the plaintiff's right of action is barred at law by the statute of limitations, it is barred in equity.

5. The principle that the statute of limitations will not protect trustees, applies only to express, not to constructive trusts.

6. If the statute of limitations begins to run in the lifetime of the intestate, it is not interrupted by his death, and the want of administration.

[Cited in Sambs v. Stein, 53 Wis. 572, 11 N. W. 54.]

The bill contained the usual averments in a creditor's bill. The defendants, in their answers, relied on the statute of limitations, and the infant heirs denied that the personal assets were insufficient to pay all the debts.

Mr. Redin, for plaintiff contended, that as the answers, relying on the statute of limitations, were not filed within three months after the day of appearance, according to the 6th and 10th rules of practice prescribed by the supreme court, they were too late, and in analogy to the practice at law, ought not to be received.

He also contended that as the plaintiff's right to proceed in equity against the real estate, did not accrue until the insufficiency of the personal estate was ascertained, which could not be before the administrator had settled his account with the orphans' court, which he was not obliged to do until a year after the death of the intestate, the statute was not a bar in this case; that, at least, the statute did not continue to run after the intestate's death, until the insufficiency of the personal estate was ascertained. That the heirs at law are trustees for the creditors, and that the statute does not run in favor of trustees. That the administrator's account settled with the orphans' court, and his answer, are prima facie evidence of the deficiency of personal assets, even against the answers of the infant heirs, who have no personal knowledge upon the subject. In support of these positions he cited Tyler v. Bowie, 4 Har. & J. 333; Gist's Adm'r v. Cockey, 7 Har. & J. 134; Bac. Abr. tit. "Limitations," E, 5, pp. 474, 480; Jolliffe v. Pitt, 2 Vern. 695; Webster v. Webster, 10 Ves. 92; Parker v. Fassitt, 1 Har. & J. 337.

Mr. Marbury, contrà. The answers were in time, as they were filed before the bill was taken for confessed. See rule 18. There is no case to show that the statute ever stops after it has once begun to run, unless where the defendant dies pending the action. Harwood v. Rawlings, 4 Har. & J. 126; Duvall v. Green, Id. 270. The rule that the statute of limitations is no bar to a trust, applies only to express technical trusts; not to implied trusts.

Mr. Redin, in reply, cited Hickman v. Walker, Willes, 27; Hill v. Smith, 1 Wils. 134; Gray v. Mendez, 1 Strange, 555; Doe

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

v. Jones, 4 Term. R. 300; 2 Starkie, 901; 3 Starkie, 1090.

THE COURT, CRANCH, Chief Judge (nem. con.), is of opinion, that the answer of the administrator, his inventory, and account settled in the orphans' court, are prima facie evidence against the answer of the infants, who do not pretend to have personal knowledge of the fact. That the allegation of the defendants that they rely on the statute of limitations in lieu of a plea, was made in due time; that is, before the bill was taken for confessed against them. That the statute began to run as soon as the plaintiff's cause of action accrued against Daniel Keally the intestate; and it is of no importance that the plaintiff's right to proceed in equity did not accrue until the death of the intestate, and until it was ascertained that the personal estate was insufficient. If the plaintiff's right of action was barred at law, it is barred in equity. That the plaintiff's right of action was barred at law by the act of limitations; and that the doctrine, that the statute of limitations is no bar to a trust, applies only to express, not constructive trusts.

To show that the plaintiff's claim was not barred by the statute of limitations, the counsel for the plaintiff cited Bac. Abr. tit. "Limitations," E, 5, and the cases of Jolliffe v. Pitt, 2 Vern. 694, and Webster v. Webster, 10 Ves. 92. The first case cited from Bacon's Abridgment is Curry v. Stephenson, Carth. 335, Salk. 421, the facts of which case appear, by a note of the editor, to be misrecited. As stated by Bacon, it seems as if the statute of limitations had begun to run in the lifetime of the intestate, and that the court decided that the administrator had the whole six years after the date of his letters of administration to commence his action in. But by the note it appears that the statute had not begun to run in the lifetime of the intestate; so that the case does not support the principle for which it was cited. In Carth. 335, it appears that the money was received by the defendant after the death of the intestate, and before letters of administration granted. The next case cited is Jolliffe v. Pitt, 2 Vern, 694, in which it is said, by the reporter, to have been agreed that "it is expressly excepted out of the statute when the party who has a right of action is beyond sea; nor can laches be attributable to him for not suing while there was no executor against whom he could bring his action;" and "that the lord chancellor inclined to be of opinion that the statute of limitations was not to take place." In that case the debt was contracted in Tripoli in Africa; both parties residing there. The creditor, in 1702, came to England, and took out his latitat against the debtor, which was continued on the roll till 1706, when the debtor died in the East Indies; and his executor came to England in 1710, and proved the will. The creditor abandoned his suit at law, which was probably abated by the defendant's death, and brought his bill in equity against the executor on the 8th of May, 1714. The other creditors, who were made defendants, insisted on the statute of limitations. Here it is evident that the statute did not begin to run in favor of the debtor or his executor until the latter came to England in 1710, which was only four years before the plaintiff filed his bill; and that is the reason why "the lord chancellor was inclined to the opinion that the statute of limitations did not take place." The case, therefore, does not support the principle for which it was cited.

In the case of Webster v. Webster, cited from 10 Ves. 92, it is said that "the lord chancellor objected, that as there was no representation till 1802, there was no person who could be sued, and therefore the statute could not be pleaded;" in support of which was cited the case of Jolliffe v. Pitt, 2 Vern. 694, which, we have before seen, is not an adjudged case to that point. The chancellor, however, was of opinion in the case of Webster v. Webster, that as the defendant had possessed himself of the goods of the testator before letters testamentary were granted, he might have been sued as executor de son tort, and therefore allowed the plea. In Bac. Abr. tit. "Limitations," E, 6, cases are cited to show that where the courts of justice are shut, so that the plaintiff cannot sue, yet the statute of limitations, if it begin to run before the shutting of the courts, continues to run during the time they remain shut; and that principle is recognized in the case of Beckford v. Wade, 17 Ves. 93. We think, therefore, the principle is not established, that the operation of the statute, if it begin to run in the lifetime of the intestate, is suspended, or interrupted, by the death of the intestate, and the want of administration. The plaintiff's bill, therefore, must be dismissed, but without costs.

Case No. 6,266.

HAYMAN v. MOXLEY.

[5 Cranch, C. C. 36.] [1]

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

INSOLVENCY—DISCHARGE—RESCISSION.

Upon allegations filed in court, within two years after the application of an insolvent debtor for the benefit of the act for the relief of insolvent debtors within the District of Columbia, if the defendant do not appear to answer the same, after being duly summoned, the court will proceed to take evidence ex parte in support of the allegations, and, if they find them to be true, will direct that the order of discharge, before made by a judge out of court, be rescinded, and that the defendant be precluded from the benefit of the act.

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

Samuel Moxley, on the 15th of November, 1831, made application to the chief judge of this court, to be discharged under the act for the relief of insolvent debtors within the District of Columbia [2 Stat. 237], and was discharged on the 21st of the same month. Within two years after his said application, William Hayman, a creditor of Moxley, filed in this court allegations charging that Moxley had, within twelve months next preceding his said application, conveyed certain property to one Samuel Chew to secure a debt due to one Peter Ritter by the said Moxley, with intent to give Ritter a preference, contrary to the 7th section of the act. Notice of the said allegations was duly given to Moxley, and he was duly summoned to answer the same on the 4th Monday of March, 1834, which he failed to do; whereupon, THE COURT, on the 7th of December, 1836, proceeded to receive evidence ex parte in support of the allegations, and finding them to be true, they made the following order: "Whereas the said Samuel Moxley heretofore, to wit, on the 15th day of November, 1831, filed his petition before the chief judge of the said circuit court to be discharged from imprisonment under the provisions of the act for the relief of insolvent debtors within the District of Columbia, and having taken the oath by the said law prescribed to be taken, by insolvent debtors, before the said chief judge, and complied with the other provisions of the said act, was, by the order of the said chief judge, dated the 21st day of November aforesaid, discharged from imprisonment agreeably to the provisions of the said act; and whereas William Hayman, a creditor of the said Samuel Moxley, heretofore, to wit, on the 26th day of March, in the year 1832, and within two years next after the filing of the petition of the said Samuel Moxley aforesaid, did file certain allegations in the said circuit court against said Samuel Moxley, now of record in the said court, and the said Samuel Moxley having been duly summoned to answer to the said allegations, a copy of which was left with him, and he having failed to appear according to the said summons, and the court having proceeded to examine the truth of the said allegations, and being satisfied by evidence in the said cause, that the said Samuel Moxley had, within one year next before the filing of the petition of the said Samuel Moxley aforesaid, to wit, on the 23d day of August, in the year 1831, by his deed of that date, conveyed certain real and personal estate, in the said deed specified, the property of him the said Samuel Moxley, to one Samuel Chew, his heirs and assigns, with intent to give a preference to one Peter Ritter, a creditor of the said Samuel Moxley, in the payment of a debt due from the said Moxley to the said Ritter, as more fully appears by the said deed, a certified copy whereof is filed as of record in this cause:—It is, this seventh day of December, in the year 1836, ordered by the court, that the order, made by the chief judge of this court on the 21st day of November, in the year 1831, for the discharge of the said Samuel Moxley from imprisonment as an insolvent debtor agreeably to the act of congress, entitled, 'An act for the relief of insolvent debtors within the District of Columbia,' be, and the same is hereby rescinded. And that the said Samuel Moxley be, and he is hereby precluded from the benefit of the act of congress, entitled, 'An act for the relief of insolvent debtors within the District of Columbia.'"

Case No. 6,267.

HAYMAN'S ADM'RS v. ROTHWELL.

[1 Hayw. & H. 156.][1]

Circuit Court, District of Columbia. Aug. 29, 1843.

INSOLVENT—TAXES—PERSONALTY—DISTRAINT.

When a party dies insolvent leaving taxes due on his real estate and the collector of taxes advertise the real estate, and there being no bidders, he distrains goods that were upon the premises for which the taxes became due, in a suit against the collector it was *held*, that the personal estate on the premises was liable for the taxes due.

[This was an action of trespass de bonis asportatis by William Hayman's administrators against Andrew Rothwell, collector of taxes for the city of Washington.]

The plea was not guilty. Leave was given to offer special matter in evidence to be submitted for the decision of the court on the following statement of case agreed:

"Wm. Hayman was the owner in his life of the lots in Washington on which the brewery stands, and occupied the same, and there conducted the business of brewing from 1830 till his death. Taxes were imposed upon the property by the city authorities for the years 1839, 1840 and 1841, amounting to $457.40. Hayman died in September, 1842, intestate, leaving the taxes in arrear and unpaid. His widow and Geo. Cover obtained letters of administration in October, 1842, upon his personal estate. The collector of taxes advertised the lots, &c., for sale, to take place in November, 1842, for the above taxes. There being no bidders, he afterwards distrained a quantity of wood, casks, &c., for said taxes. The wood and casks, &c., were part of the personal estate of said Hayman, and were upon the premises for which these taxes became due at the death of Wm. Hayman, and from that time until the time of the distress; and the casks had been generally kept by said Hayman on the premises, and used by him in connection with the business of the brewery since the taxes fell due. In November, 1829, Hayman conveyed the lots, &c., above mentioned to a trustee to secure his debts to the Farmers' and Mechanics' Bank, with power to sell. The deed

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

is made a part of this case. It is in the usual form of deeds of trust. After his death the trustee advertised the property for sale. The bank became the purchaser for a less amount than the debt due, and with the stipulation that the trustee must protect against the taxes. The sale by the trustee to the bank was on the 5th of December, 1842, and the distress of the personal property for the taxes, on the 20th of December, in the same year. Hayman died insolvent; his real estate encumbered beyond its value, and his personal property insufficient to pay the judgments rendered in his lifetime and his other debts. The question is whether the collector had a right to distrain the personal property for the taxes; or whether the lots are liable for them. If he had not, the trustee for the bank is to pay them out of the purchase money. If he had, the administrators are to pay them.

"W. Redin, for Administrators.

"Clement Cox, for Trustee and Bank."

The judgment of THE COURT was for the defendant, THE COURT being of the opinion that the personal estate of the intestate referred to was liable to be levied on and sold for the taxes mentioned in the statement.

HAYNE, Ex parte. See Case No. 4,336.

Case No. 6,268.

Ex parte HAYNES.

[See Case No. 6,269.]

Case No. 6,269.

In re HAYNES.

[2 N. B. R. 227 (Quarto, 78);[1] 1 Gaz. 78.]

District Court, District of Columbia. 1867.

BANKRUPTCY—CHOICE OF ASSIGNEE—DISTRIBUTION OF ASSETS.

When a single creditor appears at the first meeting of creditors, and proves his debt, the right to choose the assignee belongs to him. In the distribution of assets, he is entitled to be paid in full, if the fund be sufficient; if there is more than enough for this purpose, it should be distributed pro rata among the creditors who have failed to make proof of their claims, but whose claims have been acknowledged to be valid by the bankrupt.

[Cited in Re Hoyt, Case No. 6,806.]

[In bankruptcy. In the matter of David Haynes.]

WYLIE, J. Where, at the first meeting of the creditors of the bankrupt, a single creditor appeals and proves his debts, and where assets have come to the hands of the assignees, and no other debts are proven, in such case the right to choose the assignee belongs to the sole creditor who has proven his claim; and in the distribution of the assigned estate, he is entitled to be paid in full if there be enough for that purpose; if there be not enough he takes the whole. But if there be more than enough to pay his claims, then, rather than the balance should be returned to the bankrupt, it should be distributed pro rata among the creditors who have failed to make proof of their claims, but whose claims have been acknowledged to be valid by the applicant himself.

[See In re Brisco, Case No. 1,886; In re James, Id. 7,175.]

[1] [Reprinted by permission.]

HAYNES (BLANCHARD v.). See Case No. 1,512.

HAYNES (CHRISTMAN v.). See Case No. 2,703.

HAYNES (DOHERTY v.). See Case No. 3,963.

HAYNES (RAINER v.). See Case No. 11,536.

HAYNES (UNITED STATES v.). See Cases Nos. 15,334 and 15,335.

HAYNIE (READ v.). See Case No. 11,608.

Case No. 6,270.

HAYS v. BELL et al.

[1 Cranch, C. C. 440.][1]

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

ACTION OF DEBT—VERDICT.

In Alexandria, in an action of debt against the maker of a promissory note for two hundred and fourteen dollars, reduced by payments indorsed on the note before suit brought, to eight dollars and ninety-four cents, a verdict for the debt in the declaration mentioned to be released on the payment of eight dollars and ninety-four cents, will sustain a judgment for the plaintiff in the circuit court.

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

Debt on a promissory note for 214 dollars. Payments indorsed on the note, before the suit was brought, reduced the sum due on the note to eight dollars and ninety-four cents. The verdict was for the debt in the declaration, to be discharged on the payment of eight dollars and ninety-four cents.

E. J. Lee, for defendants [Bell and Wray], contended that a nonsuit ought to be entered, under Act Va. Dec. 3, 1792, p. 90, § 38.

Mr. Swann, for plaintiff, contended that this cause could not have been heard on a petition in Virginia. If an account in England be reduced by offsets to less than forty shillings, it is no cause of nonsuit. Pitts v. Carpenter, 1 Wils. 19. The declaration must state the whole amount of the note. The debt in law continues until the whole sum is paid. It is one entire debt. An action of debt must be brought on a promissory note under the act of assembly. If this action had been

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

brought before a justice of the peace, upon the face of the declaration, the defendant might defeat the plaintiff. The justice of the peace would have to decide upon the whole validity of the plaintiff's claim. The act of congress of February 27, 1801 (2 Stat. 103), only intended to give them the power of deciding upon contracts to the amount of 20 dollars. This court decided the point in the case of McKnight v. Ramsay [Case No. 8,868], at Alexandria, October, 1801, and refused a nonsuit. Mr. Swann cited 1 Wils. 19.

THE COURT (DUCKETT, Circuit Judge, contra) ordered judgment to be entered for the plaintiff on the verdict. See the cases of McKnight v. Ramsay [supra] and Currey v. Fletcher [Case No. 3,490]; St. 3 Jac. c. 13; St. 23 Geo. II. c. 33, § 19; Doug. 245, 448; 1 Wils. 19; Laws Md. 1785, c. 46, § 7; Id. 1791, c. 68, §§ 9, 10; Id. 1796, c. 43, § 5.

HAYS v. HEIDELBAUGH. See Case No. 3,318.

HAYS (HUNTER v.). See Case No. 6,906.

HAYS (JONES v.). See Case No. 7,467.

HAYS (RIDGWAY v.). See Case No. 11,817.

Case No. 6,271.

HAYS et al. v. SULSOR et al.

[1 Fish. Pat. Cas. 532;[1] 1 Bond, 279.]

Circuit Court, S. D. Ohio. Nov., 1859.

INFRINGEMENT OF PATENT—UTILITY—ESTOPPEL—PRIOR USE—ADDITION TO INVENTION.

1. It is a principle well settled and often recognized that, if the jury find that the defendant has used the invention itself or something substantially like it, he is estopped from denying its utility, for use implies utility.

[Cited in Johnson v. McCabe, 37 Ind. 538.]

2. To defeat a patent by showing a prior use of the invention, the statute has expressly provided that notice must be given of the place where and the parties by whom the thing relied on as a defense had been used. This provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use.

3. A reference to a county in which, it is alleged, the prior use took place, is not sufficiently definite and explicit, as to place, to fill the requirements of the spirit of the act.

[Cited in Smith v. Frazer, Case No. 13,048.]

4. A prior use in a foreign land, does not invalidate a patent afterward taken out in this country, where the patentee, at the time of his application, supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work.

[Cited in Illingsworth v. Spaulding, 9 Fed. 612.]

5. The description, in the prior printed publication, should be, in some degree, in the nature of a specification, so far as to enable a mechanic skilled in the art, to construct the machine. It should not be vague references to, or suggestions of, the thing described.

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

This was an action on the case tried before Judge Leavitt and a jury. The plaintiffs [Coleman and Willis Hays] were assignees, for Paint township, Fayette county, Ohio, of letters patent [No. 14,287], granted to Abraham, Ezra, and Charles Marquiss and Charles Emerson, February 19, 1856, and brought suit to recover damages from the defendants [Frederick Sulsor, William Tway, and others], who were using upon their farms, in Paint township, a mole plow, purchased of Moses Bales, and manufactured under letters patent granted to him February 15, 1859. The patented implement consisted of a piece of cast-iron about eighteen inches in length, sloping from a point upward and outward, until at the rear it was some six inches in height and width. The top projected in rear of the sides a few inches forming what was called a "tail," and shaped somewhat like a beaver's tail. The bottom was hollowed out, so that a cross-section of the mole would be nearly in the shape of a horse-shoe. This mole was attached to a long and sharp coulter, and was dragged along about three feet below the surface of the earth by powerful mechanism applied to the coulter. In its progress, it formed an arched tube or chamber, six inches in diameter not unlike the burrow of a mole. The claims of the patent were as follows: "What we do claim as our invention and desire to secure by letters patent is the peculiar shape of the mole, which enables its forward movement to form a subterranean perforation, whose top and whose sides will be smoothly and densely compressed, and whose bottom will be left almost entirely uncompressed. We also claim, the tail of the mole of such a shape and position that it will serve to close up the slit cut by the mole shank in forming a perforation, and also serve to lead the mole upward to the surface of the ground, as soon as the beam is allowed to turn on its axis."

G. M. Lee and S. S. Fisher, for plaintiffs.

R. M. Corwine and Charles Fox, for defendants.

LEAVITT, District Judge (charging jury). This action is brought against four defendants for the infringement of a patent granted to Abraham, Ezra, and Charles Marquiss and Charles Emerson, February 19, 1856, for an "improvement in the mode of draining plows." The title of the patentees has passed to the defendants by various assignments, which are in evidence, and which place their title beyond dispute. There is no controversy in the present case as to the sufficiency of the specifications. The testimony of Mr. Knight upon this point is that they are remarkably clear and exact. Not to occupy time with reading them, as they

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

have been commented upon at length, I will call your attention to the claim or summing up, which is in these words:

"What we do claim as our invention and desire to secure by letters patent is the peculiar shape of the mole, which enables its forward movement to form a subterranean perforation, whose top and whose sides will be smoothly and densely compressed, and whose bottom will be left almost entirely uncompressed.

"We also claim the tail of the mole of such a shape and position that it will serve to close up the slit cut by the mole shank in forming a perforation, and also serve to lead the mole upward to the surface of the ground as soon as the beam is allowed to turn on its axis."

The patentees admit the invention and use of the drain plow previous to their own discovery, and claim the improvements specified. There are two of these improvements, for the infringement of either of which an action may be maintained.

To the claim of the plaintiffs the defendants interpose several defenses: First, that the alleged invention is of no utility; second, that it was previously described in printed publications, and third, that the defendants do not use the thing patented.

First, as to utility. There is no question but an invention must be of some utility; a patent can not be granted for a thing altogether frivolous; but the presumption on the face of patent is that it is of some utility, for the applicant is obliged to swear that the invention is useful before the emanation of the patent.

The improvements claimed are: First, making the underside of a mole plow hollow, so that there shall be no pressure on the bottom, and second, the elongation of the hinder end, by which the cut made by the coulter is closed up. It is not claimed, as I understand it, that this cut will be closed all the way up to the surface, but only at the top of the drain itself. The plaintiffs' witnesses say that this plow makes a drain of proper size, having the top and sides compressed and leaving the bottom uncompressed. It is also claimed that perfect draining is accomplished at much less cost by the use of this instrument than by the means of draining before known, and in considering the question of utility, any saving in labor or expense is a proper subject for the consideration of the jury.

On the other side, it is said that the operation of this mole would be as complete if the hollow were filled, and also that the appendage does not close the slit. The jury are at liberty to use their own knowledge and to come to their own conclusion as to the validity of these objections. Upon this point, however, I am requested to charge, and I add, that it is a principle well settled and often recognized, that if the jury are satisfied that the defendants have used the invention itself or something substantially like it, they are estopped from denying its utility, for use implies utility, and it would be fair to presume that the party would not use it if he thought it of no utility.

Second, as to the novelty. The defense that an invention is wanting in novelty or originality goes to the validity of the patent. But here, as in the case of utility, there is a presumption arising from the patent itself, in favor of the novelty of the invention which it covers. This presumption the defendants may overcome by showing that the thing had been previously known. To do this, the statute has expressly provided that notice must be given of the place where, and the parties by whom the thing relied on as a defense had been used. This provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use. It has been ruled by the court that the notice given for this purpose in this case was defective in referring merely to the county in which the thing was in use. This reference, the court held, was not sufficiently definite and explicit as to the place, to fill the requirements of the spirit of the act. It may, therefore, be said that there is no evidence that will affect the novelty or originality of this improvement, which is derived from any use of the Clark county mole. Though, if such use had been proved, I hardly think it could stand in competition with the plaintiffs' machine. It is obviously of a very different shape, and one of the witnesses has said that it contains no element of the patented mole. Its prior use, or the knowledge of that use could, therefore, hardly have been used in contravention of this invention.

But it is claimed that this invention was known in a foreign country. Such a use in a foreign land does not invalidate a patent afterward taken out in this country, where the patentee, at the time of his application, supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work.

Two such public works are produced by these defendants, in which they say that this invention was described as long ago as 1851 and 1852. These books are "Morton's Encyclopedia of Agriculture," and "Stephens' Book of the Farm." The inquiry for the jury upon this point is, whether these books describe substantially the improvement described by the patentees. If so, then this defense goes to the validity of the patent. The description should also be to some degree in the nature of a specification, so far as to enable a mechanic skilled in the art to construct the machine; it should not be vague references to, or suggestions of, the thing described. The evidence of the experts in this case is that a skillful mechanic might construct the plow described by Stephens, but not that referred to by Morton. Whatever be the accuracy of the description, the jury

must be satisfied that the thing described is substantially the thing which would be made from the patent, for, if when made it is a different thing, it is not available to attack the novelty of the patented invention. It seems that these books do not provide for a cavity in the bottom of the mole, nor for any elongation, nor do they leave the bottom uncompressed, but provide for the water coming in from the top; the drain is also shallow and of less size—indeed Mr. Knight testifies that the thing described does not contain a single element of the patented article.

Third, as to infringement. If the jury find the patent in full force they will inquire whether the defendants have infringed. They have done so if they used either one of the patented improvements, or if they have made use of devices substantially the same, in which the same principles are brought into requisition, or, in other words, which are alike in their principle of operation. The patent is dated February, 1856. The patent of Moses Bales, under which defendants claim, is dated February, 1859. Is the plow made under the Bales patent substantially the same thing as that manufactured under the Marquiss patent? If so, it is an infringement. A mere addition to a patented invention will not justify the use of the invention first patented. Upon the question of infringement we are frequently obliged to depend in great measure upon the testimony of experts. Two of these have been examined in this case—Mr. Knight and Mr. Clifton. Both have stated that there is no substantial difference between the two moles, and they are not contradicted by any witness. If the jury are satisfied that they are substantially the same, they will have no difficulty in coming to a conclusion on this point.

The only remaining question is that of damages. When ascertainable, the defendants' profits are the proper rule of damages. In this case, it is also claimed that the license price and expenses of litigation should be considered. The law gives to the plaintiff his actual damages, and the amount of these is left to the discretion of the jury, under the circumstances of the case, looking to the compensation of the plaintiff.

The jury found a verdict for the plaintiffs, with $200 damages.

Case No. 6,272.

HAYTON v. WILKINSON.

[Brunner, Col. Cas. 247;[1] 1 Hall, Law J. 260.]

Circuit Court, D. Maryland. June, 1808.

DISCHARGE IN INSOLVENCY — RIGHTS OF BAIL UNDER—CERTIFICATE OF DISCHARGE IN INSOLVENCY—EFFECT OF.

1. Bail is not, by virtue of a discharge of the principal under a state insolvent law, entitled to have an exoneretur entered on the bail-piece; the discharge must be brought before the court by plea.

[Distinguished in Read v. Chapman, Case No. 11,605.]

2. A certificate of discharge in insolvency is not conclusive evidence that the discharge was duly obtained.

This was a motion for a rule to show cause why an exoneretur should not be entered upon the bail-piece. The defendant [James J. Wilkinson] had been discharged under the insolvent law of this state, enacted November, 1805, by the court of Calvert county, in May, 1808. The present action was instituted in the year 1806 by the plaintiff [Amos Hayton], a British subject, and residing in England. He was not returned by the defendant as a creditor. It did not appear that he had received any notice of the defendant's intended application for the benefit of the insolvent law, nor that he had any agent or attorney in this country. The debt was contracted in England.

The district attorney, Mr. Stephens, by whom this motion was made, contended,—

1. That a certificate of discharge under the insolvent law of Maryland will operate to bar an action instituted by a British creditor, in the courts of justice of this country, to recover a debt contracted in England; and

2. That a rule to show cause why an exoneretur should not be entered upon the bail-piece is a proceeding uniformly adopted in England, and still more strongly supported by the insolvent law of Maryland. As our insolvent laws do not require the assent of foreign creditors, not residing within the United States, nor having agents duly authorized to act for them, he said it was evidently the intention of the legislature that a discharge, which was regularly obtained, should extend to such claims, otherwise the law would operate with peculiar hardship upon the unfortunate debtor. By compelling him to assign all his effects to a trustee, for the use of his creditors, the law deprives him of the means of satisfying the claim. The law has promised him relief against his creditors, but what relief does he enjoy, if his discharge do not operate as a bar to this action? All the former cases on this subject are, as to the effect of a discharge, obtained in one country on an action instituted in another where the debt was contracted. They, therefore, do not decide this point. Here the court is to decide upon the effect of a discharge obtained under the laws of its own state. The question is, whether our own laws, or those of England are to be pre-eminent. Lord Kenyon, actuated by a principle which might at least be called contracted and narrow, has decided that a discharge under our insolvent law of 1787 does not bar suit, commenced in Great Britain by a subject of that country, on a cause of action accruing there. Smith v. Buchanan, 1 East, 6. So too in New York a similar adjudication has been made. Van

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

Raugh v. Van Arsdaln, 3 Caines, 154. But in Pennsylvania a debtor who had been discharged by our laws was protected by an exoneretur. Miller v. Hall, 1 Dall. [1 U. S.] 229; Thompson v. Young, Id. 294; Donaldson v. Chambers, 2 Dall. [2 U. S.] 100; Harris v. Mandeville, Id. 256; and a full review of question in East's Reports, ubi supra, 4 Durn. & E. [4 Term. R.] 192, and Cowp. 824. Our case is very different. We claim the benefit of our own laws in our own state. However it may be contended, that the plaintiff never gave his assent to this law, and that therefore his claims should not be affected. It is a sufficient answer to say that he comes voluntarily into your courts to demand justice, and he must be content to receive it according to the regulations which are prescribed to you by the legislative power. In the construction of contracts the lex loci where they are executed is observed, but in applying a remedy for a breach, you must be governed by the laws of the place where the suit is brought.

The counsel then read an extract from 2 Huberus B. tit. 3, pp. 1, 26, translated in [Emory v. Greenough] 3 Dall. [3 U. S.] 370, note, on the effect of contracts made in one country and attempted to be enforced in another; and, on the effect of foreign judgments, Judge Washington's opinion. Croudson v. Leonard [4 Cranch (8 U. S.) 434.] If the principal were to be brought into court in discharge of his bail, he would be entitled to a release on common bail. The effect of this application is no more. It is doing the same thing and waiving an idle and nugatory ceremony.

Before CHASE, Circuit Justice, and HOUSTON, District Judge.

CHASE, Circuit Justice. This is a question about which much diversity of opinion prevails, and I understand that different decisions have been made in the different states. It is a point which is of great consequence to foreign creditors particularly, and therefore it ought to receive a more solemn deliberation than can be had in a mere side-bar motion. The party should have every opportunity to put facts in issue, and courts will generally endeavor to have facts submitted to a jury. A discharge may be obtained in an improper manner. The certificate is not conclusive. It may be inquired into. This very case shows the necessity of inquiring into it. The defendant was bound to give a true list of all his creditors, but we do not find the plaintiff's name among them. Justice requires that the property should be divided among all the creditors; but a foreign creditor is not within the law. He cannot claim a dividend, nor can he even come in to allege fraud in prevention of the discharge. Is it honest, then, that a plaintiff so circumstanced should be precluded from every means of recovering a debt? Let the defendant plead this discharge, if he wish to rely upon it. I certainly cannot consent to enter an exoneretur.

HOUSTON, District Judge, thought it unnecessary to give any opinion on the effect of the record of the discharge. The proper course would be to bring it before the court under a plea. Upon this ground alone he agreed with the chief justice, to overrule the motion.

Case No. 6,273.

HAYWARD v. ELIOT NAT. BANK.

[4 Cliff. 294.] [1]

Circuit Court, D. Massachusetts. May Term, 1874.[2]

EQUITY—RESPONSIVE ANSWER—TESTIMONY OF TWO WITNESSES.

1. Where the answer is responsive to the bill, positively denies the matter charged, and has respect to transactions within the knowledge of the party making it, it is evidence in favor of the respondent; and unless overcome by the testimony of two witnesses, or one witness and corroborating circumstances, the rule in equity is that the answer is conclusive.

2. The complainant pledged certain shares of stock to a bank as collateral security for a loan. The debt not being paid, the shares were sold by the bank. The complainant alleged that they were thus disposed of without notice to him, and without the opportunity, on his part, to redeem. His allegations were sustained by his own evidence, which was contradicted by one of the bank officers. *Held*, the complainant had not overcome the force of the allegations of the answer.

Briefly stated, the material facts alleged in the bill are that the complainant [Charles L. Hayward] at the times mentioned in the record, borrowed of the respondents [the Eliot National Bank] the sum of $26,500, and that he agreed to pay lawful interest for the same, and that he pledged with the lenders, as collateral security for the payment of the amount borrowed and lawful interest, four hundred and fifty shares of the stock of the Hecla Mining Company, which belonged to the complainant, and which, as the bill states, he caused to be issued to the respondents for that purpose; that the said mining company subsequently, by an arrangement with the Calumet Mining Company, united their property and privileges with those of the latter-named company, two other companies joining with them; and that the several companies became a new corporation, by the name of the Calumet & Hecla Mining Company, with a capital of forty thousand shares or more, whereby the respondents, as holders of the said shares, so issued to them, became entitled to and did take four hundred and fifty shares of the stock in the new corporation; that the said new company had, from time to time, after the said several com-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 96 U. S. 611.]

panies were united, made sundry dividends in cash and stock, by virtue of which it had divided to its stockholders valuable portions of its earnings and property. Other important matters were alleged in the bill, and the complainant prayed for an account, and that he might be allowed to redeem the shares pledged, which, as he alleged, the respondents still held as collateral security; and he charged that no valid sale had been made of said shares; that if the respondents had pretended to sell the same, or any part thereof, or had done any act or thing having a tendency to transfer the title in said shares to any other party, or had procured or permitted certificates for said shares to issue to any other persons, it had been done without notice to the complainant, without right, and in fraud of his just claims; and that the respondents then held, in fact, or were chargeable in law as holding, nine hundred shares of the capital stock of said new company for the complainant, and as collateral security for the payment of any balance due from him on account of said transactions. Process was issued and served, and the respondents appeared and filed an answer, in which they admit the loan of the amount, the pledge of the shares as collateral security, the exchange of the shares pledged for the shares of the new company, and that dividends had been declared; but they averred that the directors of the bank, on the 17th of August, 1868, voted that unless the complainant would pay $5,000 during the then present week, and $5,000 during the following week, upon the loan; having the said shares as collateral, the president be instructed to sell the same; that said vote was communicated to the complainant, and that he declined to comply in whole or in part, saying that he would not pay anything, and that he would do nothing about it; that thereupon the proposition to sell to said purchasers, and by them to buy the shares for the price and as aforesaid, was made and canvassed and determined upon; and the sale was made with the full concurrence of, and with the prior assent, and subsequent approval of, the complainant.

James M. Barrett and Edward F. Hodges, for complainant.

A. A. Ranney and B. R. Curtis, for respondent.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Controversies like the present cannot be satisfactorily determined without some reference to the pleadings which immediately respect the material matters in issue, as where the answer is responsive to the bill, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the party making it, the answer is evidence in his favor, and unless the answer is overcome by the testimony of two opposing witnesses, or of one witness corroborated by facts and circumstances which give the opposing evidence greater weight than the answer, the rule in equity is that the answer is conclusive, so that the court will neither make a decree in favor of the complainant, nor send the case to trial, but will simply dismiss the bill of complaint. Badger v. Badger [Case No. 718]. Repeated decisions of the supreme court have established the rule, that an answer responsive to the allegations of the bill, if it have respect to matters within the knowledge of the pleader and be duly sworn to, must be taken to be true, unless disproved by two witnesses, or by one witness and corroborative circumstances which give the opposing testimony greater weight than the answer. Clark's Ex'rs v. Van Reimsdyk, 9 Cranch [13 U. S.] 160; Hughes v. Blake, 6 Wheat. [19 U. S.] 453; Id. [Case No. 6,845]; Union Bank v. Geary, 5 Pet. [30 U. S.] 111. Unsworn answers do not have that effect, but if the answer be duly sworn to, even though the suit be against a corporation, and the oath be by one of its principal officers, the answer will have that effect if it be responsive to the bill, and be clear and positive in its terms. Carpenter v. Providence W. Ins. Co., 4 How. [45 U. S.] 219; Salmon v. Clagett, 3 Bland, 165; Parker v. Petteplace, 1 Wall. [68 U. S.] 689; Tobey v. Leonards, 2 Wall. [69 U. S.] 430; 2 Story, Eq. Jur. 1528. Apply that rule to the case, and it is clear that the complainant cannot recover unless the proofs introduced by him are sufficient to overcome the allegations of the answer, giving to the answer the probative force which that rule prescribes, as the bill distinctly charges that no valid sale of the shares was made; that if the respondents pretend that they did any act tending to transfer the title to the shares, or that they have procured or permitted certificates of the shares to issue to any other parties, it has been done without notice to the complainant, without right, and in fraud of his just rights. Nothing further can be required to show that the issue of notice is distinctly tendered by the complainant, and the record shows that the answer is directly responsive to the bill, and alleges that the vote of the directors to instruct the president of the bank to sell the shares, if the pledgor failed to make the required payments, was communicated to the complainant; and that he declined to make the payments, and stated that he would not pay any thing, and would not do any thing, about it, and that the sale was made with the full concurrence of, and with the prior assent and subsequent approval of the complainant. Beyond all doubt the complainant is bound to disprove the material averments of the answer, or he is not entitled to a decree for relief, as the rule is that the answer shall otherwise prevail.

On the 17th of October, 1866, the complainant borrowed of the bank the sum of $6,500,

and on the 19th of the same month he borrowed $20,000 more, which make the amount for which the shares were pledged as collateral security. None of the principal of the loans was ever paid; but on the 1st of April following, the complainant paid interest to the amount of $837.66, which is all that he ever paid towards the principal or interest of the loans. Seven months and more elapsed after that payment without any other payment being made, or any steps being taken by the bank to enforce payment, when, on the 9th of November of that year, the complainant gave the president and directors of the bank authority in writing to sell the shares pledged, at their discretion, describing the shares in the writing as shares held as collateral security for a loan, proceeds of sale to be applied upon said loan. Shares of the kind were selling, at that time, for $37 to $38 per share, including the assessment of $18 which the bank had paid or was liable to pay, on the respective shares in controversy, from which it appears that if the president and directors had sold the shares, as they were authorized to do, $20 per share only would have been realized to apply to the payment of the loan, which would have left a deficit, to be borne by the complainant, of not less than $15,000. Considerations of the kind doubtless induced the respondents to defer the sale, and they kept the shares, on the original terms, until Sept. 8, 1868, when they sold the whole amount to three of their directors for an amount which it was understood would be equal to the whole loan, the unpaid interest and charges being $87.24 per share, which the proofs show was considerably above the market value.

Much discussion of the question whether the complainant was apprised that the directors had voted to instruct the president of the bank to sell the shares, in case he, the complainant, failed to make the two payments specified in that vote, is unnecessary, as he admits that a copy of the vote was received by him at its date. Direct and explicit proof to that effect was also introduced by the respondents, as appears in the depositions of the president and cashier. Instead of objecting to the proposed action of the bank, he stated to the president, who gave him no notice, that he could do nothing in relation to the matter, as he had no means; that the only thing the bank could do was to sell the shares for the most they could get, and that if he was ever able he would pay the balance, if any remained. Inquiry was made of him, by the president, if he had no friend who would take the stock out of the bank and hold it for his benefit, and he answered in the negative. Unable to obtain any encouragement from the complainant that he could do any thing, the president, with the assent of all the other directors, except one who was absent, sold the shares to the three directors named in the answer, in equal proportions of one hundred and fifty shares. Proof entirely satisfactory is exhibited in the record that all the other directors present fully approved the act of sale, and that the president, in making it, acted throughout by their authority. Abundant proof is also exhibited to show that the complainant was informed, before the sale was made, that the three directors proposed to make the purchase, and that he assented to the suggestion that it might be sold to them as proposed. Suffice it to say, without entering into the details of the evidence, that the proof to that effect is full and entirely satisfactory.

Information as to the proposed sale was communicated to the complainant by the then president of the bank, and he reported to the directors that he, the complainant, assented to it, or that he made no objection to the proposal. Three or four witnesses confirm these facts, and there is nothing of any moment to contradict their statements, except the testimony of the complainant. His statements are very positive that he never assented to the sale of the shares; but the great weight of the evidence is the other way. Superadded to that, he also states that he did not know that the shares had been sold, and that he never heard of the sale until the answer of the respondents was shown to him, as filed in this case. His statements in that behalf are very positive; but he admits that he received exhibit No. 21, on the day the sale took place, which is a plain statement of the account between him and the bank, including a credit of cash to balance the amount of $39,257.16, which he must have understood was realized from the sale of the shares pledged as collateral security for the loan, as it could not have been realized in any other way. Evidence was also introduced by the respondents that he not only assented that shares might be sold before the sale took place, but that he expressed himself subsequently as gratified at the result. Express statements to that effect are made by the cashier of the bank. He states that he had a conversation with the complainant subsequent to the sale, and that he expressed himself as highly gratified at being relieved from the embarrassment by the settlement of the matter of the loan.

Interest, it appears from the said exhibit, was cast, in making up the statement, at six per cent, which, as explained by the testimony of the cashier, was a mistake, the same having been computed in his absence; but it was corrected on his return, as appears by another exhibit in the record. Correctly computed, the interest was $464.16 more than as computed at six per cent, from which it appears that a deduction of $375.03 should be made, for a balance due to the complainant on the sale of some other bonds. Deduct that sum, and there is still due from the complainant the sum of $62.52, which the respondents claim that the complainant promised to pay. In relation to that sum there is considerable conflict between the tes-

timony of the former president of the bank, and the other witnesses. Demorett, the former president, states explicitly that the complainant promised to pay a balance, between $60 and $70, when he could; that he understood that it was the difference between six and seven per cent discovered by the cashier in reviewing the computation of the interest which the complainant paid during the first year of the loan. On the other hand, the cashier states that there was a small sum of $60 or $70 due to the bank after applying the proceeds of the sale of the shares which the complainant promised to pay when he should be able, and his explanation is that, on his return to the bank, he found that interest had been computed at six per cent, which he corrected, and on making the deduction of the said balance due in the former transaction, it left this small sum due to the bank, which the complainant, in a subsequent conversation, promised to pay. Difficulty attends the solution of the matter, but it is quite manifest that the former president is in error as to the origin of the small balance, in supposing that it arose from the difference between six and seven per cent in computing the interest paid four years earlier, as the books of the bank show that the computation on that occasion was correct, or that thirty-four cents in excess of seven per cent was paid. Support to the view that Demorett is in error as to the origin of the small balance is also derived from the answer which is sworn to by the cashier, whose means of knowledge is greater than that of the other witness. Importance is attached to the difference between the witnesses chiefly upon the ground that it has some bearing upon their credit as to the more important matter whether the complainant knew of the sale of the shares, and approved it after it was made. Most explicit allegations to that effect are contained in the answer; and, inasmuch as the answer is directly responsive to the bill, the court is of the opinion that it is evidence for the respondents, and that the complainant has failed to overcome the allegations of notice, assent, and subsequent approval.

Bill of complaint dismissed, with costs.

[An appeal was then taken by the plaintiff to the supreme court, where the judgment was affirmed in an opinion by Mr. Justice Harlan, who said that, as Hayward had acquiesced so long in the matter before bringing suit, he should be held to have forfeited all right to relief in a court of equity. 96 U. S. 611.]

HAYWARD (UNITED STATES v.). See Case No. 15,336.

Case No. 6,274.

In re HAYWOOD.

[Nowhere reported; opinion not now accessible.]

Case No. 6,275.

HAZARD v. CHICAGO, B. & Q. R. CO.

[1 Biss. 503;[1] 2 Chi. Leg. News, 385.]

Circuit Court, N. D. Illinois. Oct. Term, 1865.

PASSENGERS ON FREIGHT TRAINS—DUTY OF RAILROAD COMPANY—DUTY OF TRAVELER.

1. A railroad company when it takes passengers as such on its freight trains, is under the same obligation to carry them safely as if they were on the regular passenger trains, but such travelers acquiesce in the usual incidents and conduct of a freight train managed by prudent and competent men.

[Cited in Ohio & M. R. W. Co. v. Dickerson, 59 Ind. 323.]

2. It is immaterial how many such passengers the company carries, and whether they travel on special permits or regular tickets.

3. A railroad company in the transport of passengers, though not the insurer of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ all those means peculiar to this mode of transit known to skillful and competent persons; but the passenger must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances.

4. A passenger not rightfully in a certain position cannot complain of the absence of the proper safeguards.

5. Although an accident may have been the result of the negligence of the company's agents, still if a prudent man would not have been where, and as the plaintiff was, he cannot recover.

[Cited in Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 175, 36 N. W. 449.]

6. The effect of a former trial in the state court considered and stated.

The plaintiff [E. W. Hazard], on the 29th of June, 1860, was at Kewanee, a station on defendant's railway, and purchased a passage ticket for Galesburg, where he then resided, and took passage in a freight train, which had, what is termed, a way or caboose car attached. The train consisted of twelve to fifteen cars. The way car was in most respects like a freight car, with doors on each side. It had also a door at each end, and a platform with steps. For this platform there was a railing, but on the rear platform there was no chain or bar extending across, so that there was an open space in the rear and center of the platform. The way car had seats which extended lengthwise at the sides. These freight trains occasionally carried passengers, and the agent who sold the ticket, and the plaintiff when he took the passage, knew the character of the train. The train approached Galesburg about eight o'clock in the evening. Just before its arrival, and while it was yet in motion, at the rate of about three or four miles an hour, the engineer having cut off the steam, the plaintiff being the only passenger in the way car, asked the conductor where the train would stop, and was informed that he, the conductor, did not know. The

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

plaintiff then stated to the conductor and pointed out the part of town in which he lived, and then, according to the account given by the plaintiff, the conductor said, "You had better get off at the next crossing. The train will be running slowly past there, and you can step off on the sidewalk with ease and safety." The statement of the conductor was that he told the plaintiff that business men sometimes jumped off the train at Main street, (the crossing), and the plaintiff replied he guessed he would get off. The plaintiff then rose from his seat, took his carpet-bag in one hand and a whip and umbrella in the other, and started to the forward part of the car and opened the door. The conductor, who was in the act of closing the side doors, told him not to get out there, but to go to the door in the rear end of the car. The plaintiff then shut the door, and turned towards the other end of the car. As he approached the back door, and when within a few feet of the back door, the engineer took up the slack of the train, by putting on steam. The conductor had closed both the side doors, and was near but behind the plaintiff. The back door was open. At that moment, the way car received a sudden jerk, and the plaintiff was precipitated through the door and the open space already referred to, and was thrown on the ground and seriously injured. The relation given by the conductor was that when he told the plaintiff he had better not get out at the forward door, the plaintiff replied that he guessed the other door would be the safest, and came to the back door, and was in the act of stepping out, his right foot going over the threshold when the jerk came. The plaintiff declared that when he started to go to the rear end of the car his intention was to go on to the platform and to the left hand steps and step down and wait for the crossing, and if the cars were going so slow that he could step off with ease and safety he would have done so, otherwise he would have remained on the cars. The plaintiff soon after his injury brought a suit in the state court against the defendants [the Chicago, Burlington & Quincy Railroad Company],—and obtained a judgment which on appeal to the supreme court was reversed, and the case remanded. The case is reported in 26 Ill. 373. The plaintiff then dismissed his suit and commenced his action in this court.

E. A. Storrs, for plaintiff.

Walker & Dexter, for defendant.

Before DAVIS, Circuit Justice, and DRUMMOND, District Judge.

DAVIS, Circuit Justice (charging jury). We think a railway company, when it takes passengers as such on its freight trains is under the same obligation to carry them safely as if they were on the regular passenger trains—but, of course, the passenger taking the freight train accepts it and travels on it, acquiescing in all the usual incidents and conduct of a freight train managed by prudent and competent men—no more and no less. And we consider it immaterial whether the company carries more or less passengers in its freight trains, and whether or not the passenger travels on a special permit or a regular ticket.

The contract between the parties was, that for a consideration paid by the plaintiff, the defendant agreed to carry him safely from Kewanee to a usual place of stopping at Galesburg, on its freight trains. If there was more than one place of stopping the plaintiff accepted the contract on that condition.

In order to maintain the action, the plaintiff must show that the contract on the part of the defendant has been violated in consequence of some fault or negligence of its employés, or through some defect in the means of transit, and it must appear that his own fault or negligence did not contribute to the injury.

A railway company in the transport of passengers, though not insurers of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ all those means peculiar to the mode of transit known to skillful and competent persons at the time. But it must be understood that a passenger, while on the train and connected with it, must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances.

There are but two questions in this case which can be regarded as matters of controversy. First. Was the injury to the plaintiff caused by the negligence, want of care or skill on the part of the defendant. Second. Was the plaintiff himself guilty of any fault, negligence or carlessness, which contributed to the injury, and would prevent him from recovering?

Was the conduct of the plaintiff, under all the circumstances of the case, that of a prudent and careful man? He had been told by the conductor that he had better get off there, or that others did get off there. He took his carpet-bag, umbrella and whip, and was in the act of going out of the door, or approaching it, when the car was jerked—the train being in motion at the time, at the rate of three or four miles an hour. And if he acted imprudently or carelessly, did that contribute to the injury complained of? If it did, then the plaintiff cannot recover. It is insisted that the plaintiff's conduct at the time was the result of the direction or suggestion of the conductor. The jury may be satisfied that the plaintiff was leaving the car under the advice or suggestion of the conductor; but if that were given, of his own motion merely, without authority from his principal would it justify a prudent man in alighting from a car when thus in motion? And upon this part of the case it is for the jury to say whether the plaintiff exercised

common prudence in attempting to alight from the car while in motion, and, if not, whether such omission contributed to the injury. Was there any such negligence on the part of the plaintiff that but for it the injury would not have been received?

Was there fault or negligence on the part of the defendant? It is claimed the defendant was guilty of negligence, on two grounds: First. In the act of the engineer causing a violent jerk to the rear car by too suddenly taking up the slack of the train; that is by tightening too quickly the coupling of the cars. Secondly. By the want of a good chain or bar on the center part of the rear platform.

A great deal of testimony has been given as to the necessity of jerking with more or less force the rear car of such a train as the plaintiff was on in this case. On the one side it is claimed it is unavoidable; on the other that by the use of proper caution and skill it can be prevented. In weighing the evidence of this part of the case, the jury should examine it with reference to the kind of train run, and to the skill and prudence which could be applied at the time, as known and practiced by competent agents. If a skillful engineer could, at the time, by the use of proper caution, have avoided giving a jerk to the rear car, then it must be treated as a fault that it was not prevented. But if the jury shall find that some kind of jerk was unavoidable, could the engineer be required to measure and could he be expected to know the exact degree of force which in a long train would be applied to the rear car? The jury should candidly and impartially consider all the evidence bearing on this point, and test the facts by the circumstances shown to exist at the time, and which were known, or ought to have been known, to competent agents.

The proof establishes that there was no guard chain or bar in the center of the rear platform. The same principles are applicable to this point as to the last. It seems to be admitted that as a general thing it was not used on a way or caboose car at the time of the accident. This must also be tested by the degree of skill and prudence required at the time from careful and prudent agents. And the jury should also bear in mind the manifest object of the railing on the platform, viz: the protection of persons when they are rightfully on the platform in getting on or off the car, and if the plaintiff was not rightfully where he was at the time of the jerk, he cannot complain of the absence of the guard chain.

From what has been already said, it will be seen that a party may be guilty of some fault and that may not prevent him from recovering, and we think the case on trial must turn upon this. At the time of the jerk was the plaintiff rightfully where he was, and for the purpose he had in view, and was the jerk the result of negligence on the part of the agents of the defendant? If under the facts and circumstances as you may find they existed at the time, a prudent man would have been where the plaintiff was at the time of the jerk, and the jerk could have been avoided by the exercise of proper skill and caution, then the plaintiff may recover, but on the other hand if you believe a prudent man would not have been where, and as the plaintiff was at the time of the jerk, and for the purpose of alighting from the car, then we think he cannot recover, though the jerk may have been the result of negligence on the part of the defendant's agents.

These are our opinions of the law of the case, treating it as an original case. When the case commenced in the state court, was remanded from the supreme court to the court below for the reason already stated, the plaintiff voluntarily dismissed it, and some time after commenced a suit in this court for the injury sustained.

We have already decided that, as the opinion of the supreme court of the state was founded on the facts as they then appeared, the plaintiff had the right to establish other and different facts concerning the cause of the injury, and, therefore, the plaintiff has been permitted to introduce any evidence in his power having a bearing on the case, and that evidence is before you. There is also in proof the facts which were established on the trial of the cause in the state court, on which the opinion of the supreme court of Illinois was based; and, we think, if you shall find the facts as established here in all material respects the same as proved in the state court, then the opinion of the state court is conclusive against the right of the plaintiff to recover here, otherwise not. Of course, it is of no consequence that the volume of evidence on both sides is much greater than in the state court. The question is whether the cause of action is the same, and the facts, as proved here, are, in all substantial particulars, the same as established in the state court.

The record of the state court is in evidence. It contains the bill of exceptions, the evidence offered in the former trials, and the opinion of the supreme court. It is admissible only for the purpose of showing whether or not the facts as proved there affecting the case are substantially the same as shown in the trial here. We have already stated what the supreme court of Illinois decided. It would not be proper for the jury to consider the opinion of the supreme court, or to discuss its correctness, or the correctness of the views of any one of the judges of the supreme court.

If the jury, under these instructions of the court, should find it necessary to consider the question of damages, the rule would be that the jury should allow to the plaintiff such just and reasonable sum, as compensation for the injury, for the pain and suffering

he has undergone, and the expenses, etc., he has incurred in consequence thereof, as under all these circumstances of the case they think he may fairly be entitled to receive from the defendant.

The jury failed to agree.

NOTE. A recovery may be had though the passenger was not in the usual passenger cars. Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 468. Edgerton v. New York & H. R. Co., 39 N. Y. 227; Galena & C. U. R. Co. v. Fay, 16 Ill. 568. If a person enters the saloon car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the railroad company incurs the same liability for his safety as if he were in their passenger train. Dunn v. Grand Trunk Ry., 58 Me. 187. Consult, also, Bridge v. Grand Junction R. Co., 3 Mees. & W. 244; Stokes v. Saltonstall, 13 Pet. [38 U. S.] 181; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478.

[See Case No. 6,276.]

Case No. 6,276.

HAZARD v. CHICAGO, B. & Q. R. CO.

[4 Biss. 453.] [1]

Circuit Court, N. D. Illinois. July, 1865.

RES JUDICATA—CHANGE OF FORUM—NEW EVIDENCE.

1. Where a suit commenced in the state court has been carried to the supreme court, and a new trial ordered, the plaintiff has the right to dismiss his suit and commence in the federal court; the opinion of the supreme court does not constitute a bar unless it finally determines the suit.

2. But, on substantially the same state of facts, the plaintiff is bound by the law as laid down by the state supreme court: he cannot change the forum to obtain a different ruling.

3. The plaintiff has the right, however, to introduce evidence showing a new or different state of facts from those shown on the former trial.

[This was an action at law by E. W. Hazard against the Chicago, Burlington & Quincy Railroad Company to recover for injuries sustained through the negligence of defendant's agents while a passenger on defendant's railway train.]

Before DAVIS, Circuit Justice, and DRUMMOND, District Judge.

DRUMMOND, District Judge. The question arises in this case upon the pleadings, but the main point has been argued irrespective of the form of the pleadings, and it has been submitted to the court by common consent, with a view of ascertaining our opinion upon what is supposed to be the real controversy in the cause, and therefore the opinion of the court will be given without regard to the particular form of the pleadings, which can be made in conformity with the view of the court, as was the understanding between the parties.

A suit was instituted in a state court by Mr. Hazard, the plaintiff, against the defendant, alleging that while upon a railway train of the defendant, by the carelessness and negligence of its agents he was injured, and for the injury the action was brought. The case was tried in the state circuit court and a verdict and judgment obtained for the plaintiff, and it was then taken to the supreme court of the state, which reversed the judgment of the court below. Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373. When the case went back to the state circuit court it was dismissed by the plaintiff, and thereupon an action was brought in this court.

The declaration alleges substantially the same cause of action; that is to say, it is apparent that it was for the same damage for which the action was brought in the state court. It states that the injury was in consequence of the negligence of the agents of the defendant. Now, the defense set up here is that this judgment of the state court reversing the judgment of the court below is a bar to this suit, and that it cannot be maintained.

We are of the opinion that it is not technically a bar to the maintenance of the suit. If the suit had gone on in the lower state court, it is clear that the plaintiff would have had a right to proceed with the trial of his cause—to have it submitted to a jury upon the evidence. The defendant could not have relied upon the opinion of the court above, unless the evidence in the cause was precisely the same in every substantial particular as it was on the former trial, as shown by the bill of exceptions, and we think that the plaintiff cannot be placed in a worse position here than he would have been in the state court, that he has a right to go on here with his cause and have it tried. But we think that the law as laid down by the supreme court of the state, ought to govern in this case although it is tried here, and that if it shall turn out that the facts are substantially the same, in every material respect, as they were in the state court, the defendant would have a right to ask this court to instruct the jury that the law is as laid down by the supreme court of the state. But it is possible the facts may be different. For instance, the main question is as to the negligence of the agents of the defendant. The evidence might be different upon a second trial from what it was on the first trial.

We hold that the plaintiff cannot be excluded from introducing other and different facts from those which might have been established on the former trial, and which may give color one way or the other to the question of negligence.

This substantially disposes of the only question that has been argued and submitted to

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

the court, and it expresses the opinion of both judges, and the counsel can adapt the pleadings to the views of the court in relation to the question of law. We understand that, upon the statement of the facts as they exist upon the record, the suit in the supreme court of the state does not constitute a bar technically to the maintenance of this action; for example, if it were alleged in the pleadings that this case was tried, and the whole bill of exceptions, the opinion of the court, and the whole record of the court, set forth in the plea, that does not constitute a bar to the maintenance of the suit, as it would not have constituted technically a bar to the continuation of the suit in the state court; that the plaintiff would have had a right to go on and try his case in the state court; that he has the same right here, but that this court will have to lay down the law as it was laid down by the supreme court of the state, if the facts are the same as they were there. Otherwise the effect would be this, that, after a party had chosen his own forum, and the opinion of the court was against him upon the law, he might dismiss his suit and go into another forum and insist upon a different rule of law. We think as between a state court and the United States court that rule ought not to apply, but that after a party has chosen his forum, and the opinion of the court, after a full investigation of the case upon the law and the facts of the case, is given, if he dismisses his suit there and comes into this forum, the law laid down by the highest tribunal of the state must govern him here, unless it is upon a question where this court is not bound by the adjudication of the supreme court of the state.

NOTE. An application for the removal of a cause from the state court, after the state supreme court had remanded the cause to the court below, is in time. Such an order opens the case for further proceedings and for litigation as if no judgment had ever been entered. Akerly v. Vilas [Case No. 119]. By the acts authorizing a removal of the causes from the state to the federal courts, congress did not intend to allow either party to obtain a practice or ruling more favorable to them, or when dissatisfied in the state court, to obtain a trial de novo. Akerly v. Vilas [Id. 120]; Boggs v. Willard [Id. 1,603]. And see Goodrich v. Chicago, 5 Wall. [72 U. S.] 566.

[See Case No. 6,275.]

Case No. 6,277.

HAZARD v. GREEN.

Circuit Court, District of Columbia. 1847.

PATENTS—KNOWN THING—NEW PURPOSE.

The application of a known thing to a new purpose, as the use of rivets to fasten parts of a shoe instead of sewing, though such particular parts of the shoe had never before been so fastened, is not the subject of a patent.

[CRANCH, Chief Judge. Cited in Law, Dig. 488, to the point as stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 6,278.

HAZARD v. HAZARD et al.

[1 Paine, 295.] [1]

Circuit Court, D. Vermont. May Term, 1820.

JAIL BOND—ESCAPE—LUNATIC—LIABILITY OF SURETY.

1. The condition of a bond that a prisoner "shall faithfully and absolutely remain within the limits of the jail, and not depart therefrom," &c. is not broken by the escape of the prisoner, while in a state of insanity.

2. The liability of the sureties for an escape is not coextensive with that of the sheriff. As it regards the latter, a prisoner on the limits is supposed to be in his immediate custody, and the escape of an insane prisoner, therefore, as much a negligent escape as any other; and he is not allowed to excuse himself where he might so easily collude or be imposed upon. But there is no analogy in these respects between a sheriff and the sureties.

[Cited in Taintor v. Taylor, 36 Conn. 248.]

At law.

D. Chipman, for plaintiff, cited 4 Durn. & E. [4 Term R.] 789; 1 Strange, 429; 2 H. Bl. 112; 10 Mass. 206; 4 Mass. 361; 2 Bos. & P. 362.

C. Marsh and D. Edwards, for defendants.

LIVINGSTON, Circuit Justice. Robert Hazard, one of the defendants, was committed by the marshal of the district of Vermont, on a capias ad satisfaciendum issued by the plaintiff in this suit, to the common jail of the city of Vergennes, and being admitted to the liberties of the prison, executed to the marshal, together with the other defendant Robinson, a bond, with a condition, that the said Robert "should faithfully and absolutely remain within the limits of said jail-yard, and should not depart therefrom until he should be lawfully discharged, without committing any escape before such discharge, or doing any act by which the said marshal should be damnified in consequence of admitting the said Robert to the liberties of said prison." After being thus admitted to the liberties of the prison, and after the making of the bond, the defendant Hazard became insane, and while in that condition, left the said liberties, and went at large. The only question arising on the pleadings and evidence in this case, is, whether the act on the part of the debtor be an escape within the meaning of the condition of the bond on which this action is brought.

On the part of the plaintiff, it has been said that at common law, a sheriff cannot set up insanity as an excuse for the escape of a prisoner committed for debt, and that the defendants having become surety to the marshal, have substituted themselves in his place, and cannot be in a better situation than he would have been. None of the cases to which the court has been referred, decide that in-

[1] [Reported by Elijah Paine, Jr., Esq.]

sanity of the party may not be pleaded to an action against a sheriff for an escape. The cases cited from Strange, and Durnford and East, both turned on a rescue—and in that of Steel v. Allan [2 Bos. & P. 437], Lord Eldon only refused to discharge a lunatic who had been arrested on common bail. But if the law be so, as it probably is, there is very good reason for it. A prisoner in the hands of a sheriff, is committed to the walls of a prison, from which, if proper care be taken, it is as difficult, if not more so, for a lunatic to escape, than for one in the full enjoyment of his faculties. It would, therefore, be as great negligence in the sheriff to suffer such an escape as that of any other person, and for such negligence he would be liable. The law has not left him to decide in what case a party, after being committed, shall be discharged; and were it put in his power to discharge one who had become insane after commitment, or to excuse himself on that ground, he might be imposed upon himself, or he might collude with a debtor to escape from prison. Some provision seems necessary to enable the friends of a person in that situation, by some legal proceeding, to take him from the sheriff's custody. Until such provision, however, be made, it is better to let a sheriff remain chargeable for the escape of an insane debtor, than to permit such insanity to be set up as a defence, or to leave any thing to the discretion of a ministerial officer on this subject. But there is no analogy between the case of a sheriff and a surety on a jail bond, or at any rate too little to apply to the latter, the rules which it has been found necessary to adopt, in relation to the former. In the one case, the prisoner is literally, and not merely by construction of law, in the custody and keeping of the sheriff—who is provided with ample means for securing his person. In the other case the prisoner is at liberty within the limits of the jail-yard, and not under the control or in the keeping of the surety. He cannot, if in execution, be taken by his bail if he goes beyond those limits, although the legislature has given the surety a right to exonerate himself if the commitment be on mesne process, by a surrender of the principal. In the one case, too, the liability must be tested by decisions, which have been made from time to time in relation to the office of sheriff. In the other, the court has no right to look to any thing but the condition of the bond, on a reasonable construction of which, must depend the extent of the obligor's responsibility. Its engagement is, that the debtor shall faithfully and absolutely "remain within the limits of the jail-yard, and not depart therefrom until he be lawfully discharged." Although it is not said that he shall not voluntarily depart, it is plainly implied, not only from the nature of the undertaking, but from the obligation which is imposed on the debtor, faithfully to remain within the limits of the yard. The obligation can be observed only by a rational being, who can discriminate between fidelity and a violation of duty; and it would seem necessarily to follow, that no man deprived by the visitation of Heaven of all sense of right and wrong, could do any act of himself which could be said to be inconsistent with a faithful observance of the condition of the bond. On any other construction, a surety would be rendered liable by the act of God, and not by that of the party, the former of which, is never permitted to operate to the injury of any one. It is on the good faith and integrity of the debtor that his surety relies—it is for a moral agent, for whom he enters into the contract. But if his liability were to continue after the extinction of the moral sense, no one would ever be safe in signing a bond of this nature; and whatever reliance might be placed on the honour and good faith of an unfortunate debtor, who rarely has any other security to pledge, his friends would be compelled to suffer him to be immured within the walls of a prison, rather than undertake for him, at a peril which no human foresight could guard against. The principal debtor is also a party to this bond, and would be liable over to his surety, if he had not faithfully remained within the limits of the jail-yard. But an action against any man for doing, after he had became insane, an act, which in his senses he had covenanted not to do, would be a novelty, and could hardly be sustained. If this were a suit on a bond or recognizance, which had been entered into for the good behavior of Hazard, and it appeared that the breach of the peace which was alleged as the forfeiture, had been committed in a state of insanity, can it be doubted that it would not be a valid defence? For if the party who committed the offence could not be punished, surely he who had become surety for his preserving the peace, ought not to suffer. The judgment in Baxter v. Taber [4 Mass. 361], in Massachusetts, proceeds on the same principle. Although Holbrook, the prisoner in that case, was not insane, the court consider that some agency on the part of the debtor, must be employed to constitute an escape within the meaning of such a bond, and, therefore, considered his surety not liable; it appearing that the debtor was carried by others, in consequence of a sudden illness, to a house which was off the limits, where he languished and died, it being the opinion of his attending physician, that he could not be carried back to prison, without manifest danger of his life; and yet, if this had been done to a person confined in jail, it would have been an escape. This is one case, and perhaps rescue is another; and others might easily be put, in which the sheriff would be liable for an escape; and yet the condition of such a bond as this, under similar circumstances, would not be considered as broken. There must be judgment for the defendant.

Case No. 6,279.

HAZARD v. HAZARD.

[1 Story, 371.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1840.

PARTNERSHIP — THIRD PERSONS — OPERATION OF LAW—PARTICIPATION IN PROFITS—AGENCY.

1. A partnership, as to third persons, may arise by mere operation of law, and without the intention of the several parties thereto; but the actual intention of the parties will alone constitute a partnership as between themselves.

[Cited in Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588; Northrup v. Phillips, 99 Ill. 453.]

2. A mere participation in the profits will not make the parties partners inter sese.

[Cited in Seymour v. Freer, 8 Wall. (75 U. S.) 222.]

3. Quaere, whether there is any clear and solid distinction between cases, which constitute partnership, as to third persons, by participation in the profits, and cases of mere agency, where the remuneration is to be paid by a portion of the profits.

[Cited in Rodgers v. Meranda, 7 Ohio St. 179; Hastings v. Hopkinson, 28 Vt. 112.]

4. Under the circumstances of this case, where one third for one year and one fourth for another year, of the profits in a certain business carried on by A and B, was allowed to B, for his services, it was *held*, that there was no partnership, but a mere participation of interest in the profits, as a remuneration to B for his agency.

[Cited in Bigelow v. Elliot, Case No. 1,399.]

[Distinguished in Bentley v. Harris, 10 R. I. 435. Cited in State v. Shaeffer, 89 Mo. 275, 1 S. W. 293.]

Bill in equity for the settlement of the accounts of an asserted partnership between the plaintiff [Thomas R. Hazard] and the defendant [Benjamin Hazard], and for a decree for payment of the balance due to the plaintiff, &c. The answer denied the partnership, and stated expressly, that no partnership was intended between the parties; but that the defendant was, by an informal written instrument, annexed to the bill, and which was admitted to be the true agreement between the parties to have a certain portion of the profits of the business in lieu of, and as a compensation for, his services. The written instrument was not signed; but was in the following terms, and was in the handwriting of the defendant: "Benjamin Hazard agrees with Thomas R. Hazard to run his two factories situate on Rocky Brook, on the following terms, viz. The said Benjamin Hazard agrees to devote his whole time, excepting his attendance of religious meetings, exclusively to the management of the concerns of said factories, and to take the machinery in the order it is at present in, and return it in like order, at the expiration of this agreement. In consideration of which, the said T. R. Hazard agrees to allow him one fourth of the profits of the business, for the first year, and one third of the profits for each year after, until the expiration of this agreement, which is to be the sole reward of the said B. Hazard's services. And Thomas R. Hazard agrees, on his part, to purchase the stock and attend to the sale of the goods, without any charges for his personal services and time, excepting the actual expenses, necessarily incurred. All stock, and articles of any description, bills, &c. paid by Thomas R. Hazard, are to be credited to the said T. R. H., and the proceeds of the goods are to be delivered and charged to him, in the factory books. And the said Thomas R. Hazard agrees to furnish a horse and wagon, to do the business of the factory, which is to be kept at the expense of the factory, and returned of equal value, at the expiration of this agreement. It is to be understood, that Benjamin Hazard is to have no control over, or profits arising from the rents, &c. of the houses and lands adjoining the factories. Thomas R. Hazard is to charge no rent for the factories, which, with the dam, water-wheels, running gear, &c. is to be kept in running repair, and the expense charged to the factory." The agreement has no date, but it is admitted, that it was made in December, 1825, and the factories were carried on under it for four years, until about December, 1829. The business being then found unprofitable, it was discontinued by the consent of both parties.

The general replication was filed; and the parties having taken evidence on each side, the cause came on for a hearing.

Benjamin Hazard, for Thomas R. Hazard.

R. W. Greene and A. C. Greene, for defendant.

STORY, Circuit Justice. In the view which I take of this case, it is wholly unnecessary to go into the examination of several collateral matters, which are stated in the bill and answer and evidence, and which have been adverted to at the argument. The only question, which it appears to me is now before the court for consideration, is, whether under and in virtue of the informal agreement, in December, 1825, there was constituted a partnership between the parties for carrying on the factories. If there was, then there ought to be an interlocutory decree for an account. If there was not, then the bill ought to be dismissed, for although in positive terms it does not (as doubtless it ought) aver a partnership, yet the whole structure and frame of the bill is formed to this aspect of the case, and the bill would be unintelligible without it. Now, upon the point, whether there was a partnership or not between these parties in the factory business, under the agreement, it is necessary to take notice of a well known distinction between cases, where, as to third persons, there is held to be a partnership, and cases where there is a partnership between the parties themselves. The former may arise between the parties by mere operation of law against the intention of the parties; whereas,

[1] [Reported by William W. Story, Esq.]

the latter exists only when such is the actual intention of the parties. Thus, if A and B should agree to carry on any business for their joint profit, and to divide the profits equally between them, but B should bear all the losses, and should agree, that there should be no partnership between them; as to third persons dealing with the firm, they would be held partners, although inter sese, they would be held not to be partners. This distinction is often taken in the authorities. It was very fully discussed and recognized in Waugh v. Carver, 2 H. Bl. 235; Cheap v. Cramond, 4 Barn. & Ald. 663; Peacock v. Peacock, 16 Ves. 49; Ex parte Hamper, 17 Ves. 404; Ex parte Hodgkinson, 19 Ves. 291; Ex parte Langdale, 18 Ves. 300; Tench v. Roberts, 6 Madd. 145, note; Hesketh v. Blanchard, 4 East, 144; Muzzy v. Whitney, 10 Johns. 226; Dob v. Halsey, 16 Johns. 34.

The question before us is, not as to the liability to third persons; but it is solely, whether between themselves the agreement was intended to create and did create a partnership. I have looked over the agreement carefully, and my opinion is, that no partnership whatsoever was intended between the parties; but that Benjamin Hazard was to be employed as a mere superintendent, and not as a partner, and was to be paid the stipulated portion of the profits for his services as superintendent. This, it is said, in the agreement, was to be the sole reward of his services; and, if there were no profits, then he was to submit to lose the value of his services. It is not any where said in the agreement, that the parties are to be partners in the business; nor that Benjamin Hazard is to pay any part of the losses. But language is used, from which, I think, it may fairly be inferred, as the full understanding of the parties, that the whole capital stock was to be held by T. R. Hazard, as his sole and exclusive property, and that the stock was to be furnished by him, and the proceeds thereof were to be delivered and sold by him, and charged to him, as his individual property, and debts and credits. Now, if this be so, there is no pretence to say, that the parties intended a partnership. A mere participation in the profits will not make the parties partners inter sese, whatever it may do as to third persons, unless they so intend it. If A agrees to give B one third of the profits of a particular transaction in business, for his labor and services therein, that may make both liable to third persons as partners; but not as between themselves. This was the very point adjudged in Hesketh v. Blanchard, 4 East, 144, where Lord Ellenborough said: "The distinction taken in Waugh v. Carver and others, applies to this case. Quoad third persons it was a partnership, for the plaintiff was to share half the profits. But, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble and for lending R. his credit." The same doctrine was fully recognized in Muzzy v. Whitney, 10 Johns. 226. It is not necessary in the present case, to decide, whether Benjamin Hazard was, under the agreement, a partner as to third persons. That question may be left for decision, until it shall properly arise in judgment. And before it is decided, it might be necessary to examine a very nice and curious class of cases, standing, certainly, upon a very thin distinction, if it is a clearly discernible distinction, between cases of partnership, as to third persons, and cases of mere agency, where the remuneration is to be by a portion of the profits. This distinction is alluded to by Lord Eldon, in Ex parte Hamper, 17 Ves. 404, and by Lord Chief Justice Abbott in Cheap v. Cramond, 4 Barn. & Ald. 663, 670. In the latter case, the chief justice said: "Such an agreement is perfectly distinct from the cases, put in the argument before us, of remuneration made to a traveller, or other clerk or agent, (in proportion to the profits,) by a portion of the sums received by the master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion." It was also acted upon in Muzzy v. Whitney, 10 Johns. 226; Dry v. Boswell, 1 Camp. 329; Wish v. Small, Id., note; Benjamin v. Porteus, 2 H. Bl. 590; Wilkinson v. Frasier, 4 Esp. 182; and Mair v. Glennie, 4 Maule & S. 240, 244.

My judgment is, that in the present case the parties never intended any partnership in the capital stock; but a mere participation of interest in the profits; and that the one third or one fourth of the profits allowed by the agreement to Benjamin Hazard, was merely a mode of paying him as agent for his superintendency of the factories. In this view, I think, the bill ought to be dismissed with costs.

Case No. 6,280.

HAZARD v. HOWLAND.

[2 Spr. 68.] [1]

District Court, D. Massachusetts. June, 1863.

ADMIRALTY — LIBEL TO RECOVER LAY — DISPOSAL OF OIL — VIOLATION OF SHIPPING ARTICLES — PENALTY.

1. Where the master of a whaling vessel is also a co-owner, a libel in admiralty against the other owners to recover his lay, disbursements and commissions on sales of slops will be sustained as within the jurisdiction of the court so far as the lay is concerned, but not in respect to the other claims.

[Cited in The H. E. Willard, 52 Fed. 388, 53 Fed. 600.]

2. Owners are not allowed to charge the officers or crew commissions for selling the oil.

3. It is the duty of the owners to sell the oil for cash as soon as the same can reasonably be done. And the cash market price, and that only, is the measure of compensation for the officers and crew who are to be paid lays.

[Cited in Crowell v. Knight, Case No. 3,445.]

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

4. The owners, on the ground of established usage to the contrary, have no right to deduct the value of the casks from the sales of the cargo.

5. General advances of money having been made by the owners to the libellant during the voyage and before its settlement, there being nothing to show whether such advances were made on account of libellant's interest as co-owner, or on account of his earnings as master, the respondents were allowed to appropriate the same in part payment of his lay.

6. Where a violation of that part of the shipping articles prohibiting the taking on board spirituous liquors, except for specified purpose, under pain of forfeiture of the entire share of the voyage belonging to the offender, is proved, this court will not pronounce for an absolute forfeiture, but will inflict such a measure of penalty as the case equitably requires.

7. Proof of special damage occasioned by using spirituous liquors is not required.

8. In the present case the sum of $375 was deducted for such violation.

This was a libel in admiralty, originally brought against the other owners of a whaling bark by the libellant, who was himself one of the owners as well as master, to recover his lay, an alleged balance due on the disbursement account, and commissions on sale of slops. The respondent demurred to the jurisdiction of the court. The demurrer was sustained as to so much of the claim as related to disbursements and commissions, and overruled as to the matter of the lay. The case then proceeded to trial upon the issue of fact set up by the respondent in reference to the intoxication of the libellant, and his violation of the pledge in relation to taking liquors on board contained in the shipping articles.[1] The decision was reserved, and the case sent to an auditor to ascertain what the lay would amount to. Upon the coming in of the auditor's report, a hearing was had, and subsequently the following opinion was delivered.

J. C. Stone, for libellant.

R. C. Pitman, for respondent.

SPRAGUE, District Judge. Several questions have arisen on the auditor's report, and also upon the provision of the shipping articles in reference to spirituous liquors. I will first examine the former. The respondents claim commissions for selling and guaranteeing the oil, if they are to be charged with the credit price, or if that claim is not allowed, then that the credit price should be reduced to the price at which the oil could have been sold for cash.

I have several times decided against the commissions. Years ago it was urged that it was usual. I decided against the claim as inconsistent with the contract itself. In one clause of the articles the seamen bind themselves to serve for the share of the proceeds set against their names. If this stood alone, the inference might be that they were joint owners of the product of the voyage; but another article says that the seamen shall receive payment for their shares as soon as the oil can be sold and the accounts made up. It is apparent that they are not intended to be owners or to have a share of oil, and it was long ago so decided, but they are to be paid. Then it is clear the owners are to have the property in the oil. It is the duty of the officers and seamen to bring the cargo home, and deliver it to the owners; then the owners are to sell it and make up the accounts; that they have engaged to do, and they have no more right to charge for their personal services in doing what they have promised to do, than the seamen would have to charge monthly wages. A practice to the contrary is in direct violation of the contract. It must have grown up from error or by reason of the character of the men dealt with; acquiesced in, because the individual amount was small, the crew in a hurry, and it was not an object for them to contest it. These charges must be disallowed.

Then as to price. In my view, the articles contemplate a cash sale. The oil is to be sold as soon as it can fairly be put into the market, and sold for cash. It was never contemplated that the seamen should wait four or six months, or that the owners should have the power of making them submit to their terms to obtain the ready money. The duty of the owner is clear, to sell for cash in a reasonable time and with reasonable efforts. If he has not done so, then the other party must be put in as good a condition as if he had. If, therefore, a sale is made on credit for a larger price, all the owner is responsible for is the price of a cash sale; he is not bound by the credit sale. That may come in as evidence, but it is not the rule. In this case, on the assessor's report, I must allow two cents a gallon, as the difference between the cash and credit price.

The next claim is, that the owners should be allowed the value of the casks. A strong argument is urged from the language of the articles: it is said, the crew are to be paid from the product of the voyage, and that therefore they have only a right to the proceeds of the oil and bone, and the price of the oil must be ascertained independently of the casks. On the other hand, we must consider that the articles are extremely abstinent in regard to the duties of the owners. If we look at these articles alone, no obligation will be found on their part to furnish casks at all. If this were the first whaling voyage,

[1] The clause referred to is as follows: "No distilled spirituous liquors will be put on board this vessel by the owner, except for strictly medicinal use; and by their signatures the other parties to this contract pledge themselves not to take any of these articles with them as their private stores, or for traffic, either from this port or any other port or place where they may be during the voyage. And in case of a violation of this pledge by the master, or any officer or seaman, his entire share of the voyage shall be thereupon forfeited to the use of the owners."

it would be a fair question whether the owners should or not furnish the casks. It might be claimed from the analogy of other fishing voyages that the crew were bound to contribute to furnish more or less of the outfits. But now an established usage determines this. The usage is well established, that the owners furnish the casks. Is it merely to bring home the oil, or is it also for the purpose of being sold with the oil? Have they not given credit for the whole proceeds, including the package? The auditor's report says, the practice is for the oil to go with the casks. No instance is shown where the casks were charged for. Now, then, where the obligations of owners are a matter of inference from usage, here is a long-established uniform usage, and established by the owners themselves. Why should they set it aside in this case? Could the seamen have understood that a different rule was to be applied in the settlement of this voyage? I think not. Standing on the established usage, I cannot allow the deduction of the value of the casks.

The next question is one of appropriation of payments. The respondents contend that the payments made to the libellant's wife during the voyage, and to the libellant on his return, should be applied to his lay. On the other hand, the libellant says the payments should be left to be applied to his account as part owner. The libellant's counsel say that these advances were not payments, as nothing was due when they were made. That is true; they are not, strictly speaking, payments, and the same may be said if you attempt to appropriate them to the account with him as owner. So both stand on equal ground here. What was the real understanding as to these advances? I do not suppose in such cases they are thought to be mere loans, creating a debt that may be sued at once, but an advance to come into the settlement of the voyage; and there is no claim for repayment till then, if at all, in case the voyage does not amount to so much. If the libellant was only master, no question would arise; but here he is also owner, and he says he has his choice to appropriate to that account. But there is great difficulty in this. It seems to me that when advances have been made the owner may say, I am to be repaid out of the first settlement. I have a right to deduct from either. That is most probably the understanding, and is what the owner might well have insisted on. In point of fact, the lay of the master, if settled separately, would be settled first, and the payments would generally be deducted from the lay. I see no reason why I should compel an owner to pay the whole of the master's lay, and turn him over to the chance of getting his pay in another settlement. One insurmountable obstacle is that a court of admiralty does not take cognizance of accounts of part-owners, unless incidentally. Now, if I took the libellant's view, it would be necessary for me to go into those accounts to see if there is any thing due from which the respondents could deduct the advances. It may turn out as between the owners that nothing is due to libellant as one. I shall therefore deduct these payments from the lay.

The last question arises upon the use of spirituous liquors by the master, and his violation of the provisions of the shipping articles against taking them on board as his private stores.

First, as to the question of forfeiture. The articles prescribe a forfeiture of the wages for the whole voyage. But I shall treat this as forfeitures are generally treated,—they are to be cut down to a just amount under all the circumstances. I cannot suppose, indeed, that it was really intended that a total forfeiture should be made as prescribed. Some voyages are four or five years in length; then if any seaman should, after four years of faithful service, bring on board, when liberty was given on shore, a single bottle of liquor, he would, by the terms of this provision, forfeit his whole voyage. It cannot be supposed that such an injustice was intended by the owners. I have therefore no hesitation in saying that the court are not called on rigidly to inflict the whole of this forfeiture.

But then the inquiry arises, when this stipulation has been violated, as is proved here to be the case, what shall be the actual amount inflicted as a penalty? That is the most difficult question. I have no guide. Certainly, where the master, who has entered into this agreement himself, and whose duty it is to see that others observe it, violates it habitually, he has no claim for indulgence. The proof of the extent of his misconduct in this matter is somewhat conflicting, and less satisfactory than could be desired. (The judge here adverted to the evidence.) There is no testimony that any particular damage was done to this voyage, but no question that the master had liquor on board, and drank frequently. The damage is then left to inference. It might be inferred that he was less competent, that it disturbed his judgment, caused delay in port, recklessness in management, &c. These are all matters of inference, and it remains true that there are no specifications of injury. Then, also, the fact is to be considered, that this was a fair voyage or something more. I am left to say how much should be inflicted as a deduction. I suppose men of certain views might inflict the whole amount, while another class would say, nothing, without proof of special damage. I think there should be damages given without proof of special damage. I hold the contract to be an important one, and one that the owners have a right to make, and to see that it is enforced. If the master does not intend to abide by it, he should not go the voyage. It can never be ascertained with certainty, how much the

voyage is injured by its violation. The master's energy, activity, and fidelity are to be relied on above all others; therefore it is not a case for mere nominal damages. This is the first time I have been called on to inflict this penalty, and I have thought, on the whole, I should assess three hundred and seventy-five dollars ($375) as the damages. I hope this is as much as the damage to the owners amounts to, and I think it necessary to give as much as this as a serious admonition that this stipulation is to be observed. Decree accordingly.

HAZARD, The (NATTERSTROM v.). See Case No. 10,055.

HAZARD (PHELAN v.). See Case No. 11,068.

Case No. 6,281.

HAZARD v. ROBINSON.

[3 Mason, 272.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1823.

EASEMENT—WATER-COURSE—TWENTY YEARS' POSSESSION.

1. A. owns an upper mill and B. a lower mill on the same stream, with a dam of a height which obstructs the free use of the upper mill. B. lowers his dam two feet, and allows it to remain in that state thirty-eight years, and during that period the upper mill is free of obstruction. B. then sells the lower mill to A., who afterwards sells the lower mill to C. *Held*, that by the lapse of time and unity of possession the right of raising the dam of the lower mill two feet was gone and that the upper mill had acquired a right to use the water without back-flowing.

[Cited in Whipple v. Cumberland, Case No. 17,516.]

[Cited in Seymour v. Lewis, 2 Beasley [13 N. J. Eq.] 444; Dunklee v. Wilton R. Co., 24 N. H. 499.]

2. Unity of possession does not extinguish the right to use a water-course appurtenant to a mill.

[Cited in Dexter v. Providence Aqueduct Co., Case No. 3,864.]

[Cited in Cary v. Daniels, 5 Metc. (Mass.) 239; Morgan v. Mason, 20 Ohio, 412; Dunklee v. Wilton, R. Co., 24 N. H. 500; Matteson v. Wilbur, 11 R. I. 549.]

3. Twenty years' possession of an easement or use of a water-course is a conclusive presumption of right, if unexplained.

[Followed in U. S. v. Appleton, Case No. 14,463. Cited in Percy v. Parker, Id. 11,010.]

[Cited in Arbuckle v. Ward, 29 Vt. 51; Lampman v. Milks, 21 N. Y. 510; Shields v. Titus, 46 Ohio St. 539, 22 N. E. 717; Webber v. Chapman, 42 N. H. 336.]

Case for obstruction to a mill and flowing back the water by means of a dam across the water-course lower down the stream (called Sauhatucket river) and thereby stopping the operation of the plaintiff's mill. Plea not guilty. At the trial, the facts appeared to be in substance as follows: The mill in question, which for the sake of distinction may be called the upper or Niles's mill, was owned by one Ebenezer Niles in 1735, and sold by him in that year to Daniel M'Loone. In 1744, M'Loone devised the same mill to Thomas Hazard in fee; and afterwards, in 1746, being the owner of lands lying on the same stream and mill privileges nearly through its whole course, by a codicil to his will he gave to Daniel Williams a piece of land on the same stream, and "free liberty of erecting a mill or mills on any part of said river to the westward of said land; and free and full liberty of raising a pond by erecting a dam across said river, which may be sufficient and suitable for carrying of said mills when erected." After the death of the testator, his will and codicil were duly proved, and about the year 1749, the devisee, Daniel Williams, erected the lower mill with a suitable dam across the stream in pursuance of the authority in the will. The other devisee, Thomas Hazard, immediately brought an action for an alleged obstruction to his mill, by building a dam so high for the new or lower mill, and thereby flowing back the water. In this suit the defendant, Stedman, who claimed under Williams, had judgment in his favour. Rowland Hazard became the owner of the upper or Niles's mill before the year 1780; and in the year 1807, he purchased of Daniel Williams and others, the then owners, under the original devisee, the lower, or Williams's mill, thus becoming the owner of both mills. In October 1818, Rowland Hazard conveyed a certain parcel of land including the lower or Williams's mill "with all the privileges and appurtenances thereunto belonging," (alleging the premises to be part of the land and mills he purchased of Daniel Williams and others to Christopher Congdon in fee, under whom the defendant [James Robinson], claimed by a deed dated in March 1820. The plaintiff [Isaac P. Hazard] derived title to the upper or Niles's mill by deed from Rowland Hazard in May 1821. The defendant, after this period, raised the height of the dam on the lower or Williams's mill, about two feet, whereby the obstruction to the plaintiff's mill complained of was occasioned. From the year 1780, to the time of the grievance complained of, the dam of the lower mill had always been of the height it was before the two feet were added to it by the defendant in 1821. It was asserted, however, that antecedently to 1780, the dam was of the same height that it was after the defendant's addition. This last fact, however, was in controversy between the parties.

Upon this evidence Hazard and Searle, for plaintiff, contended, that the plaintiff was entitled to recover, even supposing the dam was higher before 1780. 1. Because the discontinuance from that time to the time of the sale to Congdon in 1818, was an extinction of any right to erect a higher dam. 2. Because the unity of possession in Rowland Hazard

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

destroyed any privilege, adverse to his upper mill.

Hunter and Whipple, for defendant, contended e contra on both points.

THE COURT gave an opinion upon both points in favour of the plaintiff, and a verdict was found for the plaintiff. The defendant moved for a new trial, and the cause stood continued for advisement until the next term (June term, 1824,) when the court having expressed an opinion confirming the former decision, the defendant withdrew the motion, and judgment was entered for the plaintiff. The following was the substance of the opinion.

STORY, Circuit Justice. Upon the facts in this case, two points arise: 1. Whether, assuming that originally the dam of the lower mill was rightfully erected as high as it now is, the subsequent lowering of it two feet in 1780, and keeping it in the same state for thirty-eight years, is not an extinction of the privilege to raise it higher. 2. Whether at all events the unity of possession of both mills in Rowland Hazard, by his purchase in 1807, did not extinguish any privilege appurtenant to one mill, which was injurious to, and disused in respect to, the other.

I will consider both points, because they involve considerations of great practical importance, and have been thought susceptible of no small difficulty. As to the first point: The raising of the dam of the lower mill is proved to have been a great injury and obstruction to the beneficial use and operations of the upper mill. This was the origin of the law suit stated in the evidence; and its termination in favour of the defendant, if it establishes a right in the original devisee, it also establishes the fact, that it was a material diminution of privileges, valuable to the upper mill. For thirty-eight years, that is, ever since the year 1780, the dam has remained two feet lower than it now is, and during all this period the upper mill has enjoyed the privilege of the water without any obstruction whatsoever. No adverse right has been claimed, no adverse use or privilege has been exerted. Now upon this posture of the case, upon the general principle of law, a fair, I might almost say, an irresistible, presumption arises of a grant of this privilege from the owner of the lower mill to the owner of the upper mill. In respect, however, to incorporeal hereditaments and easements, such as ways and water privileges, the rule of law is well established, that an uninterrupted possession and use for twenty years is prima facie and, if unexplained, conclusive, evidence of a right; and under circumstances courts of law will entertain the presumption of a grant, even from a shorter period of enjoyment. The cases are so numerous, so well known, and so direct on this head, that it is unnecessary to refer particularly to them. See cases in Ang. Watercourses, 44; Saunders v. Newman, 1 Barn. & Ald. 258; Balston v. Bensted, 1 Camp. 463; Bealey v. Shaw, 6 East, 208; 12 Ves. 266; Gray v. Bond, 2 Brod. & B. 667; 2 Saund. 175, Williams' note, 2; Hawke v. Bacon, 2 Taunt. 156; Gayetty v. Bethune, 14 Mass. 49; Hoffman v. Savage, 15 Mass. 132; Strout v. Berry, 7 Mass. 385; Phil. Ev. p. 120, c. 7, § 2; Wright v. Howard, 1 Sim. & S. 190, 203. A right thus acquired by user, may in like manner be lost by disuser; in other words the discontinuance of the use for a long period affords a presumption of the extinguishment of the right. Lawrence v. Obee, 3 Camp. 514. See White v. Crawford, 10 Mass. 183. In the present case there is nothing to repel the presumption arising from length of time. It was an open, public, uninterrupted use of the water after the lowering of the dam; it was an important privilege; and if a right could not under such circumstances be acquired by thirty-eight years' enjoyment, it is difficult to conceive to what cases the rule of presumption ought to be applied. My judgment is, that in this case it afforded a conclusive presumption of right.

As to the second point. From the year 1807 to 1818, the time of the conveyance to Congdon, Rowland Hazard was the owner of both mills, and of course of all the rights and privileges appurtenant thereto. In general it is true, that unity of possession of the estate to which an easement is attached and of the estate, which the easement incumbers, in effect is an extinguishment of the easement. 1 Saund. 323, Williams' note, 6; 1 Rolle, Abr. 635, c. pl. 8; Bull. N. P. 74; Poph. 166; 4 Coke, 36; Clements v. Lambert, 1 Taunt. 206. But this doctrine has some exceptions, as for instance, in case of a way of necessity, it is often said, that unity of possession does not extinguish it. The true principle that governs in that case, is this, a way of necessity being ex vi termini indispensable for the beneficial use of the estate, granted, is considered as included in the grant of the estate; for in such case the law gives by implication every thing which is necessary for the enjoyment of the estate. It would perhaps be more correct to say, that in such case the original right of way is suspended or extinguished by the unity of possession, and revived or regranted by necessary implication upon the grant severing the possession. 1 Saund. 323, Williams' note, 6.

Be this as it may, it has been laid down in Bull. N. P. 74, "that a right of watercourse does not seem to be extinguished by unity of possession in any case." For this he cites the case of Surrey v. Piggot, in Latch, 153, and Poph. 166. The case in substance was this: A. was possessed of a rectory, of which a curtilege was parcel. From time immemorial a watering-place for cattle, &c. existed in said curtilege, and a stream had flowed from Milford stream through a piece

of land called the "Hop-Yard" to fill the pond at the watering-place. A. afterwards purchased the hop-yard, and thus became possessed of the rectory and hop-yard at the same time. He then sold the hop-yard to B., under whose title the defendants entered and obstructed the water-course by erecting a stone dam across it within the limits of the hop-yard. The court were unanimously of opinion, that the right to the water-course was not extinguished by the unity of possession; and that the plaintiff was entitled to recover for the obstruction. The case is most fully reported in Popham. Whitlocke, J., said, "that a way or common shall be extinguished, because they are a part of the profits of the land; and the same law is of fishings also; but in our case the water-course doth not begin by consent of parties, nor by prescription, but ex jure naturae, and therefore shall not be extinguished by unity of possession." He took the distinction, that where a thing hath its being by prescription, unity will extinguish it; but where the thing hath its being ex jure naturae, it shall not be extinguished. Jones, J., was of the same opinion for the same reason. Doddridge, J., went into a larger examination of the subject, and held, that the unity of possession did not extinguish the right to the water-course, for two reasons; (1) for the necessity of the thing; (2) for the nature of the thing, being a water-course, which is a thing running. He put the case, "A man owns a mill, and afterwards purchases the land upon which the stream goes, which runs to the mill, and afterwards alienes the mill, the water-course remains." Crew, C. J., concurred in opinion. The same case is reported in Noy, 84; Palmer, 444; Wm. Jones, 145; and 3 Bulst. 339,—but without any essential difference. Upon this case it does not appear to me that there is any difficulty in admitting its entire correctness. It proceeds upon this plain principle, that a privilege which was annexed to, and in actual use with the rectory during the unity of possession, and was not parcel of the other land or a profit à prendre out of that land, was to be considered as still existing as an appurtenance or privilege annexed to the rectory, notwithstanding the unity of possession. The running water over the hop-yard was not parcel of the hop-yard, or an easement growing out of it. But, if during the unity of possession, the privilege had been disannexed by the owner, as if the owner had during that period stopped the water-course and thus destroyed the privilege, the case would have been otherwise. A subsequent grant of the rectory would then have conveyed only the privileges actually in existence and use at the time of the conveyance. This doctrine was admitted by the court in Surrey v. Piggot to be correct, and was adjudged in a case in 11 Hen. VII. 25b, which was on that occasion cited and approved. The case 11 Hen. VII. 25, was as follows: A. was the owner of a tenement, to which there was an ancient gutter running through an adjoining tenement, and afterwards he bought the adjoining tenement; and then sold the first tenement to the plaintiff. It was held, that the ancient gutter was not extinguished by the unity of possession; but that it would have been otherwise, if A. during the unity of possession had destroyed the gutter, or cut it off. The reason is, that it was a necessary and subsisting easement. If, therefore, in the case at bar, the dam of the lower mill had never been lowered, the right to use a dam of that height, notwithstanding the unity of possession, would have passed to the subsequent grantee of the lower mill, as a subsisting privilege or appurtenance upon the doctrine asserted, and correctly asserted, by Doddridge, J. But the dam during the unity of possession and long before had been lowered two feet, and so far as it was an adverse right, had been extinguished in point of use before the unity of possession, and not being revived during that unity, it was extinguished for ever. It did not pass by the grant to Congdon, for nothing passes by a grant of a mill and the privileges and appurtenances thereof, but privileges and appurtenances existing at the time of the grant. In Nicholas v. Chamberlain, Cro. Jac. 121, it was held by all the court, "that if one erect a house and build a conduit thereto in another part of his land and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto." Here, the unity of possession was not admitted to destroy the right to the easement, because it was annexed to the messuage, and in use at the time of the grant. But if the conduit and pipes had been actually severed before the grant, there could have been no pretence to say that the conduit and pipes passed as appurtenaces. The case of Morris v. Edgington, 3 Taunt. 24, although different in its circumstances, appears to me in its reasoning to warrant this conclusion. Whatever is actually enjoyed with the thing granted, as a beneficial privilege at the time of the grant, passes as parcel of it; but not otherwise.

My opinion on the second point accordingly is, that by the unity of possession, any adverse right of obstruction of the water to the prejudice of the upper mill, in posse, and not in esse, was extinguished; and the grant to Congdon conveyed the lower mill with only such privileges and appurtenances as to the dam and water, as were at that time used and appropriated to it. Judgment accordingly.

HAZARD, The (SINGSTROM v.). See Case No. 12,905.

HAZARD (UNITED STATES v.). See Case No. 15,337.

Case No. 6,282.

HAZARD v. NEW ENGLAND MARINE INS. CO.

[1 Sumn. 218.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1832.[2]

MARINE INSURANCE — ABANDONMENT — COPPERED SHIP—HOW UNDERSTOOD—PERIL OF SEA.

1. Semble. To make an abandonment effectual, the cause of the loss of the ship must be stated in the letter of abandonment, for the benefit of the underwriters.

[Cited in Marble v. City of Worcester, 4 Gray, 395; Cummer v. Butts, 40 Mich. 325.]

2. Where, in a written application for insurance on a ship, she is represented as "a coppered ship," the meaning of this representation is to be understood according to the ordinary sense and usage of these terms in the place, where the insurance is made; unless the underwriter knows, that a different sense and usage prevail in the place, in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance; or has some other knowledge, that the owner uses them in a different sense from that, which prevails in the place, where the insurance is made.

[Cited in Foye v. Leighton, 22 N. H. 76; Martin v. Maynard, 16 N. H. 167; Cummer v. Butts, 40 Mich. 325.]

[See note at end of case.]

3. If the underwriter has been misled in a matter material to the risk, by supposing the terms of the representation used in the sense of the place, where the application was made, and if the policy was underwritten by mistake, founded on such supposition, and the owner, who procured the insurance, intended to use the terms in a different sense, then the policy is void, as founded in mutual mistake.

[Cited in Gibson v. Pelkie, 37 Mich. 381; Widner v. W. U. Tel. Co., 51 Mich. 297, 16 N. W. 653; Wardell v. Williams, 62 Mich. 56, 28 N. W. 796.]

4. It is essential to the validity of a contract, that the parties to it should have consented to the same subject matter in the same sense; they must have contracted ad idem.

[Cited in Hughes v. Mercantile Mut. Ins. Co., 55 N. Y. 268; Van Buren Ry. Div. v. Lamphear, 54 Mich. 582, 20 N. W. 594.]

5. A loss of a ship by worms in an ocean, where worms ordinarily assail and enter the bottoms of vessels, is not a peril of the sea within the policy.

[Cited in Dix v. Union Ins. Co., 23 Mo. 60.]

[Cited in Nelson v. Suffolk Ins. Co., 8 Cush. 499.]

6. Where a ship sustained an injury at the Cape de Verd Islands, in the loss of her false keel, whereby she became exposed to the action of the worms, which obtained entrance into her in the Pacific Ocean, and destroyed the ship, the loss does not come within the policy, it being a consequential injury. In this case, the master should have caused the ship to be repaired; and in not doing so, he was guilty of negligence, which exonerated the underwriters from the subsequent loss by worms, which was occasioned thereby.

[Cited in General Mut. Ins. Co., v. Sherwood, 14 How. (55 U. S.) 358; The Queen, 28 Fed. 760; The Giles Loring, 48 Fed. 469.]

[Cited in Merchants' Mut. Ins. Co. v. Sweet, 6 Wis. 673.]

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

[2] [Reversed in 8 Pet. (33 U. S.) 557.]

Assumpsit on a policy of insurance, dated 26th December, 1827, whereby the defendants caused to be assured Josiah Bradlee & Co., for Thomas Hazard, Junior, of New York, fifteen thousand dollars on the ship Dawn, and outfits, at and from New York to the Pacific Ocean and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States, with liberty, &c. The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo, and also a partial damage to the vessel by perils of the seas. It appeared, in evidence, that the vessel sailed on the voyage on the 29th of December, 1827; and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a portion of her false keel; but proceeded on her voyage, and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December, 1829, in a very leaky condition. Upon an examination by competent surveyors there, she was found to be so entirely perforated by worms in her keel, stern, and stern-post, and some of her planks, as to be wholly innavigable; and, being incapable of repair at that place, she was condemned and sold. It also appeared in evidence, that after the ship had sustained the injury at the Cape de Verd Islands, she put into St. Salvador, and that, both at the Cape de Verd Islands and St. Salvador, her bottom was examined by swimmers, and reported not to be materially injured.

C. G. Loring and Webster, for defendants, contended: (1) That there was a misrepresentation of a fact material to the risk, in the application made for the insurance, which was by letter, and in which the vessel was represented to be a coppered ship. That, by the terms "coppered ship," applied to a vessel destined upon a whaling voyage in the Pacific Ocean, it would be understood, according to the usages of insurance in Boston, that the sides and bottom of her keel were covered with copper; and they adduced evidence to prove this position, and also that the keel of this vessel was not so covered. And upon this point the plaintiff [Samuel Hazard], produced evidence to prove, that the keel was so covered; or, if not, that it was, nevertheless, covered with leather, which was alleged to afford an equally permanent and effectual protection against worms. (2) Another point of defence was, that there had been no sufficient legal abandonment. (3) A third point was, that a loss by worms was not a loss within the policy; and for this was cited Martin v. Salem Marine Ins. Co., 2 Mass. 424; Hughes, Ins. 218; Phil. Ins. 251. (4) Another point was, that if the loss by worms was a consequence of the injury done at the Cape de Verd Islands, it was too remote to entitle the plaintiffs to

recover; that the injury ought to have been repaired by the master, and if he neglected it, a subsequent loss by his neglect was not chargeable to the underwriters. (5) Another point was, that the ship was unseaworthy, it being alleged, that the copper was put on over old leather, and so was not sufficiently fastened; but this point was not much pressed. (6) Another point was, that, if there was not a total loss, there could be no recovery for a partial loss, as the damage by perils insured against did not amount to five per cent.; but the plaintiff's counsel did not contend for a partial loss.

The plaintiff's counsel, (W. Sullivan and Selden,) on the other hand, contended (1) that there was a sufficient abandonment; (2) that there was no misrepresentation; (3) that the loss by worms was within the policy; (4) if not generally, it was under the circumstances of this case; (5) that the ship was seaworthy.

It is not thought necessary to report the arguments at large, as they are fully commented on by the court.

STORY, Circuit Justice (charging jury). The first question arising in this case is, whether the abandonment is sufficient in its form and substance. The letter of abandonment is dated the 28th of July, 1830, and after stating that a letter had been received from Captain Gardiner, the master of the vessel insured, of which it annexes a copy, adds, we hereby abandon to the underwriters on that ship and outfits, the interest insured. The letter of Captain Gardiner states nothing farther in relation to the loss of the ship, than is contained in the following passages: "The unfortunate situation I have been placed in by the failure of the ship Dawn, and all the particulars relative to my transactions, will be forwarded to you in a duplicate by Mr. S. R., whom I have authorized to that effect, by the earliest opportunity. I have shipped, on account of ship Dawn, 38,800 gallons of sperm oil; quantity obtained 53,541 gallons. The ship was stripped, sold in lots, also her stores, provisions, &c. The nett amount of sales was $6496.74; disbursements during the voyage, and expenses at this place have been about $5000." The objection to the abandonment is, that there is no statement of the cause of the loss, so as to show, that it is by a peril within the policy, for which an abandonment may justly be made. I confess, that I have always understood the law to be, that in an abandonment the cause of the loss must be stated, so that the underwriter may know, whether it is a loss by a peril within the policy, and may exercise his judgment upon the facts, whether to accept or refuse the abandonment. Nor do I well see, how an abandonment can be made without stating a case justifying the act. It seems difficult to see, in the present abandonment, any distinct statement of a loss by any peril insured against. The only allegation is, that there has been a failure of the ship; but this may be from causes wholly without the perils of the policy. The ship may have failed from the mere waste and decay incident to the voyage, without any extraordinary peril. Still, as there are other most important points in this case, whatever my own opinion may be, I shall for the purposes of the trial rule, and I do accordingly rule, that, under all the circumstances of the case, the abandonment is sufficient in point of law.

The next question is, whether there has been a false representation in any thing material to the risk. The letter of instructions, of the 22d December, 1827, under which the policy was procured to be underwritten, asserts, "She (the ship) has been newly coppered to light water mark, above which she is sheltered with leather to the wales, and fitted in every respect in the best manner," &c.; and insurance was asked on the vessel for a whaling voyage. Now, I may state at once to the jury, that the representation of facts, stated in this letter, so far as they were material to the risk, must be substantially true. If the ship was not coppered, as stated in that letter, and she did not in that respect correspond with that representation, and the difference between the facts and the representation was material to the risk, then the plaintiff is not entitled to recover upon the policy. But I shall leave the facts, as to the representation and its materiality to the jury. The words in the letter represent the ship to be newly coppered to light water mark. The underwriters insist, that the ship was not coppered according to this representation; and it is for the jury to determine, what constitutes a coppered ship. If the jury shall find from the evidence, that, in order to constitute what is called a coppered ship, the bottom of the keel and the sides of the keel, as well as the sides of the vessel, must be coppered; and if they should farther find from the evidence, that this ship was not so coppered, and the deficiency was material to the risk, then there was not a compliance with the terms of the letter left with the underwriters, and the latter are not liable upon the policy. Or, if the jury should find from the evidence, that a ship coppered on her sides and also on the sides of her keel, and not on the bottom of the keel, or false keel, would meet the representation of a coppered ship on other voyages; but that, in whaling voyages in the Pacific Ocean, the usual and customary mode is to copper the bottom or false keel, and it is understood by underwriters, when application is made for insurance on such voyages, that the vessels are so coppered, unless the contrary is stated; then, inasmuch as the letter applying for insurance is an application for insurance of a vessel on a whaling voyage in the Pacific Ocean, the underwriters had a right to consider the representation in the letter, as describing the

vessel as coppered in the manner, in which vessels are usually coppered for such voyages; and if the ship was not so coppered, and that deficiency was material to the risk, the terms of the letter were not complied with, and the defendants were not bound by the policy.

It has been argued on behalf of the plaintiffs, that the representation in the letter, as to the ship's being coppered, is to be construed and decided by the meaning of those terms in the port of New York, where the letter was written, and the owner resided, and where the voyage was to commence and end; and not by the meaning of the words in Boston, where the insurance was made, although the latter was the only sense, in which the underwriters could or did understand the terms, at the time when the insurance was made. I am decidedly of a different opinion; and I think the doctrine utterly irreconcilable with the first principles in the interpretation of contracts, and especially of contracts governed by the lex loci contractus. In my judgment, it is wholly immaterial, as to this point, where the owner resided, or where the letter was written, or where the voyage was to commence or end. This is not a question as to the usage of trade in a particular port, with reference to a particular voyage, or of seaworthiness for such a voyage. The question is not here, whether the ship was seaworthy for a whaling voyage according to the usage of the port, where the voyage was to begin and end. She might have been so, for aught I know, in the port of New York, without such entire coppering of the whole keel, as the underwriters now contend for. And if there had been no representation at all of the fact, if the vessel had been seaworthy for the voyage according to the usage of New York, the underwriters would have been bound by the policy. But, here, there is a positive representation of a fact; and whether that fact be or be not necessary to seaworthiness, is of no consequence, if it is still a fact material to the risk, and in regard to which the underwriters have been misled by the representation. The fact of extra-seaworthiness may with them constitute a solid reason for underwriting the policy. A fact indicating superior and extraordinary safety, or uncommon protection from danger, by very excellent equipment, seamanship, or structure, may, as a fact leading to a decrease of the risk, be the very inducement to take the policy. An old ship may be seaworthy; but she may not be as safe as a new ship; and if an old ship is represented as a new ship, and it is material to the risk, though the old ship be seaworthy, can it be that the underwriters are bound? Here, then, the underwriters are in Boston; the proposal is offered, and the letter is shown, and the representation is made in Boston; the policy itself is underwritten in Boston; and it is a contract made and to be executed in Boston, and, of course, is to be construed by the law of Massachusetts, and the meaning and usage of words in that state. If any thing is settled, as to the operation of the lex loci contractûs, I think this principle is. According to the usage of the terms in Boston, (I will suppose for the purpose of the argument,) the words, "coppered ship," mean a ship coppered on her whole keel and false keel, as well as on her sides; and especially in whaling voyages, a coppered ship is always so understood by all persons in Boston. The underwriters have not the slightest knowledge, that a different meaning is attached to the words elsewhere, and especially not in New York. They underwrite the policy upon the faith of the representation, that the ship is a coppered ship, in the only sense of the terms known to them, or which they have the slightest reason to conjecture. The owner gives them no information, that he uses the words in a different sense; and the very agent in Boston, who procures the insurance, and to whom the uniform sense of the words in Boston must be equally well known, is silent in regard to any difference. If the agent had by parol asked for the insurance in Boston, and made at the time a parol representation, that the ship was a coppered ship, must he not be deemed to represent her to be so in the Boston sense of the words? And if so, can it make any difference, that the representation is made in writing in the same place? I do not say, that the owner, or the agent, practised a fraud upon the underwriters by procuring a policy under such circumstances, by misleading the underwriters. All the parties may have been equally innocent. The owner in New York may not have been aware, that the meaning of "a coppered ship" in Boston, is different from the meaning of such a ship in New York. The agent in Boston may have been equally as ignorant, as the underwriters, in regard to the New York sense. What, then, under such circumstances, would be the consequence? Plainly, that it would be a contract founded in mutual mistake; and therefore neither party would be bound by it. They would not have contracted ad idem. There would never have been an agreement to the same subject matter in the same sense. This principle is so well known and so familiar, that it may now be deemed to be treasured up among the elements of jurisprudence. See Pothier on Obligations, by Evans, volume 1, p. 12, art. 3, §§ 17, 18. I have no difficulty, therefore, in directing the jury, and I do accordingly so direct, that, in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms in the place, where the insurance is asked for and made, unless the underwriter knows, that a different sense and usage prevail in the place, in which the ship is then lying, and in which the owner resides,

and from which he writes asking for the insurance; or unless the underwriter has some other knowledge, that the owner uses the words in a different sense and usage from that, which prevails in the place, where the insurance is asked for and made. And if the underwriters have been misled, in a matter material to the risk, by the terms of the representation, by supposing them used in the sense of the place, where the application was made for insurance, and if the policy was underwritten by mistake, founded on such supposition, and the owner, who procured the insurance, intended to use the terms in a different sense, then the policy is void, as founded in mutual mistake. But the questions, whether there has been any misrepresentation by mistake or otherwise, and whether, if made, it was material to the risk, are questions exclusively for the jury to decide upon their own view of the facts.

It has been said, that the terms of the letter, on which the insurance was made, do not amount to a warranty, and therefore, that they need not be strictly correct; but that it is sufficient if they are true in substance; and it need not be proved, that the ship was wholly coppered on the sides and bottom of the keel. I agree, that the terms of the letter do not import to be a technical warranty. But still, if the coppering of the ship, as stated in the letter, was substantially untrue and incorrect in a point material to the risk, the misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from deficiency in the coppering.

The next point in the defence is, that the loss did not arise from any perils insured against. The allegations in the declaration are, that the ship was lost by the perils of the seas. The proof is, that she was in fact destroyed, so as to be unfit to perform her voyage, by worms in the Pacific Ocean. The evidence, so far as it bears on this point, is to the following effect. The ship on her outward voyage struck upon a rock at or near the Cape de Verd Islands, and knocked off a portion of her false keel, and a small piece of her fore foot attached to it. At the Cape de Verds the master sent a good swimmer under the ship, to examine her. He reported, that the accident had hurt the ship only in the place, where the false keel was taken off; and that the copper was not broken. The master, therefore, did not think it necessary to make any repairs at that place, and did not make any; but sailed on the voyage. He afterwards stopped at St. Salvador, where he had the bottom of the ship examined again by good swimmers; and, from the examination, he supposed her competent to go on the voyage, and that the piece torn off from the keel had not injured her. The ship afterwards proceeded to the Pacific Ocean, and encountered some gales, and engaged for some months in the whaling business. The master finding the ship leak badly, sailed for the Sandwich Islands. Upon her arrival there, he caused a survey to be made, when it was found, that the keel of the ship was almost entirely perforated by worms, and destroyed; her fore foot and the greater part of her false keel were gone; her stern-post injured; and for the most part her sheathing and copper entirely gone; and many parts of the plank of the bottom were destroyed; and she was accordingly condemned as unworthy of repair. The immediate cause of the loss seems, by the course of the argument, admitted to have been the perforation of the keel by worms. Whether the keel was, or was not coppered on the sides, has been much contested, and the evidence is contradictory. But it seems admitted, that the bottom of the keel was not coppered, but only covered with the leather; and the sides of the keel, if not coppered, were also covered with leather.

The question is, whether a loss by worms is, in the sense of the policy, a loss by the perils of the seas. If the jury shall find from the evidence, that in the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then, in my opinion, a loss of the ship by worms, under such circumstances, in that ocean, is not a peril of the seas within the meaning of the policy. The policy is intended, not to cover ordinary perils, in the nature of wear and tear, in the voyage; but extraordinary perils. If the question were entirely new, I should upon principle adhere to this doctrine. But it appears to me, that it is fully settled by authority. This is a policy underwritten, and to be executed in Massachusetts; and therefore it is to be treated as a Massachusetts contract. It has been decided in the courts of this state, that damage, arising from an injury by worms, is not a loss within the policy (Martin v. Salem Marine Ins. Co., 2 Mass. 421. See, also, Rohl v. Parr, 1 Esp. 444; Benecke, Ins. 456; Hughes, Ins. 218; Phil. Ins. 251; Hunter v. Potts, 4 Camp. 203); and my opinion is, that underwriters in Boston must be deemed to contract in reference to this course of decision; and that consequently they are not liable for losses occasioned by worms.

But, it has been contended on behalf of the plaintiffs, that, even admitting that the destruction of the ship has been by worms, and that such a loss is not, under ordinary circumstances, a loss within the policy; yet it appears by the evidence in this case, that the access of the worms to the keel was owing to the accident and damage done to the keel at the Cape de Verd Islands, by striking against a rock; and that under these circumstances the ultimate loss is to be attributed to this accident, and so is a loss within the policy. It is added, that in all cases, where the loss is inevitable in consequence of the accident, the loss is properly immedi-

ate, although it may not in point of time happen until long afterwards. In other words, a loss is deemed immediate, not because it happens eo instanti, but because it is inevitable. And examples have been put at the bar in illustration of this doctrine. My opinion is, that in no just sense can this loss, if by worms, be deemed a loss immediate upon the accidental injury alluded to. The general rule in cases of insurance is, that the loss is to be attributed, not to the remote, but to the immediate cause. "Causa proxima, non romota, spectatur." The injury by striking on the rock at the Cape de Verd Islands, might have been the occasion, or even the remote cause, of the loss of the ship; but it was not the immediate cause. The immediate cause was the perforation of the keel by worms. The loss happened many months after the accident. I have, therefore, no difficulty in stating to the jury, that if, in consequence of the injury sustained at the Cape de Verd Islands, the false keel was torn off, whereby the ship became exposed to the action of the worms, and that they thereby obtained entrance, and destroyed the ship, the loss would not come within the policy, it being a consequential injury, against which the underwriters are not considered as taking the risk.

But an additional answer to this part of the case has been given by the counsel for the defendants, upon which it becomes my duty to express an opinion. It is said, that, even if the loss could be thus traced back immediately to the accident at the Cape de Verd Islands; yet the underwriters would not be liable, because it was the duty of the master, if he could, (and it is not shown, that he could not,) to repair the damage so done; and if he did not, the subsequent loss is properly attributable to his negligence; and that the underwriters are not liable for a loss by worms occasioned by such negligence. Upon this point my opinion is, that if the injury at he Cape de Verd Islands was repairable, and could have been repaired there, or at St. Salvador, or at any other port at which the ship stopped in the course of her voyage, it was the duty of the master, and he was bound, to cause such repairs to be made, if they were material to prevent a loss. And if he omitted to make such repairs, because he did not deem them necessary; and if by such neglect alone the subsequent loss by worms was occasioned, the underwriters are not liable for the loss so occasioned.

The court have also been called upon by the plaintiff's counsel to instruct the jury as follows; first, that if the jury believe, that the underwriters would not have charged a higher rate of premium, if the vessel had been correctly represented, than they did charge, and that the insured had not intentionally misrepresented the facts. then the representation is not material, and does not defeat the policy; secondly, that if they believe, that the object of coppering the bottom of the keel is to protect against worms, and if they also believe the leather an equal protection, and that it was put on, in that case the letter would not be considered a material misrepresentation. I feel myself compelled to refuse to give the instructions in the terms prayed. But upon the first point, I am of opinion, and so direct the jury, that if the fact stated was not material to the risk, and would not have varied the conduct of the underwriters, either as to the premium of insurance, or as to underwriting the policy at all, if the fact had been correctly represented, and the insured has not intentionally misrepresented the facts, then the misrepresentation will not prevent the insured from a recovery in this case, or defeat the policy. And on the second point, I direct the jury, that if the object of coppering the bottom of the keel was to protect it against worms, and if they believe, that leather is an equal protection, still, if the fact was, that the letter of instructions did contain a representation, which was and might have been understood as representing, that the keel was coppered, and if that fact was material to the risk, and might have induced the underwriters to ask a higher premium, or not to have underwritten at all, then the misrepresentation of its being coppered, when it was leathered, would avoid the policy. But if it was not a fact material to the risk, and would not have changed the conduct of the underwriters, either as to underwriting at all, or as to asking a higher premium, then the misrepresentation would not avoid the policy.

With these directions, after summing up, and commenting on the facts, the judge left the cause to the jury, who found a verdict for the defendants, upon which judgment was rendered accordingly.

NOTE. A bill of exceptions was filed, and the cause was carried by a writ of error to the supreme court, where, upon argument at January term, 1834, the judgment was reversed for error in stating, that the letter of instructions, under which the insurance was made, was to be understood according to the sense of the terms "coppered ship," as known and used in the place (Boston) where the insurance was applied for and made. But upon all the other points in the case, the directions of the court were held to be correct. 8 Pet. [33 U. S.] 557.

HAZEL (NICHOLLS v.). See Case No. 10,230.

HAZEL (SMITH v.). See Case No. 13,055.

Case No. 6,283.

HAZEL v. WATERS et al.

[3 Cranch, C. C. 420.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

CONSTABLE'S BOND — ACTION — BREACH — SALE OF REAL ESTATE UNDER FIERI FACIAS—RETURN OF CONSTABLE—WHETHER TRAVERSABLE.

1. In debt upon a constable's bond for not conveying to the plaintiff property alleged to have been sold by the defendant under a fi. fa., the breach is defective in not stating that the execution was levied upon the property, and that the lots were the property of the defendant in the execution, and in not describing the property with sufficient certainty; and is bad, in averring an alternative breach, namely, in not conveying the property to the plaintiff, or in not permitting him to take possession of it.

2. Quaere: Whether a constable who sells real estate under a fieri facias is bound to give a deed to the purchaser: Whether the return of the officer is traversable in a collateral action.

Debt upon a constable's bond. The declaration sets forth the condition and breach thus:—If the said John Waters "shall well and faithfully execute the duties and office of constable in and for the said county of Washington, in all things appertaining to the said office; and shall also well and truly account for and pay over all sums of money received by him; and shall also duly and faithfully perform all the duties and trusts reposed in him, by virtue of the act of congress entitled 'An act to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia'" [3 Stat. 743], then, &c. The breach alleged is, "that whereas a writ of fieri facias, issued by C. H. W. Wharton, Esq., one of the justices of the peace for the county aforesaid, to the said John Waters directed, came to his hands, by virtue of which writ he duly advertised for sale all the right, title and interest of one Joseph Johnson, in and to lot No. 7, and the east part of lot No. 8, and the east part of lot No. 9, in square 455 in the city of Washington, in the county aforesaid; and proceeded to sell to the highest bidder at public auction the said property; at which said sale the said T. Hazel became the highest bidder, and was ready and willing and did offer to comply with the terms of sale mentioned in the advertisement under which the said property was sold, and thereby became the equitable owner of the said property, and was entitled to receive a good and sufficient conveyance of all the right and interest of the said Joseph Johnson in and to the said property; and the said John Waters was bound by the duties of his office, as constable as aforesaid, to make such a conveyance to the said [Zachariah] Hazel; yet the said John Waters, in neglect and contempt, and violation of his duty as such constable, refused to convey the said property to the said Hazel, or to permit him to take possession of the same, but proceeded to sell and convey, and did actually sell and convey the said property to one J. P. Van Ness, or some other person or persons; by means whereof the said Hazel has been wholly deprived of the possession and enjoyment of the said property and every part and parcel thereof; by means whereof an action hath accrued to the said United States to demand and have, by their attorney, for the use of the said Hazel, the sum of two thousand dollars," &c. Upon the issue of performance, a verdict was rendered for the plaintiff for 53 dollars damages. The defendant moved in arrest of judgment.

C. C. Lee, for plaintiff.

Mr. Wallach, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, dissenting). The defendants contend that the declaration does not show a breach of the condition of the bond. The declaration does not state that the defendant Waters levied the fieri facias upon the property sold. If he did not, he had no right to sell it, and the plaintiff Hazel acquired no right to a conveyance or possession of it, and the defendant Waters was guilty of no breach of his bond by not conveying, or by not permitting Hazel to take possession of it. But if the execution had been levied upon the property, and if it had been duly sold by the constable to the plaintiff Hazel, I do not know any law which requires the officer to make a deed. This deed would convey nothing, for no title vested in the officer. The title passes by act of law, consequent upon the facts of lawful seizure and sale under the fieri facias; and notwithstanding the deed, the party claiming under the sale must prove all the facts necessary to show that it was lawfully made; such as the judgment—the execution—the seizure and sale by the proper officer, and the return of the vendee as the purchaser. For if the officer should return another person as purchaser, I doubt whether the return could be traversed collaterally in an action of ejectment brought by the vendee. His remedy, I should think, would be against the officer for a false return.

The declaration states that the interest of Johnson only, in the property, was advertised for sale, but that the property itself was sold. It does not state what interest Johnson had in the property. It might be a reversion only; in which case the vendee would not be entitled to the possession; and, if Johnson was in possession, the officer had no right to turn him out. The vendee must have brought his ejectment. But the averment of the breach is in the alternative, that the defendant Waters either refused to convey to Hazel, or refused to permit him to take possession; it is not certain which. The declaration does not describe the property with suffi-

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

cient certainty, so that it can be ascertained what it was that the officer refused to convey; "the east part of lot No. 8, and the east part of lot No. 9, in square 455." How much is the east part of a lot? and how is it bounded? The declaration does not state what the terms of sale were, which he offered to comply with, nor how he offered to comply with them, so that the court might judge whether it was such a compliance as required the officer to return Hazel as the purchaser, or as would give him a cause of action against the officer for not conveying the property. The declaration states that Hazel, by the sale, became the equitable owner of the property. If he acquired any right under the sale, it must have been a legal right. If he acquired only an equitable right, his remedy was in equity, and not at law for the penalty of the bond. Again: the declaration states that Hazel became entitled to receive a conveyance of all the right, title, and interest of Johnson in the property, and that Waters was bound to make him such a conveyance; but the breach alleged is, that he refused to convey the property itself.

For these reasons I think the judgment ought to be arrested.

MORSELL, Circuit Judge, concurred, in arresting the judgment; but did not agree that an officer who sells real estate under a fi. fa. is not bound to give a deed to the actual purchaser.

Judgment arrested.

[See Case No. 6,284.]

Case No. 6,284.

HAZEL v. WATERS.

[3 Cranch, C. C. 682.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

ACTION ON CONSTABLE'S BOND—AVERMENT OF BREACH.

If, after setting forth the condition of the bond in the declaration, the plaintiff does not, in the declaration, show a breach of the condition, the mere averment of non-payment of the penalty does not show a cause of action.

[This was an action of debt upon a constable's bond by Zachariah Hazel against John Waters.]

The court having at December term, 1828, ordered the judgment to be arrested, and a venire de novo [Case No. 6,283], C. C. Lee, for plaintiff, moved the court for a reconsideration of the question of law; and contended, on the authority of the case of Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 67, that the averment of the non-payment of the penalty is a sufficient breach, after verdict.

Mr. Wallach, contra. The plaintiff has set forth, in his declaration, as a special breach, what is no breach of the condition; and thereby shows that he has no cause of action.

C. C. Lee, in reply. In the Case of Minor there was no good breach set forth in the declaration, or in the replication; yet the court said that the averment, in the declaration, of the non-payment of the penalty, shows a good cause of action.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The court has again looked into this case, at the request of the plaintiff's counsel, who has referred us to the case of Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 67, and supposes that the averment in the declaration, that by reason of the breach of the condition of the bond, set forth in the declaration, the plaintiff is entitled to recover the penalty, and that the defendant has not paid the penalty, is a sufficient setting forth of a breach of the condition upon demurrer, although the breach of the condition, as set forth in the declaration, should, of itself, be insufficient. But that case is not applicable to the present. In that case there was a general plea of performance, and the replication put in issue the whole matter of defence; and the verdict, being general, and for the plaintiff, found the general breach as set forth in the replication. It is true that the court said, in that case, that the declaration assigned "a good breach, by the non-payment of the penal sum stated in the bond;" but that cannot mean a breach of the condition of the bond, for it was no part of the condition that the penalty should be paid. It is evident that by the word "breach," in that sentence, the judge must have meant a cause of action. The declaration in that case did set forth a good cause of action. It set forth the bond, without its condition, and averred the non-payment of the penalty as the cause of action. In the present case the condition is set forth in the declaration, which shows that no cause of action existed, unless there was a breach of that condition; and if, after setting forth the condition in the declaration, the plaintiff does not, in the declaration, show a breach of the condition, the mere averment of non-payment of the penalty does not show a cause of action. In Minor's Case [supra], the judge, in delivering the opinion of the supreme court, said: "That in a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being, in point of law, within the scope of the covenant, the defect is fatal, even after verdict." When the declaration itself sets out the condition of the bond, it is then like a declaration upon a covenant; and the law, as laid down by the judge, is exactly applicable to such a case. The court, therefore, is still of the opinion, that the declaration will not support a judgment for the plaintiff. Judgment arrested.

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

HAZEN (DONALDSON v.). See Case No. 3,984.

Case No. 6,285.

In re HAZENS.

[4 Dill. 549.] [1]

Circuit Court, D. Iowa. 1877.

BANKRUPT ACT — ATTACHMENT CREDITOR CANNOT FORCE DEBTOR INTO BANKRUPTCY.

A creditor fully secured by attachment cannot, while holding on to his attachment, sustain, on the same debt, a petition to force his debtor into bankruptcy.

Petition for review in bankruptcy. On July 25, 1877, Edgell, Chamberlain, & Co. filed a creditor's petition in bankruptcy against James Hazens, alleging that they were creditors of his in the sum of $10,608.25, that he had committed acts of bankruptcy, and praying that he be adjudged a bankrupt. On August 2, 1877, the debtor filed a plea that "he should not be declared a bankrupt, because the said petitioners are secured upon their said claim, for that on July 2, 1877, they brought an action by attachment in the state district court of Lee county, Iowa, against him, and on the same day attached a large amount of personal property, which the sheriff still holds under said attachment proceedings, which have not been dismissed, wherefore the petitioning creditors have no provable debt." To this plea the petitioning creditors demurred, on the ground that the plea did not show that they were secured creditors, or that their debt was not provable, or that they were not entitled to proceed in involuntary bankruptcy against their debtor. The district court sustained the demurrer pro forma, and the debtor brings the present petition to reverse that decision.

Joseph G. Anderson, for debtor Hazens.
Craig & Collier, for petitioning creditors.

DILLON, Circuit Judge. Upon the averments of the plea, it must be taken that the property attached fully secured the debt; and the question is whether an attaching creditor, thus secured, while his attachment remains in full force and effect, can sustain a petition, founded on the same debt, to have his debtor adjudged a bankrupt. Under section 20 of the original bankrupt act [of 1867 (14 Stat. 526)]—Rev. St. § 5075—the lien created by an attachment is preserved, and unless otherwise defeated, will remain until the proceedings in bankruptcy progress to an assignment, which, when made, has the effect ipso facto to dissolve the attachment, if the petition in bankruptcy was filed, as in this case, within four months of such attachment. Rev. St. § 5044 (section 14, original act); Bracken v. Johnston [Case No. 1,761].

After a careful examination of the various provisions of the bankrupt law as to the status and rights of secured creditors, under the act proper, and under the composition feature of the act, it is my opinion that a creditor who is fully secured is entitled to no agency or voice in the question whether the debtor shall be adjudged a bankrupt. That is a matter which concerns, and alone concerns, the unsecured creditors. If, however, a creditor is not fully secured, it is, I think, quite probable that, as to the excess of his debt over the value of the security, he is to be regarded as unsecured, and the court of bankruptcy, if this view is correct, has the power, if a contest arises, to determine, for the time being, as nearly as may be, the relative value of the debt and the security. Creditors who have effected a lien by attachment on mesne process are, while the attachment exists, to be considered as secured, since if proceedings in bankruptcy are not commenced within four months, or if, when commenced within that time, they do not proceed to an adjudication and assignment, the attachment lien continues in full force.

In the case under consideration, the lien created by the attachment was in existence when the petition in bankruptcy was filed, and the property attached was in the hands of the sheriff. Non constat that the bankruptcy proceeding will ever reach an assignment. It may be defeated for the want of a required quorum, by the failure to establish an act of bankruptcy, or, as has been held (In re Shields [Case No. 12,784]; In re Scott [Id. 12,519]; In re Clapp [Id. 2,785]), the attachment may continue by reason of the proceedings in bankruptcy resulting in a resolution of composition.

Under the circumstances set forth in the plea, it is my judgment that the creditors must be regarded as secured, and that they were not entitled, while holding on to the lien effected by their attachment, to force their debtor into bankruptcy. As strengthening this conclusion, the consideration may be adverted to that proceedings for the same debt by attachment and seizure of the debtor's property, and by a concurrent petition in bankruptcy, if not essentially hostile and repugnant, is oppressive to the debtor. Is it too much to require the creditor to elect which course he prefers to adopt, or wishes to pursue? If a warrant of seizure in bankruptcy should be issued, the property attached and held by the sheriff could not be taken from his custody, but would have to remain in his hands until the attachment was dissolved.

It is proper to add that, to secure uniformity of ruling in the circuit, I submitted the question here involved, with the arguments of the counsel, to Mr. Justice Miller, who concurred in the conclusion reached, and in the general views herein expressed. See Paret v. Ticknor [Case No. 10,711]. The judgment of the district court is reversed. Reversed.

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

Case No. 6,286.

In re HAZLETON.

[See Case No. 6,287.]

Case No. 6,287.

HAZLETON v. VALENTINE.

[1 Lowell, 270;[1] 2 N. B. R. 31 (Quarto 12); 1 Am. Law T. Rep. Bankr. 105.]

Circuit Court, D. Massachusetts. July, 1868.

BANKRUPTCY — FREEDOM FROM ARREST DURING PENDENCY OF PROCEEDINGS—ARRESTS EXISTING AT COMMENCEMENT OF PROCEEDINGS.

1. The freedom from arrest granted to bankrupts "during the pendency of the proceedings in bankruptcy" does not relieve them from arrests existing at the commencement of the proceedings.

[Cited in Brandon Nat. Bank v. Hatch, 57 N. H. 461; Hussey v. Danforth, 77 Me. 20.]

2. Where a debtor, a citizen of Massachusetts, was arrested in New Brunswick on mesne process, and gave bail, and after judgment had been entered up against him, surrendered in exoneration of his bail and was imprisoned, and afterwards filed his petition in bankruptcy in Massachusetts, and still later was charged in execution in accordance with the laws of New Brunswick, which require that a debtor so surrendering shall be charged within three months thereafter; *Held*, that such charging in execution was not an arrest during the pendency of the proceedings in bankruptcy, but related back to the surrender.

3. It seems, that where an arrest is made out of the jurisdiction of this court, both debtor and creditor being citizens of Massachusetts, and the debtor being in bankruptcy here, the circuit or district court might, in a proper case, enjoin the creditor from proceeding with his arrest.

Petition in the nature of a bill in equity, supported by affidavits, by which it appeared that in July, 1866, the petitioner [H. L. Hazleton] was arrested in St. Johns, New Brunswick, for a debt alleged to be due the respondent, [L. Valentine], both being then and now citizens of Massachusetts; that he gave special bail to the action, and that judgment was afterwards recovered against him for a very considerable sum, and a capias issued, on which the sheriff made due return, non est inventus; and that afterwards the petitioner went to St. Johns for the purpose of rendering himself or being rendered in discharge of his bail; which was done on the 22d February last, and he has been imprisoned there ever since. On the fourth day of March last, his petition in bankruptcy, which had been prepared before his departure from home, was duly filed in the district court for this district, and he was adjudged a bankrupt, and now asked that his creditor should be enjoined from longer detaining him in prison.

[It is not seriously denied that in some cases, when it had jurisdiction of the parties, and under some circumstances, this court, acting as a court of equity, might interpose to require a citizen of this district to do or forbear something out of the district, as in the leading cases in our state courts, of Deveau v. Fowler [2 Paige, 400], not that the subject matter gives us jurisdiction in this case. But many objections are taken to the formality and regularity of these proceedings, and to the applicability of the principle to the facts of this case, and some suggestion is made that the district court, rather than the circuit court, should be appealed to. It is true, as argued, that no special equities are set up in the petition beyond the fact of arrest and imprisonment for debt, but the petitioner avers that this is a breach of the spirit, if not the letter, of the bankrupt law, and so is a case in which equity will interfere to enforce a plain legal right, there being no adequate remedy at law. I shall first consider the question if the arrest were made within this district, reserving the special considerations which apply to it as a foreign arrest to a later moment.

[Section twenty-six of the bankrupt act [of 1867 (14 Stat. 529)] provides that no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him. Now I agree with the petitioner that the facts here show a debt from which his discharge would release him, namely, a judgment in an action of assumpsit, and not a debt created by the bankrupt's fraud or defalcation. Judge Blatchford has held in several cases that where the defalcation (or complaint) showed a debt created by fraud or embezzlement, and judgment followed, the judgment was conclusive of a debt created by fraud or embezzlement. In re Patterson [Case No. 10,817]; In re Seymour [Id. 12,684]; In re Pettis [Id. 11,046]. I do not know why the converse should not be equally true. But if it be not, the evidence here shows a simple debt, and one not directly created by any defalcation. It seems to me, therefore, that this arrest is not one that the bankrupt law authorizes to be made in the United States, pending the proceedings in bankruptcy. But the further question is raised, whether the arrest was made during the pendency of the proceedings.] [2]

H. W. Paine, J. P. Converse, and E. A. Kelley, for plaintiff.

T. H. Sweetser and L. Fairbanks, for defendant.

LOWELL, District Judge, after saying that a court of equity which had jurisdiction of the subject-matter and of the parties, might enjoin a citizen of this commonwealth and district from doing unlawful acts out of the district; and that the debt for which the

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

[2] [From 2 N. B. R. 31 (Quarto 12).]

plaintiff was imprisoned was a judgment debt, from which his discharge in bankruptcy would release him, proceeded:—

The main question, however, is whether the arrest was made "during the pendency of the proceedings in bankruptcy," for it is only to such arrests, even though the debt be dischargeable, that the bankrupt law addresses itself.[3] In dealing with this subject it differs both from the English and the Massachusetts law, on one or other of which it is said to have been mainly founded. The insolvent law of Massachusetts does not interfere with arrests at all before or after the proceedings, excepting to provide for the examination, &c., of an imprisoned debtor. The English law, on the other hand, from 5 Geo. II. c. 30, to 12 & 13 Vict. c. 106, had this provision: that if the bankrupt were not in prison or custody at the date of the adjudication, he should be free from arrest or imprisonment by any creditor during the time, &c. There were several decisions upon the construction of this statute; but they are not of much value to us, because the language of the statute is different. For instance, the bankrupt was not liable to arrest by any creditor, whether his debt were provable or not: Darby v. Baugham, 5 Term R. 209; but on the other hand, if he were already in custody at the time of the adjudication, he was not within the exemption at all, and further detainers might be lodged against him even by other creditors: Ex parte Goldie, 1 Mer. 176. In both these respects our law is obviously different. By 12 & 13 Vict. c. 106, § 112, when any bankrupt is in prison or custody for debt, excepting as excepted (which exceptions are, I suppose, of debts which would not be discharged), the court of bankruptcy may order his release either absolutely or on such conditions as it shall think fit, provided that such release shall in no wise affect the rights of the creditor, &c.

Our statute takes a middle course, and without interefering with existing arrests, forbids them on the part of certain creditors during the pending of the proceedings. Was this such an arrest? I am of opinion that it was not. The arrest was made on the writ, and the petitioner while out on bail was in the custody of his bail, and when he was rendered in their discharge, he was theoretically and actually in arrest, substantially to all intents and purposes, as if he had never been released on bail. It is shown to be a rule of court in New Brunswick that a defendant who is rendered in discharge of his bail after judgment must be charged in execution within three months after the render; this rule is not substantially different from that which prevails in England and in Massachusetts. In this case, an alias execution was duly taken out and lodged with the sheriff on the first day of May, 1868, which was after the adjudication of bankruptcy, and the argument is that the arrest was made on that day. This point is too nice. It makes no difference whether the defendant be so charged within one day or ninety, so it be within the three months. It then relates back to the day of the render, and he has been in lawful custody and arrest for debt during the whole period. Under the English law that the bankrupt should be free from arrest, it was held that he might be surrendered by his bail, and the cases all assume that he might be thereupon charged in execution without either the surrender or the charge being deemed a new arrest: Ex parte Gibbons, 1 Atk. 238; Payne v. Spencer, 6 Maule & S. 231; Offley v. Dickins, Id. 348; Crump v. Taylor, 1 Price, 74. When we consider that by the same law a debtor who is at large on bail cannot be arrested by other creditors (Ex parte Leigh, 1 Glyn & J. 264), those cases are of some weight in the present inquiry. However, I do not rely very much upon the English cases for the reason already given.

It seems highly unjust that a debtor, whether bankrupt or about to become so, should be able to surrender himself, and discharge his bail, and become at once entitled to his release, to the detriment of the creditor. His arrest, if it be called so, is but the necessary and proper consequence and completion of his surrender, and without which it would not be a surrender. Suppose the petitioner to have applied for his release before he was charged in execution. Should he allege that he is under arrest for debt or not? Must he not, if he would aver the truth, say that he is imprisoned by virtue of an order of arrest on mesne process, by which the sheriff is entitled to hold him for a certain time after judgment or after surrender? If all this be true, and if the petitioner was lawfully in arrest when he filed his petition in bankruptcy, when did that arrest cease to be lawful? Was it at the very moment that it became useful to the creditor? The deputy-sheriff makes affidavit that he arrested the petitioner on the first of May, 1868, on an alias execution, &c., but it is no part of his duty as a witness to affirm to the law, and when we look at his return, a copy of which he annexes to his affidavit, we find it is in two words,—quite conformable to the fact, but not to his affidavit,—namely, "in custody." Upon the petitioners' argument, every bankrupt already under arrest on mesne process for a debt of the appropriate kind would be entitled to his discharge, because he must be charged in execution within a certain time after judgment, and if such charging is illegal, as being a new arrest, he might as well be released at once, to avoid vexatious and useless delay and imprisonment. I agree that the charging in execution is not only necessary to perfect the rights of the creditor, but that it is at his election whether to cause it to be done or not; and if the debtor be discharged for want of it, the creditor does

[3] In re Walker [Case No. 17,060.]

not lose his debt, but only certain important rights of future arrest, &c. But these may be often equivalent to a loss of the debt; and if they were not, I cannot say that the act of the creditor is in law or fact a new arrest during the pendency of the proceedings; it is but a lawful continuation of the old arrest, according to the terms and for the purposes for which it was originally made.

This view of the case renders it unnecessary to consider the other points raised. It may not be improper, however, to remark that I know of no reason why the petitioner may not proceed to obtain his discharge in bankruptcy, if he is entitled to receive it; for this does not require his personal presence in the district, that I am aware of; and if he does obtain it, there can be no great difficulty, I should suppose, in obtaining a release from imprisonment in New Brunswick upon this judgment.

Petition dismissed.

Case No. 6,288.

HAZLETT et al. v. CONRAD.

[1 Dill. 79.] [1]

Circuit Court, W. D. Missouri. 1870.[2]

ADMIRALTY—COLLISION — SIGNAL LIGHTS — LOOKOUTS, ETC.

1. In a case of collision between an ascending and descending steamer on the Ohio river, both were held to be in fault, and the damage divided according to the rule in admiralty.

2. The respondents' vessel was adjudged to be in fault because out of her proper place in the river when the collision occurred, and because she had no licensed pilot and no proper lookout; and the libellant's vessel was found to be in fault because her signal lights were not in proper places, and because she had no lookout as required by law, and her master was not at his post, but away from it without cause.

3. The testimony relating to the foregoing facts stated and effect considered by Krekel, J.

4. Signal lights hung on each side of the boat on nails driven into the nosing of the hurricane roof are not in their proper place, since the derricks and spars would necessarily obstruct the view of them in certain directions.

5. The pilot house in the night time, especially when it is very dark, and the view obstructed, is not the proper place for the lookouts to be stationed.

6. Masters of vessels are not proper lookouts.

7. A commander of a steamer who, after hearing the whistle of an approaching vessel, goes below on deck to look after freight without any justifying reason, *held* to be in fault where a collision occurs before his return to his post.

[Cited in The Manitoba, Case No. 9,029.]

[See The Albemarle, Case No. 135.]

Appeal from a decree in admiralty of the district court for the Eastern district of Missouri, pronounced by Treat, J.

[This was a libel by Hiram K. Hazlett and others against Peter Conrad.]

The case was one of collision between an ascending and descending steamer on the Ohio river. Respondents appeal from the decree, which found both steamers to be in fault, and divided the damages, and insist that the libellants' boat was solely to blame.

Sharp & Broadhead, for libellants.

Rankin & Hayden, for respondents.

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

KREKEL, District Judge. Libellants, owners of the steamer Katie, bring this action against respondents, owners of the steamer Des Moines, to recover damages growing out of a collision which occurred on the 22d day of November, 1864, in the Ohio river in the chute between Diamond Island and the Indiana shore, by which the Katie was sunk and became a total loss. The libel charges the fault of the collision on the Des Moines. The answer of respondent denies that the Des Moines was in fault, and charges the fault on the Katie, in this, that she had no signal lights, did not answer signals, that she was not in her proper place in the river, and that she made no effort to avoid collision. Damages done to the Des Moines by the collision are claimed by respondent. The court below found both steamers in fault, referred the case to commissioners to ascertain and report the damage caused to each vessel by the collision, divided the amount ascertained between them, and rendered a decree accordingly. [Case unreported.] From this decree of the district court respondent appeals.

A preliminary question as to plaintiff's right to sue has been raised on the hearing, and on looking into the record the court finds that libellants have made out a prima facie case of ownership, one at least which, unrebutted, entitles them to maintain this action.

Passing to the merits of the case it is found that on the night of the day mentioned, the Katie was on a voyage on the Ohio river from Evansville to Nashville, and met the Des Moines on her way from Nashville to Louisville, loaded with troops. It was a starlight night, and objects could be seen a half mile at least. The pilot of the Des Moines testifies that, running up the Indiana shore, and within forty or fifty yards of it, he discovered something in the river above him which he could not make out, but he sounded his whistle for the larboard or Indiana side, received no answer, stopped his engines in due time, and backed them when danger of a collision became imminent. About the time the headway of the Des Moines had run out, and while backing, the collision took place, and the Katie received the injury causing her total loss.

For the Katie it is testified that the Des Moines was seen a half mile off, or more,

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

[2] [Affirmed in 154 U. S. 584, 14 Sup. Ct. 1168.]

coming up the Indiana shore, that the Des Moines blew her whistle for the larboard or Indiana shore, that the signals were promptly answered by the Katie for the larboard or Kentucky shore.

The witnesses for the Des Moines testify that they did not see signal lights on the Katie, nor hear any answer to signals of the Des Moines. The witnesses for the Katie testify that her lights were up, fastened to the nosing of the hurricane roof on each side, and that an officer of the Des Moines took one of them down after the collision. The captain of each steamer seems to have been on watch without any other lookout.

The witnesses for the libellants all testify that the collision took place about two hundred to three hundred yards from the Indiana shore, and near the middle of the chute. It is manifest that no collision could have taken place if the Des Moines had been within forty or fifty yards of the Indiana shore and the Katie from two hundred to three hundred yards out in the river, as the witnesses testify. An examination of the wounds given and received will, however, help to solve the problem, and lead to conclusions justifying the decree.

The Katie received her injury on her starboard, near the gangway; the Des Moines hers near the bow or stem, and towards the larboard. In order thus to give and receive the injury one or the other of the boats must have been quartering to the current. The Des Moines according to the testimony is found running within forty or fifty yards of the Indiana shore, and a boat to strike her on the stem and the larboard must have been still nearer the shore. To place the Katie in such a position and quartering the river would have put her stern against the bank, a position which none of the witnesses assign her. Again, it is testified that, at the time of the collision, the Des Moines' headway had run out and she was backing her wheels, and that the blow swung her round quartering to the current. If the position of the Des Moines had been forty or fifty yards from shore, she would inevitably have struck the bank—a matter to which no one testifies. The Des Moines received her injury at the stem and to the larboard, which would be the case if she ran into the Katie as testified to by the witnesses for the Katie. It is certain that the collision did not take place near the Indiana shore as testified to by the witnesses of respondent, but it is highly probable, if not certain, that it took place one hundred and fifty to two hundred yards from the shore.

This being the case, the Des Moines was not in her proper place in the river, the channel, according to the testimony, being along the Indiana shore, for which she, as the ascending boat, had signaled. The Des Moines, not being in her proper place in the river, and failing to justify her position where found, must be held in fault. She was also in fault in not having a licensed pilot.

It seems that the Des Moines was in the employment of the government, and running from Cairo to Nashville. Shortly before the collision she was at Nashville, and was there ordered by the quartermaster to take troops to Louisville. Her pilots were licensed to run between Cairo and Nashville, and when she arrived at Smithland, at the mouth of the Cumberland, an unsuccessful effort was made to obtain pilots to Louisville, and she proceeded, with a pilot not licensed for that part of the Ohio river, to Louisville.

The nature of the employment of the Des Moines does not clearly appear. The evidence leaves it in doubt whether the government had the entire control of the vessel, or whether it merely directed the use of her with the consent of the owner who was her master, and on board as such. The question of compulsion is, therefore, not before the court.

The Des Moines was also in fault in not having a proper lookout, of which more is said hereafter when speaking of the faults of the Katie. But the Katie was also in fault. Her signal lights were hung on each side, on nails driven into the nosing of the hurricane roof. This was an improper place for carrying signal lights, for the derricks and spars would necessarily obstruct the view of them in certain directions. When the Katie was built she had a crane attached to her chimney to carry signal lights, but one of the horns of the crane being broken, she afterwards carried her lights as stated. The rules of navigation require signal lights to be so arranged as to show a uniform and unbroken light.

The Katie was also in fault in not having a lookout stationed in proper place. In The Ottawa, 3 Wall. [70 U. S.] 268, the supreme court of the United States says that: "Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of that duty. Proper lookouts are competent persons, other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot house, in the night time, especially when it is very dark, and the view is obstructed, is not the proper place. In general, elevated positions, such as on hurricane deck, are not as favorable situations as those more usually selected on the forward part of the vessel, nearer the stem." Id. 273, per Clifford, J.

In the first place, the masters of both vessels acted as lookouts while in charge of, and navigating, their vessels. They were not proper lookouts, nor were they stationed in the proper place for lookouts. No other lookouts appear to have been on either steamer. Besides this the master of the Katie says that when he heard the whistle of the steamer, he stepped out of the cabin, heard the answering signals of the Katie, and, seeing the

approaching steamer a good way off, he went to look after some cattle, on board as freight, and before he got back the steamers had collided. Thus the Katie was left without a commander or lookout at the very time when they were both, as events showed, sadly needed. The Katie, for want of a proper lookout, and for the conduct of her officers, must be held in fault.

It is charged that the Katie was also in fault in making no effort to avoid a collision when the danger had become imminent. It is very difficult to say what should have been the action of the Katie under the circumstances. The Des Moines seems, either for the purpose of crossing over to the Kentucky shore, or on account of unskillful navigation, to have suddenly come into the course of the Katie. It may have been a question difficult to determine by those navigating her whether to go ahead, or to back her, was the best means of escape from danger. This in all probability being the case with those handling the boat, the court will not undertake, from the evidence, to approve or condemn the action taken.

In the sense of the law, under the term faults for which a party is held responsible, is included, not only willful misconduct, but the neglect of any proper precaution to avoid collision, and want of care, vigilance, or skill, in the management of a vessel. Proceeding under this definition, and the facts of the case, the court finds that the Des Moines, by being out of her proper place in the river when the collision occurred and failing to account for her position, must be found in fault. [Waring v. Clarke] 5 How. [46 U. S.] 441, 465. She had no licensed pilot navigating her at the time of the collision, and is therefore in fault. See act of congress of August 30, 1852 [10 Stat. 61], and rules and regulations. She had no lookout as required, and is therefore in fault. The Ottawa, 3 Wall. [70 U. S.] 268.

The Katie was also in fault. She did not have her signal lights in proper position, and was therefore in fault. She had no lookout, as is required, and in this respect was in fault. Her master was not in his proper place, but, on the contrary, was in a very improper place at the time of the collision, and she was on that account in fault.

Both vessels being in fault, the court below properly had the damages done to both ascertained, and, under the rule of law, divided the damages between them. There is nothing in the objections raised to commissioner's report as to the finding of damages done, and the objections are overruled. The decree of the district court is in all respects affirmed, and a decree will be entered accordingly. Decree affirmed.

[The respondent then appealed to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Davis, who said that when the ascending boat, having given two whistles, was hit on the port bow, and the other boat was injured on the starboard bow, there is convincing evidence that the ascending boat was at fault. 154 U. S. 584, 14 Sup. Ct. 1168.]

NOTE.—In the case of Fredericks v. The McPorter [unreported], on appeal from the Eastern district of Missouri, at the April term, 1871, before Dillon and Krekel, JJ., in which Messrs. Rankin & Hayden were proctors for the libellant, and Mr. Moreau, for the claimant, it was decided, affirming the decree of Treat, J., that where a barge was seaworthy, and properly moored, a steamer having a tow, being free to move, was responsible for damages caused by collision with the barge. The question whether, when a vessel is properly landed and moored, her unseaworthiness, would, in any case, be a defense, for damages caused to her by other vessels engaged in navigation was discussed by Krekel, J., who delivered the opinion, but not decided by the court.

Case No. 6,289.

HAZZARD et al. v. CREDIT MOBILIER.

[7 Reporter, 360;[1] 6 Wkly. Notes Cas. 417.]

Circuit Court, E. D. Pennsylvania. Feb. 7, 15, 1879.

EQUITY PRACTICE—RECEIVER—APPOINTMENT—NOTICE.

Where it appears that certain persons are directors in two corporations, one of which is plaintiff and the other defendant in a pending action on a promissory note; that the interest of said directors is greater in the defendant than in the plaintiff company; that they have been enjoined, on a bill filed against them and both companies by stockholders of the plaintiff company, from surrendering or cancelling the note; that the said directors are about to discontinue action theron, and that a new action would be barred by the statute of limitations, a receiver will be appointed with authority to carry on the action, although the company defendant therein has not appeared or been served in the equity suit, it having actual notice and time having been given it to put in a voluntary appearance.

Motion for appointment of receiver. The bill, originally filed in common pleas No. 2 of Philadelphia, in 1875, by Hazzard, on his own behalf and that of all other stockholders of the Credit Mobilier who might join, set forth that the Credit Mobilier had had large transactions with the Union Pacific R. R. Co.; that in 1868 the latter was indebted to the former in about $2,000,000; that on August 4, 1869, a note for that amount payable on demand was given by the railroad to the Credit Mobilier; that the note remained unpaid and an action had been brought on it in Massachusetts, only a short time before it would have been barred by the statute of limitations; that the majority of the directors of the Credit Mobilier were large shareholders in the railroad and held comparatively small interests in the Credit Mobilier, their individual interests in any transaction between the companies preponderating in favor of the railroad; that these directors had lately reopened a settlement made nearly six years before between the two companies, had admitted certain invalid items of set-off in favor of the railroad, and had thus attempted to bring the Credit Mobilier into

[1] [Reprinted by permission.]

debt to the railroad; that they had attempted to compromise all claims by agreeing to surrender the note in suit and to discontinue the action thereon; that they would carry out this compromise in fraud of plaintiff and other shareholders of the Credit Mobilier unless enjoined; and that the directors would not permit the plaintiff to use the corporate name as plaintiff in the bill. It prayed an injunction restraining the company, its directors and agents, from carrying out the alleged compromise or from cancelling, surrendering, or giving up the note, or from preventing its collection in Massachusetts. After argument, Pratt, J., granted an interlocutory injunction. In 1878 other shareholders intervened by leave of court as plaintiffs. On January 10, 1879, the executive committee of the directors of the Credit Mobilier, who under its charter exercise the powers of the board when the latter is not in session, passed a resolution directing the discontinuance of the action in Massachusetts. On February 7th the cause was removed to the circuit court and an amendment filed setting forth the above mentioned resolution and averring that one Gould controlled a majority of the railroad stock and nearly two thirds of the Credit Mobilier stock; that the executive committee of the Credit Mobilier was composed of the said Gould, his partner, and his private clerk; that the resolution had been shown to the company's counsel in Massachusetts with instruction to discontinue the action there brought on the note. An additional prayer asked the appointment of a receiver pendente lite of the note with power to conduct the action thereon and to receive the moneys due on it, and of all the property of the Credit Mobilier. There was no appearance for the Union Pacific R. R. Co., nor was it served. The hearing was on bill and ex parte affidavits.

George Biddle and James E. Gowen, for the motion. The directors of the executive committee are endeavoring to do the very thing forbidden by the injunction of the common pleas. The discontinuance, if made, will prevent the recovery of the claim, as the statute of limitations would bar a fresh action. The discontinuance could not be set aside for fraud. No fraud by one set of stockholders or by the directors of the Credit Mobilier against the rest would be ground for setting aside the discontinuance as against the Union Pacific Co., it being no party to the fraud. If discontinued, no one could be held but the directors, and possibly those stockholders who were parties to the act complained of. There is no protection to be gained by bringing the former injunction to the notice of the Massachusetts court, for a common law action may be discontinued without leave of court. A receiver alone can deprive the Credit Mobilier of the power to discontinue, and once entered, the discontinuance cannot be set aside unless the Union Pacific Co. is shown to have been, as a corporation, a party to the fraud. You may punish for contempt, but not set aside the act done as against one not before the court and therefore not guilty of contempt. But on another ground a receiver should be appointed, because the plaintiffs are entitled to have the action on the note brought to a final conclusion; and this cannot be compelled unless a receiver is appointed to do it. So long as the present directors conduct the suit they cannot be prevented from delaying or losing it.

R. C. McMurtrie, contra. The circumstances of the case are such as to render it a proper one for such action as is proposed to be taken; but there should be an examination into the alleged settlement with the Union Pacific. This court cannot interfere with the discretion of those to whom the law has confided the care of the company's property unless after hearing they are proved to be unfit. The appointment of a receiver takes away or overrules that discretion in advance and prevents any settlement of the pending litigation.

Mr. Gowen. The Union Pacific R. R. Co. is a party defendant, but has not appeared, and has no officers within this jurisdiction upon whom service can be made. Unless the railroad company is before the court no such examination can take place.

McKENNAN, Circuit Judge. If the Union Pacific R. R. Co. do not enter an appearance in this case, I think it is a proper one for the appointment of a receiver. I will let this motion stand over for one week to give the defendants an opportunity to have the appearance of the railroad company entered, and if not done by that time a motion for a receiver may be made without further argument.

(The week having expired and the Union Pacific R. R. Co. having declined to appear, a decree was made appointing a receiver of all the franchise and property of the Credit Mobilier with power to sue, etc., and ordering the Credit Mobilier, its officers and directors, to at once deliver to said receiver all their property including the $2,000,000 note, the receiver to file a bond with sureties for the faithful performance of his duties. The order to be subject to the right of any one in interest to be heard upon being made a party to except and ask for a modification of the decree.)

[For subsequent proceedings, see Hazard v. Credit Mobilier, 38 Fed. 195.]

Case No. 6,290.

The H. B. FOSTER.

[Abb. Adm. 222;[1] 6 N. Y. Leg. Obs. 223.]

District Court, S. D. New York. April 22, 1848.

SALVAGE—TOWAGE—AGREEMENT AS TO COMPENSATION — COMPENSATION IN ABSENCE OF AGREEMENT — OFFER TO PAY — EQUITABLE BAR TO COSTS.

1. There is no determinate rule of law absolutely distinguishing towage service from salvage service.

2. Salvage service is such service as is rendered in rescue or relief of property at sea, in imminent peril of loss or deterioration.

3. Towage service is aid rendered in the propulsion of a vessel, &c., irrespective of any circumstances of peril.

4. Towing may be a salvage service, when performed in aid of a vessel in distress.

[Cited in The M. B. Stetson, Case No. 9,363.]

5. Where there is a hiring or bargain bona fide, and free from fraud or mistake, for aid to be rendered by one vessel to another in distress, the terms of such agreement are adhered to as the rule of compensation; but where no agreement is made, the rate of remuneration for such services is to be governed by the considerations applicable to salvage cases.

[Cited in Adams v. The Bark Island City, Case No. 55; Coffin v. The John Shaw, Id. 2,949.]

6. A vessel laden with a valuable cargo, being overtaken by a storm while entering the harbor of her port of destination, was left by her crew, wholly crippled and unnavigable, and in a situation where a recurrence of severe weather might have produced a total loss, yet lying in the mouth of the harbor and within ready reach of assistance. A steamer, engaged in the business of towing vessels to and fro in the harbor, went out to her relief, reaching her just as another steamer of like occupation was approaching, with a view to render similar assistance, and took her in tow and brought her up to the wharf; the entire time consumed being five hours, and the severity of the storm having abated. *Held*, that this was a case for salvage compensation, and not one of mere towage service.

[Cited in Roff v. Wass, Case No. 11,999.]

7. It was not a case of legal derelict, nor one entitling the salvors to extraordinary compensation.

8. Two hundred and fifty dollars was a reasonable compensation for the service rendered.

9. A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs.

[Cited in The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 477; Ehrman v. The Swiftsure, 4 Fed. 467.]

This was a libel in rem, by Oroondates Mauran and others, the master and owners of the steamboat Samson, against the schooner H. B. Foster, to recover compensation for salvage services rendered to that vessel.

W. K. Thorn and W. Q. Morton, for libellants.

Francis B. Cutting, for claimants.

I. The libellants have not established a case which entitles them to any extraordinary compensation for their services. Although, upon the afternoon of Saturday, they had reason to believe that the lives of those supposed to be on board of the schooner were in jeopardy, they both declined to assume any risk or hazard themselves, and neglected to impart their information to others who might have volunteered to assist those then believed to be in distress.

II. The case lacks all the elements of a case of meritorious salvage service, as these elements are stated in The Clifton, 3 Hagg. Adm. 120. Nor are there any circumstances connected with the towing of the schooner which entitle libellants to any unusual compensation. No lives were saved, and the schooner was in perfect safety when the steamboat reached her.

III. The conduct, on Sunday morning, of those on board the steamboat, shows, in several particulars, more eagerness to secure a prize than to save property. 1. Another steamboat was on her way, and was in sight of the schooner. The libellants, in their haste, slipped the cables, and left the schooner without ground tackling to protect her in case of accident. 2. They omitted the obvious duty of attaching a buoy to the anchors, so as to mark the spot where they were left. Their excuse that the anchors were twisted, ought not to avail them, because they made no effort to extricate them. They pretend that they could not find the brakes of the windlass; but there ought to have been handspikes or other means belonging to the steamboat by which the anchors could have been extricated.

IV. In The Neptune, 1 W. Rob. Adm. 300, it was held that salvors must show that they possessed skill commensurate with their vocation and condition in life, and adequate to the demands of the service which they undertook to perform. In the present case, it appears that the Samson started for the relief of a vessel in distress, with a crew short by one man, and ignorant of the soundings and navigation, and without handspikes or other means to get up anchors.

V. The steamboat was absent, engaged in rendering the service, only about five hours. Under the circumstances, the libellants ought to be allowed little if any more than a mere remuneration pro opere et labore. The case can scarcely be considered a case of salvage service; and if it was something more than mere towage, the schooner having sustained some damage, yet the compensation ought not greatly to exceed towage compensation. The Reward, 1 W. Rob. Adm. 174; The H. M. S. Thetis, 3 Hagg. Adm. 62. Here the claimants offered $150, or three times the ordinary compensation allowed by the usage of the harbor for towage for an equal length of time; and went so far as to inquire if $250

[1] [Reported by Abbott Brothers.]

would be satisfactory, intimating a willingness even to pay that sum to avoid litigation. The libellants ought to have accepted this offer, or at all events to have manifested some disposition to settle upon reasonable terms; instead of which they hastened to file their libel, and demanded fifty per cent. on the vessel and cargo.

VI. Even in cases of derelict, the rule is not invariable that one half should be awarded. The principle, as now established, is, that a reasonable compensation shall be given; but the amount is discretionary. Abb. Shipp. 555.

VII. The schooner was not a legal derelict. She was fastened by her anchors within the bay of New York. The spes recuperandi was not gone, nor was the animus revertendi abandoned. Her crew intended, as the testimony shows, to have returned. Under these circumstances she was not derelict. The Bee [Case No. 1,219]; The Upnor, 2 Hagg. Adm. 3.

E. Paine, for claimants of the cargo.

BETTS, District Judge. The libellants, owners and master of the steamboat Samson, for themselves and others, demand a salvage compensation for the relief and rescue of the schooner H. B. Foster and her cargo.

The facts upon which the decision rests, only will be stated; and they, upon the pleadings and proofs, are these:

The schooner, on March 26, 1847, arrived inside of Sandy Hook from St. Croix, with a cargo of sugar, rum, and molasses, of about $12,000 value. The schooner was worth from $1,600 to $2,000, dismantled, and about $3,000 when fitted for sea.

She anchored under the west bank at about half-past seven, p. m. It came on to blow a gale, with a heavy storm of snow and rain; and during the night the schooner dragged her anchors, and continued to drag the next day, till half-past one, p. m. The masts were cut away at eight a. m. Wind was N. and W. N. W.

About three o'clock in the afternoon of the next day, (Saturday, the 27th,) the storm ceased and the wind moderated. The schooner struck bottom two or three times after the masts were cut away, but not with violence, and no injury was produced by it. She made no water in consequence. She had dragged a distance of two and a half miles to the eastern bank, and brought up in from thirteen to fifteen feet water, at nearly low tide, on her outside, and about eleven feet on the shoalest side, and distant about four miles from Coney Island, and six or seven from Sandy Hook.

The sea broke over her the last time at about three, p. m., and at about four, p. m. she struck once. The pilot stated that the master and crew were frightened at her striking. When she last struck, the master jumped from his berth, and said, "This won't do; we must go ashore." The crew all rushed to go ashore. All on board, nine in number, immediately left the schooner in a small boat for Sandy Hook, taking nothing from the vessel. The wind was still blowing hard, and so as to render it, in the opinion of the pilot, very dangerous to attempt going to Sandy Hook, a distance of six or seven miles, in that boat,—more dangerous even than to remain with the schooner. The next morning (Sunday) the wind was fresh, but not so as to render it dangerous for steamboats to navigate the bay, or to go to and alongside the schooner.

The principal employment of the steamboat Samson is to tow vessels to sea from New York, and in from sea to the port, and also to go to the assistance of vessels within and outside the harbor, requiring aid. When engaged for such service, her compensation is $10 per hour, from the time of leaving on the expedition to her return. This is the common rate allowed steam-tugs in the harbor for that description of services, others also being engaged in it. When no bargain is made, and either party refuses to be governed by the customary price, the rate is adjusted upon the principle of a quantum meruit.

About noon on Saturday, the schooner was seen by a person residing near the light-house on Staten Island. He went to the wharf of the libellants on the island, to give notice of her situation. A letter was written to the master of the Hercules, (another steamer employed in towing, &c., and owned by the owners of the Samson,) then in New York, superscribed to be "on urgent business." In the absence of the master of the Hercules, it was delivered to the master of the Samson, between four and five, p. m., of that day.

It stated: "There is a vessel of about 200 tons lying in the lower bay, with all her masts gone. She is between the east bank and Romer, and requires immediate assistance, as the sea is making a complete breach over her, rendering it impossible for her to be seen, except at intervals."

The wind at the time was blowing so heavily that the master of the Samson declined going down, and said he should not be able to assist another vessel, or do more than take care of his own boat in such weather, but he would go for her if the wind lulled.

Steam was put on the boat, and she was kept in a condition to leave till between nine and ten, p. m. The master then left her and went to his house, with orders to have steam on again at four the next morning. He was called at that hour, but considered the wind too violent to justify his going out. At five, he concluded the wind had abated; he got under way for the schooner, and finding he could navigate safely, he kept on slowly to her, and reached her between seven and eight, a. m. These are the representations on the part of the libellants.

The weight of evidence in the case is, decidedly, that the weather at that time had become moderate, so as to render it perfectly safe for boats of the size and power of the Samson to go to and from the schooner, and tow her in any part of the bay. She was brought up to the quarantine in tow by the Samson, a little after nine o'clock, and the whole time she was engaged in going and returning to the city was about five hours.

The tug was run close to the quarter of the schooner, near enough for one of the men to jump on board. A hawser was secured to the bow of the schooner, her cables slipped, (being foul, which rendered it difficult to raise her anchors promptly,) and she was then towed up to the city, without impediment or difficulty.

This general outline of the facts is sufficient to bring under consideration the two main questions on the merits discussed between the counsel. These are—first, whether the services rendered the schooner were salvage services or mere towage—and, second, if they are regarded as salvage services, whether the schooner was at the time derelict, so as to entitle the salvors to the scale of compensation usually applied in cases of derelict.

I am not aware of any determinate rule of law which discriminates towage service from salvage. It is manifest that circumstances may exist rendering towage the most efficient, if not the only service, which can be afforded in saving property and life. A dismantled and disabled ship of large burden, filled with passengers, may be thus rescued by a very small vessel, wholly inadequate even to receiving on board the sufferers on the wreck. It has, therefore, never seemed to me that any advance was made towards solving the question, whether a service was salvage in its character, and to be rewarded as such, by proving that it was performed by towing only.

If there is any intrinsic difference between towage and salvage, it would appear to be only that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion.

Sir Stephen Lushington says, in the case of The Reward, 1 W. Rob. Adm. 177: "Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

In that case, a ship going to sea grounded. She was got off with the loss of her two best anchors and cables, and with the starboard end of the windlass and bulk-head carried away. She was proceeding back to repair damages, when she fell in with a steam-tug, and accepted its services to tow her into the dock. She tendered £17, which was the rate established for towing (greater distances) by the company owning the tug. The tender was refused, and the court held the service was salvage, and awarded £80. 1 W. Rob. Adm. 176. See, also, 2 W. Rob. Adm. 294.

In The London Merchant, 3 Hagg. Adm. 396, £400 salvage was allowed a steam-tug for towing a vessel off the rocks and into harbor. See, also, The Meg Merrilies, 3 Hagg. Adm. 346, and note. No other assistance than towing was rendered by The United Kingdom, and £800 salvage was awarded. Id. 401, note; S. P., The Earl Grey, Id. 363; The Traveller, Id. 370.

Sir John Nicholl lays down the rule, that if towage leads to the rescue of a vessel from danger, it should be remunerated as salvage. The Isabella, 3 Hagg. Adm. 428. In The Industry, Id. 203, £143 salvage was awarded a pilot smack for towing a brig into Cowes' roads. See, also, The Sussex, Id. 339.

The condition of the schooner was such, when the Samson came to her, as to constitute the assistance given her a salvage of vessel and cargo, in the proper acceptation of the term. She was utterly unmanageable and helpless, and without a crew or guard to protect her and the cargo. It was no less so than if the libellants had boarded the schooner, fitted up masts, sails, and steering apparatus, and brought her into port by such means of self-navigation, or had even transferred her cargo to the steamer. The difference would only have been in the greater amount of labor, exposure, and peril. So, also, compensation is awarded upon a common principle, whatever may be the method by which the relief is effected.

The cases above cited afford sufficient exemplifications of the application of the rule, where the service has been by towing, to dispense with the necessity of fortifying it by further references.

When there is a hiring or bargain, bona fide, without fraud or mistake, the terms of such agreement are adhered to as the rule of compensation. But if no agreement is made, settling the terms on which aid will be given by one vessel to another in distress, remuneration is awarded with regard to considerations appropriately governing salvage cases. The Britain, 1 W. Rob. Adm. 40; The Betsey, 2 W. Rob. Adm. 167; The True Blue, Id. 176; The Mulgrave, 2 Hagg. Adm. 71; The Traveller, 3 Hagg. Adm. 372. The same principle may be considered as involved in The Zephyr, 2 Hagg. Adm. 43. Sir John Nicholl, however, intimates that if an engagement even were made to tow, unforeseen circumstances may convert such towage into a salvage service. The Isabella, 3 Hagg. Adm. 428.

On the second topic of discussion, I do not deem it important to review the cases relied upon on each side, or weigh very scrupulous-

ly the facts or principles connected with the subject; for if it be conceded that the schooner for the time being, and when taken in charge, was technically a derelict in respect to her crew, that circumstance would in no way determine the scope of compensation to which the libellants would be entitled. Abb. Shipp. 660, notes.

She was not derelict, in the sense of being at the time helpless of relief except by the aid of these libellants. She lay safely at anchor in the bay. The danger of the storm was over. She had been seen the day previous from Staten Island, and that morning she was visible from Sandy Hook, and, of course, would be from the nearer vicinity of Coney Island and Staten Island. Another steamboat was directly in the rear of the Samson, going down the bay, for the purpose, among other objects, of looking out for this schooner. The Boston [Case No. 1,673].

Contingencies might occur in her then condition and position, making it highly desirable and advantageous to her to be immediately taken into port. But prospective and possible calamities which might attend her remaining there, do not constitute a case of imminent peril, especially where other resources for aid and relief are at hand. The Emulous [Id. 4,480].

The circumstances amount, in my judgment, simply to a case of salvage of a vessel laden with a valuable cargo, wholly crippled and unnavigable, and placed in a situation where a recurrence of severe weather might have produced a total loss; but lying in the mouth of her port of destination, at anchor, and within ready reach of assistance, with competent aid going to her relief, and already very near to her, when the libellants took her in possession.

But I regard the allegation of the defence set up that the steamer Duncan C. Pell was surreptitiously prevented by the libellants from relieving the schooner, as not supported by the proofs. There is probable cause to suspect it was known on board the Samson that the Pell contemplated running to this wreck, but it being proved that other vessels in the vicinity were aground, or injured from the effects of the storm, there might be reasonable grounds with the master of the Samson to suppose the Pell was not specially destined to the schooner, and was out on a general adventure, to give assistance where it might be desired. It was well known to the Samson that the Pell was employed ordinarily in towing vessels, and affording them assistance as required.

Both steamers were wreckers as well as towing-boats, and it is to be assumed, that after the tempest, they would, in pursuit of their vocation, be on a cruise to render aid wherever it might be needed, and that their object would be mutually well understood; and neither was bound to give place to the other, and avoid visiting a wreck which she supposed her competitor might intend going to. Although this fact does nor take away a just claim to compensation, it is certainly not without influence in determining whether the interposition of the Samson was valuable to the salved vessel, in an eminent degree; and so, also, it becomes an element of weight in determining the salvage to be awarded.

The particulars in evidence in the cause tend to diminish any claim to extraordinary compensation for the services rendered. Had the Samson gone down and relieved the schooner and her crew on Saturday afternoon, when apprised of their situation, her gallantry and exposure in the act, equally with the rescue of life and property, then in serious hazard, would have entitled her to the highest grade of reward. The Clifton, 3 Hagg. Adm. 117. But on Sunday, so far as the danger to the steamboat or her crew, or the safety of those on board the schooner was concerned, the aspect of things was wholly changed. The libellants, as is most natural, magnify their labors and exposure, but facts independent of their testimony demonstrate that the service could have been no more than a very ordinary one, for with less than her full complement of men, the tug ran the distance to the wreck, fastened to her, and towed her alongside of the wharf in New York, in five hours.

The evidence of other witnesses on the bay at the time shows the weather to have become fine, and it is also to be remarked that the Samson was not taken from or delayed in other business, or subjected to hazard which might jeopard her insurance as if only a passenger or freight boat, for this was no more than part and parcel of her daily and ordinary employment in towing vessels in and out of the harbor, or giving assistance to those in distress.

The original libel, filed on the 2d of April, alleged, "that on Sunday morning, March 28, about 6½ o'clock, as the libellant, &c., in the steamboat Sampson, was going down below the Narrows to look for vessels coming in and needing a towboat, he discovered the schooner," &c.

This averment was substituted on the 15th by an amendatory one, alleging that the boat went down in consequence of a previous notice, &c.; but the claimants have a right to invoke that allegation as an admission on record, attested by oath, in corroboration of evidence showing that the tug did not go out of her common line of business, or assume a hazard beyond what was incident to her calling, and was anticipated; and no fair ground for doubt exists that if she had been applied to by any person interested, she would have gone down and towed in the schooner that morning, for the usual compensation of $10 per hour.

No such agreement having been made, she is now entitled to lay the case before the court, and demand payment commensurate to the merit of the act, considered as a salvage service.

The claimants impute to the libellants a want of due skill and care in not raising the anchors of the schooner, and also in slipping the cables without attaching buoys to them; and that they have been compelled to pay other wreckers $75 for searching for and raising the anchors, and restoring them to the schooner. I think, however, on the proofs, that as the cables were foul, and considerable time must have been necessary to extricate them and raise the anchors, and as the tide was falling, and there might be danger, in case of a slight swell, that the schooner in that depth of water would ground on the bank so as either not to be easily moved off, &c., or by thumping to spring a leak, to the injury of the cargo, the course taken by the libellants was prudent and justifiable, not to risk the vastly greater value of vessel and cargo for the purpose of saving the anchors, even if their total loss might ensue from slipping the cables. Such loss was not to be apprehended, as the shoalness of the water and the known position of the schooner would leave little doubt that they could be easily recovered in calm weather.

After the libel was filed, the owner of the schooner sought a compromise with the libellants. He claimed that they were responsible to him for the value of the anchors and chain-cables, but proposed to settle the matter by relinquishing that claim, and paying $150. That proposition they peremptorily refused. He then inquired whether an offer of $250 would be accepted, and was given to understand that would be rejected also.

The libellants claim a large percentage upon the proved value of the schooner and cargo, say, $14,000; and, on the argument, it is put at from one third to one moiety, the familiar allowance in cases of derelict or desperate stranding. Abb. Shipp. 666, note 1.

Enough has already been stated to evince that the court does not regard the libellants entitled to any extraordinary compensation. I have perused all the cases cited, in which the subject has been passed upon; but it is manifest, that beyond the recognition of the general principles composing the doctrine of salvage reward, and a few facts of a pervading and permanent character which may serve as guides to the discretion of the courts, the cases must each have been determined essentially upon particulars peculiar to itself.

Other circumstances being alike, steamboats, as having the ability to render more prompt and efficacious assistance than sail vessels, are encouraged by a more liberal reward. The Raikes, 1 Hagg. Adm. 246. This is most rightfully so, when they turn aside from their voyage, or leave other pursuits to go as mere volunteers to vessels in distress.

This doctrine has certainly less force applied to them as professional wreckers and towers. Their intrinsic superiority to sail vessels for such service, will secure them the preference in that employment when they can be obtained, and thus the calling of itself will be sufficiently encouraging and advantageous, without the aid of the stimulus of high salvage rewards.

At most, in reference to mere harbor service, and that rendered about the mouths of their own ports, it is by no means manifest, that steamers whose regular pursuit is to tow and relieve vessels, should be regarded as meriting a reward out of all relation and proportion to what would have been accepted as satisfactory on a fair bargain for their services. When the steamer is employed under contract, she receives full pay, whether she brings in the vessel she is sent for or not, and of consequence can afford to place a lower price on her employment than if the enterprise was entirely at her own expense and risk. This consideration should not be overlooked in measuring the reward in this case, where the libellants assumed the hazard of wasting the day at their own charge, with, perhaps, exposure of the boat and her machinery to more or less damage; and it certainly would tend to retard their adventuring in like undertakings without the security of an express promise, if they, after assuming the hazard and expense and loss of time without reward, were still to be left, as to compensation, on the same footing as if under regular hire.

Giving the most liberal weight to these considerations, and viewing this case in the light of its special circumstances, I shall award the libellants $250, and their taxed costs.

No offer of payment was made by the claimants in such manner as to operate an equitable bar to costs. No more was done by the claimant than attempt at negotiation for compromise. On failing in this he should have made a regular tender, if he relied upon his offer as amounting to full satisfaction of the demand.

The charge of embezzlement against the libellants I consider fully repelled by the proofs. Decree accordingly.

Case No. 6,291.

The H. B. FOSTER.

[3 Ware, 165.] [1]

District Court, D. Massachusetts. July, 1858.

HIRE OF VESSEL ON SHARES — LIABILITY OF VESSEL FOR SUPPLIES AND REPAIRS.

1. In a contract for the hire of a vessel on shares, that is, the hirer to victual, man, have the control of the vessel, and pay over to the proprietors a certain proportion of the net earnings as charter or hire, the general owners are not responsible for supplies or repairs furnished in a foreign port.

2. But the vessel is liable whether the hirer navigate her himself or employ another master.

3. Every person who furnishes such supplies or repairs to a foreign vessel is, by the maritime

[1] [Reported by George F. Emery, Esq.]

law, considered as contracting with the vessel herself as a principal debtor, as well as with the master and owners.

[Cited in The Queen of the Pacific, 61 Fed. 215, 216.]

4. The natural and legal presumption in such a case is that the creditor looks to the vessel as one of his securities, because no person is ever presumed without proof to renounce any of the securities provided for him by law.

[Cited in The Illinois, Case No. 7,005; Southard v. Brady, 36 Fed. 561.]

In admiralty.

Mr. Jewell, for libellant.

Mr. Pike, for claimants.

WARE, District Judge. This is a libel in rem filed May 1, 1857, by Bela Hunting, et als. assignees of Charles B. Hunting, against the schooner H. B. Foster, for supplies of ship stores furnished by order of the master in the months of September, October, and November, 1856. The home port of the vessel at the time when the supplies were furnished, was Machias, in the state of Maine, and it appears from the proofs in the case that she was let by the owners to Robinson, the master, by a parol contract to be employed on shares, and that her actual employment was in the coasting trade between Machias and Boston, where the supplies were furnished. The general and well understood terms of this contract are, that the master is to victual and man the vessel at his own expense, is to have the entire control of her, and, after deducting certain port charges, pay one-half of the net earnings to the owners as the hire or charter of the ship. It is well settled by a series of decisions that, when by such a contract the possession and control of the vessel is transferred to the hirer, he becomes special owner and for the time she is employed under it, is liable as such; and that the general owners, the proprietors, are exempted from liability on the master's contract for repairs and supplies; and it makes no difference whether the hirer navigates the vessel himself as master or employs another person. Skolfield v. Potter [Case No. 12,925], and the authorities therein cited. But this does not affect the liability of the vessel. That always remains liable whoever may be the absolute owners.

The authority of the master to bind the ship itself by his contracts for supplies and repairs is a principle growing out of the necessities of maritime commerce, and was early incorporated into the maritime law as one of its original elements. The master has the management and control of the vessel, and she may be carried into port where neither he nor the owners are known, or if known, where they have not credit. His duty is to carry the ship on her voyage safely to her final port of destination. If she becomes in want of repairs and supplies to enable her to perform her voyage, these must be provided, and to procure them the master always carries with him the credit of the ship itself. It is for her benefit that they are required, and on principles of natural justice she ought to pay for this indispensable viaticum. This is the view the maritime law takes of the case. Every person who makes such repairs and furnishes such supplies is considered as contracting with the vessel herself. The master binds himself, it is true, for it is his own contract, and he binds his owners, for he is their authorized agent; but the creditor may pass by both master and owners, as he has in this case, and proceed directly against the ship as the principal debtor for whose benefit the services were rendered. In the primitive maritime law there was in strictness no personal liability beyond that of the master. The owners would always exempt themselves from personal responsibility by abandoning their interest in the ship and freight as an appurtenance to the ship. The authority of the master extended no farther than to bind the property of the owners entrusted to his management. And such is now the law of all maritime nations on the continent of Europe. Ordonnance Louis 14, liv. 2, tit. 8, art. 2; 1 Valin, Commentary, p. 568; The Rebecca [Case No. 11,619], where the authorities are cited.

This view of the subject furnishes an answer to one of the positions of the claimant's counsel, that the liability of the ship continues only to the end of the voyage, for which the supplies were provided. If it is the proper debt of the ship, why is she not liable like any other debtor until the debt is paid? There is no statute of limitation raising a bar in the admiralty. Lapse of time indeed, connected with circumstances, will create an equitable bar. Every man is bound to use reasonable diligence in enforcing his rights. If he does not, and in the free and rapid circulation of property, he suffers other persons to acquire an interest in the subject matter without notice of his rights, the just penalty of such neglect may be the forfeiture of his rights, or postponement of them to the equitable claims of others. Ships, it is well known, are frequently changing owners; still more frequent are claims and rights against them for wages, repairs, and supplies. All such claims ought to be enforced in due season, and indeed promptly, and not be allowed to lie as secret liens and charges, which may operate as a surprise, if not a fraud on others. It is such considerations that have led able and learned admiralty judges to say that they will look narrowly into a lien claim of this kind if it is sought to be enforced at a later time than the termination of the voyage for which the supplies were furnished, and not because the claim then necessarily and legally becomes stale. The Utility [Id. 16,806]; The Boston [Id. 1,669].

But there is another view of the subject which requires consideration. The power

of the master extends no farther than to charge the vessel with such supplies as are necessary, that is, such as are suitable and proper. This is a power that is firmly sustained as indispensable for the purposes of navigation, but it is a power easily liable to abuse, and is therefore to be critically watched. The creditor is safe in trusting to the vessel only when the supplies are necessary, that is reasonably fit and proper, and in such amount as may fairly be supposed to be required for the vessel's use, and he is bound, as in case of bottomry, to use reasonable diligence to inform himself on this point. The reason for this requirement is the same in both cases, though perhaps it would be enforced with somewhat less stringency in the case of a simple maritime lien, than in one of bottomry with marine interest. Pratt v. Reed, 19 How. [60 U. S.] 359. If, therefore, the supplies furnished are not necessary, or if they are furnished in an amount beyond the needs of the ship; in the first case the ship will not be liable at all, and in the second not liable at least for the excess beyond her reasonable needs.

The necessity of such supplies and provisions as are the subject of this suit cannot be questioned. But there was a suggestion at the argument that the amount was greater than was required for the consumption of the crew. The vessel was trading between Boston and her home port, Machias, where the family of the master resided, and she would naturally be expected to procure a part of her supplies there. But even on that supposition, I do not think that the amount charged is such as would awaken in the mind of the creditor, who furnished them, a suspicion that the master was procuring provisions for other purposes than that of feeding his crew. But then we have the direct testimony of the master himself, that a considerable portion of these supplies were actually carried home to his family, and not used in the vessel. If that had been known at the time to Hunting, or if he had reasonable grounds to believe from the amount furnished, or other circumstances that such was the fact, it would, I think, have been a fatal bar to this suit. It would be a credit not authorized by law and a fraud on the vessel, for that is liable only for what is for her own use. But if they were originally furnished in good faith for the vessel's use, the creditor is not answerable for a misapplication by the master to which he was not a party. To justify a loan on bottomry there must be an apparent necessity, and the loan must be made in good faith to relieve that necessity, but the lender is not affected by the master's misapplication of the money. Emerigon, Contrâts a la Grosse, c. 4, § 8. Admitting, then, that the supplies were thus misapplied by the master in this case, if it was without the knowledge and consent of the creditor, it ought not to affect his claim.

But it is strongly urged that these supplies were furnished under a special agreement on the personal credit of the master alone. This is directly and positively sworn to by the master, and if so, it makes an end to this case. Modus et conventio vincunt legem. But it is as positively and directly denied by Hunting. It requires some charity to enable one to believe that both these witnesses have sworn fairly; that there was not intentional falsehood in one or the other. The only other explanation of the contradiction that I can imagine is that there was a conversation on the subject between the parties without their coming to mutual understanding and agreement; that the master ordered the supplies, intending that the charge should be to him personally, but that Hunting, not having consented to it, charged them to the vessel according to his usual practice. This agreement or conversation took place in the month of June. Between June and September the vessel made three trips, and in each case supplies were obtained of Hunting. Bills of parcels were delivered with the goods charged, as the bills in this case, against the ship and owners. They have been all paid without objection to the manner in which they were charged. The supplies for which this suit is brought were charged in the same manner, and bills of parcels delivered with the goods, and no objection made by the master. Whatever his original intention may have been as to procuring his supplies on his own personal credit, he must be held to have abandoned them. Hunting says that he would not have furnished them on the master's credit alone, and a creditor is never presumed without proof to abandon any of the securities the law gives him. My opinion on the whole evidence is that the libellant is entitled to a decree in his favor. Decree $69.00 and costs.

H. D. BACON, The (EADS v.). See Case No. 4,232.

Case No. 6,292.

HEAD v. GREEN.

[5 Biss. 311;[1] 5 Chi. Leg. News, 423; 18 Int. Rev. Rec. 63; 5 Leg. Gaz. 247.]

Circuit Court, N. D. Illinois. May, 1873.

BREACH OF GUARANTY—MEASURE OF DAMAGES.

1. The measure of damages for breach of guaranty of the amount due on a note, there being no guaranty of payment or collectibility, is what the plaintiff has lost by that breach, which is the value of a judgment if one had been obtained against the makers.

2. Where the makers were solvent but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty.

This was a motion for a new trial, the case having been tried by the court without a

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

jury, and the issues found for plaintiff [James Head]. The suit was brought on a guaranty by the defendant, Harley Green, upon a note for $500, made by A. King & Co., to plaintiff, dated July 18, 1867, payable on demand, with interest at ten per cent., and on which there was an indorsement of $100, paid January 30, 1869. The guaranty is in the following words: "I hereby guaranty that there is now due and unpaid on the within note, the original sum of five hundred dollars and interest, except the one hundred dollars indorsed. But it is expressly understood that this guaranty is without liability of any kind on the undersigned, except as above, as to amount due. Signed, Harley Green." The defendant being the owner, on December 8, 1870, of this note, together with four others for $500 each, made by Mary E. and A. C. King, and secured by mortgage, sold the whole to the plaintiff for the sum of $2,150, making at that time the guaranty sued on. The mortgage was collectible, and plaintiffs knew that the makers had nearly completed their arrangements to pay it, and neither party considered the A. King & Co. note of any great value. After obtaining the guaranteed note, plaintiffs brought suit on it against the makers, A. C. and Alpheus King, in Greene county, Iowa, to which the makers pleaded payment in full, to defendant, on the 30th of January, 1869. Defendant was duly notified of this defense, and requested to furnish proof to meet it. He directed plaintiffs to subpoena a son of A. C. King, and Mrs. Mary E. King as witnesses. Both were duly summoned; the son attended and testified that the note was paid; Mrs. King did not attend the trial by reason of sickness. Defendant did not attend the trial, nor furnish his deposition, although he was a competent witness, nor did plaintiff take any steps to obtain his testimony other than by notifying him to furnish testimony to meet the defense. The case was tried and resulted in a verdict against plaintiff, on the ground that the note had been fully paid to defendant before he transferred the same to plaintiff. The record of the suit and judgment in Iowa, as well as other evidence of payment, was introduced on the trial, and the court found that the note had actually been paid at the time of the guaranty, and that the amount apparently due could have been collected if judgment had been obtained against the makers.

C. H. Lawrence, for plaintiff.

Miller & Frost, for defendant, as to measure of damages, cited Rapelye v. Anderson, 4 Hill, 472; Hutchins v. McCann, 7 Port. (Ala.) 94; Braman v. Hess, 13 Johns. 52; Shaeffer v. Hodges, 54 Ill. 337; Wright v. Butler, 6 Wend. 284; Cram v. Hendricks, 7 Wend. 569; Munn v. Commission Co., 15 Johns. 44; Raplee v. Morgan, 2 Scam. 561; Hawkinson v. Olson, 48 Ill. 277; Case v. Hall, 24 Wend. 102; Burt v. Dewey, 31 Barb. 540; Morgan v. Ryerson, 20 Ill. 343; Crabtree v. Kile, 21 Ill. 180; Caswell v. Coare, 1 Taunt. 566; Joslyn v. Collison, 26 Ill. 62; Judson v. Gookwin, 37 Ill. 286; Pitts v. Congdon, 2 Comst. [2 N. Y.] 352; Peine v. Weber, 47 Ill. 41.

BLODGETT, District Judge. The only question now made is as to what is the true measure of damages. The well-established rule in actions by indorsees against indorsers or guarantors of negotiable paper is, that the measure of damages is the amount paid by the assignee or indorsee to the guarantor or indorser, with interest. But this rule has been only applied, so far as my examination has gone, to cases where there was either an express or implied guaranty of payment or collectability, and I have been unable to find from any research of my own, nor has the industry of counsel on either side furnished me with any adjudged case, or even the dictum of a court or text writer, as to what is the true measure of damages on the breach of a guaranty like this. On a guaranty of payment or collectability, the holder knows that if he takes the necessary steps to fix the liability of the guarantor, he can recover back at least the amount paid for the note, with interest; but in a guaranty like this, he has no such redress. Here the holder of the guaranty takes all the chances of the collectability of the demand. There is no liability even by the guarantor in case the maker of the paper proves insolvent, but the holder must lose all he has paid unless he can collect from the maker. And it seems to me that the measure of his damages, in case of a breach of the contract as to the amount due, is what plaintiff has lost by that breach; which in this case should be the whole amount due on the note at the time suit is brought. And it appears to me that one weighty reason why this rule should be applied to a guaranty like this, is that the holder of notes or bills who attempts to negotiate them after due, must be presumed to know (and he alone) whether there are any legal or equitable defenses to the paper he purposes to transfer to another. And as he assumes no risk in regard to the collectability of the debt, he should at least be held to make good his express undertaking that the paper represents an honest demand for what purports to be due thereon. Can it be supposed that any person would buy a note with such a guaranty unless he understood that the guarantor was holden to make good the pledge he gives? [I do not say he is holden for the full amount due on the note, for the maker of the note may be insolvent, and a judgment obtained would be worthless, but the measure of his liability is the value of the judgment, if one had been obtained, against the maker.] [2] And here it appears that the judgment would have been worth the

[2] [From 5 Chi. Leg. News, 423.]

full amount, if it had been obtained. Motion for new trial overruled, and judgment for plaintiff.

HEAD (MEANY v.). See Case No. 9,379.

Case No. 6,293.

HEAD v. STARKE.

[Chase, 312; [1] 3 Am. Law T. Rep. U. S. Cts. 155.]

Circuit Court, D. Virginia. Sept., 1870.

TRUSTEES—LIABILITIES — CONFEDERATE BONDS — NON-RESIDENT BENEFICIARIES—CONFEDERATE CURRENCY.

1. It being agreed that the most prudent and careful business men were in the constant habit of making investments in Confederate bonds, it would seem unreasonable to call in question the good faith or prudence of the administrator who does likewise.

2. Especially is this so when such investment by an administrator is sanctioned by the state court. Even if there had been no such decision, this court will not say that the administrator ought to be charged, if the investment were free from objection on other grounds.

3. It would seem, however, that where a trustee held funds in the Confederacy, for the benefit of parties within and adhering to the United States, that an investment of such funds in Confederate bonds will not exonerate such trustee from accounting for the value of the funds invested, to his non-resident cestui que trustees.

4. Dealing in Confederate currency which was imposed on the community by irresistible force is essentially different from an actual advance of money to the Confederacy itself. In this case there was an investment of trust funds, entirely voluntary on the part of the administrator, on a loan to the Confederate government, to aid it in its efforts to dismember the Union.

5. This administrator paid his trust fund actually into the treasury of the Confederate States, and received directly from the treasurer a Confederate bond for the amount so paid in. Such an investment can not receive the sanction of a court of the United States. It is inoperative as a discharge from responsibility.

In equity.

CHASE, Circuit Justice. This is a suit in equity, brought to enforce payment by the defendant to plaintiffs of their distributive shares of the estate of the decedent, John Starke.

The proof shows that the plaintiffs, Adeline Head and Charlotte R. Starke, were children, and are the only surviving heirs of John Starke, and that the defendant [Talley] had in his hands as administrator on January 31, 1860, the sum of seven thousand two hundred and forty-nine dollars and eighty-eight cents, belonging to the estate. It is claimed by the defendant that he subsequently disbursed considerable sums in payment of just claims against the estate, by which the balance in his hands was so far reduced that on September 20, 1863, only the sum of five thousand and odd dollars remained.

The defendant states that the records and papers of the Hanover county court were destroyed by fire, and among them the records of the settlement by which this balance of about five thousand dollars was ascertained.

It is agreed by counsel that the records in sundry cases, in which certain decrees and orders were made affecting the balance in the hands of the plaintiff, were destroyed by the fire mentioned by the defendant; but there is no agreement that the record of the last settlement on which he relies was thus destroyed.

It appears in proof that the defendant, as administrator, invested five thousand dollars in the loan of the states then confederate in armed hostility to the United States, and received from the officers of the so-called "Confederate Government" a certificate for that sum.

It is not disputed on the part of the defendant that there must be a decree for an account, and that he is liable to the complainants for whatever balance may be found in his hands exceeding the five thousand dollars.

The important questions in the case are two: (1) Was the investment in the loan of the Confederate States one which a prudent person acting as trustee or administrator might make? And (2) was the investment being actually made in a loan to a politico-military organization formed for the purpose of overthrowing the union of the states under the national constitution, and establishing a new confederation in a portion of those states, one which, under any circumstances, can be recognized in the courts of the United States as excusing the administrator from accounting for the funds in his hands to the parties otherwise entitled lawfully to receive them?

Upon the first question little may be said. It must indeed be regarded as already decided. The court of the state authorized by law to consider and sanction investments by administrators sanctioned the loan under consideration; and it is agreed that the most prudent and careful business men were in the constant habit of making such investments.

It would seem, therefore, to be unreasonable to call in question the good faith or prudence of the administrator in the circumstances by which he was surrounded. If there had been no decision of the state court approving the investment, we could not say that the administrator ought to be charged if the investment were free from objection on other grounds.

This makes it necessary to consider the second question. But we need not examine it at length, for in the case of Botts v. Crenshaw [Case No. 1,690], in this court, we held that investment even of Confederate curren-

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

cy in Confederate bonds by an attorney who had collected a debt due to a citizen of Kentucky, in that currency under what were considered to be justifying circumstances did not absolve him from accounting for its value, although in that case as in this the investment had been sanctioned by a court, whose decision but for the abnormal condition created by the Rebellion would have been conclusive.

This case, we think, covers the present in principle. So in the case of Shortridge v. Macon [Case No. 12,812], the circuit court of the United States for the district of North Carolina, speaking through the presiding judge of the court, held that compulsory payment to a receiver under an order of a court of the Confederate States of a debt due to a citizen of Pennsylvania, did not excuse the debtor from the duty of paying the sum due to the original creditor.

And we think that these decisions are sustained by the reasoning of the supreme court in the case of Texas v. White, 7 Wall. [74 U. S.] 733. Nor is there anything in the case of Thorington v. Smith, 8 Wall. [75 U. S.] 12, which conflicts with the cases of Botts v. Crenshaw and Shortridge v. Macon [supra]. In that case the supreme court held that contracts stipulating for payment in Confederate currency "can not be regarded for that reason only" as void, but in this case there was something more than the mere use of the currency imposed on the community by irresistible force. There was an actual advance of money to the Confederacy itself. There was an investment of trust funds, entirely voluntary on the part of the administrator, in a loan to the Confederate government to aid it in its efforts to dismember the Union, and to overthrow the national government.

Whatever may have been the motive inducing such an investment, however it may have been warranted by example, or even by judicial authority, itself involved in the general rebellion, it is impossible that it should receive the sanction of a court of the United States.

We must hold, therefore, the investment complained of to be inoperative as a discharge from responsibility to complainant, and will so decree, ordering an account by the defendant with the complainants and payment of such a sum as may be found due.

Case No. 6,294.

HEAD et al. v. TALLEY.

[The case reported under above title in 3 Am. Law T. Rep. U. S. Cts. 155, is the same as Case No. 6,293.]

HEALEY, In re. See Case No. 2,796.

HEALEY (BRADLEY v.). See Case No. 1,781.

HEALEY (GRANT v.). See Case No. 5,696.

Case No. 6,295.

HEALEY v. MARTIN.

[Oliver's Forms (Ed. 1842) 483.]

District Court, D. Massachusetts. May, 1823.

SEAMEN — PROTECTION AGAINST OPPRESSION—AUTHORITY OF MASTER—DISOBEDIENCE OF CREW.

[1. A court of admiralty will always be solicitous to protect the rights of seamen, and redress any injuries and oppression to which they may be subjected; but, at the same time, it will exercise great care not to sustain any unreasonable demand on their part, which would have a tendency to loosen the ties of that wholesome discipline which should be maintained in every voyage, especially in long and arduous voyages, such as those to the northwest coast of America.]

[2. It is within the sound discretion of the master to judge as to when additional supplies of wood and water are necessary, and as to what risks should be incurred in procuring them; and the court will not be quick to infer that he recklessly, or without sufficient cause, exposed his men to attacks of savages.]

[3. The conduct of the master in imprisoning revolted seamen in the forecastle until they promised obedience, as well as his act in sending a boat crew for wood and water to an island where they were attacked by savages, sustained as within the limits of his just discretionary authority.]

[This was a libel by John Healey, a seaman, against William Martin, master of the ship Hamilton, for personal injuries while in the service of the ship.]

Samuel L. Knapp, for libellant.

Harrison G. Otis, Jr., for respondent.

DAVIS, District Judge. The libellant was a seaman on board the ship Hamilton, of which the respondent was commander, on a voyage from Boston to the northwest coast of America, to Canton, and back to Boston. The voyage commenced on the 7th of Sept., 1819, and terminated on the 9th of April last. More than two years of this long interval was spent on the northwest coast of America, and it was during that period that the transactions occurred of which the libellant complains. The libel alleges the sufferings of the complainant, with the rest of the crew, from bad and unwholesome food, and a confinement, by order of the respondent, commencing on the 30th of May, 1821, and continued for the space of seventy-two hours, without food, drink, air or light. It also alleges a wanton and cruel exposure to the savages, in an expedition in the boat for wood and water, of which, it is asserted, there was no want on board the ship at that time, and that the libellant was severely wounded in an attack made by the savages; the respondent, as it is alleged, well knowing their hostile disposition at that time and place.

The respondent, in his answer, admits the confinement, the employment of the libellant in the ship's boat, to procure wood and water, and the wound received by him in an attack by the savages; but asserts that the

confinement was a just and necessary measure to reduce a portion of the crew, among whom was the libellant, to obedience and return to duty, they having refused to do duty on board the ship; retiring to the forecastle, which the respondent caused to be closed, after repeated and ineffectual endeavors to prevail on them to return to the duties of their station, and that they were liberated as soon as they had relented and promised obedience. And, as to the injury received from the natives, he alleges that it was while the libellant was duly and necessarily engaged in the ship's service, in the proper duties of his station, and after every prudent precaution, without any fault or culpable act or omission on the part of the respondent.

It is often difficult to form a satisfactory judgment of the real state of facts, in regard to transactions at sea, which become matters of controversy. The evidence is frequently contradictory, and statements are exaggerated and inflamed. The difficulty is less, however, in the present case, than there would appear reason to apprehend from the nature of the dispute, the degree of combination which existed, and the collision between authority and disobedience. The essential features of the transaction in question are sufficiently prominent, and leave little room for doubt or delay, in regard to the judgment which ought to be pronounced on the subject.

The confinement of the party of men, thirteen in number, of which the libellant was one, was indeed long and severe; but the master was placed in a difficult and distressing dilemma, by the sudden and determined revolt of such a large portion of his crew. They were in a state of mutiny, and unless they could be, by some means, reduced to obedience, the consequences must have been disastrous. The voyage would have been ruined, and the lives of all on board were, on that savage coast, in imminent danger. There may have been some ground of complaint in respect to their food, for a short time before the adoption of the culpable measure to which these men resorted. Admitting, however, that the salted halibut, with which they were dissatisfied, was not according to the fair expectation which they might entertain, under their contract, it was not so intolerable as these men were disposed to represent it. The officers shared this unwholesome diet with the crew; the use of it had not been of long continuance; the new station, to which they were proceeding, might furnish fresh supplies of fish and game, and, with the plentiful supply of bread, the addition of pork, and occasional messes of rice, beans, and flour, to say nothing of the coffee or tea every morning and evening, and the weekly allowance of spirits, it is difficult to believe that there could be any apprehension of starvation, or that it was necessary to organize a revolt, to compel a change of provisions, or an additional allowance. A querulous humor, incident probably to long and monotonous voyage, was unduly indulged by the crew. With much greater privation than appears to have existed on board the Hamilton, there should have been more patience and forbearance than was manifested by the discontented party of this crew; and when the whole history of this very long voyage is examined, there appears no reason to believe that real grievances would not have been, in due time remedied, if it were practicable, without a resort to such a desperate expedient as was adopted by those misguided men. There was, evidently, a fixed and resolute determination to compel the master of this ship to terms, by an obstinate refusal of duty. Without the discharge of that duty the ship was evidently endangered, and no calculation could be made of the extent and issue of that dangerous proceeding, if the revolters could not be persuaded or compelled to submit. Conduct so extraordinary demanded, and, in my opinion, fully justified the extraordinary measures adopted by the commander. Conciliatory offers were repeatedly made to them, and as repeatedly slighted or refused. They were confined in the place to which they had voluntarily repaired, when their duty and the call of their officers required them to be upon deck; and it was their own fault and folly that they were not sooner relieved. Severe and painful as this operation undoubtedly was, it is exaggerated in the libellant's statement. These men were not without food, for they had a sufficient supply of bread, and some of the tampions were occasionally removed from the apertures in the deck, for the admission of air. Captain Martin, while in the exercise of the harsh measure of coercion, to which he was impelled by the occasion, had a considerate regard to the dictates of humanity. Recollecting that two of the men in the forecastle were sick, he immediately sent for them, and (to use the language of the log-book) begged them to come and live in the cabin, offering to give them every thing they should want, if it were in the ship. This kind offer was refused, and this incident, as well as the determination of the man at the helm to leave his station, to unite himself with the men in the forecastle, and to be confined with them, affords striking evidence of the strength and extent of the alarming combination which existed.

In regard to the skirmish with the Indians, June 3d, 1821, the complaint, in my opinion, is equally groundless. The suggestion of a wanton indifference in Captain Martin to the safety of his crew, and of a willingness to subject them to slaughter by savages, is not supported by the evidence. If he were destitute of the common feelings of humanity, a regard to self-preservation alone, would have forbidden the exercise of such unnatural dispositions. Strong and intem-

perate expressions, under excitement from misbehavior, undoubtedly escaped him; but the general care of his men appears to have been humane and proper; and the successful termination of such a long and laborious voyage, under peculiar difficulties, affords no inconsiderable indication of his prudence and discretion, as well as of his firmness, resolution, and self-command. It is said that he was warned by Captain Harris of the hostile temper of the natives, and cautioned against going or sending on shore; that he had provoked resentment, by retaining a quantity of oil, said to belong to some of the natives, and that there was no necessity for wood or water, for which the boat was despatched. The trade in which this ship was engaged, is always more or less hazardous, and those who embark in such voyages may be presumed to make up their minds to encounter the difficulties and dangers incident to the employment. With every disposition to indulgence, on the part of the officers, there must be instances of inevitable exposure, and he who has the responsible office of managing the whole concern, must be the best judge in what manner to direct its operations. In the exercise of this command, under the various emergencies which occur, his conduct should be candidly estimated, and cruelty or caprice should not be imputed to him without the fullest evidence. Captain Martin was, indeed, informed that the Indians were in a hostile mood. Still it was competent for him to determine as to the measures he should adopt. In regard to the supposed cause of that irritation, it would be unreasonable to impute blame to Captain Martin, when the well-known traits of savage character are considered. The fact of their irritation was indeed important, and required precaution. Such precaution appears to have been exercised. Wood and water, in the opinion of the master, were required, and the boat was sent to procure them. The boat was well manned, and well armed, and a cautious course was prescribed in approaches to the shore. The officer was directed to look carefully round the island, from which wood and water were to be procured, and a landing was not to be made, if any Indians were seen. Capt. Martin, as was justly observed by his counsel, could not have done more to ensure the safety of his men, if they had been his children. As the boat was about to land, Indians were descried by Capt. Martin, before they were seen by his men in the boat. He immediately gave the alarm, and ordered the boat to return to the ship. In the return she was attacked by the natives in two canoes. The daring assault was bravely repelled; the libellant and one of his companions being unfortunately severely wounded in the conflict.

The view taken by some of the men of Capt. Martin's preparation to discharge a cannon from the ship during the contest, appears to me extravagant and groundless. It is said it was criminally or most carelessly pointed, and that, if it had been discharged at the moment intended and in the direction given, it must have destroyed some of his own people. It would require much more evidence of all the circumstances of the affair than has been furnished, to bring my mind to an adoption of the uncharitable opinion which these men seem to have entertained on this subject. In the hurry and anxiety of such a critical moment, a mistake might have been made; and if the cannon had been discharged, and the result had been calamitous, still the conduct of the master should have received a candid and benignant construction. But it was not discharged in the direction indicated, and the speculations that have been offered as to the probable event if it had been fired in that direction, are too uncertain, and the supposition suggested too palpably gratuitous, to be sustained in the deliberate estimate which the court is required to make on the subject. The language used by Captain Martin on the occasion, should receive a liberal interpretation. The remark was in reply to suggestions probably irritating and offensive. The general treatment of his men does not warrant the construction which has been urged. We are to make allowances for the habits of the profession, and for modes of speech, in which less is often meant than meets the ear.

It would be unjust to infer a malignant intent from a strong but hasty expression, uttered in a moment of excitement. Upon a deliberate view of the evidence, I consider this expedition in the boat as a fair application of the discretionary powers of the commander of the ship, and as incident to the nature of the employment. Its results furnish no just ground of complaint against the master of the ship, much less a demand for damages. The men behaved bravely, and those who had the misfortune to be wounded, are entitled to compassionate and generous attention from the owners of the ship. Such attention, I can have no doubt they will receive, if benevolent offices should not be repressed by improper deportment on the part of the men.

The counsel for the libellant has justly and eloquently eulogized the hardihood of our seamen, by which maritime enterprises of uncommon character are successfully accomplished. The energetic spirit by which our maritime adventures are extended, well merits the commendation. It should be remembered, however, that the crews of our ships are not the only agents in these arduous services. The officers partake most deeply of the labors and perils which belong to the employment; and from the high responsibility which they sustain, their minds are constantly exercised by anxieties and cares, from which the crew are, in a

great degree, exempted. In this voyage we have an example of what enterprise and perseverance may accomplish; and it is but one of many instances of like kind, furnished by the history of our commerce. These interesting pursuits have their systematical arrangements, essential to their success, which it would be rash, and probably ruinous to the trade, to violate or to interrupt.

The best concerted plans for the prosecution of these remote and circuitous expeditions will be defeated if strict discipline be not preserved. The cod fishery has its peculiar character, and may be conducted, as it habitually is conducted, with all the familiarity and simplicity of domestic economy or of rural occupations. The various operations at sea and on the fishing-ground, are subjects of mutual consultation, and the shipper is little more than primus inter pares. It is far otherwise on voyages to the northwest coast, in which our countrymen so early engaged, and which they have so perfectly reduced to system. They require, in a great degree, the subordination, strict obedience, and deference to command, which are practised in military regimen. In this connection, I cannot but notice a circumstance, incidentally mentioned in the log-book of the Hamilton. On the 28 May, two days only before the secession of the crew, one hundred and thirty canoes were numbered alongside the ship at one time. Without the utmost vigilance, strict subordination, and perfect command of the whole strength of the ship, assaults from the savages and fatal destruction must be expected to ensue. The important interests at stake, demand the solicitous attention of courts deciding on such controversies, not to weaken the great moral tie, without which all the machinery of navigation would be useless. It is painful to perceive any symptoms of departure from habits of obedience and respect to authority, by which navigation and commerce have been so greatly advanced. Even in our whaling ships, where such irregularities would not be apprehended, we find recently instances of insubordination and revolt, of an alarming character.

In maritime controversies coming under the cognizance of the court, it has never, I trust, been indifferent to the wrongs and injuries which seamen may have sustained. In the present case, I have been disposed to hear every thing that could be disclosed, and the inquiry has been extended beyond the usual limits of such investigations. This course was considered to be due to the nature of the complaint, the remote distance to which the men were removed from their country and friends, and the great length of time for which they were engaged. I cannot, as appears to me, sustain the libellant's demand, without implying a surrender of the wholesome discipline which should be maintained in every voyage, and which, in voyages of this description, is peculiarly important. With these views of the subject, I must dismiss the libel, with costs.

HEALY (JOHNSON v.). See Case No. 7,389.

Case No. 6,296.

HEALY et al. v. MOTHERSHED et al.[1]

District Court, N. D. Mississippi. Dec. Term, 1875.

STATUTE OF LIMITATIONS—SUSPENSION—CIVIL WAR.

[Plaintiff, a citizen of a loyal state during the Civil War, is not entitled to the benefit of both the supension of the statute of limitations by reason of his residence, and the suspension under a state statute (Act Miss. Dec. 31, 1862) of actions of ejectment, but, if not confined to the former suspension, must elect one or the other.]

[This was an action of ejectment by Healy & Whitney against Marcellus Mothershed and J. J. Allen.]

J. W. C. & J. H. Watson, for plaintiffs.

H. A. Barr and L. P. Cooper, for defendants.

HILL, District Judge. The question presented is as to the proper judgment to be rendered upon the following special verdict of the jury: "The jury find from the evidence that the plaintiffs were the legal owners of the land described in the declaration on the 15th day of May, 1856, sold the same to J. W. Matthews, and, to secure the payment of the purchase money, received from him his three promissory notes for the sum of $400.00 each, payable one, two, and three years thereafter, and executed to him a bond for title when the same should be paid, which notes remain unpaid. That the land was then wild and unoccupied, and so remained until the 12th day of January, 1858, when Samuel Matthews sold the same to Allen, the defendant, and put him in possession, who, by himself and tenants, have continued to occupy the same ever since. That Samuel Matthews, at the time he so sold to Allen, had no title or claim, legal or equitable, to the land, but on the 16th day of February, 1868, by an agreement in writing with J. W. Matthews, agreed to exchange other lands for the lands so sold, the deeds of conveyance to be executed at the convenience of the parties. Allen, at his purchase, paid one-third of the purchase money in cash, and executed his notes for the remainder, in one and two years, and took from Samuel Matthews his bond for title, Matthews stating that he had a good title. The notes so given for the purchase money were paid at maturity, and on the 12th day of March, 1860, Samuel Matthews executed to Allen a deed of conveyance to the land. Allen had no knowledge of any defect in his title until shortly

[1] [Not previously reported.]

before the commencement of this action, and held and claimed the land adversely to all other persons from the time he went into possession under his purchase, as he understood his occupancy. That Allen, by himself and tenants, has placed on said land improvements, of the value to said land amounting to $3,400.00, and that the use and occupation of said land for the past six years has been worth $3,475.00, and that said land is now worth $5,000.00. The jury further find that plaintiffs are now and always have been citizens and residents of the state of Mass. That if, in the judgment of the court, the holding possession of the land, as aforesaid, was an adverse holding, so as to entitle the defendant Allen to the benefit of the statute of limitations of ten years, the jury find the issues in favor of the defendant; but, if not, they find the issues in favor of the plaintiffs, and assess as damages for use and occupation, over and above the value of the improvements aforesaid, the sum of $75.00."

The main question presented is as to the time the possession of Allen became adverse to plaintiffs, so as to entitle him to the benefit of the statute of limitations. It is insisted for defendants that it commenced from the time Allen took possession, in January, 1858, under his purchase; and, by plaintiff's counsel, that it did not commence until the execution of the deed, March 12, 1860. An examination of the authorities and adjudicated cases leaves it a matter of some doubt as to whether or not Allen, having accepted the deed of Samuel Matthews after the written agreement between Samuel Matthews and Joseph Matthews, will not be held as holding subordinate to the title of plaintiffs, until the execution of the deed, after which it is admitted to be an adverse holding to the rights of all others. Had there been no agreement entered into between Samuel and Joseph Matthews, then, Allen holding under his contract with Samuel Matthews up to the execution of his deed, the possession would undoubtedly have been adverse to the plaintiffs' title, from the time he went into possession. The question is, could Samuel Matthews have placed him in a worse condition by a private agreement, of which Allen knew nothing? Although not clearly satisfied, I am inclined to the opinion he could not, and that notwithstanding Allen would be entitled, if necessary, to avail himself of the benefit of this agreement, that he is not compelled to be prejudiced by it when he does not seek its aid; but, under the finding of the jury, I do not deem it necessary to decide this question the one way or the other.

From the date of the deed, 12th day of March, 1860, to the 8th day of May, 1875, when this action was commenced, a period of 15 years, 1 month, and 17 days elapsed, and would constitute a complete bar, unless the deduction of the time the statute of limitations was suspended from this period reduced it to less than ten years. The plaintiffs' counsel insist that the statute was suspended from the 19th of April, 1861, to the 2d of April, 1867. The jury, by their verdict, have found that the plaintiffs are, and always have been, citizens and residents of the state of Massachusetts,—consequently, citizens of one of the loyal states during the late war. The supreme court, in the case of The Protector, 12 Wall. [79 U. S.] 700, settled the time the statutes of limitation became suspended in this state, as against citizens of the loyal states, by means of the war, to be the 19th of April, 1861, and the time when they again became operative to have been the 2d of April, 1866. That the plaintiffs are entitled to this deduction of time, there is no doubt; which a party then a citizen of the state could not have claimed against another citizen of the state. The period which elapsed from the 19th day of April, 1861, to the 2d day of April, 1866, is 4 years, 11 months, and 13 days, which deducted from 15 years, 1 month, and 17 days leaves 10 years, 2 months, and 4 days; so that, under this claim of suspension, more than 10 years elapsed from the execution of the deed to the commencement of the action, after deducting the time the statute was suspended, and consequently the action is barred. But it is insisted the statute was suspended by reason of the act of the legislature, and that plaintiffs are entitled to avail themselves of this act, to avoid the bar set up. Let us examine, and see how that is.

The act approved January 29, 1862 [Laws Miss. 1861–62, p. 235], did not suspend actions of ejectment, but the act approved December 31, 1862 [Laws Miss. 1862–63, p. 96], did. Admitting that plaintiffs are entitled to the benefit of this act, we find that from the 31st of December, 1862, to the 2d of April, 1867, was a period of 4 years, 3 months, and 1 day, which period deducted from 15 years, 1 month, and 17 days, leaves a period of 10 years, 10 months, and 16 days, —more than a sufficient time to complete the bar. But it is insisted that plaintiffs are entitled to avail themselves of both these suspensions, commencing with the suspensions by reason of the residence of the parties, and the existence of the war, and ending with the statute of limitations. I am satisfied that this position cannot be maintained, but that plaintiffs must elect one or the other, if not confined to the rule laid down by the supreme court for their benefit, and, whether relying upon one or the other, the deduction falls short of reducing the time the statute runs to less than 10 years; consequently, the bar by the statute must be held complete, and the judgment upon the special finding of the jury be for the defendants. This, in my opinion, is not only the law, but the equity, of the case. The proof shows that, had plaintiffs proceeded in proper time, they would have collected the purchase money from Joseph Matthews, and thus have avoid-

ed any difficulty in Allen's title, and if they had commenced their action of ejectment in a reasonable time, and ejected Allen, he could have recovered from Samuel Matthews, his vendor, the purchase money paid by him, with interest; but, by delaying until Samuel Matthews' insolvency and death, were Allen now ejected, he would be left without remedy.

HEALY (PREVOST v.). See Case No. 11,408.

Case No. 6,297.

HEALY v. PREVOST.

[8 Reporter, 103; 25 Int. Rev. Rec. 240; 6 Wkly. Notes Cas. 579; 8 Cent. Law J. 445; 27 Pittsb. Leg. J. 6.] [1]

Circuit Court, E. D. Pennsylvania. April 4, 1879.

JURISDICTION—CIRCUIT COURT—AMOUNT INVOLVED—DECLARATION—COMMON COUNTS—BILL OF PARTICULARS — REMOVAL OF CAUSE TO FEDERAL COURT — VOLUNTARY APPEARANCE IN STATE COURT—INTERPLEADER.

1. The limit of the jurisdiction of the circuit court as to the amount involved is to be determined by the amount laid in the declaration, and when it consists of the common counts, by the amount in the bill of particulars.

2. One brought into a state court by an order to interplead, made on the motion of the original defendant, will not be regarded as voluntarily before the court and waiving his right of removal, and, if otherwise qualified, may remove the cause into which he has been brought to the circuit court.

[Cited in Wehl v. Wald, Case No. 17,356; Bailey v. New York Sav. Bank, 2 Fed. 18.]

Rule to remand cause to state court. This was an action of assumpsit originally brought in the common pleas of Philadelphia by Healy against the Jefferson Oil Company, both plaintiff and defendant being citizens of Pennsylvania. The declarations consisted of the common counts only, the damages claimed being $5,000. The bill of particulars, however, claimed only $1,591.35, which sum was composed of two items, one of $1,375.90, and the other of $215.45, arising out of different transactions. Before plea filed the original defendant petitioned the court for an interpleader between Healy and Prevost, who, it was averred, had, before action brought, filed a bill in equity against the oil company in the circuit court in respect to the item of $1,375.90, and who, it likewise averred, was about to bring an action against it in respect to the smaller item; the petition also alleged that the larger sum had in obedience to an order of the circuit court been paid into the registry of said court, leaving only the sum of $215.45 in the defendant's hands out of the amount originally claimed by Healy, which sum the defendant prayed leave to pay into court. A rule to show cause having been granted, an order was made granting the prayer of the petition, neither Prevost nor Healy appearing, and Prevost was substituted on the record as defendant. Prevost, being a citizen of New Jersey, then filed a petition and bond for a removal of the cause to the circuit court, and removed it accordingly. The plaintiff then took the present rule.

A. Sydney Biddle showed cause.

The amount in controversy here brings the cause within the act of congress. It is not merely the $215.45 which at the time of removal remained in the hands of the original defendant, but the sum named in the bill of particulars. The amount in controversy for the purpose of giving jurisdiction is the amount named in the declaration. Gordon v. Longest, 16 Pet. [41 U. S.] 97; Sherman v. Clark [Case No. 12,763]; Postmaster General v. Cross [Id. 11,306]; Martin v. Taylor [Id. 9,166]. When the narr. consists of the common counts, the amount is fixed by the bill of particulars. After the order for payment into court, which reduced the sum in the defendant's hands to less than $500, the plaintiff might have amended his bill, but he did not do so. The order of the common pleas granting an interpleader was general and not confined to the smaller sum. Prevost's consent to the order of interpleader does not deprive him of his right to remove.

L. Waln Smith, for the rule.

The defendant came voluntarily into the state court, and consequently waived his right to a removal of the cause. West v. Aurora, 6 Wall. [73 U. S.] 139; Dill. Rem. Causes, § 13, and note. The controversy is for less than $500. The common pleas clearly intended its order to apply to the $215.45 only, as the remainder of the sum had been paid into the registry of another court. The court would take judicial notice of the latter fact, and not make an order where the res upon which it would operate was within the jurisdiction of another sovereignty. Though as between the original parties the sum in controversy is determined by the bill of particulars, yet as to Prevost the sum is determined by writ bringing him upon the record, i. e. the interpleader order.

BUTLER, District Judge. The plaintiff's claim, as it appears from the bill of particulars filed, is for upwards of $1,500. And this is the amount involved in the issue joined with Mr. Prevost. It is true that the original defendant in the case has paid $1,375 of this sum into the circuit court. But the claim of the plaintiff is not abated thereby. It is not improbable that the issue was intended to be joined on the $215, the remainder of the claim, but it is not so done. We cannot regard Mr. Prevost as voluntarily in the court of common pleas, and not therefore

[1] [Reprinted from 8 Reporter, 103, by permission; 8 Cent. Law J. 445, contains only a partial report.]

entitled to the benefit of the statute which he invokes. He was called in by the rule to interplead, and although he subsequently assented to the rule being made absolute, I think he should be regarded as if in under a summons. Rule discharged.

HEARD (LOVERING v.). See Case No. 8,554.

Case No. 6,298.

HEARD v. ROGERS et al.

[1 Spr. 556;[1] 17 Law Rep. 442.]

District Court, D. Massachusetts. Oct., 1854.

SHIPPING ARTICLES—NEW CLAUSE.

1. Where a new clause in the shipping articles is relied upon, to repel a claim for wages, it must be pleaded.

2. If not pleaded, the court must infer that the articles are in the usual form.

3. A new clause in the shipping articles, in derogation of the general rights of a seaman, will be inoperative, unless explained to him, and an adequate compensation therefor be received by him.

This was a cause of subtraction of wages, promoted by the chief mate of the ship Columbia, of Salem, against the owners, one of whom was also the master. The voyage was from Boston to San Francisco, and thence to Calcutta, and back to the United States. The libellant left the vessel in San Francisco, and claimed wages to the time of leaving. The shipping articles contained this clause: "With an express condition, that if any of the crew desert, or leave the ship, at California, or Calcutta, without a written discharge from the master, they shall forfeit all wages due them."

R. H. Dana, Jr., for libellants.
W. C. Endicott, for respondents.

SPRAGUE, District Judge. Two defences are set up against the demand for wages; one, the alleged misconduct of the libellant, in endeavoring to induce several of the crew to leave the vessel at San Francisco, and the other, that he himself left the ship, without a written discharge from the master, and has thus forfeited his wages, under the new clause in the shipping articles. (His honor reviewed the evidence upon the first point, and said that he thought the charge was not proved, and proceeded.) On the second head, it is proved by the libellant, that he left with the verbal permission of the master; and a paper is introduced, written in pencil, and signed with the initials of the master, which it is contended was a written discharge. There are also other objections to giving effect to the clause. It is urged for the libellant—1st. That the want of a written discharge is not sufficiently pleaded. 2d. That it has been waived by the admission, without objection, of parol proof of a discharge. 3d. That the word "crew" was not intended (in this case) to include the chief mate. 4th. That being an unusual stipulation, of a severe character, in derogation of the general rights of seamen, it should not be permitted to operate, without proof that the party signing the articles had his attention called to the clause, or otherwise knew of its existence and effect. These objections must prevail. The answer does not state that there was any such clause in the articles, and only alleges that the libellant left "contrary to the shipping articles." This is not sufficient notice to the libellant, either of the existence of this clause, [if he was, as he says, ignorant of it,][2] or that the respondents intended to rely upon it. From the pleadings, the court could only infer that the shipping articles were in the usual form, and that the allegation meant only that he left without permission, before the voyage was ended. Such clauses, so unusual, so severe in their operation, and so little likely to be anticipated or looked for by the crew, are to be closely scrutinized. There is no evidence, as to when, or how, the libellant or any of the crew signed the articles, or that he, or any of them, knew that the clause was there; and it is in proof, that it was put in by the special direction of one of the owners, and not in the presence of any of the crew. This alone would be decisive. For without proof that the clause was made known to, and understood by the crew, and that they received an adequate consideration for its introduction, it must be inoperative.

Decree for the libellants, the cause being referred to a master, to examine the accounts and report upon the balance of wages due.

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

Case No. 6,299.

HEARN v. EQUITABLE SAFETY INS. CO.

[3 Cliff. 328.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

TRIAL OF CAUSES WITHOUT A JURY — MARINE INSURANCE—USAGE—CORRESPONDENCE AS EVIDENCE.

1. Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation waiving a jury.

2. The terms in a policy of insurance were "to a port of discharge in Cuba and at and thence to a port of advice." *Held*, that the policy protected the insured in a voyage from the port of loading to a port of discharge in Cuba, and at and thence to the port of advice. It cannot be made to give any further protection without adding words to the contract.

[2] [From 17 Law Rep. 442.]

[1] [Reported by William Henry Clifford, Esq. and here reprinted by permission.]

3. Depositions offered to show that on a voyage of this kind the vessel might, under a usage, go to a second port in Cuba to load, were admitted de bene esse.

4. It does not establish a usage that vessels have the right to so go to a second port in Cuba and load, under a policy in the terms of this one, to show that Cuba charters from Liverpool and back contain an express stipulation that the charterers shall have the option of a second port of loading. Matter of contract and usage or evidence of usage are quite different.

5. Correspondence between insurer and insured prior to the execution of the policy is inadmissible to vary the terms of the policy, but the court thought it proper to examine the letters.

6. Whether the policy was drawn in accordance with the contract disclosed by the letters is not a question for determination in a suit at law; it must be understood in this case in this form that all negotiations antecedent to the date of the policy were merged in the written instrument. The policy only authorized a voyage to a port of discharge in Cuba, and at and thence to port of advice.

[This was an action of assumpsit brought on a contract of marine insurance by George Hearn against the Equitable Safety Insurance Company.]

B. R. Curtis and Walter Curtis, for plaintiff.

Hutchins & Wheeler, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. 13 Stat. 501. Pursuant to that provision the parties in this case, as well as in the preceding one, filed a written stipulation submitting the controversy, both law and fact, to the determination of the court. It is an action of assumpsit on a policy of insurance, dated May 11, 1866, to recover the sum of four thousand dollars, insured "on charter of barque Maria Henry at and from Liverpool to a port of discharge in Cuba, and at and thence to port of advice and destination in Europe."

By a comparison of the terms of the policy in this case with the terms of the policy in the case just decided, it will be seen that the only difference between the two is rather in favor of the defendants in the present case, as the policy is, "to a port of discharge in Cuba, and at and thence to port of advice," while in the other the language of the policy is "to port in Cuba and at and thence to port of advice." Well expressed as the terms of the policy are, it is clear that by its true construction the policy protects the insured in a voyage from the port of loading to port of discharge in Cuba, and at and thence to port of advice, and it is equally clear that it cannot be held to give any further protection without adding words to the contract which it does not contain, as the intention of the parties is as plainly and unambiguously expressed as it can be by any form of expression which our language affords. Under that policy the vessel was only justified in going to her port of discharge in Cuba, and thence to Europe, and her homeward voyage was to commence at her port of discharge. Where the parties express their intention in clear and unambiguous language, courts of justice are bound by what the parties have written, and all the authorities which sustain the conclusion of the court in the preceding case are alike applicable in the construction of the policy in the present case. Evidence of usage in such a case cannot be admitted, as the terms of the contract are incapable of any other meaning than that which is plainly expressed by the language which the parties have employed. Different views were entertained by the plaintiff, and he offered in this case the same depositions to prove the alleged usage, that the vessel in such a voyage might go to a second port to load, as were offered in the preceding case, and they were admitted de bene, subject to the same conditions. Suffice it to say, as was remarked in the other case, the witnesses proved that in all Cuba charters from Liverpool and back, the express stipulation in the charter party is that the charterers shall have the option of a second port of loading. They show the fact to be that vessels in that trade do ordinarily have leave to use two ports, but the evidence does not show that they have that privilege by force of any usage. On the contrary, every witness who says anything upon the subject, or nearly every one, states that the privilege of the second port is conferred by virtue of the express terms of the charter party. Contract is one thing, but usage or evidence of usage is another, and a very different thing. Usage will not make a contract, nor is the evidence of it admissible to incorporate into a contract any right or privilege to either not conceded or secured by its terms. If examined with care it will be seen that the evidence does not prove that there is any usage that a vessel under a policy whose terms are to port of discharge in Cuba, and at and thence to port of advice in Europe, may go to a second port in Cuba to load.

Nothing of the kind is shown by the depositions offered in evidence, and without proof to that effect it cannot be pretended that the plaintiff can recover in this case. Correspondence between the parties which took place antecedent to the execution of the policy, was offered in evidence to show that the voyage intended to be covered by the policy was such an one as the plaintiff assumes is now covered by its terms. Although such evidence is inadmissible to enlarge or diminish the terms of a written instrument, still the court has thought it proper to examine the letters produced. They are brief and explicit, and it is impossible to

read them without being satisfied that the parties at that time contemplated the insurance of a charter from Europe to Cuba and back to Europe. Such certainly was the proposal made by the plaintiff in his letter of the 2d of May, 1866, and the defendants by their letter to the plaintiff of the 8th of May following, agreed to "write upon the charter of the barque Maria Henry as proposed by you from Europe to Cuba, and back to Europe" at the rate therein named. Such was the plain language of the first two letters, and the defendants in the same letter added, "It is worth something, you know, to cover the risk at port of loading in Cuba," and to that letter the plaintiff on the 9th of that month replied, "I accept of your proposition in reference to the insurance of the charter of the barque Maria Henry. Please insure four thousand dollars, three and a half on the charter valued at sixteen thousand dollars at and from Liverpool to Cuba and to Europe via a market port for orders, where to discharge," and without further correspondence, so far as appears, the present policy was executed. Whether the policy in the suit before the court is drawn in accordance with the contract of insurance is not at this time a question for consideration as in a suit at law; it must be understood that all the preliminary negotiations were merged in the written instrument, and of course such correspondence cannot be received to vary the contract as evidenced by the policy, and must be laid out of the case. Tested by the terms of the policy as it now reads, it only authorized a voyage to port of discharge in Cuba, and at and thence to port of advice, and under that contract the vessel was not justified in going to other ports in Cuba, as she might probably have done, if the policy had covered a voyage from Liverpool to Cuba and at and thence to port of advice. Judgment for the defendants.

[See Cases Nos. 6,300–6,302.]

Case No. 6,300.

HEARN v. EQUITABLE SAFETY INS. CO.

[4 Cliff. 192.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1872.[2]

COURTS OF EQUITY — POWER TO REFORM POLICY OF INSURANCE — SETTLED FORM OF CHARTER — UNDERWRITERS — REPRESENTATIONS — WARRANTIES.

1. Courts of equity possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses; but the power should be exercised with great caution, and only when the proof is entirely satisfactory.

2. Where an instrument is intended to carry into effect an agreement, whether in writing or by parol, but by mistake of the draftsman, either of law or fact, does not fulfil, or violates, the manifest intention of the parties, equity will correct the mistake so as to produce conformity of the instrument to the agreement.

3. When there is a settled form of charter in a particular trade, underwriters are bound to know the customary stipulations of a charter in that trade, and when informed by an applicant that the vessel is chartered in such trade, the contract of insurance must be considered to be made with the understanding that the charter is framed in the usual way, unless the correspondence leads to a different conclusion.

4. In their letter of acceptance of the proposed insurance, the underwriters said that it was worth something to cover the risk at the port of loading. *Held*, this implied that it was not to be the same as the port of discharge, and knowing that the outward cargo was coal, the underwriters were bound to know that charters for such voyages usually contained a stipulation allowing a second port for loading the return cargo.

5. Equity will reform a policy not containing such a permission when, as in this case, the antecedent correspondence of the parties showed that the complainant intended to secure such protection, and that the respondent knew such to be his understanding.

6. When the contract is agreed to, whatever it, by fair interpretation, includes, the underwriters are bound to insert in the policy, and if they omit to do so, the insured has a right to insist upon strict conformity to the original agreement.

7. A misrepresentation in insurance is a false representation of a material fact by one of the parties to the other, tending directly to induce such other to enter into the contract, or to do so on less favorable terms to himself, when without the misrepresentation such other party might not have entered into the contract at all, or done so on different terms.

8. Applicant's letters to the underwriters stated that the vessel would take, on her outward voyage, her register tonnage of coal, but she did carry more than that quantity. *Held*, not a material misrepresentation. 1. Because the letters, when properly construed, did not amount to a representation that the cargo did not exceed that amount. 2. Because the representation was not material to the risk, she was not overloaded, nor was the voyage prolonged or risk increased thereby. 3. Because the representation had no effect in determining the underwriters whether to insure or not.

9. Representations are collateral and incidental to the contract of insurance; warranties are stipulations forming part of it, and are construed as conditions.

10. Extraneous statements, not introduced into the policy, are regarded as collateral to the contract, unless expressly referred to in the same. If so referred to, they acquire the character of warranties.

11. When a provision was made in a policy to indemnify the respondents, if the cargo of coal exceeded the registered tonnage, and where it was clear that the insurers did not regard the applicant's statement, as to quantity, as founded on positive knowledge. *Held*, that the stipulation, "outward cargo of coal not to exceed registered tonnage," was not a material misrepresentation.

12. Policy reformed to agree with the correspondence of the parties.

[See note at end of case.]

Bill in equity to reform a policy of insurance. An action of assumpsit was first brought on the policy, and the case was heard and decided by Clifford, J. (Oct. Term, 1870 [Case No. 6,299]).

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 20 Wall. (87 U. S.) 494.]

Insurance on charter of barque Maria Henry was granted by the respondents on the 11th of May, 1866, in the sum of $4,000, "at and from Liverpool to a port of discharge in Cuba, and at and thence to port of advice and destination in Europe." When the application for the policy was made, the barque was at Liverpool, and it appears that she loaded at that port with a cargo of coal, and having been regularly cleared there, she proceeded thence, without difficulty, on her outward voyage to the port of St. Jago de Cuba, where she discharged her outward cargo, and, having accomplished that object, she sailed thence to Mansanilla, another port in Cuba, and there took on board a cargo of the products of the island; and on the 13th of September sailed thence for Europe, via Falmouth for orders, and on the 18th of the same month was totally lost, by perils of the sea, on her return voyage. Due notice of the loss which was admitted, was given to the respondents; but they refused to pay the amount insured, or any part of the same, upon the ground that the barque, without any justifying cause, departed from the prescribed course of the voyage as described in the policy mentioned in the bill of complaint. The refusal to pay was based solely upon the ground that the barque, after she discharged her outward cargo, went to a second port for a return cargo, and this court, in the suit at law founded upon the policy, was of the opinion that the plaintiff [George Hearn] could not recover, as the going to a second port to load was not authorized by the terms of the contract, and amounted to a deviation that, tested by the words of the policy, was certainly a departure from the regular and usual course of the voyage therein specified, and inasmuch as it was voluntary and without actual necessity, or any cause recognized by the law of insurance as reasonable, it must at law be regarded as a departure, and as an answer to any legal claim made by the plaintiff. The complainant was a part-owner and agent of the barque, and he alleged that the master of the barque, on the 5th of April, 1866, chartered her to one John Meek for a round voyage from the port of Liverpool to the island of Cuba, and thence to return to a market port in Europe for orders where to discharge; that a charter party to that effect was signed by the master, in which it was agreed that the barque should, in the course of the voyage, visit two ports in the island of Cuba; that being informed that the barque was so chartered, and that she would carry a cargo of coal on her outward voyage from Liverpool, he made application, by a letter bearing date May 2, 1866, to the corporation respondents, to insure the sum of $4,000 on the charter of the barque, valued at $16,000, provided the premium to be charged therefor by the company should not exceed three per cent., the voyage for which the charter was granted being described in the letter in the words following, to wit: "Voyage from Liverpool to Cuba and to Europe, via Falmouth for orders where to discharge," adding, "She will take her register tonnage of coal to Cuba." By that letter the respondents were requested to insure on the charter of the barque, and were informed that the voyage was from Liverpool to Cuba, and to Europe via Falmouth for orders where to discharge, and that she would take her register tonnage of coal to Cuba. The reply of the respondents, dated May 4, 1866, showed that they fully understood the nature of the application, as they said in their reply, "We cannot write the charter of barque Maria Henry at your rate, viz., three per cent., including coals from Liverpool to Cuba. Our rate will be four per cent. for the voyage, to include coals." On the 7th of the same month the plaintiff replied, repeating the statement that the barque would take her register tonnage of coal to Cuba, and insisting that the respondents, if they took the whole matter into consideration, ought to take the risk at three per cent., or at four per cent., and one and a half per cent. to be returned if no loss. Evidently the respondents reconsidered the matter, as they responded as follows, on the succeeding day: "We will write upon the charter of the barque as proposed by you, Europe to Cuba, and back to Europe, at three and a half per cent. net. It is worth something, you know, to cover risk at port of loading in Cuba," and concluded by saying, "We cannot take the risk at any lower figure." Distinct notice was given to the respondents, in the first letter of the plaintiff, that the subject of insurance was the charter of the barque, that the voyage was from Liverpool to Cuba, and to Europe, via Falmouth for orders where to discharge, and that the barque would take her register tonnage of coal to Cuba. Much stress was laid by the respondents upon the fact that the outward cargo was to be coal; because they said in their reply to the first letter of the plaintiff, "We cannot write the charter at three per cent., including coals from Liverpool to Cuba," adding, in conclusion, "Our rate will be four per cent. for the voyage, to include coals;" showing conclusively that, in their view, the rate ought to be higher because the vessel was to carry her register tonnage of coals. Evidence was introduced by the plaintiff, showing that charters for such a voyage almost invariably contain a stipulation, authorizing the vessel to go to a second port to load, and some of the witnesses, of great experience, testified that they never knew a charter in that trade which did not contain such a stipulation. Such a provision was in this charter, and the correspondence afforded clear evidence that both parties intended that the contract should embrace that risk as a part of the voyage.

Walter Curtis and B. R. Curtis, for complainant.

John C. Dodge, for respondents.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Courts of equity unquestionably possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses therein which are the subjects of special agreement; but the settled practice is that the power should be exercised with great caution, and only in cases where the proof is entirely satisfactory. Oliver v. Mutual Commercial Marine Ins. Co. [Case No. 10,498]. Where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either of fact or law, does not fulfil, or violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. Hunt v. Rousmanier, 1 Pet. [26 U. S.] 12. Underwriters are in general bound to know the course of the trade which they insure, and cannot resist a claim for loss, otherwise valid, upon the ground that they were ignorant of it, unless a contrary intention is expressed in the policy, or is to be implied from the language employed. Vallance v. Dewar, 1 Camp. 508; Noble v. Kennoway, 2 Doug. 513; 1 Duer, Ins. 196, 197.

Deviation is the defence in this case, as the evidence to establish the defence is that the barque, after she went to St. Jago de Cuba, and there discharged her outward cargo, proceeded thence to Mansanilla for her return cargo, before she sailed for Europe. Attempt was made by the plaintiff in the suit at law, to show that the usage of the trade justified the owners of the insured vessel in sending her to a second port for a return cargo, and that such an act did not constitute a deviation within the meaning of that term in the law of insurance. Nothing of the kind is expressed in the policy, and the court was unable to adopt the views of the plaintiff, for two reasons: 1. Because the testimony introduced did not prove the alleged usage. It showed that charters in that trade almost invariably contained authority to go to a second port to load; but it did not show that as between the insurer and the insured, the vessel possessed any such authority, unless it was expressed in the policy, or to be implied from the language employed. 2. Because the court was of the opinion that evidence of such a usage, even if proved, was not admissible to vary or enlarge the meaning of the language of the policy, as the language employed is clear and unambiguous. Called upon, as the court then was, to construe the language of the policy, the court was bound to give it its usual and ordinary signification; but the question presented in the present case is quite different, as it involves the construction of the correspondence which preceded the execution of the policy. Application was made for a policy upon the charter of the barque, and the underwriters were plainly notified what the voyage would be, and that the outward cargo would be coal. They must have known that the owner expected to discharge the outward cargo at the port of destination, and to have leave to visit a second port for a return cargo, as the evidence shows that such policies almost invariably contain a stipulation granting that privilege. Pursuant to that understanding, the complainant closed the correspondence in the following terms: "I accept your proposition in reference to the insurance of the charter of the barque. Please insure $4,000, at 3½ per cent., on the charter, valued at $16,000, at and from Liverpool to Cuba, and to Europe via a market port for orders where to discharge." Weighed in view of the circumstances, the court is of the opinion that the correspondence shows a concluded agreement, insuring the charter of the barque for the voyage mentioned in the charter party as described in the first letter of the complainant, during the passage of the vessel from Liverpool to the island of Cuba, and during her discharge and loading at the island, and from that island to her port of discharge in Europe. Unquestionably both parties contemplated that the barque would discharge her outward cargo, and take on board her return cargo, before she sailed for her ultimate destination; and in view of the correspondence and the attending circumstances, not a doubt is entertained by the court that both understood that the vessel might, if necessary, go to a second port for her return cargo. Where there is a settled form of charter in a particular trade, underwriters are bound to know the customary stipulations contained in a charter in that trade, and when informed by an applicant for a policy of insurance, that the vessel described in the application is chartered in that trade, it must be understood that the contract of insurance is made with the understanding that the charter is framed in the usual form, unless the correspondence tends to a different conclusion. Salvador v. Hopkins, 3 Burrows, 1707; Gregory v. Christie, 3 Doug. 419; Grant v. Paxton, 1 Taunt. 468; 1 Marsh. Ins. 184.

Protection at the port of loading was clearly within the contract, as the underwriters remind the plaintiff, in their second letter, that it is worth something to cover the risk at port of loading, which clearly implies that it may not be the port where the outward cargo should be discharged, as they knew that the outward cargo was coal, and were bound to know that charters for such a voyage usually contained a stipulation allowing a second port for loading the return cargo. Undoubtedly underwriters may refuse to grant that privilege, or the insured may voluntarily accept a policy which denies it, or does not contain it; but the correspondence

in this case satisfies the court that the respondents did not so refuse, and that the complainant intended to secure it, as the clear inference from the letters of both parties is, that the complainant expected that protection, and that the respondents knew that such was his understanding of the agreed terms for the policy. That equity will reform such a contract, where there is a mistake of such a character, whether it be termed a mistake of law or of fact, is beyond all doubt, as appears by numerous authorities in addition to those to which reference has already been made. Henkle v. Royal Exchange Assur. Co., 1 Ves. Sr. 317; Motteux v. London Assur. Co., 1 Atk. 545; Collett v. Morrison, 12 Eng. Law & Eq. 171; Andrews v. Essex Co. [Case No. 374].

When once the contract is agreed to, whatever that contract, by a just and reasonable interpretation, includes, the underwriters are bound to insert in the policy, and if they omit to do it, the insured has a right to insist upon a perfect conformity to the original proposition and agreement. Canedy v. Marcy, 13 Gray, 377; Gillespie v. Moon, 2 Johns. Ch. 596; Wake v. Harrop, 1 Hurl. & C. 202; Finlay v. Lynn, 6 Cranch [10 U. S.] 238.

Suppose that is so, still it is contended by the respondents that the complainant is not entitled to a decree, because they insist that the letters of the plaintiff contain a material misrepresentation. Reference is there made to the fact that the letters state that the vessel would take, as outward cargo, her register tonnage of coal, and to the conceded fact that she carried more than that quantity. Tested by that consideration, the respondents contend that the bill of complaint must be dismissed, even if the court is of the opinion that the contract of insurance, as made by the parties, is not correctly set out in the policy; but the court is of a different opinion, for several reasons: 1. Because the letters, when properly construed, do not amount to a representation that the cargo did not exceed the registered tonnage of the vessel. 2. Because the representation was not, in fact, material to the risk, as there is no pretence that she was overloaded, or that the excess had any effect to prolong the passage, or to increase the risk. 3. Because the representation did not have any effect to determine the underwriters to insure, or to regulate their estimate of the premium. A misrepresentation in insurance is a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on less favorable terms to himself, when otherwise he might not enter into the contract at all, or might demand terms more favorable. 1 Phil. Ins. § 529. No fact is to be deemed material unless there is just reason to believe that it either determined the underwriter to insure, or regulated his estimate of the premium. 2 Duer, Ins. 680. Representations differ materially from warranties in the law of insurance, as the former are regarded as collateral statements of facts incidental to the contract; but a warranty is a stipulation forming a part of the contract, and is construed as a condition. All statements in the policy itself are prima facie warranties, but extraneous statements are, in general, regarded as representations even when made formally in writing, or in answer to written or printed questions propounded by the insurers. Such statements, when not introduced into the policy, are ordinarily regarded as collateral to the contract, unless when expressly referred to in the policy as forming a part of the contract, when they acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer. Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co. [Case No. 4,277].

Representations may be material and of a character, if not true, to avoid the contract; but there can be no pretence, in this case, that the respondents were induced to execute this policy by the fact that the barque would carry only her registered tonnage, or that they would not have entered into the contract of insurance at all had they known that she would carry the cargo which she did carry and discharge in safety. Enough appears in their printed form of policies to negative every such inference, as the following clause is found in the margin of the policy: "To add for each passage, viz., one per cent. if loaded with more than registered tonnage of guano, coal, salt, nitrate of soda, iron, copper ore or slate, either, or in any combination." Provision is therefore made to indemnify the respondents in case the cargo of coal exceeds the registered tonnage. Responsive to that, it is insisted by the respondents that the representation was false; but the evidence does not support any such conclusion, and the letter of the respondents tends strongly to negative it and to show that the representation was treated by them as an immaterial and unascertained matter, as the respondents do not allude to the registered tonnage as a limit to the outward cargo. Doubtless they knew that the plaintiff could not control the matter, and that the master took no account of the quantity, as the coal out, under such a charter, earned no freight. Influenced by these considerations, the better opinion is that the respondents did not regard the statement as to quantity, as one founded upon positive knowledge, and consequently inserted the provision for one per cent. additional in case the coal carried exceeded the registered tonnage. Executed, as the policy was, in the usual and ordinary form of policies issued by this company, the court is of the opinion that the representation was not material, in their mode of conducting the business of insurance in that trade. Flinn v. Headlam, 9 Barn. & C. 693;

2 Duer, 682. In view of all the circumstances, the court is of the opinion that the policy must be reformed, as prayed in the bill of complaint, and that the complainant is entitled to a decree to that effect, and for his costs.

[NOTE. An appeal was then taken by the insurance company to the supreme court, where the decree was affirmed in an opinion by Mr. Justice Swayne, who said that "the clear terms of the preliminary agreement warranted the court below in overruling the departure from it found in the policy." 20 Wall. (87 U. S.) 494. See, also, Id. 488, and Cases Nos. 6,299, 6,301, and 6,302.]

Case No. 6,301.

HEARN v. NEW ENGLAND MUT. MARINE INS. CO.

[3 Cliff. 318.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

MARINE INSURANCE — DEVIATION IN VOYAGE — USAGE—EVIDENCE OF, TO VARY CONTRACT.

1. Policies of insurance are regarded as commercial instruments, and are liberally construed; but no evidence of any usage or custom can be admitted to vary or explain their terms when precise and clear.

2. The voyage was described in the policy as follows: "At and from Liverpool to port in Cuba, and at and thence to port of advice and discharge." *Held*, that "port" cannot be construed to mean "ports," or "port or ports," and the going to a second port in Cuba constituted a deviation.

3. Parol evidence as to the usage of trade is admissible relating to a written contract in two classes of cases: Where the evidence is offered to prove that the words used in the contract are employed in a peculiar sense in the particular trade to which the contract relates; where the purpose of the evidence is to annex incidents to the contract in matters upon which the contract is silent.

4. In the latter case, however, the peculiar meaning which it is proposed to attach to the words must not either expressly or by implication vary the terms of the written instrument.

5. Such evidence is admissible to define what would otherwise be indefinite and obscure, and always with a view to give expression to the presumed intention of the parties.

6. Under the policy in this case, parol evidence to the effect that it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo, was not admissible to avoid the effect of a deviation.

7. If admitted, it would extend the voyage and increase the risk beyond what the language employed warrants the court in believing the parties had in contemplation.

[This was an action of assumpsit by George Hearn against the New England Mutual Marine Insurance Company.]

B. R. Curtis and Walter Curtis, for plaintiff.

Hutchins & Wheeler, for defendant.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Policies of insurance against marine risks are liberally construed, as they are regarded as commercial instruments in the strictest sense. Such instruments, where their terms are ambiguous, may be explained by parol evidence of the usages of trade; but where the terms employed are clear and precise in themselves, the principles which govern their construction do not vary from those which are applicable to other mercantile instruments, and no evidence of any usage or custom can be admitted to explain, alter, or impair the terms of the contract as made by the parties. Oelricks v. Ford, 23 How. [64 U. S.] 63; Bliven v. Screw Co., Id. 431; 1 Arn. Ins. (2d Am. Ed.) 64.

Insurance was effected in this case at Boston on the 9th of May, 1866, in the sum of five thousand dollars "on charter of the barque Maria Henry, at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge in Europe." When the application for the policy was made, the barque was at Liverpool, and it appears that she loaded at that port with a cargo of coal, and, having been regularly cleared from that port, proceeded thence without difficulty on her outward voyage to the port of St. Jago de Cuba, where she discharged her outward cargo, and that, having discharged her outward cargo, she sailed thence to Mansanilla, another port in Cuba, and there took on board a cargo of the products of the island, and on the 13th of September sailed thence for Europe via Falmouth for orders, and on the 18th of the same month was totally lost on her homeward voyage by perils of the sea. Due notice of the loss was given to the defendants, and the loss is admitted as alleged, but the defendants refused to pay the amount insured, or any part of the same, upon the ground that the barque, without any justifying cause, departed from the prescribed course of the voyage as described in the policy on which the action is founded. Reference was made in that proposition to the fact that the vessel, after she went to St. Jago de Cuba and there discharged her outward cargo, proceeded thence to Mansanilla for a return cargo before she sailed for Europe; but the plaintiff contended that going to a second port in Cuba did not constitute a deviation, as it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo. Nothing of the kind is expressed in the policy of insurance, if the words are to be taken in their ordinary signification; but the theory of the plaintiff is that such is the usage of the trade, and he insisted that parol evidence of such usage was admissible, and that the language of the policy should, in view of that evidence, be construed as conferring that right. Deviation

in marine insurance is understood to mean a voluntary departure without necessity or reasonable cause from the regular and usual course of the specified voyage insured, which in this case was to port in Cuba, and at and thence to port of advice and discharge, as plainly and explicitly expressed in the policy. Whenever a deviation of that kind takes place, the voyage is determined and the underwriters are discharged from any responsibility. Park, Ins. 294; Elliot v. Wilson, 4 Brown, Parl. Cas. 470.

Different language is sometimes employed, as where the voyage is described as one from the port of departure to Cuba or to the island of Cuba, but the terms of the policy in the case before the court are "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge," showing a contract complete in itself, and one expressed in plain, clear, and unambiguous language, employing no terms of art nor any word or phrase of doubtful meaning. Unambiguous as the language is, the court cannot impute to the parties any other intention than that which they have expressed, as the court must do, to hold that port means ports, or port or ports, or to a port of discharge, and also to a second port for a return cargo and at and thence "to port of advice and discharge." Precisely the same question was presented in the case of Brown v. Tayleur, 4 Adol. & E. 241, and the court held that the word "port" in such a policy could not be construed to mean "ports," nor "port or ports," and that the going to a second port in such a case constituted a deviation, the judges giving their opinions seriatim, and all concurring in the conclusion. Sea Ins. Co. v. Gavin, 4 Bligh (N. S.) 578, 2 Dow & C. 125. Evidence of usage, such as the plaintiff assumes in argument that he has offered in this case, if admissible for any legitimate purpose, must be expected to have the effect, and, if fully believed, ought to have the effect, to induce the court to decide that a policy of insurance covering a voyage to a single port in Cuba may be construed, and if the evidence of such usage is full to the point, must be construed, to cover not only that voyage, but also a voyage to a second port for a return cargo, even though it be necessary in order to accomplish the purpose, to make a coasting voyage to the opposite side of that large and highly commercial island. Suppose, for example, the master in this case had gone to Matanzas, on the north side of the island, as his port of discharge, he might, under the theory of the plaintiff, have afterwards gone to Trinidad for a return cargo, which is on the southern side of the island. Every policy of insurance, if properly drawn, describes the place of the ship's departure, and also the place of destination, and the reason why a deviation discharges the underwriter is, that if the voyage is changed after the ship sails, the voyage becomes a different one, and not that against which the insurer has undertaken to indemnify. But in the case supposed, the insurer would be held responsible for a voyage from Matanzas to Trinidad, though no such voyage is mentioned in the policy.

Custom or usage is sometimes supposed to be admissible to show that the parties to a written instrument had something in their contemplation more than is expressed in what they have reduced to writing; but Lord Denman well said, in the case of Trueman v. Loder, 11 Adol. & E. 589, that the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract. Extrinsic evidence of custom and usage is doubtless admissible in certain cases, where the transaction is of a commercial character, to annex incidents to written contracts in respect to which the contracts are silent, but such evidence cannot be properly received if it is inconsistent with the terms of the written instrument, whether such inconsistency appears by the express terms of the written contract or by reasonable implication from the same as applied to the subject-matter. Hutton v. Warren, 1 Mees. & W. 475; 1 Smith, Lead. Cas. 387. Apply that rule, and it is clear that evidence of usage, if offered to show that the barque might go to one port to discharge and to a second for a return cargo, ought not to be admitted, as it is plainly inconsistent with the written contract, which is to port and at and thence to the return port.

Few cases are to be found where the rule under consideration is better stated and explained than in the case of Spartali v. Benecke, 10 C. B. 222, in which the opinion is delivered by the chief justice of the common pleas. He admits that evidence as to the usages of trade is admissible in two classes of cases: (1) Where the evidence is offered to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from what they ordinarily import. (2) That the evidence is also admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but he remarks, what it is important to observe, that both these rules are subject to the limitation or qualification that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract must not vary or contradict either expressly or by implication the terms of the written instrument. Such evidence is admitted for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what is obscure, or to ascertain what is equivocal, or to annex particulars and incidents which, though not mentioned in the contract, were connected with it, or with the relations growing out of the same; but in all these cases the evidence is admitted with a view of giving effect as far as can be done

to the presumed intention of the parties. Humfrey v. Dale, 7 El. & Bl. 273; Myers v. Sarl, 3 El. & El. 318.

Proof of usage may be admitted to explain a word, term, or phrase of doubtful or equivocal meaning, but it cannot be admitted to add to a word of a known and certain signification a meaning beyond what it plainly imports for the purpose of adding a new and different obligation to a written contract. Phillipps v. Briard, 1 Hurl. & N. 25. Usage may be relied on, says Lord Campbell, in the case of Hall v. Janson, 4 El. & Bl. 510, to show the sense in which an expression found in a written contract is used in a particular trade, but to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been made. Commercial usage, said Judge Story, in the case of The Reeside [Case No. 11,657], can never be resorted to, to control or vary the positive stipulations in a written contract, and a fortiori not to contradict them. An express contract of the parties, he held, was always admissible to supersede, vary, or control a usage or custom, but he denied in the most explicit terms that a written contract could be controlled, varied, or contradicted by a usage or custom. Three decisions of the supreme court, delivered within the last twelve years, affirm the same rule. Bliven v. Screw Co., 23 How. [64 U. S.] 431; Insurance Co. v. Wright, 1 Wall. [68 U. S.] 470. "When we have satisfied ourselves," said Mr. Justice Miller, in the last case cited, "that the policy is susceptible of a reasonable construction on its face without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." 2 Greenl. Ev. § 251. Omission (in a contract), say the court, in the case of Thompson v. Riggs, 5 Wall. [72 U. S.] 679, may be supplied in some cases by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract, usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure.

Decided cases also of high authority and of recent date from the reported decisions of the state courts may be referred to, in which it is held that the clear and explicit language of a contract, mercantile or otherwise, cannot be enlarged or restricted by proof of usage or custom. Strong doubts are expressed by the court in the case of Seccomb v. Provincial Ins. Co., 10 Allen, 314, whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage in a policy which is susceptible of a clear and definite exposition in conformity to the interpretation of the words as established by adjudicated cases, has another and different meaning by mercantile usage from that which has been so recognized and settled. Mercantile usage, say the court in that case, in order to be received as explanatory or in aid of the exposition of a policy of insurance, must not on the one hand tend to increase materially the risk assumed by the insurers, nor on the other hand to deprive the assured of the indemnity which the words of the contract fairly interpreted secure to him in case of loss. Examined in the light of these rules, as given substantially in the case last cited, the court is of the opinion that the usage relied on by the plaintiff, if the evidence offered showed that it exists as he supposes, would not be admissible to avoid the effect of the deviation, as, if admitted, it would enlarge the voyage insured as described in the policy, and would materially increase the risk cast upon the underwriters beyond what the language employed warrants the court in believing they had in contemplation when the contract was executed. Dickinson v. Gay, 7 Allen, 36; Hone v. Mutual Safety Ins. Co., 1 Sandf. 149.

Authorities to show that evidence, even of general usage, is never admissible to contradict the settled rules of law cannot be necessary, as they are all one way from the earliest period to the present time; and that remark is just as applicable to a commercial contract as to one where the construction of the instrument is governed by the principles of the common law. Rankin v. American Ins. Co., 1 Hall, 619; 2 Pars. Mar. Law, 58; 1 Duer, Ins. 177–233; Edie v. East India Co., 2 Burrows, 1216; Homer v. Dorr, 10 Mass. 26; Frith v. Barker, 2 Johns. 327. Parol evidence of usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain. Blackett v. Assurance Co., 2 Cromp. & J. 249; Cox v. Heisley, 19 Pa. St. 247. Incidental matters, it is said, may be supplied by usage where the policy is silent, but the policy in this case is not silent as to the matter in question, as the description of the voyage is plain and unambiguous,—on charter at and from Liverpool to port in Cuba, and at and thence to port of advice. Vandervoort v. Smith, 2 Caines, 160; 1 Pars. Shipp. & Adm. 83; 2 Phil. Ev. (Ed. 1859) 789; Steward v. Scudder, 24 N. J. Law, 96; Foley v. Mason, 6 Md. 37. Where the contract is clear, certain, and distinct, it is not subject to modification by proof of custom. Such a contract disposes of all customs and usages by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined. Simmons v. Law, *42 N. Y. 219; Westcott v. Thompson, 18 N. Y. 367.

Certain cases are cited by the plaintiff, which, it is suggested, support the opposite theory, but when carefully examined it will

be found that they do not have any such tendency. Warre v. Miller, 4 Barn. & C. 538; Cruickshank v. Janson, 2 Taunt. 301; Dickey v. Ins. Co., 7 Cranch [11 U. S.] 327. At and from Grenada to London was the description of the voyage in the first case, and at and from Jamaica in the second, and at and from Trinidad in the case decided in the supreme court. Evidence was introduced in the first case showing that there was but one custom-house for the whole island of Grenada, and inasmuch as the voyage insured was at and from Grenada and not at and from a port in Grenada, the court decided that the island must be considered as all one place, and that there was no deviation, although the vessel went to three places to discharge. Nothing different is asserted in the second case, and in the third the court decided that where the voyage as described in the policy is "at and from an island," the vessel may sail from port to port to take in cargo, but the decision has no application to the case at bar, as the voyage described in this case is to port in Cuba and at and thence to port of advice, which shows that the two cases are in no respect analogous. Underwriters are presumed to be acquainted with the course of the trade they insure and with its peculiarities, and the court decided, in the case of Noble v. Kennoway, 2 Doug. 510, that in that trade, which was the Labrador trade, greater delay in landing the cargo was customary than would be justifiable in most other adventures, but it is not perceived that the case has much bearing upon the question under consideration. Vallance v. Dewar, 1 Camp. 503. Undoubtedly, evidence of usage was also admitted to explain the terms of the contract in the case of Salvador v. Hopkins, 3 Burrows, 1707, as suggested by the plaintiff, but the motion for new trial was overruled and the decision of the court placed expressly upon the ground that the evidence offered and admitted was not repugnant to the contract. Other cases of an analogous character are also referred to, where evidence of usage was admitted to explain some ambiguous phrase in the terms of the contract to which the same answer may be given, that the evidence admitted did not contradict what was in writing. Uhde v. Walters, 3 Camp. 16; Hyde v. Willis, Id. 202. Such evidence was also admitted in the case of Gracie v. Marine Ins. Co., 8 Cranch [12 U. S.] 75, to show the boundaries and extent of a commercial port named in the policy as the port of destination, and it is quite clear that the ruling was correct, as the evidence tended to explain and not to contradict the terms of the policy, and a like ruling is found in the case of Lowry v. Russell, 8 Pick. 362, where the court overruled the objection to the evidence expressly upon the ground that it did not contradict the terms of the bill of lading. Reliance is also placed upon the case of Bulkley v. Protection Ins. Co. [Case No. 2,118]; but the case was decided wholly irrespective of any such question, as the evidence introduced failed to show that there was any such usage as the plaintiff supposed. The policy in that case described the voyage as from Ocrocoke to St. Bartholomew or St. Thomas, and at and from thence to Tobasco, and the court, and rightly, held that it did not authorize the assured to go to both ports, that he might go to either at his election, and that, having first stopped at the island of St. Bartholomew and afterwards proceeded to St. Thomas, it was a deviation. "That the policy only covers a voyage to one or the other of those islands," said the judge, "cannot admit of a doubt," and if the sentence stopped there the case would be consistent with the recent decision of the supreme court, and all the other modern decisions upon the subject, but he adds, in continuation of the same sentence, "unless justified by usage," leaving it to be inferred that his opinion was that the evidence of usage would be admissible to incorporate a different meaning into the contract. But he could hardly have intended what the words imply, as in the next sentence he says that "it was at the election of the assured to go to either, to the one or the other, but the language of the policy is too plain and explicit to admit of a construction that it authorized a voyage to both," in which latter view we entirely concur.

Support to the views of the plaintiff cannot be derived from the case of De Peyster v. Sun Mutual Ins. Co., 19 N. Y. 276, as the court held, irrespective of usage, that the three additional ports allowed by the addition made to the policy, included ports on the main, and referred to ports to be touched before finally leaving the main for the return voyage. Viewed in the most favorable light for the plaintiff, the court only allowed the evidence of usage to be received as explanatory of what was doubtful and not as contradicting any part of the contract.

Submitted as the case was under the act of congress, which authorizes parties to waive a jury by stipulation in writing, the court will proceed to a brief examination of the evidence of usage offered by the plaintiff, and admitted de bene by the court. Vessels frequently go to a second port, as the evidence offered shows, for their return cargo, but it is equally well established by the same depositions that they always do so under an express stipulation in the charter-party so to do, if required by the charterer, and not because any usage exists obliging them to go to a second port in cases where there is no stipulation to that effect. Evidence to support that theory of fact is found in the charter before the court, as it provides that the vessel "shall proceed to a safe port in Cuba for orders (Havana excepted), and there discharge the same (meaning the cargo), after which shall there[and/or] at one other usual place in the island, load," etc. Had that lan-

guage been incorporated into the policy of insurance, the question would be one of easy solution, but the charter-party is a contract between the owners of the vessel and the charterer, and is not in any aspect of the case to be regarded as the contract between the insurers and the insured. They have made their own contract, and the court, in ascertaining what their rights are under it, must look at its terms. Such a policy of insurance may be made to cover the whole voyage or a part of it, as the parties find it for their interest to contract. Insurance to port in Cuba and at and thence to port of advice might have been all that the insured desired, as he might know that his vessel would load at port of discharge, and in that state of the case he might not be willing to pay the additional premium for the risk of insuring the voyage to a second port. Conjectures, however, are unnecessary, as the conclusive answer to the theory of the plaintiff is that he did not contract with the insurers for the privilege to go to a second port, and the evidence which he offered upon the subject of usage does not show the existence of any such usage as he supposes. The deponents testify that vessels almost always go to a second port, but all the witnesses, or nearly all of them, agree that they do so by virtue of an express stipulation in the charter-party requiring them to do so, if the charterer so directs. They do not show that there is any usage which warrants a vessel in going to a second port under a policy of insurance, where its terms are from Liverpool to port in Cuba and at and thence to port of advice. Instead of that, most of the witnesses who testify in answer to such an inquiry express most decided opinions that under such a policy the vessel would be restricted to the port of discharge.

[A bill in equity to reform the said policy was dismissed in Case No. 6,302. A similar action by the same plaintiff against another company will be found in Cases Nos. 6,299 and 6,300.]

Case No. 6,302.

HEARN v. NEW ENGLAND MUT. MARINE INS. CO.

[4 Cliff. 200.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1872.[2]

MARINE INSURANCE—DEVIATION IN VOYAGE—EVIDENCE OF USAGE.

1. In reply to complainant's application for insurance, not to cost over four per cent, on a vessel carrying coal to Cuba, and return to Europe, the underwriters replied, "As requested, we have entered $5,000 on the charter of the barque Maria Henry, Liverpool to port in Cuba, and thence to port of advice and discharge in Europe, at four per cent," and did write such a policy in the same terms. *Held*, that these words did not authorize the insured to go to a second port in Cuba for a return cargo.

[See note at end of case.]

2. Under the pleadings in this case, that evidence of a usage at Liverpool for vessels chartered at that port for a round voyage to Cuba and return to Europe, carrying outward coal, and bringing a return cargo; to visit two ports in Cuba, could not be admitted to affix such an interpretation to the policy.

[See note at end of case.]

This was a bill in equity [by George Hearn], to reform a policy of insurance. A prior action of assumpsit was brought on the policy, in which judgment was entered for the defendants. [Case No. 6,301.]

Walter Curtis and B. R. Curtis, for complainant.

H. C. Hutchins, for respondents.

CLIFFORD, Circuit Justice. Equity will reform a policy of insurance if it does not, when drawn and received, correctly express a previously concluded agreement for insurance, which it was designed by both parties should have been expressed in the instrument; but the power will only be exercised with great caution, and upon such proof as is entirely satisfactory. Application for insurance was made by the complainant to the respondents on the 7th of May, 1866, in which communication he stated, among other things, that the barque Maria Henry was chartered to go from Liverpool to Cuba, and load for Europe, via Falmouth for orders where to discharge, and requested the respondents to insure $5,000 on the charter, valued at $16,000, provided they would not charge over four per cent premium. In the same communication the complainant also stated, "I think the vessel sailed from Liverpool, April 22, for Cuba, with her registered tonnage of coal on board." Whatever prior contract was made between the parties was consummated by the respondents in their reply to the communication from the complainant, which bears date two days later than the communication from the complainant, in which they say, "Your favor of the 7th is at hand, and, as requested, we have entered $5,000 on the charter of barque Maria Henry, Liverpool to port in Cuba, and thence to port of advice and discharge in Europe, at four per cent." What they represented that they had done they did, in fact, do, as appears by the words of the policy, which are, "$5,000 on charter of the barque Maria Henry, at and from Liverpool to a port in Cuba, and at and thence to port of advice and discharge in Europe." They stated not only that they had done as requested, but they stated what they had done, and gave the terms in which they had expressed the contract in the policy. Argument to show that those words did not authorize the insured to go to a second port for a return cargo is unnecessary, as that proposition is fully established by the opinion given in the suit at law, to which reference is made to support that conclusion. Complainant alleges that at the time of

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 20 Wall. (87 U. S.) 488.]

issuing the policy, there existed a general and uniform usage at the port of Liverpool, that all vessels chartered at that port for a round voyage from that port to the island of Cuba, and thence to return to Europe, carrying coal as their outward cargo to Cuba, and bringing a return cargo thence to Europe, should visit two ports in said island, that is, one for the purpose of discharging the outward cargo and a second for the purpose of shipping a return cargo, and he avers that, in applying for insurance in this case, it was his intention to obtain insurance upon the charter of the barque for such a voyage as is usually performed by vessels chartered at Liverpool for such a round voyage, carrying coal for an outward cargo, and that the respondents were fully informed that such was his purpose, and of the nature of the voyage, and that they agreed to insure the charter for such a voyage. On the other hand, the respondents, in their answer, deny the existence of any such usage, and allege that they did insure $5,000 on the charter of said barque from Liverpool to port in Cuba, and thence to port of advice and discharge in Europe, at a premium of four per cent, and so informed the complainant by letter. They also state that they replied to the letter of the complainant, stating in positive, clear, and unambiguous language precisely for what voyage the respondents agreed to insure the charter of the barque, and that they thereafter, in their due and regular course of business, made out a policy of insurance and delivered the same to the complainant, in exact accordance with the statement in their letter to him, and exactly in tenor and effect in accordance with what they had agreed to do.

None of those statements of the answer can be denied if the language of the correspondence between the parties be taken in its ordinary signification; but the complainant contends that his letter, if interpreted as the underwriters were bound to interpret it, asked for a policy permitting the use of two ports in Cuba; but the answer to that proposition is, that the language of the policy is the same as the language of the complainant's letter, and the court decided, in the suit at law, that evidence of usage was not admissible to affix such a meaning to that language, and the court adheres to that opinion. Hearn v. New England Mut. Marine Ins. Co. [Case No. 6,301]; Hearn v. Equitable Safety Ins. Co. [Id. 6,299]. Viewed in any light, the court is of the opinion that the complainant fails to show that the respondents agreed to give him any other policy than the one which they executed and delivered to him, and, in respect to that, the court has already decided that it does not give him any such right. Bill of complaint dismissed.

[NOTE. Cases Nos. 6,299 and 6,300 were actions by the same plaintiff against another company, and involved the same points as in this case and Case No. 6,301.

[From the decree in this case dismissing the bill the complainant appealed to the supreme court, where, in an opinion by Mr. Justice Swayne, the decree was affirmed. 20 Wall. (87 U. S.) 488. It was held there was no misapprehension on either side as to the terms of the contract. Only where the minds of the parties have not met is there no contract. "Usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract." In a case of deviation the law annuls the contract as to the future, and forfeits the premium to the underwriter.]

Case No. 6,303.

HEARNE v. BARRY.

[3 Cranch, C. C. 168.] [1]

Circuit Court, District of Columbia. May Term, 1827.

REAL ESTATE — SALE UNDER DECREE OF COURT — FAILURE TO PAY PURCHASE-MONEY — RESALE.

If the purchaser of lots at a sale under a decree of this court, neglects to pay the purchase-money, and suffers them to be sold for taxes, the court will, upon the petition of the trustee, order so much of the property to be resold, as will pay the taxes and redeem the residue.

Robert Barry had become the purchaser of certain lots in Washington, under a decree of the court in this cause, but had not paid the purchase-money, and had permitted the lots to be sold for taxes, and to be bought in by his son, for a very small price. The time for redeeming them will expire on the 15th of June next. Griffith Coombe, the trustee appointed by this court to make the sale, petitioned the court to order so much of the property to be resold, as would be sufficient to redeem the residue under the corporation laws; and obtained a rule to show cause, &c., which was served upon Mr. Barry and his son.

Mr. Worthington and Mr. Coxe, for the Barrys, contended that this court has no power to order a resale. That Robert Barry, Junior, (the son) the purchaser at the tax-sale, is not a party to this suit, and his right as a purchaser cannot be affected. How could a purchaser under such a resale, maintain ejectment? This court has refused to order a purchaser under its decree, to complete his purchase, so as to bring him into contempt.

Mr. Jones, contrà. This court will not assist a forfeiture. The sale will not affect the inchoate right of R. B., Jun. The purchaser will take it subject to his right, at the tax-sale. The court always retains the right of resale if the purchase-money be not paid. The court will not suffer the real security to be lost, if the loss can be prevented.

Mr. Coxe cited the case of Oats et al. v. Ladd [unreported].

THE COURT ordered a resale of so much as would redeem the residue.

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

Case No. 6,304.

In re HEATH et al.

[7 N. B. R. 448.] [1]

District Court, S. D. New York. 1873.

BANKRUPTCY—DISCHARGE—EXAMINATION.

The fact that the bankrupt has received his discharge more than two years ago is not a good objection to his being examined in accordance to the requirements of section 26 of the bankrupt act [of 1867 (14 Stat. 529)].

[Cited in Re Dole, Case No. 3,965.]

[In bankruptcy. In the matter of Heath and Hughes.]

By the Register:

I, Henry Wilder Allen, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the proceedings and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. H. S. Pennett, who appeared for Mr. Hughes, the bankrupt, and Mr. Thomas M. North, who appeared for the assignee in bankruptcy.

On the application of said assignee an order was duly obtained and served on the 25th day of January, 1872, requiring the said bankrupt to attend before me on the 29th day of January, 1872, to submit to the examination required by the twenty-sixth section of the bankrupt act of March 2d, 1867. The bankrupt, by advice of counsel, declined to be examined under said order on the ground that he had obtained his discharge in bankruptcy more than two years ago, and the said parties requested that the same should be certified to the judge for his opinion thereon.

BLATCHFORD, District Judge. I do not think that the fact that the bankrupt has been discharged is a good objection against his being examined at all under the order in question.

Case No. 6,305.

HEATH v. AUSTIN.

[12 Blatchf. 320.] [2]

Circuit Court, S. D. New York. Sept. 11, 1874.

REMOVAL OF CAUSES—CITIZENSHIP—BURDEN OF PROOF.

A defendant in a suit brought in a state court of New York removed the suit into this court, on the ground that, being a citizen of Connecticut, he had been sued by a citizen of New York. The plaintiff moved to remand the cause to the state court, on the ground that the defendant was not, in fact, a citizen of Connecticut: *Held*, that, on the question of such citizenship of the defendant, the affirmative was with the defendant; that, where he was a permanent resident and citizen of Connecticut down to a period shortly prior to the commencement of the suit, the presumption was, that such permanent residence and citizenship continued, until it was shown to be changed; that, where the cause was removed on the defendant's oath as to the jurisdictional fact of such residence and citizenship, it was not enough for the plaintiff to raise a doubt in the question; and that, the proceedings for removal being regular, and the question raised by the plaintiff being fairly disputed, it was not a proper practice to remand the cause on motion.

[Cited in Mackaye v. Mallory, 6 Fed. 751; Filer v. Levy, 17 Fed. 610.]

[This was a suit by Eugene A. Heath against Theodore P. Austin. The suit was originally brought in a court of the state of New York, and was removed to this court by the defendant, Theodore P. Austin. Plaintiff moves to remand.]

Isaiah T. Williams and Royal S. Crane, for plaintiff.

Elihu Root, for defendant.

BLATCHFORD, District Judge. The motion of the plaintiff to remand this cause to the state court must be denied.

(1.) On the question as to whether, at the time this suit was commenced in the state court, the defendant was a resident of Connecticut in such sense as to make him a citizen of that state, the affirmative is with the defendant, as essential to the right to remove the cause, and to the jurisdiction of this court. On the evidence presented, the defendant has successfully maintained such affirmative. It is undisputed that he was a permanent resident and citizen of Connecticut down to a period shortly prior to the commencement of this suit. The presumption is, in such a case, that such permanent residence and citizenship continues, until it is shown to be changed. There is no satisfactory evidence to show a permanent change of residence by the defendant, animo manendi.

(2.) The cause was regularly removed into this court, on the defendant's oath as to the jurisdictional fact of residence and citizenship in Connecticut. At most, the plaintiff raises a doubt only, on that question. In such a case, the jurisdiction is to be maintained, as the act of congress makes such oath prima facie evidence of the jurisdictional fact.

(3.) Being regular in his proceedings for removal, the defendant, on this motion, fairly disputes the claim that he was not, when the suit was commenced, a resident and citizen of Connecticut. In such case it is not a proper practice to remand the cause on motion. Dennistoun v. Draper [Case No. 3,804]; Galvin v. Boutwell [Id. 5,207].

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

Case No. 6,306.

HEATH et al. v. ERIE RY. CO. et al.

[8 Blatchf. 347.] [1]

Circuit Court, S. D. New York. April 27, 1871.

PRIVATE CORPORATION—RIGHTS OF STOCKHOLDER—ISSUANCE OF SHARES—ULTRA VIRES—DEMURRER TO BILL—PARTIES—AMENDMENT.

1. The cases reviewed, on the question as to when a stockholder in a private corporation will be allowed to file a bill in his own name, on behalf of himself and all others standing in the same situation, making the corporation a party defendant, to compel the ministerial officers of the corporation to account for breach of official duty or misapplication of corporate funds.

[Cited in Hardon v. Newton, Case No. 6,054; Ranger v. Champion Cotton-Press Co., 52 Fed. 615.]

[Cited in Bulkley v. Big Muddy Iron Co., 77 Mo. 106; Brinckerhoff v. Bostwick, 88 N. Y. 56, 60; Byers v. Rollins, 13 Colo. 22, 21 Pac. 896.]

2. Where the bill sets out acts ultra vires, in issuing shares of stock, and breaches of trust, which are frauds on the stockholders, inasmuch as such acts and breaches of trust are beyond the power of the corporation to affirm or sanction, it is not necessary that the stockholder should aver that he has applied to the corporation or its board of directors to bring the suit, and that they have refused.

[Cited in U. S. v. Union Pac. R. Co., Case No. 16,598.]

3. If a demurrer to a bill in equity covers the whole bill, when it is good to a part only, it will be overruled.

4. Where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit, the suit may be brought by the stockholder, without showing such request and refusal.

5. A person not a stockholder cannot be joined as plaintiff, in such a bill, with persons who are stockholders, and, if the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill.

[Cited in Brown v. Duluth, M. & N. Ry. Co., 53 Fed. 894.]

6. A person who has no shares standing in his name on the books of the corporation, is not a stockholder, although he holds certificates of stock issued to other persons by the corporation, with powers of attorney authorizing the transfer of such shares to him, executed by the persons in whose names the shares stand registered on the books of the corporation, and although the corporation has, on demand, wrongfully refused to allow such transfer to be made to him.

7. If several trustees are all of them implicated in a common breach of trust, for which the cestui que trust seeks relief in equity, he may bring his suit against all of them, or against any of them separately, at his election, the tort being treated as several as well as joint.

[Cited in Trustees of Mutual Building Fund v. Bosseiux, 3 Fed. 836; Boyd v. Gill, 19 Fed. 146; Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 582; Wall v. Thomas, 41 Fed. 621.]

8. The same doctrine applies to any wrongdoer who is confederated with a fraudulent trustee.

9. A general demurrer to the whole of a bill cannot be sustained as a demurrer to relief prayed in respect of persons who are not made parties to the bill.

10. It is not necessary that the directors of the corporation should be made parties to the bill, although the bill prays for an injunction against the corporation, and for a receiver of the corporation, if no relief is asked as against such directors.

11. If the plaintiff waives an answer on oath, the defendant has a right to answer on oath, notwithstanding such waiver, and the tender of the waiver is no ground of demurrer to the bill. If the tender is not accepted, the defendant is still bound to answer the bill, either without oath or on oath.

[Cited in Amory v. Lawrence, Case No. 336.]

12. The bill, in this case, was allowed to be amended by striking out the name of a person improperly joined as plaintiff.

In equity. This case came up on four separate demurrers to the whole bill, by the four several defendants, the Erie Railway Company, Jay Gould, James Fisk, Junior, and Frederick A. Lane, who were the only defendants in the suit. The bill was sworn to on the 8th of April, 1870, and filed on the same day. It was brought by eight persons [John Benjamin Heath and others] as plaintiffs, all of whom were aliens and British subjects. Six of the eight plaintiffs were the owners of shares of what was known as the common capital stock of the defendants, the Erie Railway Company, which was a corporation created under the laws of the state of New York, and which shares stood in their names on the books of the company. One of the eight plaintiffs was the owner of shares of what was known as the preferred capital stock of the company, and which shares stood in his name on the books of the company. The remaining plaintiff, Burt, was alleged to be the owner and holder of shares of the preferred capital stock of the company, for which he held certificates issued by the company, but not to him, and a power of attorney, authorizing the transfer of the shares to him, executed by the persons in whose names such shares stood registered on the books of the company. It was also alleged that he was entitled to have such shares standing in his name on the books of the company, but that he had been prevented therefrom by the wrongful refusal of the company to allow such transfer to be made to him, upon his demand duly made therefor.

The bill was very voluminous. Its allegations were, in substance, as follows:

(1.) The company owns and operates a railroad extending from Dunkirk and likewise from Buffalo, on Lake Erie, to Piermont and Newburgh, on the Hudson river, twenty-six miles of the route being through the state of Pennsylvania, and the rest through the state of New York, and also controls and operates a line of railroad, extending from its main line to Jersey City, with a ferry connection to the city of New York.

(2.) On the 31st of December, 1865, the capital stock of the company consisted of $8,535,-

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

700, of preferred stock, and $16,570,100, of common stock, being a total of $25,105,800, in shares of $100 each, the preferred stock being entitled, in preference over the common stock, to dividends up to the rate of seven per cent. per annum, payable semi-annually out of the net savings of the railroad during the current year, after the payment of mortgage interest.

(3.) At the election for directors of the company, seventeen in number, in October, 1867, the defendants Gould, Fisk and Lane, and one John S. Eldridge, were the chief movers in a combination which resulted in the election as directors of themselves and five new directors and eight old directors, Lane having been a director during the previous year, and Gould, Fisk and Eldridge being also new directors. The directors so elected, other than Gould, Fisk, Lane and Eldridge, were Henry Thompson, Levi Underwood, Josiah Bardwell, Eben D. Jordan, James S. Whitney, William Evans, Alexander S. Diven, J. C. Bancroft Davis, Homer Ramsdell, Dudley S. Gregory, William B. Skidmore, Frank Work and George M. Groves.

(4.) This election was accomplished chiefly or entirely by illegitimate means, namely, by the purchase of proxies for voting, and by borrowing or purchasing and holding, for the briefest possible period, shares of stock, in order that the same might stand in the names of some of the parties acting in concert with them, or whose proxies they could obtain on the day of closing the transfer books preparatory to the election, the plan being to obtain control of the company without any real proprietorship in any considerable portion of its stock, in order that such control might be made subservient to the private gain of the majority of the board, consisting of the new members and Lane, without regard to the interests of the company, or the equitable rights of its real shareholders.

(5.) The chief immediate object in obtaining control of the company at the time, was to commit it to engagements in aid of the building of the Boston, Hartford and Erie Railroad, in which some of the parties, and particularly Eldridge, was largely interested; and such aid was given in the form of a guarantee by the company of the bonds of the Boston, Hartford and Erie Railroad Company, to the amount of $5,000,000, which bonds were put into circulation.

(6.) The Boston, Hartford and Erie Railroad Company has suspended payment.

(7.) The election of directors in October, 1867, was accomplished by the use of about $70,000 of the money of the Boston, Hartford and Erie Railroad Company, placed in the hands of Gould for the purpose.

(8.) The furnishing of the money, its use, the accomplishment of the election, and the guarantee of the bonds, were all part of a fraudulent conspiracy by which, in return for the money to accomplish the election, Gould, Fisk and Lane should betray their trust as directors by using their influence in favor of the guarantee of the bonds, to the prejudice of the interests of the company, and should find their own compensation in such personal advantages as they could obtain by means of their trust and power as directors.

(9.) On the 30th of September, 1867, the total amount of the preferred and common stock of the company was $25,111,210.

(10.) In February, 1868, the total amount of the stock was $32,801,910, being $8,536,910 of preferred stock and $24,265,000 of common stock.

(11.) Up to February, 1868, the company had not only met the interest on its bonds, but had paid regular cash dividends of seven per cent. per annum on its preferred stock, and dividends, although not regularly, on its common stock, and the market value of its common stock was between 70 and 80 per cent.

(12.) In February, 1868, the company had its roads in successful operation, and substantially owned the property of the Long Dock Company, and also owned a large amount of property proper for use in operating its roads, which consisted of 459 miles of main road and 314 miles of branches and leased roads, there being a double track of about 362 miles on its main line, and its average gross earnings for the three years then last past had been about $15,000,000 per year.

(13.) In February, 1868, Gould, Fisk and Lane, with others of the directors, put in execution the scheme of making further large issues of the common stock of the company, under color of the authority alleged to be conferred by the 10th subdivision of the 28th section of the general railroad act of New York, of April 2d, 1850 [Laws 1850, p. 225], and which they claim to be applicable to the company, notwithstanding the special provisions of the acts of April 4th, 1860 [Laws 1860, p. 257], April 2d, 1861 [Laws 1861, p. 213], and March 28th, 1862 [Laws 1862, p. 208], fixing its capital stock at $11,500,000 of common stock, and $8,535,700 of preferred stock, and the provision of the act of May 4th, 1864 [Laws 1864, p. 1303], authorizing an increase of $8,000,000, such 10th sub-division providing, that the corporations thereby referred to should have power, "from time to time, to borrow such sums of money as may be necessary for completing, and finishing or operating, their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises, to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt."

(14.) In execution of such scheme, the said confederates caused to be executed the bonds of the company to the amount of $5,000,000, purporting to confer upon the holder the right to convert the principal sum into stock of the company, and made a pretended issue of such bonds to some of the directors or their confederates; and almost immediately thereafter, and on or about the 19th of February, 1868, there was made a conversion, or pretended conversion, of such $5,000,000 of bonds into stock of the company; and thereupon, under the direction of Gould, Fisk and Lane, and their confederates, there were issued certificates for the common stock of the company, to the amount of $5,000,000, in 50,000 shares, which were put on the market and sold to bona fide purchasers.

(15.) The only consideration which the company received for the bonds was received from the proceeds of the sale of the stock.

(16.) The amount which the company in any way received, in respect of the bonds and stock, did not exceed $3,625,000, or 72½ per cent. of the par value thereof; but a large sum was realized therefrom by Gould, Fisk and Lane, and their confederates, and divers methods were adopted to cover up and conceal the excess and deprive the company of the benefit thereof, and enable the said confederates to retain the same for their private profit.

(17.) In or about March, 1868, there were issued, and put on the market, and sold to bona fide purchasers, an additional 50,000 shares, or $5,000,000 in amount, of the common stock of the company.

(18.) Such transaction consisted in putting into the hands of some persons acting in confederacy with Gould, Fisk and Lane, and their associates, convertible bonds of the company for $5,000,000, but no money was loaned or advanced to the company upon the bonds, or any consideration received by it from them. With full notice of an injunction, restraining the issue of the stock, certificates for such additional 50,000 shares of stock were by Fisk, with the concurrence of Gould and Lane, caused to be filled out, 250 certificates, for 100 shares each, certifying that the firm of Smith, Gould, Martin & Company, stock brokers, of which firm Gould was then a member, were the owners of the stock mentioned therein, and 250 other certificates, for 100 shares each, certifying that the firm of Fisk, Belden & Company, stock brokers, of which firm Fisk was a member, were the owners of the stock mentioned therein. Thereupon, by the direction and procurement of Gould and Fisk, confederating with Lane and others, such certificates were sold to bona fide purchasers by the said firms to which they were issued, the price being about 80 per cent. of the par value thereof, or $4,000,000. Only a portion of this amount, namely, $3,625,000, or at the rate of 72½ per cent. for the stock, was ever paid or accounted for to the company, and the residue of the proceeds, being the sum of $375,000, was wrongfully withheld from the company by Gould and Fisk, in combination with Lane and others.

(19.) Almost immediately after the last 50,000 shares of stock were issued, Gould, Fisk and Lane, with certain of their confederates, in order to avoid the legal consequences of their acts, and to withdraw the pecuniary fruits of the operation from the jurisdiction of the courts of the state of New York, fled to Jersey City, carrying with them many millions of dollars, the property of the company, being proceeds of the stock or bonds, and remained there until they succeeded, by the use of the money of the company and other corrupt means, in effecting arrangements for their return, when they returned.

(20.) During such period, Gould, Fisk and Lane and their confederates employed paid guards, and expended money otherwise for expenses which were not lawful charges against the company, but were paid out of the funds of the company by their procurement, some of it being used to influence and obtain action by the legislature of the state of New York in respect to the issue of the bonds and stock, and the transactions connected therewith, which money has never been refunded or accounted for to the company.

(21.) The issuing of the bonds and of the 100,000 shares of stock was substantially legalized by an act of the legislature of New York, passed April 21st, 1868, which declared as follows: "It shall be lawful for the Erie Railway Company to use the money realized from the convertible bonds issued by said company on the 19th day of February and on the 3d day of March, 1868, the said bonds amounting in all to $10,000,000, for the purpose of completing, furnishing, and operating its railroad, and for no other purpose. Nothing in this section contained shall affect any right of action of any person against any officer or agent of the Erie Railway Company, nor shall it affect any action or proceeding now pending, save as herein expressly provided, nor shall anything therein contained be held or construed to affect any liability, civil or criminal, of any officer or agent of the said Erie Railway Company, or any other person. The use of the moneys in this section mentioned, by any officer or agent of said railway company for any other purpose than is herein mentioned, shall be a felony, punishable, upon conviction thereof, by imprisonment in the state prison for not less than two nor more than five years."

(22.) In July, 1868, Eldridge resigned his presidency of the company, as the result of an agreement between him and Gould, Fisk and Lane, that he should do so, and that the company should purchase the bonds of the Boston, Hartford and Erie Railroad Company, to the amount of $5,000,000, or thereabouts. Jay Gould was made president

in his place. At the same time, Gould, Fisk and Lane secured the control of the executive committee of the company, by becoming three of its five members, and the company, by the procurement of Gould, Fisk and Lane, purchased the bonds of the Boston, Hartford and Erie Railroad Company, to the amount of $5,000,000, and they were paid for out of the funds of the company.

(23.) Such purchase of bonds was illegal and beyond the corporate powers of the company, and resulted in a large loss to the company. Gould, Fisk and Lane concurred in the purchase, not only knowing it to be illegal and prejudicial to the interests of the company, but from the corrupt motive of inducing Eldridge thereby to resign his presidency, and of their being thereby enabled to substitute Gould as president, and acquire complete practical control of the company. At the time, Gould, Fisk, Lane and Eldridge had such control of the company, that the other directors, except the immediate friends of Eldridge, had little influence, and most of them were ignorant of what was transpiring and what was intended.

(24.) By an arrangement made in or about July, 1868, Gould, Fisk and Lane obtained the discontinuance and withdrawal of certain suits and litigations in which they and Eldridge were involved, and to some of which the company was a party, which suits had grown out of the proceedings relating to the said convertible bonds and stock, and other wrongful acts of such four parties and their confederates in and about the affairs of the company, it being supposed that one Cornelius Vanderbilt was promoting such suits, though not a party to them, and it being an object of Gould, Fisk and Lane to induce the withdrawal from the board of directors of said Frank Work, who was hostile to them, and understood to be in alliance with the parties carrying on the suits. By such arrangement, they also obtained their own personal relief from accountability in such suits, and for the moneys of the company which they had illegally retained, and the withdrawal of Work from the directorship, and the quieting of the opposition of Vanderbilt to the then past and proposed future spoliation of the company's funds, property, and credit by them and their confederates, which objects were for the personal gain of them and their confederates, and not for the benefit of the company, and were accomplished by them not at their own cost, but at the expense of the company, and mainly by the payment of money from the funds of the company to the parties with whom the settlement was effected, as the consideration for the settlement, and for the personal advantages thereby secured to Gould, Fisk, and Lane, and their confederates, but not in discharge of any legal claim against the company in favor of such parties.

(25.) Such payments out of the funds of the company by the procurement of Gould, Fisk, and Lane, and their confederates, were —$429,000 in settlement of a suit of one Richard Schell, and in compromise of some claim made by him, such suit being founded on the wrongful acts of Gould, Fisk, Lane, Eldridge, and their confederates, and being a claim against them personally, and not a valid demand against the company—$1,000,000 paid as a bonus or subsidy to Vanderbilt, which was not on account of any legal demand of his against the company, but was made on considerations personal to Gould, Fisk, and Lane, and their confederates—the purchase from Vanderbilt of 50,000 shares of the stock of the company at the rate of about 70 per cent. of its par value, and at a price greatly exceeding its then market value, for which there was paid to Vanderbilt, from the funds of the company, about $3,500,000, such purchase being illegal, wasteful, and fraudulent, and resulting in a large loss to the company.

(26.) On that occasion, other large sums were paid from the funds of the company, by the procurement of Gould, Fisk, and Lane, and their confederates, for what were not legal charges against the company, but for the personal benefit of them or their confederates.

(27.) About the same time, from $20,000 to $50,000 was wrongfully received out of the funds of the company by Gould and Fisk, or one of them, for an illegal and unfounded claim of them, or one of them, against the company.

(28.) When such payments were made to Schell and Vanderbilt, Gould was the treasurer of the company, and had custody of its funds, and, as such treasurer, participated in making the payments to Vanderbilt, and in settling the suit and claim of Schell, and endorsed over to such parties the checks by which the payments were made, which were drawn against funds in bank belonging to the company, and he did so knowing that the payments were illegal.

(29.) In or about July, 1868, Daniel Drew, who had until then been treasurer of the company, resigned that office, and Gould was made treasurer in his place, and received from the former treasurer cash funds of the company to the amount of more than $5,500,000, nearly all of which was proceeds of the $10,000,000 of convertible bonds, or the 100,000 shares of stock. In addition to this, and to the current receipts of the company from its earnings, Gould, as such treasurer, received, between July, 1868, and October, 1868, about $1,000,000 from the proceeds of sterling bonds of the company which remained on hand when he became treasurer.

(30.) From July, 1868, when Eldridge retired and Gould was made president, until October, 1868, as well as subsequently, Gould, Fisk and Lane had practically in their own hands the entire control of the affairs and funds of the company.

(31.) In or about July, 1868, Fisk was made comptroller of the company, and has since continued to exercise, except as Gould and Lane have participated therein, control over the allowance and disallowance of claims against the company. Gould, as president and treasurer of the company, has had supreme control over the company's funds, except in so far as Fisk and Lane may have participated therein, and has made such uses thereof from time to time as would best serve the ends of himself and Fisk and Lane. Lane at the same time was made, and has thenceforth continued to be, the counsel of the company, with the addition of large powers to those previously exercised by the counsel of the board.

(32.) During the period from July to October, 1868, the board of directors of the company held no meeting, and had no participation in the control of the affairs of the company, but, whatever of such control was not exercised by Gould, Fisk and Lane, in their said offices, was exercised by them as the controlling and always co-operating majority of the executive committee, the other two members of such committee being by Gould, Fisk and Lane systematically kept in great measure ignorant of the important doings of the committee, and no proper minutes of its proceedings being by them allowed to be kept.

(33.) In anticipation of the election of directors to be held in October, 1868, Gould, Fisk and Lane contrived a scheme for causing themselves, and such other persons only as they should choose for the purpose, to be elected directors of the company at such election; and, in order to carry out such scheme, they put in execution divers illegitimate and fraudulent devices. Having made such arrangements as that, at a given date, a very large amount of stock should stand on the books in the names of themselves and their confederates, and of persons whose proxies for voting they could secure by purchase or otherwise, Gould, Fisk and Lane, as a majority of the executive committee, without the knowledge of the other members of the committee, and without any action or knowledge of the board of directors, or the knowledge of any member of it save themselves, and without any previous public notice of an intention so to do, suddenly closed the stock transfer books of the company on the 19th of August, being about sixty days before the annual election, and at least thirty days earlier than the by-laws of the company contemplated, or the stockholders anticipated, or than had been the usage of the company, or than was necessary for any honest or useful purpose. They pretended to keep such transfer books closed from that time until the election, so that, during such period, no stock could properly be transferred into the name of any person, so as to enable him to vote thereon, or to prevent the same from being voted on by the person in whose name it happened to stand at the time of closing the books. But transfers were, during such period, caused by Gould, Fisk and Lane to be secretly made in certain cases, where such transfer would increase the voting power of themselves and their confederates, although transfers were not permitted in any other case. Such arrangements had been made by Gould, Fisk and Lane, and their confederates, that, when the transfer books were so closed, there stood thereon in the names of themselves, and their business firms, and their confederates, the following stock: Fisk, Belden & Co., 18,300 shares; Fisk, Bradford & Co., 25,000 shares; Smith, Martin & Co., 1,800 shares; Smith, Gould, Martin & Co., 74,800 shares; and 33,740 shares in the name of another firm, the control of whose proxies for voting thereon at such election Gould, Fisk and Lane acquired, making in all 153,640 shares of stock, the voting power on which at such election was controlled by Gould, Fisk and Lane, the whole number of shares voted on at such election being 274,874.

(34.) Although, at the time of the closing of the transfer books, there stood in the names of the firms with which Gould and Fisk were connected, stock to the nominal amount of nearly $12,000,000, Gould and Fisk, as to much the greater proportion thereof, had not, nor had their said firms, any beneficial proprietorship of such stock, but they had caused it to stand in their names at that particular time, by its having been originally issued in their names for the purposes of sale, and retained in such names notwithstanding the sale thereof and a delivery by handing over certificates and powers of attorney, and by the process of borrowing or purchasing stock and holding it for the briefest possible period, in order that such stock might stand in their names at the closing of the transfer books, notwithstanding the shares might be returned or resold and parted with immediately afterwards, and delivered by handing over the certificates, with power of attorney to transfer. Such of the stock as, in fact, belonged to Gould and Fisk, or any of their firms, had, in great part, been acquired by the use of the money of the company.

(35.) Gould, Fisk and Lane made a pretended issue and delivery of convertible bonds of the company, to the amount of many millions of dollars, and caused to be executed certificates for a great amount of stock, into which such bonds were proposed to be converted, with the design of voting on such stock, if necessary, in order to control the election; but the new stock was not created, for the reason that they were enabled by other devices to cast votes enough to control the election.

(36.) Shortly before the election, Gould, Fisk and Lane, having secured to themselves the power of controlling the election, procured to be signed by several of the persons whom

they proposed to elect as directors, a paper, by which such persons pledged themselves to support the policy of Gould, or resign their directorship, and they were elected directors under said pledge.

(37.) Gould, Fisk and Lane, or one of them, voted at such election on a large number of shares, in virtue of proxies for voting which they purchased from parties in whose names the stock stood, which parties, in many of such instances, were not the actual owners of such stock, but had previously parted with it, and made delivery by handing over the certificate, with power of attorney to transfer. The price paid for such proxies was derived from the funds of the company.

(38.) At such election, in October, 1868, Gould, Fisk and Lane caused the following persons, in addition to themselves, to be elected directors of the company for the then ensuing year: William M. Tweed, Peter B. Sweeney, Daniel S. Miller, Junior, Alexander S. Diven, George M. Diven, Homer Ramsdell, John Hilton, George M. Groves, John Ganson, Charles G. Sisson, O. W. Chapman, J. C. Bancroft Davis, Henry Thompson and William B. Skidmore. Davis and Skidmore, when they came fully to understand the purposes of Gould, Fisk and Lane, resigned their offices as directors. Immediately on the election being made, a meeting of the board of directors was held, at which the only business transacted was to elect Gould, president, Alexander S. Diven, vice-president, Fisk, comptroller, and Gould, Fisk, Lane, Tweed and Miller, the executive committee; and such persons respectively held such offices until October, 1869. Miller is a brother-in-law of Gould, and wholly under his influence. Tweed was and is in entire accord with Gould, Fisk and Lane. Alexander S. Diven is a person of integrity, and good capacity, and of experience in railroad management, and had formerly been an active executive manager of the company, but the position of vice-president was a nominal one, and, especially in view of such pledge made by the directors, said Diven was powerless to thwart the schemes of Gould, Fisk and Lane.

(39.) From and after the day of such election, in October, 1868, until the election of a new board, in October, 1869, no meeting of the board of directors of the company was held, except in a single instance, where a company, with whom a contract was being made, insisted that the contract should be ratified by the board, on which occasion a special meeting of the board was called for that single purpose, and no other business was transacted.

(40.) During the entire year, from October, 1868, to October, 1869, Gould, Fisk and Lane, in virtue of their offices of president, treasurer, comptroller and counsel, and as the controlling majority of the executive committee, had in their own hands, and exercised, the absolute control of the affairs of the company, and its funds and property, and, whatever was done, during such period, in respect of the company and its affairs, was under the control of Gould, Fisk and Lane, and they are responsible therefor, and for the results thereof, as fully as if there had been no board of directors.

(41.) During such period, not only did the board exercise no control, as a board, over the management of the company, but the doings of Gould, Fisk and Lane, as controlling members of the executive committee, were, for the most part, kept by them from the knowledge of the individual members of the board, except those of them who were on the executive committee, and those who were the close allies and confederates of Gould, Fisk and Lane, in their schemes of private gain and spoliation of the company, and, excepting those persons, the directors of the company knew little or nothing more of what was going on in its affairs, than if they had not been directors.

(42.) During the year ending September 30th, 1869, there was an apparent surplus of net earnings of the company, applicable to dividends, after paying interest on the mortgage debt, of $475,621.91, which ought to have been applied to pay a dividend on the preferred stock, and would have paid about five per cent. thereon. But no dividend was paid, and, on the allegation that the surplus earnings of the year, over mortgage interest, had been applied to expenditures for permanent improvement, the said managers of the company's affairs, in or about November, 1869, declared a dividend of seven per cent. on the preferred stock, payable in scrip, by which the amount is promised to be paid at some future period. During the year ending September 30th, 1869, the capital of the company was increased to the extent of $32,234,700, or 322,347 shares of common capital stock, of $100 each, par value. No reduction was made, during such year, in the funded debt of the company. By the report of the company, made to the state engineer and surveyor of the state of New York, for such year, it appeared, that, at the close of the year ending September 30th, 1868, the floating debt of the company amounted to $4,893,735.81, and that at the close of the year ending September 30th, 1869, there was no floating debt. In fact, there was a considerable floating debt at the close of the last-named year, but, if the above-named amount of floating debt was extinguished during such year, such debt was, in great part, illegitimate, and had been created by the illegal and fraudulent acts of Gould, Fisk and Lane, and their confederates, and the large amount of cash which Gould so received from the late treasurer in July, 1868, and which had not been appropriated to any legitimate uses of the company, prior to September 30th, 1868, was much more than adequate for the payment of such amount of floating debt. The expenditures during the year ending September 30th, 1869, under the head of "cost of

road and equipment," were $3,832,451.96, leaving unaccounted for $28,402,248.04, of the addition so made to the share capital during such year, or, leaving unaccounted for more than $23,500,000 thereof, after deducting an alleged item of $4,813,001.08, as paid out, during such year, to or upon account of the old New York and Erie Railroad Company.

(43.) In so far as any portion of the proceeds of such additional share capital of $32,234,700, not so accounted for, may have been expended on property of the company, such expenditures were almost wholly illegal, and were made by Gould, Fisk and Lane, or one of them, in virtue of their power as executive officers and executive committee, without any order or assent of the board of directors, and mainly for purposes foreign to the legitimate business of the company, and many of them in furtherance of the private objects of Gould, Fisk and Lane, or some or one of them, and were wasteful, and the sum total of such as were made even professedly for the company's account, is but trifling, in comparison with the unaccounted-for deficiency of proceeds of such $32,234,700 of new share capital.

(44.) Certificates for the new stock, to the amount of over 322,000 shares, of $100 each, were issued, and put in circulation, and the shares have become so mingled with the genuine stock of the company, existing on and before September 30th, 1869, that they cannot now be distinguished or separated therefrom.

(45.) Such new stock was put in circulation by Gould, Fisk and Lane, without any resolution of the board purporting to authorize it, and without any authority therefor in any way derived from the then existing stockholders, and the transactions of its issue were carried on by Gould, Fisk and Lane, merely by the exercise of their power as executive officers and executive committee. For the most part, the issues of the new stock were made by Gould, Fisk and Lane secretly, and it was sold in small parcels to bona fide purchasers, while they and the community were ignorant that such large issues were being made.

(46.) The only authority under which new stock of the company could lawfully be created by it during the year in which such new stock was issued, is to be found in the power of the company to issue shares of its stock in exchange for stock of other railroad companies which might be consolidated with it, or whose roads might be leased to it, and in the power to issue shares on the conversion into stock of valid convertible bonds previously issued by the company, containing the privilege to the holders to convert such bonds into an equal amount of stock at par.

(47.) No portion of such stock issued in the year ending September 30th, 1869, was issued in exchange for the stock of any other railroad company, and no portion of it was issued on the conversion of any valid bonds of the company which were outstanding on September 30th, 1868, for no such bonds have been converted into stock; and, therefore, the whole of such new stock could only have been issued on the conversion into such stock of convertible bonds issued subsequent to September 30th, 1868.

(48.) The new stock was issued on the conversion of convertible bonds of the company which had been issued on its behalf during the year ending September 30th, 1869, by Gould, Fisk and Lane, in virtue of the control which they exercised as such executive officers and executive committee. The whole transaction of issuing and disposing of such bonds, and receiving their proceeds, was under the control of Gould, Fisk and Lane, save in so far as their confederates, Tweed and Miller, may have participated therein, and was devised and carried through by Gould, Fisk and Lane without any resolution of the board of directors authorizing the same, and without the knowledge and assent of the board and of the stockholders. Gould, Fisk and Lane disposed of the bonds on such terms as suited their pleasure, and received and wholly controlled the application of the proceeds.

(49.) The bonds were, as alleged by Gould, Fisk and Lane, issued under authority derived from the 10th sub-division of the 28th section of the general railroad law of New York, of April 2d, 1850. The only purpose for which such bonds could be legally issued by the company, was, "to borrow such sums of money as may be necessary for completing and finishing or operating their railroad." Such bonds were, to a great extent, sold by Gould, Fisk and Lane to some of themselves, and to business firms in which they or some of them were interested as copartners or otherwise, and particularly to Smith, Gould, Martin & Co., and Fisk, Belden & Co., and to others, the confederates, friends and personal associates of Gould, Fisk and Lane respectively. On such sale of the bonds, extravagant discounts and commissions thereon were allowed to the purchasers, and the agreement on the part of Gould, Fisk and Lane to allow them, was corrupt and fraudulent. All such allowances, and particularly where Gould, Fisk and Lane, or either of them, or any of their confederates, were interested in the purchase, were illegal and not binding upon the company. Gould, Fisk and Lane, they having issued and negotiated the bonds solely under the authority to borrow money for the purposes in that behalf limited by the general railroad act, and the bonds or stock having ultimately passed into the hands of bona fide purchasers, are liable to the company and its bona fide shareholders for sums equal to the face of the bonds, as for so much money borrowed by them on behalf of the company.

(50.) From July, 1868, continuously, up to the present time, Gould, Fisk and Lane have really had the entire direction and control

of the financial affairs of the company, and the custody and disposition of all its funds, and have used such funds at their own will and pleasure, and made the same in great measure subservient to their own private gain, and used such moneys of the company very much as if the same belonged to themselves.

(51.) Large amounts of money belonging to the company have, for long periods of time, not been kept on deposit in the name of the company, nor been in any way kept separate as the property of the company, but have been retained in the hands of Gould, Fisk and Lane, or some or one of them, or in the hands of business firms with which they or some of them were connected, and in the hands of other persons, their confederates, and have been used by Gould, Fisk and Lane for their private gain, and have been by them, to a very great extent, put at hazard in speculations in stocks, gold and other things, and in other ventures, and thereby they have made to themselves great profits.

(52.) In respect to large amounts of the money of the company, Gould, Fisk and Lane have resorted to divers methods to cover up the truth in regard to their real use of such moneys. Among such devices, has been the one of pretending to keep the money of the company in a bank to its credit, while they, or some of them, or of their confederates on their behalf, have had the use of such moneys, or a great part thereof, or an amount corresponding thereto, in the shape of loans from or drafts on such bank, or in some other form.

(53.) Gould, Fisk and Lane, or some of them, have had the use of the moneys of the company to a large amount, and made large gains therefrom. At a certain time, they engaged in a stock speculation, wherein they purchased stock of the New York Central Railroad Company, to the amount of several millions of dollars, from which, upon a great and sudden rise in such stock, owing to an operation of which they had previous secret intelligence unknown to the public, they made many hundreds of thousands of dollars of profits. The substantial capital with which such speculation was carried on was derived from the funds of the company. The substantial capital for other speculations and financial operations of Gould, Fisk and Lane, or some of them, in the purchase or sale of other stocks, and of gold, and in speculating for a fall in the price of stocks and bonds, in operations of all which kinds they, or some of them, have from time to time engaged to a great extent, and to their great profit, has been in like manner derived from the funds of the company.

(54.) During the entire period, from the time when Gould, Fisk and Lane acquired a control in the affairs of the company, and more especially from the time when they acquired complete control in July, 1868, continuously, up to the present time, they have respectively, from time to time, and on a great many occasions, and habitually, taken advantage of and abused their trust as directors, officers and managers of the company, in the making of transactions on behalf of the company on one side, in which they or some of them were interested on the other side, and wherein they obtained great gains to themselves, to the loss of the company.

(55.) In some instances, such adverse private interests of theirs were in the shape of their being stockholders in the company thus entering into transactions with the Erie Railway Company. In other instances, the transaction purported to be made with some other person than themselves, and without any interest of theirs being apparent on the face of it, although such private interest really existed. In other instances, they, or some of them, received, for their own private uses, from the parties with whom the transaction was had, allowances by way of compensation for their influence as managers of the company, in causing the transaction to be entered into on its behalf. In other instances, they, or one of them, were openly sellers or lessors of property to the company, or purchasers of property from the company, or otherwise dealers with the company, and the terms on which the company was made to enter into the transactions were determined, on the part of the company, by them, as its controlling managers, notwithstanding their personal interest adverse to the company, and such terms were fixed beneficially to their private interest and unfavorably to the interests of the company.

(56.) Among such transactions, was the purchase, on behalf of the company, of a water front property on the Jersey shore, known as the "Weehawken Docks Property," for which the company was made to pay, or agree to pay, the excessive price of about $1,600,000, and expenditures on such property; the purchase of numerous other parcels of real estate in New Jersey, and expenditures thereon; and the lease to the company, at an extravagant rent, of the offices which it occupies in the building known as the "Grand Opera House," on the corner of Eighth avenue and Twenty-third street, in the city of New York, of which building Gould and Fisk, or one of them, claim to be owners or owner.

(57.) The purchase of the said Grand Opera House, and of a number of adjacent houses and lots, was made by Gould and Fisk, or one of them, for about $700,000, of which about $300,000 was paid in money, and the remaining $400,000 was secured by bond and mortgage on the premises. Thereupon, Gould, Fisk and Lane, as managers of the company, took a lease for a long term from Gould and Fisk individually, or one of them, of a portion of the building, to be occupied for the business offices of the company, and fixed the rent therefor at an amount far beyond

its true rental value, and much greater than could in any case with propriety be paid for business offices suitable for the occupation of the company, the rent so fixed being at the rate of $45,000 per year. The sum of $300,000 which was paid on account of the purchase money of such premises, or the greater portion thereof, was in fact taken by Gould and Fisk from the funds of the company, under their control as trustees, and such use of the funds of the company for their private purposes is by them pretended to be justified by the allegation that such amount was advanced by the company to them on account, and in anticipation, of the rent to become due from the company under such lease. A large additional amount of the money of the company has been expended by Gould, Fisk and Lane in furnishing, fitting up, and decorating the offices thus leased in an unsuitably extravagant style.

(58.) At the time of making such lease, the company was in the occupation of business offices at the foot of Duane street, in the city of New York, which is the starting point of the ferry which connects their road with the New York side, which offices had been occupied by them for many years, and were sufficient and suitable for their legitimate purposes. Such new offices are located in a portion of the city inconvenient for the legitimate purposes of their business. The location of the business offices of such a corporation in a building occupied, as is said Grand Opera House, for theatrical entertainments, under the management and direction of Fisk, one of the chief officers of the company, is unsuitable, discreditable, and prejudicial to the interests of the company, and the keeping of the books and records of the corporation in a building used as a theatre is unsafe and improper.

(59.) The taking of the lease, the advance of the company's money, and the expenditures in furnishing, fitting up and decorating the offices, were and are fraudulent breaches of trust on the part of Gould, Fisk and Lane, and, if suffered to remain in effect, would involve a loss to the company of nearly the whole amount of its funds thus applied and expended. The company and its bona fide shareholders are entitled to be relieved against such transaction, and against all such expenditures of its funds, and to have the lease cancelled, and to recover back from Gould and Fiske the whole amount advanced or paid on account of rent under the lease, and such portion of the sum paid by Gould and Fisk, on account of the purchase money of the premises, as was derived from the funds of the company, and all money of the company expended in fitting up or decorating the offices; and an equitable lien exists in favor of the company, and should be enforced in this suit, on behalf of the plaintiffs and the other shareholders, upon and against the Grand Opera House, and the land on which it stands, and the adjacent houses and lots which were embraced in the purchase by Gould and Fisk, or one of them.

(60.) During the period in which Gould, Fisk and Lane have had the control of the company, they have made great profits to themselves, and subjected the company to great loss, by a system of favoritism and discrimination in the rates of freight for transportation over said road of various articles, and especially petroleum, in cases where the articles thus transported belonged to Gould, Fisk and Lane, or one of them, or to firms or companies in which they or some of them had pecuniary interests, such discrimination being made, in many instances, in adjusting the charges for transportation of freight, or by making drawbacks or returns of portions of the freight nominally charged, to an extent which drove off other shippers from sending their freight by said road. The plaintiffs pray, that Gould, Fisk and Lane may be adjudged to account for and pay to the company, for the benefit of the plaintiffs and the other bona fide shareholders, the full amount of the profits thus obtained by themselves or their associates or confederates, and the full amount of the losses they have thus caused to the company.

(61.) Gould, Fisk and Lane, on many different occasions, since they acquired the control of the company, have wrongfully applied large amounts of the funds and property of the company to the acquisition of property, professedly for the company, which the company had no legal right so to acquire, and to large expenditures upon such property, and to purchasing, leasing, constructing, altering or improving, maintaining and operating other railroads, which it was not within the legal power of the company so to acquire, possess, maintain or operate, and to purchasing and dealing in the stock and bonds of other companies, professedly for account of the company, which it had not the legal right to purchase or deal in, and to rendering aid, on behalf of the company, to other companies, outside of the legal right of the company, and to divers other purposes not within the legal authority of the company. Thereby, large amounts of the funds of the company have been lost. All this has been done by Gould, Fisk and Lane in bad faith, and with full knowledge of such illegality, and most of the transactions were entered into by them without the sanction of the board of directors, unless in virtue of the pretended wholesale delegation by it of all its powers to the executive committee, which delegation is incompetent. Such transactions were almost entirely carried on by Gould, Fisk and Lane merely in virtue of the power which they practically possessed as such executive officers and executive committee, without the knowledge or assent of either the stockholders or the directors, with the exception of their confederates in the executive committee, and were manifestly wasteful when entered upon, and many of them were entered into

by Gould, Fisk and Lane by reason of private interests which they or some of them had in the subject matters affected thereby, and with a view to their own schemes of personal gain; and all such transactions were fraudulent breaches of trust on their part.

(62) The plaintiffs demand an accounting from Gould, Fisk and Lane in respect to such transactions and the company's funds applied thereto, and pray that they and each of them may be adjudged in this suit to pay to the company, for the benefit of the plaintiffs and the other bona fide shareholders, the amount of such funds which, upon such accounting, shall be found to have been lost by such transactions, and all losses and damages sustained by the company in consequence thereof.

(63.) During the greater portion of the time since Gould, Fisk and Lane acquired the substantial control of the company, they have been and are largely interested in a steamboat company styled the Narragansett Steamship Company, engaged in running steamboats on Long Island Sound, and they have had and still have the practical control of the affairs of that company, and they have, to a very large extent, used the funds and property of the Erie Railway Company for the benefit of such steamship company, and in aid of their own private acquisitions of stock therein, and otherwise in furtherance of their own private interests as shareholders therein. They have abused their trust as executive officers and executive committee of such railway company, to make and carry out in its name, and professedly on its behalf, arrangements with such steamship company, relating to the division of through freights on merchandise transported by the two companies, and other bargains between the two companies, which arrangements and bargains were prejudicial to the interests of such railway company, and greatly to the advantage of such steamship company, and of Gould, Fisk and Lane, in respect of their private interests therein.

(64.) The plaintiffs pray a full accounting in respect to such arrangements or bargains, and of all dealings of Gould, Fisk and Lane in the name of, or professedly on behalf of, such railway company with such steamship company, or with themselves in respect of their interest therein; and that Gould, Fisk and Lane may be adjudged, in this suit, to pay to such railway company, for the benefit of the plaintiffs and the other bona fide shareholders, the full amount of all loss or damage to it in consequence of the subject-matters of such accounting.

(65.) Gould, Fisk and Lane, since they have had the control of the company, have been accustomed to make large profits to themselves respectively, in connection with the furnishing of supplies to it, in the shape of discounts, brokerages, bonuses, and in other forms. They have been and are largely interested in coal mines, and in transportation lines connecting therewith, and have abused their trust as such executive officers and executive committee, by supplying to the company, for its uses, coal derived from such mines, at excessive prices, and have thereby made to themselves great profits, and subjected the company to great loss. In order to make room for such supplies of coal wherein they were themselves interested, they have forborne to make use of other sources of supply of coal previously and still within the control of the company, by means of which the coal required by the company could and should have been supplied to it at a cost much less than it was made to pay for the coal supplies wherein Gould, Fisk and Lane, or some of them, were interested. The plaintiffs demand from Gould, Fisk and Lane an accounting in respect of all these matters, and pray that they may be, in this suit, adjudged to pay to the company, for the benefit of the plaintiffs and the other bona fide shareholders, the amount of all profits derived by them from any of such sources, and the amount of all losses which they have inflicted upon the company by such transactions.

(66.) On the 20th of May, 1869, an act was passed by the legislature of New York, providing as follows: "No stockholder, director, or officer of either the New York Central Railroad Company, the Hudson River Railroad Company, or the Harlem Railroad Company, shall be a director or officer of the Erie Railway Company, and no stockholder, director, or officer of the latter company shall be a director or officer of either of the three first named companies. The board of directors in each of the said companies may so classify the members of such board, by lot or otherwise, that, as nearly as may be, one-fifth of their number shall go out of office at each annual election; and, at the next election of directors in each of the said companies, directors shall be voted for only in place of those whose terms shall then expire under the classification aforesaid." That act was procured to be passed by Gould, Fisk and Lane, with the co-operation of Tweed, who was a member of the legislature, they pretending therein to represent the company. The provision thereof purporting to authorize such a classification of the board of directors as to extend their terms of office to periods of from one to five years, instead of an uniform term of one year, was obtained by Gould, Fisk and Lane, for the sole purpose of enabling themselves to perpetuate for a long term their control of the company for their own private gain, despite the will of the stockholders, and the passage of the act was not applied for by either of the other three companies named therein, and neither of them has taken any action under the act.

(67.) Gould, Fisk and Lane illegally and fraudulently expended a large amount of the funds of the company, in order to ob-

tain the passage of such act. Its passage was obtained by means of the corrupt expenditure of large sums of money of the company, in influencing the action of members of the legislature in favor of the bill; and, also, large amounts of the money of the company were used by Gould, Fisk and Lane by way of compensation to agents employed by them to promote the passage of the law. All these expenditures were fraudulent breaches of trust on their part.

(68.) The plaintiffs demand an accounting from Gould, Fisk and Lane for all moneys applied from the funds of the company to obtain or promote the passage of such act, and pray that they may, in this suit, be adjudged to pay to the company, for the benefit of the plaintiffs and the other shareholders, the whole amount of such money, with interest.

(69.) Since Gould, Fisk and Lane acquired control of the company, they or some of them have wrongfully and fraudulently put in circulation, and received the money for, a large amount of the bonds of said Long Dock Company, of which company the Erie Railway Company is substantially proprietor, which bonds had been previously taken up and extinguished by exchange therefor of stock of the Erie Railway Company. The reissue of such bonds was wholly illegitimate, and their amount was about $500,000.

(70.) Gould, Fisk and Lane controlled the annual election held for the election of directors of the company in October, 1869, by means substantially similar to those which they had successfully employed for the like purpose at the election in October, 1868. They were aided in wielding such voting power at the election in October, 1869, by the fact that, during the year then last preceding, a large amount of the new stock of the company created during that period had been issued to, or put in the names of, Gould, Fisk and Lane, or some of them, or their confederates, and in the name of said Smith, Gould, Martin & Co., and in the names of other persons or firms acting in concert with Gould, Fisk and Lane, or some of them, or their business firms, and whose proxies for voting on such stock, so long as it stood in the names of such parties, were subject to the control of Gould, Fisk and Lane, or one of them. Such shares of stock, at the time of the closing of the transfer books, preparatory to such election, were in fact no longer held by the persons in whose names the same stood, but had been previously sold and deliveries thereof made to the purchasers, by handing over the certificates, with blank powers of attorney to transfer, and which certificates passed from hand to hand as the representative of the stock without making any transfers in the books of the company.

(71.) A large amount of stock thus situated was, at the time of such election in 1869, held and owned in England and on the continent of Europe, where it is the custom to deal in American stocks of this character by delivery of the stock certificate with such blank power of attorney, executed by the person in whose name the stock was originally registered, the same passing from hand to hand in like manner with coupon bonds. At such election in 1869, Gould, Fisk and Lane voted upon this stock to a large amount, without any authority from its real owners, and without their knowledge or assent, by taking advantage of the circumstance of its having been originally registered in the names of Gould, Fisk and Lane, or some of them, or Smith, Gould, Martin & Co., and the other persons acting in concert with Gould, Fisk and Lane, or whose proxies were thus subject to their control.

(72.) It is alleged by Gould, Fisk and Lane, that, at such election in 1869, 355,000 votes were cast in favor of the board of directors who were then chosen, and that there was substantially a similar vote at the said annual meeting in favor of accepting the provisions of said act providing for a classification of the board of directors. The pretence of there having been any such amount of votes really cast by the actual holders of the stock thus voted on, or by any person thereunto authorized by such holders, is a fraud and fiction. In fact, the votes which were cast in favor of the election of the board and of the acceptance of the act, were almost all cast by Gould, Fisk and Lane, or one of them, or by persons acting under their control; and the voting power which they exercised on such shares was almost wholly derived by them from devices of the character before set forth, namely, voting upon stock which had been sold and delivered by handing over certificate and power in the names of the parties originally registered as shareholders, notwithstanding they had parted with and delivered such stock; voting upon stock borrowed or otherwise acquired for a very brief period, so that the same might stand in the names of Gould, Fisk and Lane, or their associates and confederates, on the day of closing the transfer books, although returned or parted with almost immediately afterwards, under the plan before set forth; and voting upon proxies obtained by purchase from parties who either owned the stock, or, as was usually the case, had it standing in their names without really owning it. The purchase money paid for such proxies was derived from the funds of the company, and the moneys by the use of which such shares had been caused to stand in the names of Gould, Fisk and Lane, or their associates or confederates, at the time of closing the transfer books, had been derived from the funds of the company. As to another large portion of the shares alleged to have been thus voted on, such shares had not been actually and legally issued when thus voted on, or

the prices or value thereof had not been paid to the company, and, if the same existed at all, they belonged to the company itself. The pretended voting at such election did not emanate from the actual proprietors of such shares to any considerable extent, and Gould, Fisk and Lane, by mere fraudulent devices, controlled the election, and thereat elected the board of directors selected purely by themselves and of their own will, without either themselves owning, or being the actual bona fide representatives of, any substantial proprietary interest in the stock of the company to any considerable amount. The omission of the bona fide stockholders to make any substantial opposition to the management of such election by Gould, Fisk and Lane, was mainly owing to the fact, that a great proportion of the stock had come to be held by European stockholders, who were not apprised of what was going on or intended to be done, or of the necessity for action on their part to defeat the fraudulent schemes of Gould, Fisk and Lane, and to a feeling on the part of American stockholders of the apparent hopelessness of any action on their part against Gould, Fisk and Lane, by reason of the voting power which they had accumulated in themselves by trick and device.

(73.) At the election held in October, 1869, under such circumstances; Gould, Fisk and Lane caused themselves and the following persons to be elected directors of the company for the ensuing year, namely: William M. Tweed, Alexander S. Diven, Justin D. White, John Ganson, O. W. Chapman, Horatio N. Otis, Charles G. Sisson, Abram Gould, Homer Ramsdell, Henry Thompson, John Hilton, Henry N. Smith, N. R. Simons, and George C. Hall. Almost immediately after such election, and on the same day on which it was held, a meeting of said board was held, and thereat there was made a pretended classification of said directors, in pretended pursuance of the act of May 21st, 1869, by which classification it was arranged that the terms of office of the said directors should be as follows: (1.) Expiring in October, 1870, Ramsdell, Sisson and White; (2.) expiring in October, 1871, Hilton, Simons and Hall; (3.) expiring in October, 1872, Ganson, Chapman and Thompson; (4) expiring in October, 1873, Diven, Smith, Abram Gould, and Otis; (5.) expiring in October, 1874, Jay Gould, Fisk, Tweed and Lane. This classification was prepared beforehand by Gould, Fisk and Lane. The board, in making the same, acted purely on their dictation. At the meeting at which it was made, several of the directors, including Ganson, Diven and Chapman, besides others, were absent. The postponement of such classification, until after an election of directors should be held, subsequent to the passing of the act, was a mere trick and device of Gould, Fisk and Lane, in order to present the false appearance of an approval by the stockholders of the plan of classification, and to afford room for the allegation on the part of Gould Fisk and Lane, that the directors to whom long terms were assigned in the classification had been elected by the stockholders in view of such probable prolongation of their terms, and not merely for a single year. Gould, Fisk and Lane, in such postponement, also had reference to the consideration that thereby they could secure to themselves one year's additional length of term. They did not decide to postpone such classification until after the next annual election should be held, until they had ascertained that they had complete control of such election, and would have complete control of the board of directors to be elected thereat; and the pretence of there having been any substantial voice of the stockholders other than Gould, Fisk and Lane and their associates and confederates, in favor of such measure of classification, or of the election of the board thus pretended to be classified, is a mere sham.

(74.) Such pretended classification is without legal authority from the provisions of the act, and is of no legal force, because, by the act, the power of classification was given only to the board of directors holding office at the time of the passage of the act, and it is required that the classification, if made, shall be so made as that a portion only of the directors shall go out of office at the annual election held next after the passage of the act. But Gould, Fisk and Lane claim such classification to be valid, and intend to maintain it, and having, with their confederates, practically, the entire control of the company, as well in respect of holding its elections as of its other affairs, intend, at the next annual election to be held in October, 1870, not to permit a voting for a full board of directors, but only for three directors in place of those whose terms then expire under said pretended classification.

(75.) The plaintiffs, on behalf of themselves and the other bona fide shareholders, pray, that there may be an adjudication had, in this suit, of the invalidity of said pretended classification, and that, by the order of the court, the company, or those controlling its action in that behalf, may be directed to hold an election for a full board of seventeen directors at the stated time for holding the regular annual election in October, 1870, as if such pretended classification had never been made.

(76.) The board of directors elected by the procurement of Gould, Fisk and Lane, in October, 1869, is so constituted, and was designedly so made up by them, that it possesses no independent force for controlling them, but, as a board, in so far as it acts at all, is the mere instrument of their will, and, as matter of fact, in so far as it has acted at all, has acted, and does act, in entire subserviency to the personal, selfish and fraudulent schemes of Gould, Fisk and Lane. Although it may be true that, since the election of such new

board, meetings of the directors have been held more frequently than during the preceding year, yet, as well since the election of such new board as before, Gould, Fisk and Lane have had, and still have, practically, the absolute and unchecked control of the corporation and its funds, property and affairs. Tweed is in full accord with Gould, Fisk and Lane in their schemes and acts for private gain at the expense of the company and to the sacrifice of its interests, and has been, and is, pecuniarily interested in many of such schemes and acts. Smith was a copartner of Gould in the firm of Smith, Gould, Martin & Co. Several of the directors are salaried employees of the company, holding their offices at the pleasure of Gould, Fisk and Lane, or of Gould alone, and are under the influence and control of Gould, Fisk and Lane, and have only a nominal and trifling interest, if any, as shareholders of the company. Among the persons thus situated are White, the assistant treasurer; Hilton, the father of the transfer clerk, and himself a clerk or agent in some other capacity; Otis, the secretary of the company; and Hall, the supply agent of the company. Simons is in substantially like position or relation with Gould, Fisk and Lane, except that he is a salaried employee of the Narragansett Steamship Company, which is under the management, direction and control of Gould, Fisk and Lane, as aforesaid. As to some other members of the board, such as Ramsdell, Diven, Ganson, and some others, who are gentlemen of character, and of such position and capacity as to make them intrinsically proper directors for the company under ordinary circumstances, their independent action as such directors is compromised by reason of their being under some pledge that they would either support the policy of Gould or resign. If it be not so, they are in too small a minority to interpose any substantial check to the plans and operations of Gould, Fisk and Lane, supported, as they are, by an overwhelming majority of the board in their interest, and they are in such personal relations, or otherwise, with Gould, Fisk and Lane, as have prevented and will prevent them from in any way causing to be exerted the corporate power of the company to bring Gould, Fisk and Lane to account for their past misdeeds, and to compel restitution from them of the money which they have wrongfully and fraudulently obtained from the funds of the company; and some of the directors, not being residents of the city of New York, where the meetings of the board are held, do not attend such meetings.

(77.) Since the election of the new board of directors, in October, 1869, there has been, by the procurement of Gould, Fisk and Lane, a further increase of the common capital stock of the company to the extent of $5,000,000, or 50,000 shares of $100 each, making the whole share capital of the company over $80,000,000. This has been accomplished by the issue, by Gould, Fisk and Lane, in the name and on behalf of the company, of its bonds for $5,000,000, containing a clause authorizing the holder of them to convert them into capital stock of the company, which conversion has been subsequently made.

(78.) The like allegations are substantially applicable to this increase of stock, and to the issue, negotiation and sale of the convertible bonds which were converted into such stock, and the receipt of the proceeds thereof by Gould, Fisk and Lane, and the application of such proceeds by them, as are before contained in the bill in respect of the convertible bonds and stock, to the amount of $32,000,000 or thereabouts, issued during the year ending September 30th, 1869, with this exception only, that there may have been obtained by Gould, Fisk and Lane some nominal approval by the board, who were in fact the mere instruments of their will, of some of their acts and doings in respect of the $5,000,000 of bonds and stock issued subsequently to the election in October, 1869.

(79.) The plaintiffs pray, that all the allegations of the bill in relation to the $32,000,000 of stock and bonds, and the issue, sale and negotiation thereof, and the receipt of such proceeds by Gould, Fisk and Lane, or some of them, or under their control, and the application of such proceeds, and all the allegations of the bill in relation to the liability of Gould, Fisk and Lane in respect of such stock and bonds and their proceeds, may be regarded as repeated and made applicable to the last mentioned $5,000,000 of stock and bonds, and the negotiation, sale and issue thereof, and the receipt of the proceeds, and the liability of Gould, Fisk and Lane in respect of the same, with the like effect as if the same were repeated at large in connection with such $5,000,000 of stock and bonds and the proceeds thereof.

(80.) The plaintiffs believe that Gould, Fisk and Lane, unless restrained by injunction, will cause to be issued, in the name and on behalf of the company, further large amounts of its convertible bonds, and further large amounts of its stock, in pretended conversion of such bonds, and that such stock will be put on the market and sold to bona fide purchasers, and that Gould, Fisk and Lane will be guilty of the like mismanagement, waste and frauds in respect to such further issue of bonds and stock, and the proceeds thereof, that they have committed in relation to the convertible bonds and stock already issued since Gould became president of the company.

(81.) The credit and character of the company have become so greatly impaired, by reason of the mismanagement, waste and fraud of Gould, Fisk and Lane, that no further issues of its unsecured bonds or of its stock could now be made, except on most ruinous terms of discount, and not so much as one-third of the nominal amount of any such further issues of bonds or stock could

or can be obtained for the same in the market.

(82.) Within the few months last past, a large number of the shareholders of the company, resident in Great Britain, have become awakened to the necessity of action on their part, in concert with other bona fide shareholders, in order to wrest the control of the company from Gould, Fisk and Lane, and save it from utter bankruptcy, and it has been ascertained that over 450,000 shares of the stock of the company, representing a capital of more than $45,000,000, are held in Great Britain. There is, also, a large amount of the share capital of the company held on the continent of Europe, and the fact of intended adverse action against Gould, Fisk and Lane, on the part of the British shareholders, has become known to them, and is public and notorious.

(83.) In the course of the proceedings of the British shareholders, the fact has appeared, that upwards of 190,000 shares of the stock were held and owned by parties in Great Britain whose evidence of title was merely the stock certificate, with blank power of attorney for transfer, endorsed thereon, the stock standing registered on the company's books in the names of holders who had parted with it. A large portion of such stock was found to stand in the names of Smith, Gould, Martin & Company, and other persons and firms whose proxies for voting could be controlled or obtained by them through purchase or otherwise. The holders of a large amount of the stock thus owned in Great Britain, decided to have their stock transferred on the company's books to Robert Amadeus Heath and Henry Lewis Raphael, of London. Accordingly, the original certificates for a part of such stock, with the powers of attorney for the transfer thereof endorsed thereon, signed in due form by the parties in whose names the stock stood registered, and so filled up as to authorize the transfer of the stock represented by the certificates respectively to Robert A. Heath and Henry L. Raphael, were forwarded to L. Von Hoffman & Co., bankers, of the city of New York, in order that they might procure the transfer of such stock to be made accordingly.

(84.) On the 7th of February, 1870, L. Von Hoffman & Co., as agents of said Heath and Raphael, presented to the company, at its transfer office, such certificates, to the aggregate amount of 16,770 shares, with powers of attorney authorizing the transfer to said Heath and Raphael of the stock represented thereby, and demanded the transfer of such stock to said Heath and Raphael on the company's books, proposing to surrender the original stock certificates on such transfer; but permission to make such transfer was refused by the company, although the transfer books were open, and transfers were being made by other persons.

(85.) L. Von Hoffman & Co., as agents of said Heath & Raphael, have thus far been wholly unable to obtain a transfer of the 16,770 shares, or any part thereof, nor has any reason been given to them for not permitting such transfer, except a giving out, on the part of the company, that the transfer books are closed, and that an injunction against permitting transfers has been granted at the suit of some shareholder. The true motive for such closing of the transfer books is the desire and determination, on the part of Gould, Fisk and Lane, to prevent foreign shareholders from causing their stock to be transferred into their own names, or the names of their nominees, and to keep not only the 190,000 shares and upwards of the stock of the company, held in Great Britain, but a very great amount of stock similarly situated, held upon the continent, in the names of the former holders, who are in a great measure confederates, friends and associates of Gould, Fisk and Lane, or persons whose proxies they can obtain by purchase or otherwise when needed. Such course of preventing transfers has been adopted, and is persisted in, by Gould, Fisk and Lane, with the design of frustrating, as far as may be, the efforts of the foreign stockholders to bring Gould, Fisk and Lane to justice for the wrongs and frauds which they have committed.

(86.) The pretended suit on behalf of a stockholder in the company against the company, wherein such pretended injunction against transfers was obtained, is a fraudulent and collusive suit in the interest of Gould, Fisk and Lane, set on foot and carried on by them and subject to their control.

(87.) At various times since Gould, Fisk and Lane acquired control over the affairs of the company, as well before as after July, 1868, they have wrongfully expended the moneys of the company, to a large amount, to obtain or influence legislative action by them desired, besides the particular legislation before specified, in carrying on suits set on foot by them, and in defending other suits wherein they were defendants or the defence whereof was for their personal benefit, and in numerous litigations, in some of which the company was a party and in others of which it was not, and for various purposes, in great proportion illegitimate, connected with such litigations, and to promote the objects which, by such litigations, they were seeking to obtain for their own private benefit. They have caused to be instituted and carried on by other persons, fraudulent and collusive suits, some of them purporting to be against the company, and some of them purporting to be against themselves or some of them, but all of which suits were in fact in their own interests. The expenses of such suits have been paid by Gould, Fisk and Lane out of the funds of the company, in fraud of the rights of the bona fide shareholders of the company, and include expenditures to a large amount on behalf of the pretended

plaintiffs in such suits, and of the parties purporting to be therein arrayed in hostility against the company or against Gould, Fisk and Lane, and expenditures purporting to have been made on behalf of the company.

(88.) In one instance, one Peter B. Sweeny, a person possessing great political influence, and whose aid in their schemes they desired to obtain, was nominally appointed receiver of a large fund belonging to the company, and, although no portion of such money ever passed into his hands, and he never performed any service as such receiver, and never became entitled to any commissions as such receiver, he was, on the discharge of his receivership, paid out of the funds of the company about $150,000, in pretended compensation for his services as such receiver, which payment was made with the concurrence of Gould, Fisk and Lane, and their assent to the payment was a fraudulent breach of trust on their part, for the loss from which resulting to the company they are personally responsible.

(89.) Gould, Fisk and Lane, since they acquired control of the company, have wrongfully and fraudulently expended a large amount of the funds of the company in influencing public elections and in aid of political partisanship, with the object of obtaining for themselves aid in their schemes of fraud.

(90.) The plaintiffs demand from Gould, Fisk and Lane a full accounting in respect of all expenditures of the company's money for the purposes before mentioned, and pray that, by the decree in this suit, Gould, Fisk and Lane may be adjudged to repay to the company, for the benefit of the plaintiffs and the other bona fide shareholders, the full amount of all such expenditures wrongfully made from its funds, with interest thereon.

(91.) By the official report made by the company to the state engineer and surveyor, for the year ending September 30th, 1868, purporting to be verified by the oath of Gould, as president, it appears that, during that year, the share capital was increased $21,191,000, the funded debt, $968,880, and the floating debt, $1,368,922.58; that, deducting $2,464,615.87, expended during that year for permanent improvements of and additions to said railroad, from such increase of stock and of funded and floating debt, there is a deficiency unaccounted for of over $21,000,000, arising from that year's operations of Gould, Fisk and Lane and their confederates, except that there is an illegal charge in said report of $4,774,220.40 for "discount on sale of convertible bonds," &c. The deficiency thus remaining unaccounted for from such year's operations, when added to the before mentioned deficiency for the year ending September 30th, 1869, shows an aggregate against Gould, Fisk and Lane and their confederates of between $40,000,000 and $50,000,000.

(92.) As the net result of the two years' management of the company by Gould, Fisk and Lane, they have reduced the net earnings of the company to the extent of more than $500,000 a year, while they have increased the amount of its share capital and funded and floating debt from $51,065,943.23 to $101,935,710, or to an extent of more than $50,000,000. Of this $50,000,000 they do not pretend to show more than between six and seven millions actually expended in improvements of and additions to the property, and they have not paid any dividends to the shareholders except a single dividend on the preferred stock in January, 1868, which was substantially paid out of surplus earnings accruing prior to the time when Gould and Fisk came into the management.

(93.) The public mind has become so fully impressed with the extent and degree of the disastrous consequences resulting and likely to result to the company from having Gould, Fisk and Lane to be its managers, that the market price of the preferred stock has recently fallen to about 42 or 43 per cent., and the market price of the common stock to about 25 per cent., and the market value of its mortgage bonds has very materially fallen. The company has not now any substantial credit for any considerable amount without giving collateral security. The credit of the company and the market prices of its stocks, of both classes, would be much lower than they are, were it not for the hope entertained that Gould, Fisk and Lane will be ousted from the control of the company's affairs, and brought to justice for the wrongs and frauds which they have committed.

(94.) It is essential to the protection of the rights and interests of the plaintiffs and the other bona fide shareholders of the company, and in order to avoid the further wrongful injury and depreciation of such interests of such shareholders, that Gould, Fisk and Lane, and the company, and all the officers, directors, managers and agents thereof, shall be enjoined and restrained, by the order of this court, from issuing any further convertible bonds of the company, and from issuing any further stock or certificates of stock of the company, otherwise than upon surrender and cancellation of certificates of existing valid stock of the company, upon transfer of such stock in the usual manner.

(95.) By reason of the matters before alleged, Gould, Fisk and Lane, respectively, are unfit, improper and unsafe persons to be trustees of the property of the company, or for the shareholders or creditors thereof, or to be any longer entrusted with the control of the property, funds or affairs of the company, or with the exercise of any of their powers as directors, executive officers or executive committee of the company, and it is essential to the preservation of the rights and interests of the plaintiffs and the other bona fide shareholders, that they should be at once ousted from all control about the property, funds or affairs of the corporation, and enjoined from exercising any of their powers as

directors, executive officers or executive committee, or from in any wise interfering with the property, funds or affairs of the company.

(96.) By reason of the power which Gould, Fisk and Lane now practically exercise over the property of the company and its books, accounts and documents, and of the influence they exercise over the subordinate officers and employees of the company, in whom rest, in great measure, the knowledge and information necessary to be obtained in relation to the details of the past doings of Gould, Fisk and Lane, in respect to the company's affairs, it is and will be impracticable to obtain any fair investigation of the details of such transactions, until Gould, Fisk and Lane shall be wholly ousted from their power and control and deprived of their influence.

(97.) Unless and until Gould, Fisk and Lane shall be wholly excluded from the management and control of the affairs of the company, and such management shall be placed in the hands of persons possessing integrity and independence of character, and that high degree of competence, experience, and skill which is requisite for the adequate and proper management of so great a concern, the rights and interests of the plaintiffs and the other bona fide stockholders will be constantly exposed to further and continual depreciation, injury and loss; and, if Gould, Fisk and Lane be very much longer permitted to remain in the control of the company, no other result can be reasonably looked for than the utter wreck and ruin of the whole interest of the holders of the common stock, and the interest of the holders of the preferred stock will also thereby be put in great jeopardy.

(98.) If the control of Gould, Fisk and Lane be permitted to continue even until the next annual election, there will be thereby occasioned great and irreparable loss to the plaintiffs and the other bona fide shareholders, even if by that time Gould, Fisk and Lane shall be legally forced to allow the present owners of the stock which stands in the names of former holders, whose proxies Gould, Fisk and Lane can control, to transfer such stock into their own names, or the names of their nominees, and even although, before the time for the next annual election, there shall have been a competent legal adjudication of the invalidity of the said pretended classification of directors, so as to require an entire board to be elected in October, 1870; and, unless both those contingencies shall be determined favorably to the interests of the plaintiffs and the other bona fide shareholders, prior to the time for the next annual election, the coming of such time would afford little or no opportunity of redress for the bona fide shareholders against the still further continuance of the wrongs and frauds of Gould, Fisk and Lane.

(99.) By reason of the composition of the present board of directors, who were so put in office by Gould, Fisk and Lane, in October, 1869, and their confederacy with, and subjection to, Gould, Fisk and Lane, and the other circumstances before stated in the bill in that behalf, there can be no adequate and proper management of the affairs of the company under the administration of that board of directors, even after the exclusion of Gould, Fisk and Lane, or under the administration of executive officers or agents likely to be selected by them in place of Gould, Fisk and Lane, and in place of the present agents and employees heretofore selected by Gould, Fisk and Lane; and, in order to the proper management of the affairs of the company, and the preservation of the rights and interests of the plaintiffs and the other bona fide shareholders, until a new board of directors can be elected by the shareholders at a regular election, honestly and fairly conducted, it is essential that a receiver should be appointed by this court to take charge of the property, funds and affairs of the corporation, including the railroad and appurtenances, and to manage and carry on the same under the order and direction of this court.

(100.) The several rights and equities, claims and demands, in favor of the company, which are set forth in the bill, cannot be enforced by suit brought in the name and in behalf of the company, for the reason that the control of the company is now wholly in the hands of Gould, Fisk and Lane, and the plaintiffs are wholly unable to procure the bringing of a suit in the name of the company, as plaintiffs, against them.

(101.) The holders of the preferred stock, as well as the holders of the common stock, of the company are very numerous, as well as constantly changing, and it is impracticable to make them parties, either plaintiff or defendant, in this suit, and the bill is, therefore, filed on behalf of the plaintiffs and all other bona fide shareholders who shall elect to unite in the suit and contribute to the expenses thereof.

The bill asked that the answer might be without oath, and expressly waived an answer on oath. It also prayed: (1.) That Gould, Fisk and Lane, and each of them, may be compelled to render an account of all their trust and management in respect of the property, funds and affairs of the company, since their election as directors in October, 1867, and of all moneys and funds belonging to the company, which, since that time, have come into the hands or under the control of them, or either of them, and of the disposition of all such moneys; and also an account in respect of all profits, benefits, gains and advantages which, during such period, they, or either of them, have derived to themselves from the property, funds or credit of the company, or at its expense, or in anywise by reason of the trust vested in them as executive officers, executive committee, or directors of the company, and in respect of all losses, damages and injuries to which, during such period, they have subjected, or caused to be subjected, the company, and in respect of all

the allegations and charges contained in the bill. (2.) That Gould, Fisk and Lane may, by the decree in this suit, be adjudged to make payment and compensation to the company, for the benefit of the plaintiffs and the other bona fide shareholders, to the full extent of all such profits, benefits, gains and advantages, and of all such damages, losses and injuries. (3.) That, by such decree, Gould, Fisk and Lane may be ousted from all management, control or power in or about the property, funds or affairs of the corporation, and enjoined from exercising any powers as directors, executive officers, or executive committees thereof, and in any way interfering with the property, funds or affairs of the company. (4.) That Gould, Fisk and Lane, and the company, and all its officers, directors, managers and agents, may be enjoined and restrained, by this court, from issuing any further convertible bonds of the company, and from issuing any further stock or certificates of stock of the company, otherwise than upon surrender and cancellation of certificates of existing valid stock of the company, upon transfer of such stock in the usual manner. (5.) That, by order of this court, in this suit, a receiver may be appointed to take charge of the property, funds and affairs of the company, including its railroad and appurtenances, and to manage and carry on the same, under the order and subject to the direction of this court, in such manner, and for and during such period, as, under the circumstances, may seem proper. (6.) That, pending this suit, Gould, Fisk and Lane, and the company, and its officers, directors, managers and agents, may be enjoined and restrained from issuing or delivering any bonds or obligations of the company, purporting to confer upon the holder thereof any right of converting the same into stock of the company, or of receiving any such stock in exchange therefor, and from issuing, putting in circulation, delivering or aiding in giving currency to, any stock or certificates purporting to be for stock of the company, otherwise than on the surrender and cancellation of genuine certificates of existing shares of stock of the company, now standing registered upon its books, on transfer of such stock in the usual manner. (7.) That the plaintiffs may, pending this suit, have such writ of injunction enjoining and restraining Gould, Fisk and Lane, and each of them, and their attorneys and agents, from exercising any power or authority, and from doing any act as directors, or executive officers, or executive committee of the company, and from interfering with any of the property, funds or affairs of the company, and from disposing of any of such property or funds of the company, and from removing, or suffering or permitting to be removed, from the offices of the company, any of the books, papers, securities or funds of the company, and from secreting or concealing, or suffering to be secreted or concealed, any such books, papers, securities or funds. (8.) That the plaintiffs may have such further or such other order, relief and decree in the premises as may be equitable.

The demurrer of the company set forth, as causes of demurrer to the whole bill: (1.) That the plaintiffs have not, in and by their bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against such defendant. (2.) That it appears by the bill, that John S. Eldridge, Henry Thompson, Levi Underwood, Josiah Bardwell, Eben D. Jordan and James S. Whitney are necessary parties to the bill, inasmuch as it is therein stated, that all of said persons were confederated to secure control of the company by illegitimate means for purposes of their private gain, which purposes were accomplished, and which purposes are made a part of the grounds of the bill; and that the Boston, Hartford and Erie Railroad Company is a necessary party to the bill, inasmuch as it is therein stated that the said company received a large amount of money from the Erie Railway Company, in violation of the corporate powers of the latter company, in collusion with Gould, Fisk and Lane; and that Richard Schell and Cornelius Vanderbilt are necessary parties to the bill, inasmuch as it is therein stated that they received large amounts of money from the company by fraud and combination with Gould, Fisk and Lane; and that the Narragansett Steamship Company is a necessary party to the bill, inasmuch as it is therein stated that the said company has acquired wrongful gains from the Erie Railway Company by collusion with Gould, Fisk and Lane, of which gains an accounting is demanded by the bill; and that William M. Tweed, Alexander S. Diven, Justin D. White, John Ganson, O. W. Chapman, Horatio N. Otis, Charles G. Sisson, Abram Gould, Homer Ramsdell, Henry Thompson, John Hilton, Henry N. Smith, M. R. Simons and George C. Hall are necessary parties to the bill, inasmuch as it is therein stated, that those persons, together with Gould, Fisk and Lane, were elected directors of the company in October, 1869, and divided themselves into five classes, holding offices for different terms, which classification the bill prays to have set aside, and thus to shorten the term of fourteen of the said directors; and that the persons last named appear by the bill to be still directors of the company; and that, in respect to Tweed, it is alleged by the bill that he is in full accord with Gould, Fisk and Lane, in schemes of private gain at the expense of the company, and is personally interested therein. (3.) That the plaintiffs, in and by their bill, have expressly waived an answer by such defendant in such manner and form as alone is known to and recognized by the rules and practice of this court, and so such defendant is not bound to answer the bill, but the same should be dismissed.

The separate demurrers of the other three defendants respectively were the same in tenor and effect as the demurrer of the company.

William M. Evarts and Ebenezer R. Hoar, for plaintiffs.

Benjamin R. Curtis and David Dudley Field, for defendants.

BLATCHFORD, District Judge. It is to be noted, that the demurrers are to the whole bill, and the causes of demurrer set forth are set forth as causes of demurrer to the whole bill, and there is no demurrer to any separate part of the bill. The first cause of demurrer set forth is a general want of equity in the bill, and an absence of title therein to any of the relief prayed for. The second cause of demurrer is the want of parties, the absent and necessary parties being specified. The third cause of demurrer is the waiver of an answer on oath.

Under the first cause of demurrer, the defendants advance the propositions: (1.) That the bill states no cause of action, even in favor of the plaintiffs other than Burt. (2.) That Burt is improperly a plaintiff, because he is not a stockholder in the company. (3.) That if, on that ground, the bill cannot be sustained on behalf of Burt, it cannot be sustained on behalf of any of the plaintiffs. The principal discussion, on the hearing, was on the first of these three propositions.

The argument on the part of the defendants, succinctly stated, is, that the charges in the bill amount to allegations that Gould, Fisk and Lane, holding such offices of trust and confidence under the company, misused, in breach of their trust, and for their own profit, powers actually confided to them by the corporation, and usurped powers not granted to them by the corporation, and, in breach of their duty, used such powers for their own profit; that the corporation alone can come into court, as plaintiff, and challenge an act that is within the limit of the corporate powers of the corporation; that a stockholder in a corporation can come into court, as plaintiff, to restrain the corporation from doing an illegal act which it is about to do, joining as parties defendant the corporation and directors whom he accuses of a breach of trust; that, where a corporation, or its governing body, has actually done illegal acts, with injurious consequences, a stockholder, before he can come into court and assert the title of the corporation, must show that he has exhausted all means to set the corporate body in motion; that, in this case, there is no allegation in the bill showing any corporate act, either within or without the powers of the corporation, but only allegations of misuse of corporate powers by Gould, Fisk and Lane, and usurpation by them of powers beyond the corporate powers; that it is within the power of the corporation to call them to account for such misuse and usurpation; that the bill is brought to enforce such corporate right; that it must fail, unless the plaintiffs have laid a sufficient legal foundation for taking away such power from the board of directors of the corporation, and vesting it in the plaintiffs; that the bill must show that the directors of the corporation have committed a breach of trust, by not pursuing the remedy which the plaintiffs ask for; that, as the bill does not show any application to the board of directors to bring a suit for the relief sought by this suit, and a refusal or neglect by such board thereafter to bring such suit, it must show a sufficient excuse for not making such application, by averments from which it can be legally concluded that, if such board had been so applied to, it would have been guilty of the breach of trust of not bringing such suit; and that, within these principles, the foundation is not laid for any title in the plaintiffs to bring this suit.

The doctrines of equity jurisprudence involved in these propositions on the part of the defendants are not controverted by the plaintiffs. The difference between the parties arises in the application of such doctrines to this case.

A text-book of authority on the subject of corporations lays down the law thus, on the subject under consideration: "The general rule is, that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for breach of official duty, or misapplication of corporate funds, should be brought in the name of the corporation, and cannot be brought in the name of the stockholders, or some of them. * * * And, generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit in equity may be brought by, and in the name of, the corporation, to compel them to account for such waste or misapplication, directors being regarded as trustees of the stockholders, and subject to the obligations and disabilities incidental to that relation. But, as a court of equity never permits a wrong to go unredressed merely for the sake of form, if it appear that the directors of a corporation refuse in such case to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant." Ang. & A. Corp. § 312. As authorities for these views, the authors cite, among other cases, those of Hersey v. Veazie, 24 Me. 12; Hodges v. New England Screw Co., 1 R. I. 312; and Robinson v. Smith, 3 Paige, 222, 233.

The leading case on the subject in the courts of this state is that of Robinson v. Smith, in 1832, (above cited). In that case, Chancellor Walworth declares it to be the

law of this state, that the directors of a joint-stock corporation, who wilfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable, as trustees, to make good that loss; that they are equally liable if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust; that the directors of joint-stock corporations are the trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation; and that no injury the stockholders may sustain by a fraudulent breach of trust, can, upon the general principles of equity, be suffered to pass without a remedy. He adds: "Generally, where there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But, as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute, by collusion with those who had made themselves answerable, by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant. And, if the stockholders were so numerous as to render it impossible or very inconvenient to bring them all before the court, a part might file a bill in behalf of themselves and all others standing in the same situation."

In the case of Cunningham v. Pell (1836) 5 Paige, 607, the liability of the directors of a corporation to the parties injured by a fraudulent breach of trust was again asserted, and it was held not to be necessary to make all the fraudulent directors parties to a bill filed for the purpose of obtaining satisfaction for a fraudulent breach of trust.

In the case of Hodges v. New England Screw Co. (1850) 1 R. I. 312, a stockholder in a corporation brought a bill in equity against the corporation and its directors, charging various acts of mismanagement and fraud and a violation of the charter of the corporation. The defendants took the ground that the wrong, if any, was a wrong to the corporation, and that the suit should have been brought by the corporation. In reply to this it was contended for the plaintiff, that the application of the funds of a corporation, by its directors, to purposes not authorized by its charter, was a breach of trust cognizable by a court of equity; and that, where the corporation was in the control of the directors who had committed the breach of trust, a stockholder might bring his bill against them and make the corporation a party. The court held, that the directors of the corporation were liable in equity, as trustees, for a fraudulent breach of trust; that the primary party to sue for such fraudulent breach of trust was the corporation, as being the party injured, but, if the corporation refused to sue, or was under the control of the guilty directors, the stockholders might sue; that, in the case then before the court, the defendants who were charged with the fraudulent breach of trust were still the directors of the corporation, and still controlled its action; that, therefore, the bill, so far as it sought a remedy against directors, came within the settled jurisdiction of the court; and that the plaintiff was, under the circumstances, the proper party to sue.

In the case of March v. Eastern R. Co. (1860) 40 N. H. 548, five stockholders in the Eastern Railroad in New Hampshire, a New Hampshire corporation, brought a bill in equity, in behalf of themselves and all other stockholders in the corporation who should come in and join in the suit, against the corporation, and its five directors, and a Massachusetts railroad corporation, setting forth a fraudulent combination between such directors and the officers of the Massachusetts corporation, to defraud the plaintiffs, as stockholders in the New Hampshire corporation. The court sustained the bill. It says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies, by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in law denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an implied violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law." For this principle the court cites, as authority, the case of Dodge v. Woolsey, 18 How. [59 U. S.] 341. It also refers, with approval, to the case of Robinson v. Smith (before cited), as establishing the principles before referred to as laid down in that case.

In the case of Peabody v. Flint (1863) 6 Allen, 52, two stockholders in the Lowell and Salem Railroad Company, for themselves and in behalf of the other stockholders, brought a bill in equity against certain directors and agents of said company, and of the Lowell and Lawrence Railroad Company, and others, charging various acts of conspiracy and fraud, by which the interests of the stock-

holders in the former company were prejudiced and sacrificed for the benefit of the latter company. The bill was demurred to, and it was argued for the defendants, that the bill could not be sustained; that the only possible remedy for the stockholders was to bring a bill asking for an order to compel the corporation and its officers to bring an action in favor of the corporation; that, before that could be done, the corporation must have fraudulently refused, on request, to bring such action; and that no such averment was made in the bill. In its opinion, the court says: "The principal ground of demurrer relied on by the defendants is, that the plaintiffs have not, and never had, any remedy for such injuries as they complain of; that, conceding the truth of the allegations, that the directors of the Salem and Lowell Railroad Company, either by themselves, or with the consent and connivance of a majority of their stockholders, combined, either among themselves, or with the Lowell and Lawrence Railroad Company, or its directors, or with any of the other defendants, to defraud a minority of the stockholders of the Salem and Lowell Railroad Company, and, in pursuance of this combination, did the acts alleged, and so dealt and managed as to destroy the value of the stock as set forth, yet the only relief which the minority can have is the very imperfect one of selling out their stock for what it will bring in market." The court repudiates this doctrine as leading to the encouragement of frauds in the management of corporations, and, referring to the principle, that the interest of the stockholders in a joint-stock corporation is an equitable interest, says: "If there is an equitable interest, there must result from it equitable relations and equitable rights; and these rights may be enforced by equitable remedies. As between the corporation itself and its officers, it was long since held, that they were trustees, and that a court of equity would hold them responsible for every breach of trust. The corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as cestui que trust. The corporation may call its officers to account if they willfully abuse their trust, or misapply the funds of the company; and, if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders, who are the real parties in interest, may file a bill in their own names, making the corporation a party defendant; or, a part of them may file a bill in behalf of themselves and all others standing in the same relation, if convenience requires it. If other parties have participated with the officers in such proceedings, they may, according to the established principles of equity pleading, be joined as parties. In the discovery of frauds, and in furnishing remedies to parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case, and holds all parties to their just responsibility, following trust property into the hands of remote grantees and purchasers who have taken it, with notice of a trust, in order to subject it to the trust. The objection, therefore, that a court of equity has no power to furnish a remedy in a case of this character, is untenable."

Several cases were cited and relied on by the defendants in support of the demurrers in this case, especially the two English cases of Foss v. Harbottle (1843) 2 Hare, 461, and Mozley v. Alston (1847) 1 Phill. 790, the first before Sir James Wigram, and the second before Lord Cottenham. In regard to those cases, it is apparent, from the opinion of the court in the case of Gray v. Lewis (1869) L. R. 8 Eq. 526, 541, that those cases are regarded by the court of chancery in England only as holding, that a shareholder cannot maintain a suit on behalf of himself and the other shareholders, where the acts complained of are capable of being released or confirmed by the corporation, and that, in such a case, the corporation itself is the only proper plaintiff; but that those cases are not regarded as holding, and that it is not the law in the court of chancery in England, at this day, that a shareholder cannot maintain a suit on behalf of himself and the other shareholders where the acts complained of are ultra vires of the corporation. The case of Gray v. Lewis also holds, that where the ground of complaint is that the powers of the corporation have been exceeded, a bill may properly be filed by a shareholder to assert the rights of himself and his co-shareholders against the illegal acts of the corporation.

Such, also, is the principle established by the decision of the present lord chancellor of England, when vice-chancellor, Wood, in the case of Atwool v. Merryweather (1868) L. R. 5 Eq. 464, note.

The case of Hoole v. Great Western Ry. Co. (1867) 3 Ch. App. 262, was a case before the same vice-chancellor. A shareholder in a corporation, on behalf of himself and all his co-shareholders who were not defendants, filed a bill in equity against the corporation, its directors and its secretary, alleging that the corporation had acted ultra vires in issuing certain shares, and was about further to act ultra vires in issuing certain other shares, and praying for a declaration that the corporation was not entitled to issue such shares, and that those which had been issued be cancelled, and that the corporation be enjoined from paying dividends on those which had been issued, and that the corporation and its directors be enjoined from issuing any more of such shares. The corporation demurred to the bill for want of equity, and the vice-chancellor overruled the demurrer. He also enjoined the corporation from issuing further shares, and gave liberty to apply for an injunction, in case a dividend should

be declared on shares which had been already issued. The corporation appealed, and the appeal was heard before the lords justices, holding the court of appeal in chancery. Lord Justice Lord Cairns, while holding that the issuing of the shares was believed by all the parties concerned in issuing them to be most advantageous to the corporation, and to every person concerned, and regretting that the arrangement did not meet with the unanimous assent of all the shareholders, declared that if the issuing of the shares was ultra vires, and therefore illegal, any member of the corporation might dissent from it, and had a right to appeal to a court of equity to be protected against its effects. On the question of power, he held that the issuing of the shares was ultra vires, that the equity of the bill was clear, and that the order for the injunction, as regarded equity, was entirely correct. He also declared, that he had a very strong opinion, that any corporator or member of a company may maintain a bill against the corporation and the executive to restrain them from doing an act which is ultra vires, and therefore illegal, without making the bill a bill on behalf of other shareholders. Viewing the prayer of the bill in regard to cancelling the shares issued not as praying for relief affecting the individuals holding the shares, as purchasers or otherwise, but as a request to the court to order the executive of the company to take steps under their own responsibility and at their own expense to cancel or get in the stock improperly issued, he held, that, in regard to the prayer for an injunction against paying dividends on the shares already issued, the holders of such shares were sufficiently represented in the suit by one of the defendants, who was a director, and held some of such shares. He sustained the bill and the order for the injunction. Lord Justice Rolt, in his opinion, said that it was possible and very probable, that the arrangement proposed by the issuing of the shares was very beneficial; that if it were within the power of the corporation, the decision of the governing body might, upon the principle adopted by the court, in Mozley v. Alston, and Foss v. Harbottle, be held to govern; but that, if the scheme proposed was altogether beyond their power, the court had nothing to do with the merits, but had only to see that the corporation did not exceed its powers. He held, that the scheme was beyond the powers of the corporation, and that the order overruling the demurrer, and the order granting the injunction, were right. He added: "If the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers. * * * If one individual having an interest complains of an act of the whole company, or the executive of the whole company, as being illegal, there is, as a general rule, no necessity for any other shareholders being present." See, also, Bloxam v. Metropolitan Ry. Co. (1868) 3 Ch. App. 337, before Vice-Chancellor Wood, and, on appeal, before the lord chancellor, Lord Chelmsford.

The cases of Foss v. Harbottle and Mozley v. Alston were cited and relied on by the defendants in the case of Gregory v. Patchett (1864) 33 Beav. 595, in which case the master of the rolls, Sir John Romilly, says, that he has examined the various cases on the subject, and the result of them is, that, in matters strictly relating to the internal management of a company, even though the court should come to the conclusion that the course adopted is not warranted by the terms of the charter, the court will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of, (the general body of the shareholders, at meetings duly convened for the purpose, being the ultimate governing body); but that, if the measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, the court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so whether an appeal has or has not been made by the minority to the shareholders generally.

The following cases in courts in the United States were cited and relied on by the defendants: Hersey v. Veazie, 24 Me. 9; Dodge v. Woolsey, 18 How. [59 U. S.] 331; Allen v. Curtis, 26 Conn. 456; Bronson v. La Crosse R. Co., 2 Wall. [69 U. S.] 283; Memphis City v. Dean, 8 Wall. [75 U. S.] 64; and Samuel v. Holladay [Case No. 12,288].

The case of Hersey v. Veazie (1844) was this: Two stockholders in a corporation filed a bill in equity against one Veazie, the collector of tolls, treasurer and agent of the corporation, charging him with having abstracted the funds of the corporation, and with having fraudulently sold and received the pay for the franchise of the corporation, and praying that he might account for and pay to the plaintiffs their proportion of the funds of the corporation in his hands. The bill was demurred to. The court, in its opinion, allowing the demurrer, adverts to the fact that there was no allegation in the bill that the corporation had refused to call the defendant to account, or had acted collusively with him, except as represented by him as agent, or that a corporate meeting could not be obtained, it being the law of the state that a minority of the shareholders could cause a meeting of the corporation to be called; and that, therefore, it did not appear by the bill that the corporation had not the power and the disposition to settle with the defendant according to its own pleasure. The fact was also noted, that the corporation was not a defendant, and that the wrongs were primarily committed against the corporation.

Still, the court says: "If the plaintiffs have been injured by these fraudulent acts, they should have taken measures to have the corporation obtain redress for them, and through its action have obtained their own redress. If, after proper exertions made, it had been found incapable of doing it, or had improperly or collusively refused to do it, they might perhaps have obtained redress by making it a party defendant." It is to be remarked, that, in that case, there was no attempt in the bill to show any state of facts warranting a departure from the general principle that the corporation itself, as the injured party, should sue as plaintiff.

In the case of Dodge v. Woolsey (1855) the court uses the language hereinbefore quoted from the opinion of the court in March v. Eastern R. Co. Woolsey, a shareholder in a corporation, brought a bill in equity against the corporation and its directors and Dodge, a state tax collector, to enjoin the collection of a state tax from the corporation, alleging that the tax was illegal, and that he had requested the directors of the corporation to take measures by suit or otherwise to prevent the collection of the tax, and that they had refused to do so. He obtained from the circuit court the relief he asked. The case was taken to the supreme court by appeal. That court lays down the principles before referred to, in regard to the jurisdiction of a court of equity over a corporation, at the instance of a shareholder, to restrain a violation of its charter or any other act amounting to a breach of trust. It also refers with approbation, to the view that it is a breach of trust towards a shareholder in a joint-stock corporation, to divert its funds, without his consent, from the purposes prescribed by its charter, though the misapplication be sanctioned by the votes of a majority, and that, therefore, he may file a bill in equity, in his own behalf, against the corporation, to restrain such diversion or misapplication; and to the view, that a corporation has no power to apply its profits, any more than its capital, to objects not contemplated by its charter, and that, therefore, a shareholder may maintain a bill in equity against the directors, and compel the corporation to refund any of the profits thus improperly applied. These views it cites from Ang. & A. Corp. §§ 391, 392. It also quotes the following remarks from the same work (sections 391, 393), as stating properly the result of the cases: "That, in cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled; and there are cases in which a bill in equity will lie against a corporation by one of its members." "Although the result of the authorities clearly is, that, in a corporation acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern, yet, beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." Holding, then, that the refusal of the directors of the corporation, on request, to take measures to test the question of the legality of the tax referred to was a breach of trust, it also held, that such breach of trust amounted to an illegal application of the profits due to the stockholders of the corporation, by suffering them to be applied to pay the tax, into which a court of equity would inquire, to prevent its being made, and that the directors were properly made parties to the bill, because they had committed such breach of trust. This decision is very far from sustaining the principle for which it is invoked by the defendants, namely, that no suit can be brought by a stockholder unless he avers and proves that he has applied to the corporation to bring the suit itself, and it has refused.

The case of Allen v. Curtis, in 1857, was a suit at law and not one in equity, brought by a stockholder in a corporation against its directors, to recover damages for the destruction of the value of his stock by the fraudulent acts of the defendants as such directors. The declaration was demurred to and the demurrer was sustained, the objection being taken, in support of the demurrer, that the remedy was in equity and not at law, and that the corporation must be a party. The court held that such an action at law, by a stockholder, would not lie, adding, that if, for any cause, the corporation was unable to bring suit, or if, through fraud and collusion, the directors refused or neglected to bring suit in the corporate name, and would not seek redress, a ground would be laid for invoking the interposition of a court of equity.

The case of Bronson v. La Crosse R. Co. (1863) holds, that where the directors of a corporation, for the fraudulent purpose of sacrificing the interests of the stockholders, refuse to appear and defend a suit in equity against the corporation, the court, in its discretion, will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the corporation, and will also permit him to appear on behalf of other stockholders, who may desire to join him in the defence. The court, in its opinion, says, that the remedy is an extreme one, and should be admitted by the court with hesitation and caution, but that it grows out of the necessity of the case, and may be the only remedy to prevent a flagrant wrong, but that

it would be a reproach to the law, and especially in a court of equity, if, in the case referred to, the stockholders were remediless.

In the case of Memphis City v. Dean (1868) the bill filed by the stockholder in the corporation averred that the corporation declined to sue. The court held, that the corporation had brought a suit in the state court, which was still pending, presenting the only question of which the plaintiff could compel the presentation, and that, therefore, the stockholder could not maintain in his own name, in another court, a suit presenting the same question.

In the case of Samuel v. Holladay (1868), before Mr. Justice Miller, of the supreme court of the United States, in the circuit court for the district of Kansas, there was, as the court says, in its opinion, no attempt to transcend the powers of the corporation, and no breach of trust on the part of the directors, but merely a neglect, on request, to bring a suit which one of the stockholders believed ought to be brought. The learned judge admits that the doctrine of the case of Dodge v. Woolsey recognizes the jurisdiction, where other parties are concerned, as extending to preventive remedies, to be used for the protection of rights endangered by the neglect of the directors and the threatened aggressions of others; and the doctrine he combats is, that an individual stockholder in a corporation can decide for the corporation when suits shall be brought to assert supposed rights, and, assuming the place of the corporation, "use the courts to enforce his private views in opposition to the sense of the directors, and probably of all the other shareholders." The case he was considering was a totally different one from that presented by the bill in this case. See the same case, reported as Samuel v. Holladay [Case No. 12,238].

In the bill before us there are many acts set forth which are ultra vires. On the allegations in the bill, it would appear that all issues of stock by the company, other than such as were specially authorized or approved by the acts of April 4th, 1860, April 2d, 1861, March 28th, 1862, May 4th, 1864 [supra], and April 21st, 1868 [1 Laws (N. Y.) p. 574], were unauthorized and illegal, and that no authority for the issuing of any stock by the company can be derived from the tenth subdivision of the twenty-eighth section of the general railroad act of April 2d, 1850 [Laws 1850, p. 225]. Besides the issues of stock not covered by the acts of 1860, 1861, 1862, 1864 and 1868, there are in the bill many acts charged in respect to the use and application of the corporate funds of the corporation, which were ultra vires of the corporation, and breaches of trust on the part of Gould, Fisk and Lane, who constituted a majority of the executive committee, to which committee, according to the bill, the administration of the affairs and funds of the company appears to have been wholly given up by the board of directors. The bill, among other things, prays for preventive relief, by injunction, to restrain the corporation from issuing any new certificates of stock, except on the surrender and cancellation of certificates for existing valid stock, on a regular transfer thereof, and to restrain Gould, Fisk and Lane, who have committed such breaches of trust, from exercising any further powers as directors, executive officers or executive committee of the company, and from interfering with or disposing of its property, funds or affairs.

Now, so far as the bill sets out acts ultra vires, in issuing stock, and breaches of trust, which are frauds on the stockholders, such acts and breaches of trust are beyond the power of the corporation or its directors to affirm, or sanction, or make good; and, in such case, the authorities agree, that the reason of the rule for an application to the corporation, or its board of directors, to bring the suit, does not exist. Such reason is, that, while the stockholder is prosecuting his suit, the corporation, through its board of directors, may affirm and make good the acts complained of. But the rule ceases when the reason ceases. The bill is, therefore, clearly maintainable, in respect to the acts ultra vires which it sets forth, and the preventive relief it seeks, founded thereon, without reference to anything else contained in it.

It is a rule of equity pleading (Story, Eq. Pl. § 443) that, if a demurrer covers the whole bill, when it is good to a part only, it will be overruled. Livingston v. Story, 9 Pet. [34 U. S.] 632, 658. The demurrers, in this case, cover the whole bill. The first cause of demurrer assigned in each, the want of equity, or, that the plaintiffs have not stated such a case as entitles them to any such relief as they seek, is a cause of demurrer to the whole bill, and to each and every part of it. The demurrer for want of equity must, therefore, be overruled, as the bill is, at least, good in part. The thirty-second of the rules in equity prescribed by the supreme court allows a defendant to demur to the whole bill, or to a part of it.

But I think the bill states a case which brings it within the settled principles as to allowing a bill by a stockholder, where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit.

The bill alleges, that, from July, 1868, to October, 1868, the board of directors of the company held no meeting, but left the management and control of the affairs of the company to Gould, Fisk and Lane, as executive officers, and to the executive committee of five, of whom Gould, Fisk and Lane were three. It also avers that, from and after the day of the election, in October, 1868, until the election of a new board of directors, in

October, 1869, no meeting of the board was held, except a special meeting, called to ratify some contract, at which no other business was transacted. Assuming that identity of names indicates identity of persons, in respect to the persons alleged in the bill to have been, at various times, directors of the company, it appears by the bill, that, of the seventeen directors who so failed to hold a meeting, as a board, from July, 1868, to October, 1868, nine (a majority of the whole) were re-elected directors in October, 1868, namely, Gould, Fisk, Lane, Thompson, A. S. Diven, Davis, Ramsdell, Skidmore and Groves; that of these nine, seven, (excluding Davis and Skidmore, who resigned), with the eight new directors, namely, Tweed, Sweeny, Miller, G. M. Diven, Hilton, Ganson, Sisson and Chapman, failed to hold any meeting of the board from the day of the election, in October, 1868, until the election of a new board, in October, 1869, except the special one before mentioned; and that, of such fifteen directors, eleven were re-elected in October, 1869, namely, Gould, Fisk, Lane, Thompson, A. S. Diven, Ramsdell, Tweed, Hilton, Ganson, Sisson and Chapman, and, with White, Otis, A. Gould, Smith, Simons and Hall, constituted the seventeen persons who were directors when the bill was filed, in April, 1870. It was during the period between October, 1868, and October, 1869, that the share capital of the company was increased by over $32,000,000. Of the seventeen directors elected in October, 1869, eight (excluding Gould, Fisk and Lane) are persons who thus wholly neglected their duties, and abnegated their functions, during the year ending in October, 1869. As to them, and as to their six new associates, brought in in October, 1869, the bill alleges, that, as a board, they possess no independent force for controlling Gould, Fisk and Lane; that Gould, Fisk and Lane have practically the absolute and unchecked control of the corporation, and its funds, property and affairs; that Tweed is in full accord with them in their schemes for private gain at the expense of the company, and has been, and is, personally interested in many of such schemes; that Smith was a copartner with Gould in said firm of Smith, Gould, Martin & Co.; that Hilton, White, Otis and Hall are salaried employees of the company, holding their offices at the pleasure of Gould, Fisk and Lane, or of Gould alone, and have only a nominal and trifling interest, if any, as shareholders in the company; and that Simons is in a substantially like relation with Gould, Fisk and Lane, being a salaried employee of the Narragansett Steamship Company, which is under the management and control of Gould, Fisk and Lane. Gould, Fisk, Lane, Tweed, Hilton, White, Otis, Hall and Simons constitute a majority of the seventeen directors. The bill also avers, that the independent action of some of the other directors is compromised by reason of their being under some pledge to support the policy of Gould, or resign, or they are in too small a minority to interpose any substantial check to the operations of Gould, Fisk and Lane, supported, as they are, by an overwhelming majority of the board in their interest, and that such other directors are in such relations with Gould, Fisk and Lane, as have prevented, and will prevent, them from, in any way, causing to be exerted the corporate power of the company to bring Gould, Fisk and Lane to account. The bill sums up its conclusion from the facts alleged in this regard, by averring, that the rights and equities, claims and demands, in favor of the company, which are set forth in the bill, cannot be enforced by suits brought in the name and on behalf of the company, for the reason that the control of the company is wholly in the hands of Gould, Fisk and Lane, and the plaintiffs are wholly unable to procure the bringing of a suit in the name of the company as plaintiffs against them. The allegations of the bill show satisfactorily that the company is under the actual potential control of the defendants Gould, Fisk and Lane, within the rule of equity jurisprudence before referred to, so that it would be a mockery to require or permit a suit against them to be brought and prosecuted under their management, to obtain the relief sought by this bill. These allegations are admitted by the company, which speaks for all the directors, by the demurrer which it has interposed. It is urged, by the counsel for the defendants, that the allegation of the bill, that the board of directors elected in October, 1869, is so constituted that it possesses no independent force for controlling Gould, Fisk and Lane, is a simple impossibility, for the reason that the fourteen directors do possess an independent force to control the three. But the facts set forth in the bill show that this is no impossibility. An absence of control is shown, facts showing dependence are shown, a failure to exhibit force is shown, a surrender of the entire corporation to Gould, Fisk, and Lane is shown, and a moral paralysis on the part of the fourteen directors is shown, which warrants the statement in the bill. If there ever was a case which called for the remedial power of a court of equity to be exerted at the suit of the stockholder for the benefit of himself and of his co-stockholders and of the company, to take cognizance of fraudulent breaches of trust on the part of the controlling directors, this is such a case; and it is a case where sufficient ground for the interposition is shown, without requiring a direct request to the corporation to prosecute, and its refusal.

Burt is not a stockholder, and is improperly joined as a plaintiff. As the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill. Story, Eq. Pl. § 509. The objection is one to the substance of the bill. But the plaintiffs may, if they desire, under rule 35 of the rules in equity

prescribed by the supreme court, amend their bill, on payment of costs, by striking out the name of Burt as a plaintiff, and the allegations of the bill in regard to his claim to stock.

It is set forth as a ground of demurrer to the bill, that Eldridge, Thompson, Underwood, Bardwell, Jordan and Whitney are necessary parties to the bill, as being stated therein to have been concerned in the illegal and fraudulent acts in respect of which the bill asks relief. Those six persons were six of the directors from October, 1867, to October, 1868. This objection, if of avail, would apply equally to Evans and Gregory, who were directors during the same period, and to Groves, Sweeny, Miller, and G. M. Diven, who were directors from October, 1868, to October, 1869, for, while there are allegations in the bill, of complicity in breaches of trust and in fraudulent acts, that are applicable to the six directors so specified in the causes of demurrer, there are other such allegations that are applicable, some of them to the first two, and the others to the last four, of the last named six directors, who are not specified in the causes of demurrer as necessary parties. I exclude Work, Davis and Skidmore, because of the allegations in the bill in regard to them. But it is not necessary to make any of such twelve persons parties. The well settled rule is, that, if there are several trustees who are all implicated in a common breach of trust, for which the cestui que trust seeks relief in equity, he may bring his suit against all of them, or against any one of them separately, at his election, the tort being treated as several as well as joint. Story, Eq. Pl. § 213; Cunningham v. Pell, 5 Paige, 607, before cited.

Nor is it necessary that the Boston, Hartford and Erie Railroad Company, or Schell, or Vanderbilt, or the Narragansett Steamship Company should be parties to the bill. No relief is prayed for against them. The transactions with them by Gould, Fisk and Lane, which are complained of, are set forth, but the bill seeks to charge Gould, Fisk and Lane as tort-feasors. If the parties named have been in collusion with Gould, Fisk and Lane, in wrongfully obtaining the funds of the company, Gould, Fisk and Lane have no right of contribution over against such parties, and, therefore, cannot require them to be made parties to the suit. As to the company, the tort of each wrong-doer against it is several, and, neither in a suit by it nor by its stockholders, is every one of the wrong-doers a necessary party, because some one wrong-doer is a proper party. The doctrine above referred to in regard to several trustees implicated in a common breach of trust, applies equally to any wrong-doer confederated with a fraudulent trustee.

It is alleged, as a case of demurrer to the whole bill, that the fourteen persons, other than Gould, Fisk and Lane, who were, with them, elected directors of the company in October, 1869, are necessary parties to the bill, inasmuch as the bill prays to have the classification of directors of October, 1869, set aside, and thus shorten the term of such fourteen persons, who appear by the bill still to be directors of the company. Even if such fourteen persons be necessary parties in respect of the relief prayed in regard to such classification, and even if a demurrer to such relief would be maintainable for want of such parties, yet the demurrer in this particular is too general and must be overruled, because it covers the whole bill, and should have been a demurrer only to the relief prayed in regard to such classification. Story, Eq. Pl. § 443; Livingston v. Story, 9 Pet. [34 U. S.] 632, 658.

The objection that such fourteen persons ought to be made parties, as appearing to have been directors when the bill was filed, for the reason that the bill asks for an injunction against the corporation, and for a receiver of the corporation, is not well taken. The relief so asked is against the corporation. If such fourteen persons were made parties, they would be merely nominal parties and not real parties, in respect to any relief that is asked against the corporation; and no relief is asked as against them, except in respect to the matter of the classification, which has already been disposed of. This question was fully considered in the case of Hatch v. Chicago, R. I. & P. R. Co. [Case No. 6,204].

The views already stated dispose of the objection that Tweed is not a party to the bill. Though he is charged to have been in complicity with Gould, Fisk and Lane, relief is not asked against him.

As to the case of demurrer assigned, that the plaintiffs have waived an answer on oath, there is no doubt that the defendants have a right to answer on oath notwithstanding such waiver, and that the plaintiffs cannot, by tendering such waiver in their bill, deprive the defendants of the right to answer on oath. But, for the very reason that such waiver can deprive the defendants of no right, the waiver amounts to nothing, unless the defendants choose to accept it. Yet the plaintiffs have the right to tender it, as they have done, and, if the defendants should choose to answer without oath, the plaintiffs could not complain. The tender of the waiver is, however, no ground of demurrer. Notwithstanding the provision of rule 43 of the rules in equity prescribed by the supreme court, a plaintiff may tender such a waiver, if he chooses. If the defendant does not accept the tender, it is to be regarded as surplusage; but the defendant is still bound to answer the bill, either without oath or on oath.

It results, therefore, that the demurrers are overruled, and the bill is sustained in all particulars, except as to the joining of Burt as a party plaintiff, as to which the

plaintiffs may amend, as before stated, on payment of costs.

[NOTE. The defendants having brought a cross bill, moved that the subpoena to appear and answer might be directed to be served on the solicitors of the plaintiffs, the latter being out of the jurisdiction. The motion was denied. Case No. 6,307. In Case No. 4,513 a motion was granted for an attachment against Jay Gould, the president of the defendant company, for contempt of court in refusing to produce certain books and documents. In Case No. 4,514 sundry questions in a petition for relief for stock abstracted by Jay Gould were answered by the court, and a motion by the company to open a default taken was denied. In Case No. 4,515 a petition by Jay Gould to take proof of the title to said stock was denied, and an order for the suspension of the delivery of certain shares to Heath and Raphael was vacated. In Case No. 4,516 the commission of the master was fixed by the court.]

Case No. 6,307.

HEATH et al. v. ERIE RY. CO. et al.

ERIE RY. CO. et al. v. HEATH et al.

[9 Blatchf. 316.] [1]

Circuit Court, S. D. New York. Jan. 16, 1872.

CROSS BILL—NATURE AND SERVICE—SUBSTITUTION OF PARTIES FOR PURPOSE OF SERVICE—DISCOVERY—INTERROGATORIES.

1. The bill in the first cause was an original bill. The bill in the second cause was a bill for discovery and relief, and denominated itself a cross bill. The relief prayed in it was, that certain releases and proceedings might be declared to be a bar to any further proceedings in the first cause, and that the bill in that cause might be dismissed, and that an injunction might issue restraining the prosecution of any suit involving the questions covered by such releases and proceedings. The discovery prayed was as to whether such proceedings did not take place, and as to whether the agent of the defendants in the second cause was not present when such proceedings took place. The releases were given, and the proceedings took place, after issue was joined in the first cause. The defendants in the second cause being aliens, and out of the jurisdiction of the court, and being the plaintiffs in the first cause, the plaintiffs in the second cause, who were the defendants in the first cause, moved, that the subpoena to appear and answer in the second cause be served on the solicitors for the plaintiffs in the first cause, and that the proceedings in the first cause be stayed until the cross bill should be answered. In reply to the motion, such solicitors tendered a stipulation, withdrawing their replications to the answers in the first cause, and permitting such answers to be amended by setting up therein the matters of the cross bill not contained in such answers, or supplemental answers to be filed, setting up such matters: *Held*, that such stipulation made the cross bill unnecessary, as to its prayer for relief, except so far as it prayed for an injunction; that, in that respect, it was an original bill; and that the substituted service asked for could not be made in an original suit.

[Cited in Kountze v. Cargill (Tex. Sup.) 25 S. W. 14.]

2. *Held*, also, that there was no allegation in the cross bill that it was material the plaintiffs should have the discovery asked; and that, if there were, the discovery was unnecessary, in view of the act of July 6, 1862, § 1 (12 Stat. 588), and the act of July 2, 1864, § 3 (13 Stat. 351), permitting parties to be witnesses.

[Cited in Drexel v. Berney, 14 Fed. 268.]

3. The theory and basis of a bill of discovery in equity, in aid of a defence in another suit, is, that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein, of facts material to the defence.

[Cited in Markey v. Mutual Benefit Life Ins. Co., Case No. 9,091; Rindskopf v. Platto, 29 Fed. 132.]

4. The motion was denied, but the benefit of the stipulation tendered was given to the defendants in the first cause.

5. If the defendants in that cause choose to examine the plaintiffs therein by commission, the court can require that the plaintiffs answer fully all interrogatories put to them, or else debar them from the benefit of their suit.

[Cited in Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, etc., Co. (Fla.) 9 South. 665.]

[Motion by complainant, the Erie Railway Company, that the subpoena to appear and answer to a cross bill filed by it against John Benjamin Heath and seven others (who were complainants in a bill filed in Case No. 6,306) might be directed to be served upon their solicitors, the proper parties being aliens, and out of the jurisdiction.]

David Dudley Field and Dudley Field, for the motion.

William M. Evarts and Charles F. Southmayd, opposed.

BLATCHFORD, District Judge. The bill in the second cause, so far as it sets up matters which are alleged to have transpired since the answers to the bill in the first cause were put in, sets up matters which appear to be particularly within the knowledge of the plaintiffs in the second cause, and not at all within the knowledge of the defendants in that cause, except as to one point. The holding of the annual meeting of the stockholders of the company, on the second Tuesday of October, 1871, the laying before that meeting of the report of an investigating committee, and of the releases executed by the company, and of the declaration of trust and agreement executed by the other plaintiffs in the second cause, the adoption by the meeting of a resolution of ratification, the election of directors, and the subsequent execution of a release by the company to the other three plaintiffs in the second cause, are not matters of which it is pretended the defendants in the second cause know anything. The bill alleges that, at such meeting of stockholders, one John Swann was present; that said Swann is the agent and attorney in fact of the defendants in the second cause, and of all the stockholders of the company who are acting in concert with them; and that Swann was, at the time of the meeting, in possession of powers of attorney or proxies empowering him to vote at such meeting on behalf of each and every one of the defendants in the second cause.

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

The bill in the second cause prays for a discovery from the defendants therein, as to whether such proceedings, acts and resolutions were not had at the stockholders' meeting; as to whether Swann was not present at such meeting, when such resolutions were passed; and as to whether Swann was not and is not the agent and attorney in fact of such defendants, and employed by them, as such, to carry on the first cause, and authorized and empowered by them to vote in their names at such meeting.

The bill in the second cause also prays for relief, namely, that such releases and proceedings may be established and declared by this court to be a full and sufficient bar to any further proceedings, by the defendants therein and all other stockholders of the company, in the first cause, and that the bill in the first cause may be dismissed, and that the defendants and all other stockholders of the company may be enjoined from prosecuting any suit involving the questions disposed of by the action of the stockholders at such meeting.

As a foundation for these prayers, the bill in the second cause, which denominates itself a cross bill, avers, that issue was joined in the first cause on the 2d of September, 1871; that no witnesses have been examined in it, and the time for taking proofs in it has not expired; that the defendants threaten and intend to proceed in it, and to bring it on for hearing in due course, and pretend that no such releases were executed, or that, if they were executed, they are not valid and binding on the defendants; that such releases were properly granted and duly executed by the company, and, with such proceedings, constitute a good bar in equity to the first cause; and that, under the circumstances, the plaintiffs are unable to put such proceedings in issue or to use the same as a plea in bar in the first cause.

The defendants in the second cause being all of them aliens, and none of them being found within the jurisdiction of this court, the plaintiffs in that cause, who are the defendants in the first cause, move that the subpoena for the defendants in the second cause, who are the plaintiffs in the first cause, to appear and answer, may be directed to be served on the persons who are the solicitors for the plaintiffs in the first cause; and that the proceedings in the first cause may be stayed until the bill in the second cause is answered. In answer to this motion, the solicitors for the plaintiffs in the first cause tender to the defendants therein a written stipulation, entitled therein, in these words: "In order to obviate any necessity for a cross bill herein, the plaintiffs hereby offer, by stipulation, to withdraw their replications to the defendants' answers, and permit the defendants, within fifteen days from this date, to amend such answers, by setting up therein such of the matters of the cross bill as are not already contained in the answers, or, if the defendants so prefer, to allow them to file supplemental answers, setting up such matters."

The stipulation tendered makes the bill in the second cause unnecessary, so far as it prays that the releases and proceedings set up may be established and declared to be a bar to any further proceedings in the first cause, and that the bill in the first cause may be dismissed. So far as the bill in the second cause prays that the defendants therein, and all other stockholders of the company, may be enjoined from prosecuting any other suit involving the questions alleged to have been disposed of by the action of the stockholders at the meeting referred to, the bill is not a cross bill, but is an original bill. The substituted service asked for cannot be made in an original suit.

So far as the bill in the second cause is a bill of discovery, there is no allegation that it is material that the plaintiffs should have the discovery. If there were, and if the bill were purely a bill of discovery, and not a bill for discovery and relief also, it would be wholly unnecessary, in the present state of the law. By the act of July 6, 1862, § 1 (12 Stat. 588), the laws of the state of New York are made the rules of decision, as to the competency of witnesses, in this court, in trials in equity. By the laws of New York, the plaintiffs in the first cause could be examined as witnesses by the defendants therein, if that cause were pending in a court of the state. So, also, by the act of July 2, 1864, § 3 (13 Stat. 351), it is provided, that, in the courts of the United States, there shall be no exclusion of any witness in civil actions because he is a party to or interested in the issue tried. So far as the bill in the second cause seeks the discovery of any facts resting in the knowledge of the defendants, it is unnecessary, for the discovery can be had by an examination of them in the first cause. The theory and basis of a bill of discovery in equity, in aid of a defence in another suit, is, that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein of facts material to the defence. I do not deem it a proper exercise of discretion, in these cases, to direct the substituted service asked for, or to stay proceedings in the first cause till the bill in the second cause is answered. But the defendants in the first cause may have the benefit therein of the stipulation tendered them by the plaintiffs therein, and, if the defendants in that cause choose to examine the plaintiffs therein by commission, the court can require that the plaintiffs answer fully all interrogatories put to them, or else debar them from the benefit of their suit.

[NOTE. In Case No. 4,513, a motion was granted for an attachment against Jay Gould, the president of the Erie Railway Company, for contempt of court, in refusing to produce certain books and documents. In Case No. 4,514, sundry questions in a petition for relief on account of certificates of stock abstracted by said

Jay Gould were answered by the court, and a motion by the company to open a default taken was denied. In Case No. 4,515, a petition by said Jay Gould to take proof of the title to said stock was denied, and an order for the suspension of the delivery of certain shares to Heath and one Raphael was vacated. In Case No. 4,516, the compensation of the master was fixed by the court.]

HEATH (ERIE RAILWAY CO. v.). See Cases Nos. 4,513–4,516.

Case No. 6,308.

HEATH v. HILDRETH.

[See Case No. 6,309.]

Case No. 6,309.

HEATH v. HILDRETH.

[1 MacA. Pat. Cas. 12; Cranch, Pat. Dec. 96.] [1]

Circuit Court, District of Columbia. Oct. 15, 1841.

PATENTS—PRIORITY OF INVENTION—"REDUCED TO PRACTICE" DEFINED—CAVEAT—LACHES.

[1. The right of a first inventor, who is maturing his invention and preparing to make application in a reasonable time, to a patent is not barred by the fact that before making his application a subsequent inventor has obtained a patent, and has put the invention into actual use.]

[Cited in Richardson v. Hicks, Case No. 11,783. Approved in Re Wagner, Id. 17,038; Ellithorp v. Robinson, Id. 4,409. Applied in Mowry v. Barber, Id. 9,892.]

[2. To be the "first inventor," within the meaning of the patent law of 1836 (5 Stat. 117), it is not necessary that he who first conceived the idea should reduce it to practice otherwise than by making a model and drawings from which one skilled in the art would be enabled to carry it into actual use.]

[Cited in Marshall v. Mee, Case No. 9,129; Re Seeley, Id. 12,632. Approved in Stephens v. Salisbury, Id. 13,369.]

[3. "Reduced to practice," as used in the patent law, does not import bringing the invention into use, but rather reducing it to such form that it may be used so as not to be a mere theory. If a machine be invented and described in such manner that it may be made and used, and especially if a model be made, the invention may be said to be reduced to practice.]

[4. The filing of a caveat, as provided for in the twelfth section of the act of 1836, is for the benefit of the inventor, and enables him to have notice of any interfering application; and hence an omission to file it while maturing his invention does not impair his rights.]

[5. It is doubtful whether mere lapse of time between the time of invention and the filing of the application will authorize the commissioner to refuse a patent to the first inventor, especially when he was bona fide taking measures to improve as perfect his invention, and preparing to apply for a patent, unless there has been some intermediate use by the applicant or by his consent; and, in any event, a delay of four years does not have that effect.]

[This was an appeal by George W. Hildreth, owner of patent No. 1,517, granted March 29, 1840, from a decision of the commissioner of patents, in interference proceedings, awarding to George Heath priority of invention of an improved canal lock gate.]

The Commissioner:

It is admitted by both parties that the inventions are substantially the same, and it is not claimed by Hildreth that the invention ultimately perfected and presented at the patent office [by him] is any other than the one to which the witnesses on the part of Heath testify to having seen in the possession of said Heath as early as the spring or summer of 1836. On the other hand, it does not appear that Hildreth invented said gate or had any knowledge of it until the summer of 1838. It is therefore perfectly apparent from the testimony (and is not seriously controverted by Hildreth) that Heath had conceived the idea of the gate in question and constructed one in miniature, to wit, a model, long before the first notions of the same entered the mind of Hildreth, which would certainly seem to settle the question of priority of invention, and certainly does settle it, unless the courts have given a construction or signification to the word "invention" very different from that ordinarily attributed to it. But there are two points upon which Hildreth relies, to wit: First. He claims that Heath has forfeited his right by neglecting to "put it into actual use." Secondly. That the evidence is that Heath had abandoned his invention. As to the first point, the statute in so many words gives the patent to the "original and first inventor," and nowhere requires the same to be reduced to practice or put into use—a condition too important to have been omitted, if it were really a prerequisite. And, moreover, among the circumstances which are enumerated as invalidating a patent already obtained, is proof that the same "has been described in some public work," &c., which is sufficient without proving "putting into use." It certainly would be preposterous under our statute to require an applicant who had invented a steamship to build one of full size, and put it into operation, before a patent could issue or his right be protected. As matter of practice, the great mass of patents daily granted are granted upon models of what has never been reduced to practice in any other sense than the invention of Heath was so reduced. The statute requires as necessary to the grant of a patent that the "invention," &c., should be of something "not known or used before," &c., which renders previous knowledge without use sufficient to invalidate a patent, and destroys the ground upon which Hildreth rests his claim. But it is not to be taken as granted that the courts, in the face of the statute, have decided that reduction to practice is necessary to preserve the rights of the party; and it is incumbent on Hildreth to show such decisions, if they exist. The cases of Bedford and Hunt and Evans and Eaton,

[1] [Cranch, Pat. Dec. 96, contains only a partial report.]

quoted by him, do not establish the doctrine contended for. In those cases the question was whether prior use was sufficient to invalidate a subsequent patent; and the court very properly decided that it was, and a verdict was rendered for the defendant. But the question, what would amount to a prior invention, or whether a prior invention not put in actual use would have invalidated the patent, was no part of the case; and what is said by the court beyond the limits of the case is a mere dictum, and not authority.

But, giving the language of the court its full force, taken in connection with the other parts of the case, it amounts simply to this: "that the mere speculations of a philosopher or mechanician" would not defeat an inventor. And surely it never can be successfully contended that inventing a machine and building it on a small scale, making drawings of it, and describing it in the form of a caveat, and making oath to the invention of the same, "are mere speculations." If the court had used the language "mere speculations," &c., without adding anything about putting "into practice," this passage would never have been quoted by the appellant. But does adding the expressions "never put into actual operation," "never tried by the test of experience," change the force of the language? Not in the least. It is still a "mere speculation," not a model, drawing, and specification. If the court had said "inventing a machine and making a model, drawings, and specifications of the same, without putting the machine into actual operation, will not defeat an inventor," the dictum would have been in point; and unless the language of the court will bear this construction (which it clearly will not,) it is not in point, and makes nothing for the claim of the appellant. It is submitted, therefore, that the appellant has wholly failed to show that reduction to practice is a prerequisite to the grant of a patent, but that the provisions of the statute may be fully complied with without putting the invention into actual use.

Thos. P. Jones, for appellant.
Mr. Fitzgerald, for appellee.

CRANCH, Chief Judge. On the 29th of April, 1840, George Heath filed in the patent office his application for a patent for his invention of an improved canal lock-gate. The commissioner, being of opinion that the patent thus applied for would interfere with an unexpired patent granted to George W. Hildreth on the 19th of March, 1840, gave notice thereof to the parties, and, upon a hearing before him, decided that George Heath was the original and first inventor, and entitled to a patent therefor. From this decision Mr. Hildreth has appealed; and the question is now submitted to me by the parties, upon written argument. The commissioner has furnished a certificate in writing of his opinion and decision; and Mr. Hildreth has filed his reasons of appeal with the written argument of his counsel. The reasons for appeal thus filed are eight in number, but may be reduced to three: (1) Because Mr. Heath was not the first inventor, in the meaning of the patent law, inasmuch as his invention was never reduced to practice, but was the mere speculation of a philosopher or mechanician. (2) Because he never filed a caveat pursuant to the twelfth section of the act of July 4th, 1836. (3) Because he has forfeited his claim to the invention by his delay in applying for a patent.

1. Upon the first point the very ingenious argument of Mr. Hildreth's counsel is founded upon a dictum of Mr. Justice Story in the case of Bedford v. Hunt [Case No. 1,217], that "the first inventor who has put the invention in practice, and he only, is entitled to a patent," and that dictum was, perhaps, founded on these words in the sixth section of the act of February 21st, 1793, viz., "or that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery by the patentee," &c., from which an inference seems to be drawn that the defense—that the matter was not originally discovered by the patentee—would not avail the defendant unless he should show also that it had been in use by the prior discoverer. But the words "but had been in use" seem to have been carefully excluded from the fifteenth section of the act of 1836, which, like the sixth section of the act of 1793, states the matters which may be given in evidence under the general issues in an action for infringing the plaintiff's patent. By thus excluding those words the defense—"that the patentee was not the original and first inventor or discoverer of the thing patented"—is complete without showing that the first inventor had put his invention in practice.

None of the patent laws have ever required that the invention should be in use or reduced to actual practice before the issuing of the patent, otherwise than by a model, drawings, and a specification containing a written description of the invention and of the manner of making, constructing, and using the same in such full, clear, and exact terms as to enable any person skilled in the art to which it appertains to make, construct, and use the same. In England it is understood that if the thing is in use before the issuing of the patent it is void; and our act of March 3, 1839, § 7 [5 Stat. 354], in order to meet such an objection, provides that the use of the thing, even by leave of the inventor, for two years before his application for a patent, shall not invalidate it; a fortiori, the use of it by a third person, or a subsequent inventor, after the first invention and before the issuing of the patent to the first inventor, and without his consent, will not, under our patent laws, be a bar to the issuing of it.

Mr. Justice Story, in the case of Bedford v. Hunt [supra], was not considering the question whether the patent should be issued, but whether it should be invalidated by prior use. He has not said that under any circumstances an invention must be in use before a patent for it can be obtained; and his dictum is wholly inapplicable to the question whether the commissioner of patents should issue a patent. If a patent should be issued to Mr. Heath, its validity would be still a question open to the courts, and is one which can be conclusively settled by the courts only. By the seventh section of the act of 1836, the commissioner is bound to issue a patent in the case and under the circumstances there stated. He has in such a case no discretion; and the present is such a case. By that section it is enacted "that on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the commissioner shall make or cause to be made an examination of the alleged new invention or discovery; and if on such examination it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale, with the applicant's consent or allowance, prior to the application—if the commissioner shall deem it sufficiently useful and important, it shall be his duty to issue a patent therefor."

It appears by the proceedings before the commissioner that Mr. Heath regularly filed his application, description, and specification, and paid the duty; that the commissioner made the examination; and that upon such examination it did not appear to him that the same had been invented or discovered by any other person, or had been patented or described in any printed publication in this or any foreign country prior to the alleged invention or discovery thereof by the applicant, or that it had been in public use or on sale, with the applicant's consent or allowance, prior to his application. The commissioner was, therefore, prima facie bound to issue the patent to Mr. Heath. At first view it may seem doubtful, from the words of that section, whether a patent issued to the second inventor before the application of the first inventor would not be a bar to the issuing of a subsequent patent to the first inventor. But upon comparing the words of that section with those of the sixth, eighth, and fifteenth sections of the same act, it is evident that the patent, which would bar the issuing of a patent to the applicant, must be a patent issued prior to his invention, and not merely prior to his application. Having complied with all the requisites of the seventh section, what is to prevent the applicant from obtaining his patent? It is alleged that he was not the first inventor because he had not reduced his invention to practice. But that objection is answered by showing that there is no law which requires an inventor to put his invention in practice or use before obtaining his patent; and it is perfectly immaterial to him whether the subsequent inventor had put it in practice or not. That fact cannot affect the right of the first inventor. If congress had intended that a patent to the second inventor should be a bar to a patent to the first inventor, they would not have given jurisdiction to the commissioner to decide the question of priority between them, and to grant a patent to the first inventor in cases of interference, as they have done by the eighth section of the act. Neither that section nor any other section of that or any other act makes the right of the patentee or of the applicant depend upon the fact of the invention being reduced to actual practice, except in the case of an alien patentee failing and neglecting, "for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued." From this exception an inference may be drawn that a citizen patentee cannot lose his right by non-user, unless it amount to evidence of an abandonment of the patent; and the question of abandonment of a patent is a question for the jury in a trial at law. If the invention be the mere speculation of a philosopher or mechanician in his closet, and he takes no steps toward obtaining a patent, but keeps his invention secret, and another person, who is also an original but subsequent inventor of the same thing, obtains a patent for it and brings it into use, it has been held, both in England and in this country, that the patentee in a suit at law is to be considered as the first inventor. But it has happened in such case, as in many others, that elementary writers and subsequent tribunals have laid down the doctrine in broader terms than the cases upon which it was founded will warrant.

Thus Smith, in his Epitome of the Patent Laws (page 11), says: "It sometimes happens that two men severally discover the same thing, each by his own unassisted exertions; when this happens, the first who communicates it to the public is deemed the first inventor and entitled to the patent." And he cites Boulton v. Bull, 2 H. Bl. 487; Forsyth v. Riviere, Chit. Prerog. 132n; Lewis v. Marling, 10 Barn. & C. 22; Wood v. Zimmer, Holt, N. P. 58; Edgeberry v. Stephens, 2 Salk. 447. And Mr. Justice Story, in the case before cited, says: "The first inventor who has put the invention in practice, and he only, is entitled to a patent."

The doctrine thus broadly laid down is not supported to that extent by the cases cited, and it would be unjust if it were, for it makes no exception of the bona fide first in-

ventor who is "using reasonable diligence in adapting and perfecting" his invention, and whose right is saved by the spirit, if not by the letter, of the fifteenth section of the act of 1836, which makes it a good defense to an action for infringing the patent that the plaintiff had "unjustly obtained the patent for that which was, in fact, invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same." If such a case had been presented to the mind of Mr. Justice Story, there can hardly be a doubt that he would have excepted it from the broad terms of the doctrine as laid down by him in the case of Bedford v. Hunt. Such, from the evidence and admissions of counsel, was the case of Mr. Heath. He was using reasonable diligence in adapting and perfecting his invention; and it appears by testimony adduced by Mr. Hildreth that in the winter of 1839, before he obtained his patent, Mr. Heath exhibited to the witness Alfred Barrett, who had in his possession a model of Mr. Hildreth's paddle-gate, his (the said George Heath's) model of his gate, and claimed to be the inventor thereof. It is probable, therefore, that Mr. Hildreth had notice of Mr. Heath's claim before he obtained his patent. The doctrine as stated by Mr. Smith and by Mr. Justice Story seems to have originated in Dolland's Case, cited by Buller, J., in the case of Boulton v. Bull, [supra.] Dolland had a patent for an improvement in making object-glasses for telescopes. It was objected that he was not the inventor, "but that Doctor Hall had made the same discovery before him. But it was holden that as Doctor Hall had confined it to his closet, and the public were not made acquainted with it, Dolland was to be considered as the inventor." This Case of Dolland is not reported; and all that we know of it is what was said by Buller, J., in the case of Boulton v. Bull, 2 H. Bl. 463, 464; and upon that foundation is probably built the broad doctrine that the first of two original inventors who communicates the invention to the public is entitled to the patent, although the other invented the thing first. Between simultaneous inventors this may be just, because neither can claim the priority; but it cannot be just that the prior inventor, who is maturing his invention and preparing to make application for a patent in a reasonable time, should be defeated by a subsequent inventor who first obtains a patent. This is not the doctrine of Dolland's Case, which was only that an inventor who confines his invention to his closet, and does not communicate it to the public, and takes no steps toward obtaining a patent until a subsequent original inventor has obtained his patent, thereby forfeits and abandons his claim to priority of invention. But the question of forfeiture or abandonment is for the jury upon a trial at law. The first inventor is prima facie entitled to a patent, and the commissioner, as before observed, is bound to issue it under the seventh section of the act of 1836, if certain facts should not appear to the commissioner, as therein specified, which specification of facts does not include delay or abandonment; so that the question of delay or abandonment is not by that section submitted to the jurisdiction of the commissioner.

I do not consider the expression "reduced to practice" as importing the bringing of the invention into use. When applied to an invention, it generally means the reducing it into such form that it may be used so as not to be a mere theory. If a machine be invented and described in such a manner that it may be made and used, and especially if a model be made, the invention may be said to be reduced to practice. In the present case it is admitted in argument (and such is the evidence) that Mr. Heath in the summer of 1836 actually made a lock-gate according to his specification. It was, indeed, a small one—a model only—but the size is of no importance. The thing was done; the invention was reduced to practice; and it was demonstrated thereby that the invention was practicable. I am, therefore, and for the reasons before stated, of opinion that where the invention is not of a mere philosophical speculation, abstraction, or theory, but of something corporeal, something to be manufactured, the applicant need not show that he has reduced his invention to practice otherwise than by filing his specification and furnishing drawings and a model, as required by the statute, where the nature of the case admits of drawings or of a representation by a model. These having been thus filed and furnished by Mr. Heath, and it being admitted that he, in point of time, was the first inventor of the thing patented, he is entitled to a patent therefor, notwithstanding the patent granted to Mr. Hildreth, unless he has lost his right by not filing a caveat or by delay in applying for his patent.

2. The second reason of appeal is that Mr. Heath never filed a caveat pursuant to the twelfth section of the act of July 4, 1836. That section was introduced for the benefit of the inventor, but was not necessary to the preservation of his right. It only enables him to have notice of any interfering application. Godson (Law of Patents, 146) says: "Of its nature and effect much misconception has arisen. It does not create any right, but is simply a request to be favored with information." Again he says: "Upon the whole, therefore, the entering of a caveat is nothing more than giving information that there is an invention nearly completed, and requesting that if any other person should apply for a patent for the same thing the preference may be given to him who entered it, which request is complied with by the courtesy of the crown

upon its being satisfied of its reasonableness by the report of the attorney-general or the opinion of the lord chancellor; and when the patent is granted, it is to be judged of as if no caveat had been entered." But this caveat gives no notice to the world or even to the interfering applicant. It is notice to the commissioner only, and is locked up in the secret and confidential archives of the office. It would not in any manner have strengthened the title of Mr. Heath; nor does the omission of it impair that title or aid that of Mr. Hildreth. This reason of appeal, therefore, as well as the first, must be overruled.

3. The last reason of appeal is that Mr. Heath has forfeited his claim to the invention by his delay in applying for a patent. The statute does not limit any time in which the inventor must apply for a patent, nor does it declare a forfeiture by reason of any delay. The delay, therefore, seems to be unimportant, unless it amounts to evidence of abandonment of the claim. It is not one of the specified grounds for which the commissioner is, by the seventh section of the act of 1836, authorized to refuse to grant the patent, and it seems to be a matter within the peculiar province of the jury upon a trial at law in any action which either of the patentees may institute against the other. If there be any limit of the time of application, it must be a reasonable limit, and that is proper matter for the consideration of a jury. And I am very much inclined to the opinion that any matter of defense which it is the peculiar province of a jury to decide, and which is not, by the seventh section of the act of 1836, made a ground for the refusal of a patent by the commissioner, should be left by him to be decided by the jury in a subsequent action at law. In Morris v. Huntington [Case No. 9,831], Mr. Justice Thompson said: "No man is to be permitted to lie by for years and then take out a patent. If he has been practicing his invention with a view of improving it, and thereby rendering it a greater benefit to the public before taking out a patent, that ought not to prejudice him; but it should always be a question submitted to the jury what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent should not be considered an abandonment or present of it to the public." In Pennock v. Dialogue, 2 Pet. [27 U. S.] 16, Mr. Justice Story, in delivering the opinion of the court, says: "It has not been, and indeed cannot be, denied that an inventor may abandon his invention and surrender or dedicate it to the public. The question which generally arises at trials is a question of fact rather than of law, whether the acts of acquiescence of the party furnish, in the given case, satisfactory proof of an abandonment or dedication of the invention to the public." The point decided by the court in that case was "that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent." But it is believed that it has not yet been decided that the right of first inventor has been lost merely by lapse of time between the invention and the application for the patent, unless there has been some intermediate use by the applicant or by his consent, and especially where he was bona fide taking measures to improve or perfect his invention and to prepare for applying for the patent, which, from the evidence, appears to have been the case of Mr. Heath. If, therefore, the question of abandonment be cognizable by the commissioner, there is in my opinion no evidence to support it; and this reason of appeal must also be overruled. It is therefore, upon the whole case, my opinion, and I do so decide and adjudge, that the decision of the commissioner of patents in this cause be, and is hereby, affirmed.

[See Reed v. Cutter, Case No. 11,645; Evans v. Eaton, 3 Wheat. (16 U. S.) 454.]

Case No. 6,310.

HEATH v. WRIGHT.

[3 Wall. Jr. 141; Cox, Amer. Trade-Mark Cas. 154; Cox, Manual Trade-Mark Cas. 76.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1855.

INJUNCTION—PATENT MEDICINE.

Chancery will not interfere by injunction in questions of trade mark between the vendors of patent medicines, being quack medicines; such questions having too little merit to commend them on either side.

[Cited in Kohler Manuf'g Co. v. Beeshore, 59 Fed. 574.]

This was an application by the complainant for an injunction to restrain the defendant from using the name "Kathairon" for a compound for toilet purposes, manufactured and vended by both parties. The complainant alleged that this term was his trade mark, which the defendant denied, alleging that the word "Kathairon" was in common use, like that of "Magazine," &c. Both Kathairons consisted essentially of a mixture of castor oil and brandy; and it appeared by the labels upon the bottles which contained the respective Kathairons, that the complainant claimed for his, that it would infallibly cure "scald head, tetter, ringworm, erysipelas, itch, barber's itch, shaving pimples, salt rheum, chapped hands, stings, cuts, chilblains, swellings, inflammations, rheumatisms," &c.: and that it would "almost instantly relieve sympathetic attacks of nervous headache," besides "restoring the hair,

[1] [Reported by John William Wallace, Esq., and here reprinted by permission. Cox, Manual Trade-Mark Cas. 76, contains only a partial report.]

and preventing it from turning gray." "It would be labor lost," his label declared, "to enumerate the wonderful properties of this invaluable preparation; its reputation, coextensive with the civilization of the globe, makes all praise superfluous, all exaggeration impossible." The claim of the defendant was not quite so extensive. He declared his to be a "sovereign remedy for tetter, itch, scald head, salt rheum, ringworm." He made no mention of its power to cure erysipelas, but professed that it was able to cure "barber's itch, chapped hands, chilblains, stings and bites of insects, inflammations, swellings," &c., besides "preserving the hair and keeping it from turning gray," and dispelling nervous headache. And he averred that his Kathairon had had "millions of patrons."

KANE, District Judge. It is impossible for me to distinguish this case in principle from that of Fowle v. Spear [Case No. 4,996], which was before me on a similar motion some years ago. I then refused an injunction against the vendor of a patent medicine at the suit of his brother quack, who complained that his label and envelope of certificates had been imitated, on the ground that the special action of chancery could not be involved in a controversy which had so little merit to commend it on either side. Injunction refused.

HEATH, The MARTHA M. See Case No. 7,113.

HEATON (JONES v.). See Case No. 7,468.

HEATON (MARCH v.). See Case No. 9,061.

Case No. 6,311.

HEATON et al. v. QUINTARD et al.

[7 Blatchf. 73.] [1]

Circuit Court, S. D. New York. Dec. 1, 1869.

PATENTS — INFRINGEMENT—WHAT CONSTITUTES—LIABILITY OF UNITED STATES GOVERNMENT FOR—ARMOR FOR VESSELS.

1. Where armor for a vessel was constructed by Q. under an order given for that purpose by the secretary of the navy of the United States, and was applied to a vessel built for the United States, and was paid for to Q. by the secretary of the navy: *Held*, that, although the armor may have been the same, in arrangement, as that covered by a patent, Q. was not liable, in a suit on the patent, for any value which the armor may have been to the United States.

2. The patent being for the application or employment of the armor on the vessel, the putting of the armor by Q. on a vessel owned by the United States, was not a making or using or vending to be used of the armor by Q.

[Distinguished in American Cotton Tie Supply Co. v. McCready, Case No. 295. Cited in United Nickel Co. v. Worthington, 13 Fed. 393.]

3. Whether the United States are excluded from the right to make for themselves and use a patented invention, without the consent of the patentee, under the grant by them to him of an exclusive right to make, use and vend it, quere.

4. The cases of Walker v. Congreve, 1 Carp. Pat. Cas. 356, and Feathers v. The Queen, 12 Law T. (N. S.) 114, discussed.

In equity. This was a final hearing, on pleadings and proofs, of a suit [by Charles W. S. Heaton and William H. Webb against George W. Quintard and others] founded on letters patent [No. 38,206], of the United States granted April 14th, 1863, to the plaintiff Heaton, for a "system of defensive armor for marine and land batteries." Such system was described in the specification of the patent as consisting of iron armor plates laid in the usual way against the longitudinal or outer timbers of a vessel, such timbers being such as to form a sufficient backing to rigidly support the armor plates, and of an outer layer of timber covering the armor plates, and only bolted on sufficiently to hold it to its place, and of a plate or thin sheath on the outer surface of the timber. The bill was filed in December, 1863.

Samuel D. Cozzens, for plaintiff.
Edward N. Dickerson, for defendants.

BLATCHFORD, District Judge. The alleged infringement in this case consisted in putting upon the Onondaga, a vessel of war constructed for the government of the United States, substantially the arrangement of armor described and claimed in the patent. The vessel was built by the defendant Quintard, under a contract made by him with the government of the United States to build her for such government. Such contract did not include the putting of any wooden armor outside of the iron armor. In March, 1863, the navy department of the United States gave directions to have the wooden armor put on. The vessel was then being built under such contract, and, while being built, belonged to the government. The iron armor was begun to be put on in May, 1863. The wooden armor and the outside plating thereon were begun to be put on in June, 1863, and the work of putting them on was finished in July, 1863. The defendant Quintard acted as agent for the government, in procuring such wooden armor and outside plating to be put on by one or both of the other defendants. The work in respect of the same was not done by contract but was done by days' work and by the pound. The government paid the bills therefor, through the defendant Quintard. The price so paid for such wooden armor and outer plating, and for putting them upon the vessel, was in addition to the contract price for the vessel as she was to have been constructed according to the contract, without such wooden armor and outside plating. Quintard paid out for the wooden armor and outside plat-

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

ing all the money that he received from the government therefor.

One of the defences set up in the answer is, that, as the wooden armor and outside plating were built in consequence of an order given for that purpose by the secretary of the navy of the United States, and were applied to a vessel built for the United States, and were paid for to the defendants by the secretary of the navy, the defendants are not liable for any value which such armor may have been to the United States. I think this is a good defence. To hold that workmen and employees of the government, who do work for it upon a vessel owned by it, and are paid by it for doing such work, such work being done in a specific form by the orders of the government, can be held liable in a court of the United States for infringing a patent by doing such work, would be, in effect and substance, to allow the government itself to be sued, in the guise of a suit against its workmen, and would lead to embarrassments of the operations of the government which might prove of serious detriment.

I have examined the case of Walker v. Congreve, 1 Carp. Pat. Cas. 356, cited for the plaintiffs. An ex parte injunction had been granted, restraining the defendant from making barrels for preserving and conveying gunpowder, alleged to be imitations of vessels covered by a patent obtained by the plaintiff. It was alleged that the defendant had violated the injunction by forwarding to the ordinance office of the British government, on its direction to that effect, some of the barrels, which had been previously made for the public service, and an application was made to the court of chancery, (Lord Eldon,) to commit him for a contempt. In the course of the hearing, Lord Eldon alluded to the fact that a public servant, as such, might not be liable to the consequences of a private suit for infringing a patent, and, therefore, would, in such case, not be subject to be enjoined. The defendant set up that he was not amenable for a contempt, as he was acting in a public capacity, and in the public service, while he superintended the making of the machines complained of. A motion was made at the same time to dissolve the injunction. On the suggestion of the court, and with the consent of the government, it was arranged that the government should keep an account of the barrels until there could be a trial at law on the patent, so that the public service might proceed without interruption and its demands be supplied, and the injunction was dissolved. The patent was not further contested. This case by no means supports the right of the plaintiffs to recover in this suit.

Another view of the present case is, that what the defendants did did not amount to an infringement of the patent. They neither made, nor used nor vended to others to be used the patented invention, in any proper sense. It was no infringement to make or fashion the articles which were to form the wooden armor and the outer plating, so long as they were not applied outside of iron armor on a vessel. The patent is limited to such application or employment. The testimony is, that the Onondaga belonged to the United States, while she was being built under the contract, although the contract was not considered by the government as having been fulfilled by the contractor until late in 1863, after the wooden armor and outer plating had been put on the vessel. In putting such wooden armor and outer plating upon a vessel owned by the government, the defendants cannot properly be regarded as having made such armor and outer plating. It was made by the government, by being put by it, through the defendants as its employees and workmen, upon a vessel of its own, as a defence to such vessel. So, too, the defendants have never infringed the patent by using the patented armor. The government, the owners of the vessel, alone used such armor, before the bill was filed. As to the vending to be used, there was no such armor to be vended until it became armor by being put upon the vessel, and the putting it, by the order of the government, upon a vessel owned by the government, which paid the defendants for it by the pound and by days' work, cannot be regarded as a vending of it, as armor, to the government.

Of course, in considering these questions, I refer only to what was done by the defendants before the bill was filed, and for which alone they are sued in this suit. What was done by the defendant Quintard subsequently, in purchasing the vessel from the United States government and selling her to the French government, is not involved in this controversy.

I do not intend, by any thing I have said, to intimate an opinion as to whether the government is or is not excluded from the right to make for itself and use the patented invention without the consent of the patentee, under the grant by it to him of an exclusive right to make, use and vend it. The subject is very ably discussed in a case decided by the court of queen's bench, in England, in 1865 (Feathers v. The Queen, 12 Law T., N. S., 114), in which a decision was arrived at, that the crown retained the right to use the patented invention in question there, being one relating to armor for vessels, although the grant by the crown to the patentee was one of sole privilege. Nor do I decide whether or not the patent to the plaintiff Heaton is valid. The bill is dismissed, with costs.

[For another case involving this patent, see Webb v. Quintard, Case No. 17,324.]

Case No. 6,312.

Ex parte HEBARD.

[4 Dill. 380.] [1]

Circuit Court, D. Kansas. 1877.

JURISDICTION OVER MILITARY RESERVATION OF FORT LEAVENWORTH — ARTICLE 1, § 8, OF THE CONSTITUTION OF THE UNITED STATES CONSTRUED—HABEAS CORPUS—PRACTICE.

1. The title to the land constituting the military reservation of Fort Leavenworth, in Kansas, has always been in the United States: in 1875, at the instance of the secretary of war, the legislature of the state passed an act ceding exclusive jurisdiction to the United States over all territory included within the reservation: congress never expressly assumed this jurisdiction: subsequently a larceny was committed on the reservation: *Held*, that the jurisdiction over the offence was in the courts of the general government, and not in those of the state of Kansas.

2. Section 8 of article 1 of the constitution of the United States, construed; and it was *held* that, whenever the United States is the owner of the land it uses as a fort, etc., the legislature of the state may permit congress to exercise exclusive jurisdiction over such land.

Mr. Thomas P. Fenlon, an attorney of this court, presented the petition of Samuel Hebard for the allowance of a writ of habeas corpus. The petitioner was charged with larceny, committed in 1877, on the military reservation of Fort Leavenworth, and was held to answer by a commissioner of the circuit court of the United States for the district of Kansas, and committed for want of bail. The question involved was, whether the federal courts have jurisdiction of offences of this character committed on the reservation, or whether the jurisdiction is in the courts of the state. On the 22d day of February, 1875, the general assembly of the state of Kansas, at the instance of the secretary of war (Rev. St. § 1838), passed the following act:

"Chapter LXVI., Laws 1875.

"Fort Leavenworth Military Reservation.

"An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation.

"Be it enacted by the legislature of the state of Kansas:

"Section 1. That exclusive jurisdiction be and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation, known as the Fort Leavenworth reservation, in said state, as declared from time to time by the president of the United States, saving, however, to the said state the right to serve civil or criminal processes within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said cession and reservation; and saving, further, to said state, the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation.

"Sec. 2. This act shall take effect and be in force from and after its publication once in the Kansas Weekly Commonwealth.

"Approved February 22, 1875."

No act of congress assuming the jurisdiction thus ceded has been passed. The ownership of the land constituting the reservation has always been, and now is, in the United States. The constitution of the United States provides that "congress shall have power to exercise exclusive legislation, in all cases whatsoever," over the District of Columbia, "and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall lie, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Article 1, § 8.

Mr. Fenlon, for petitioner.

Mr. Peck, Dist. Atty., contra.

MILLER, Circuit Justice. This is an application for a writ of habeas corpus, on behalf of Samuel Hebard. The petitioner states that he is held a prisoner for want of bail, under a commitment on a charge of larceny, the order committing him to the custody of the United States marshal having been made by Samuel D. Lecompte, a commissioner of the circuit court of the United States. It appears, very clearly, that the offence for which plaintiff is held to bail was committed on the military reservation of Fort Leavenworth, and the only question in the case is, whether the officer of the United States who ordered the imprisonment of the petitioner had jurisdiction of the case. This is asserted by the district attorney, on the ground that Fort Leavenworth is within the exclusive jurisdiction of congress, under the provision of the constitution on that subject.

This jurisdiction is denied by counsel for petitioner, and as this is the only question in the case, and all the facts necessary to its decision are before us, it can be as well disposed of on the application for the writ as on a return to the writ when issued.

What constitutes the military reservation of Fort Leavenworth is now, and has been the property of the United States ever since the country of which it is a part was purchased from France. There is not, and never could be, any consent of the state of Kansas to that purchase, literally speaking, because the state of Kansas had no existence for fifty years after that transaction, and her consent, since she became a state, could in no way affect that purchase, or the title by which the United States holds the reservation.

The locus in quo had a military fort on it, and had been reserved for military purposes for many years before Kansas was admitted into the Union as a state, but when congress

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

passed the law by which the state was created, it included this reservation within the boundaries of the state, and made no exception, as regards this piece of land, of the sovereign rights of jurisdiction which it ceded to the state in that transaction. The effect of this, as this court held in U. S. v. Stahl [Case No. 16,373], was that, while the title and right of use for all lawful purposes remained in the United States, as it did in all its other land in the state, the political jurisdiction passed to the state of Kansas.

If matters had remained in this condition to the present time, there can be no doubt that the warrant under which the prisoner is now held would be void, because the jurisdiction of the offence would be in the state, and not in the federal government. But on the suggestion of the war department of the federal government to the authorities of the state of Kansas, the legislature passed a law, approved February 22, 1875 [Laws 1875, p. 95], granting to the United States exclusive jurisdiction over the military reservation, and if this act is effective for that purpose, the writ must be denied.

It is objected that the legislature has no constitutional power to part with its jurisdiction over any part of the soil within the boundaries of the state. Unless the act in question is within the purview of section 8, art. 1, of the constitution of the United States, it is unnecessary to inquire further as to its validity. If it is, then it is valid, for the reason that the constitution has expressly conferred on the legislatures of the states the right to give consent to such jurisdiction. It is also urged that some act of congress assuming this jurisdiction is necessary, even if the statute of Kansas be valid; but I am of opinion that when the locus in quo is under the control of the United States and is used as a fort, magazine, or other purpose mentioned in the constitution, the laws of the United States, framed for such places, become the law of these places upon the consent of the state lawfully given for that purpose.

We then come to the question whether this act, conferring jurisdiction, passed by the state of Kansas, is within the meaning of the constitutional provision referred to—"congress shall have power to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." If the consent of the state to the act of buying the land, or acquiring the title to it, is all that can be considered in construing this provision, then, as we have already said, the state of Kansas has never given any such consent. But if this is a form of expression whose true meaning is that the general government, as respects lands needed for forts, etc., may, whether such lands are owned by it or shall be purchased from others, exercise exclusive jurisdiction, whenever the consent of the legislature of the state to the exercise of such jurisdiction shall be given, then the legislature of Kansas, in the act referred to, has given the consent required by the federal constitution. As this court remarked in the case of U. S. v. Stahl [supra], it can hardly be supposed that the constitution intended to make the consent of a state necessary to its power to erect forts, etc., in that state, nor to the acquisition of title to land used for that purpose. Such a proposition would be placing the military power of the government, which in every other respect is so ample, at the mercy of the states as regards forts, arsenals, etc. A similar remark will apply to buildings for post-offices, court-houses, etc. It is impossible to believe that the constitution intended to restrict the right of eminent domain, and to declare that in any such instance the consent of the state is necessary to the validity of a purchase for such purpose. If, however, we suppose that in many such cases it would be desirable for the national government to hold such places free from the general jurisdiction which the state in all other cases exercises within her boundaries, but that she shall not be ousted of that jurisdiction except by her own consent, and that this consent shall be given by her legislature, we have at once a motive and a reasonable explanation of the purpose of the provision of the constitution. The consent of the state being necessary for no other purpose than that of plenary jurisdiction in the federal government, it is consent to this which is provided for in the constitution.

This consent may be given whether the land is purchased in the common meaning of that word or not, and may be given either before or after title is acquired by the United States. The elements necessary to render valid this consent to the exercise of federal jurisdiction are, title in the United States and possession for one of the purposes mentioned in the constitution. In 6 Op. Attys. Gen. 577, many of the statutes of the states granting this exclusive jurisdiction are examined, and their language criticised, and in very few instances is any expression of consent to the purchase used, but a direct and express grant of jurisdiction, with occasional qualifications on that point. This is an implied construction, that the thing to be granted by the state is her consent to the exercise of jurisdiction, and not to the mere purchase which is provided for in the constitution.

The constitution was adopted at a time when the federal government owned no land. Hence, when it desired any it must pay for it, whatever might be the uses to which it was appropriated. It was, therefore, a very natural form of expression to say that when

the legislature gave consent to the purchase for such and such purposes, the United States should exercise exclusive jurisdiction. Did they mean that if the United States should become the owner of land which it desired to use for such purposes, the legislature could not grant jurisdiction also, if within her limits? or is it but a just construction of the clause, that whenever the United States is the owner of the land which it uses for a fort or arsenal, the legislature of the state, by its own consent, may permit congress to exercise exclusive jurisdiction over such land? I think the latter the more reasonable construction, and the writ is denied. Writ denied.

Case No. 6,313.

Ex parte HEBBARD.

[See Case No. 6,314.]

Case No. 6,314.

In re HEBBARD.

[1 Mac. A. Pat. Cas. 543; 3 App. Com'r Pat. 65.]

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

PATENTS — ANTICIPATION — COMBINATION — WATER COOLERS.

[1. A claim for a water-cooling pitcher, consisting of a combination of felt, as an elastic non-conducting packing, inserted between an interior porcelain pitcher and an exterior metallic shell, is not anticipated by an ice pitcher having two metallic walls, between which, in the process of manufacture, air becomes confined, such air not being designed as a non-conductor, and the use of double walls to intercept heat being expressly disclaimed.]

[2. The rule that the application of an old machine or combination to a new purpose does not involve invention does not hold good in the case of the application of a new combination to an old purpose.]

[3. If the change introduced by an applicant constitutes the mechanical equivalent of means used by a prior patentee, and, besides being an equivalent, it accomplishes some other advantages beyond the effect or purpose accomplished by the patentee, such further advantages may make it a patentable subject, as an improvement on the former invention.]

[This was an appeal by Alonzo Hebbard from the refusal of the commissioner to grant him a patent for a water-cooling pitcher. The patent was issued to Hebbard in accordance with this decision, November 3, 1857,—No. 18,546.]

Charles L. Burritt, for appellant.

MORSELL, Circuit Judge. The claim of the above-named Alonzo Hebbard, as set forth in his specification filed with his petition in this case, is in the following words: "What I claim is the use of the combination of the woolen cloth or felt covering as an elastic non-conducting packing for a porcelain or glazed-ware pitcher with the said porcelain or glazed-ware interior pitcher and external metallic shell or pitcher, for the purpose of making a water-cooling pitcher, as hereinbefore set forth." The nature of the invention consists in the use of the combination, as above stated, for the purpose of making a frigorific pitcher, and at the same time of great lightness, as well as non-destructible from the action of lemonades or other acidulated articles or liquids used as cooling drinks, or for other purposes. In the course of the examination of this claim a reference was given to the rejected claim of Haggard and Bull, 29th of September, 1855, as being substantially the same invention as Hebbard's, which therefore presents no patentable novelty, as appears by the letter of the acting commissioner dated the 1st of November, 1856. He states that "the use of non-conducting materials in double-walled vessels is common, and its application to the case where the outer wall has been used to protect the inner one is fully suggested thereby; and among known non-conducting materials the choice of one that is elastic, so as not to communicate a blow to the glass, is also directly and fully suggested by the common practice of using elastic packings for glass vessels, such as flasks and demijohns. * * * No new invention, therefore, is involved in the case, and a patent is refused."

As the final decision seems to be placed upon the authority of a different reference, and the one given above was not thought sufficient, I pass immediately, therefore, to the final decision, dated 24th July, 1857. The commissioner in his opinion says: "This application has been rejected on a reference to the rejected case of Haggard and Bull. That reference does not satisfy me. The object is not to construct a water cooler; and although plaster of Paris (a good non-conductor), or other suitable material, is introduced between the external and internal surfaces, it does not appear to have been in consequence of its non-conducting properties, but merely for the purpose of cementing the two surfaces together. Felt would not have answered the purpose of Haggard and Bull; plaster of Paris would not have fully satisfied the purpose of Hebbard, and some other similar materials would have been still less suitable. Stimpson's ice pitcher (patent No. 11,819, October 17th, 1854, antedated April 17th, 1854) seems much nearer anticipation of the present invention. It shows the interposition of a non-conducting substance between an external and internal wall or surface. It is true that the internal wall of Stimpson's pitcher is metallic, while that of Hebbard's is of porcelain or glassware. If there is any merit in this change of material, the claim should be founded entirely on that change. A similar remark will apply to the use of felt instead of confined air; so that, as the case now stands, I think the substantial combination the same as is found in Stimpson's ice pitcher, and that, therefore, the patent should be refused."

From this decision the appeal has been

taken by Mr. Hebbard, who has filed five reasons of appeal. The first three reasons are, in substance, that the nature of the jurisdiction and duties of the commissioner of patents are, as it relates to the granting of patents, supervisory and analogous to the duties of the attorney-general prior to the act of July 4th, 1836 [5 Stat. 117], and that upon deciding that the objections raised by the examiner were unsatisfactory, he ought to have reversed the said decision, and that he was estopped from taking up new matter for cause of rejection. The fourth reason is that the commissioner of patents having decided that the objections were not satisfactory, thereby concluded all argument thereon, and that the only issue on appeal from the commissioner's decision is on the new issue made by him. The fifth reason is that the new objections raised by the commissioner of patents, by reference to Stimpson's ice pitcher, do not cover or interfere with the claim of the applicant for his invention of a water-cooling pitcher, and therefore, &c.

To these reasons the commissioner has replied: "The first point raised by counsel for appellant is that the commissioner's duties are administrative and supervisory; but what is claimed under this head is contrary to the meaning and letter of the sixth and seventh sections of the act of July 4th, 1836. The second, third, fourth, and fifth points all proceed upon the assumption made in the second point, that the commissioner in deciding that the objections raised by the proper examiner 'were not satisfactory' could not go any further, and had no right to bring forward additional reasons or facts upon which to refuse a patent. But this assumption is clearly untenable. The language of the law in regard to the examination of applications is that 'the commissioner shall make or cause to be made an examination,' &c. Every examination is in the eye of the law the act of the commissioner, and the result is always signed by him. The matter of referring a case to an examiner, and its subsequent revision by the commissioner himself, is only a thing of internal administration. Legally, the acts are all acts of the commissioner, and there can be no doubt of his right to review and modify in any respect at his pleasure any decision refusing a patent. But besides this, the new matter, so called, which the commissioner brought forward in the final decision, is matter the substance of which was tacitly understood in the previous actions of the office, to be recognized by the applicant himself as old, viz., the device of a double wall in coolers, with a non-conductor of some kind or other between them, such as air. The reference finally given to the Stimpson pitcher was only a reference to a particular case, showing the general fact which the office all along took it for granted the applicant knew; for so far as the memory of the examiner goes, such general fact, not questioned in the claim, had not been questioned by the applicant in any other way. In the final decision of the commissioner, where he states that the reference to Haggard and Bull does not satisfy him, it is manifest he does not mean to say that that case does not exhibit the fact for which it was first referred to, viz., an inner vessel of glass or porcelain, protected by an outer one of other material; that single thing alone would not furnish a good ground to refuse a patent. This is all we are authorized to understand the late commissioner to say. The main question at issue is whether the present is a case where a new association of old devices can also be said in any just sense to be a combination of that kind which the courts and the patent office regard as a good subject for the grant of a patent. The office has held that in many cases the new association of or permutation upon old devices does not constitute a true combination. One instance only of this the office has time to refer to now, and that is the case cited in section 26, p. 23, of Curtis on Patents, viz., Bean v. Smallwood [Case No. 1,173]. This is where an old device is claimed in a chair, and the patent was declared void because it had been used in other things." On the day and at the place which had been appointed for the hearing of said appeal, an examiner on the part of the office appeared, and produced and delivered all the original papers in this case, and also those in the two cases to which references were given. On which occasion the appellant also appeared by his attorney, and put in his written argument in the case, and the same was submitted.

It appears from what is stated in the final decision just recited that upon a reconsideration and review of the grounds on which the acting commissioner had rejected the claim of the appellant, also hereinbefore recited, they were deemed unsatisfactory and insufficient. The reason assigned is that the object was to construct a different thing; and although a good non-conductor (plaster or other suitable material) is introduced between the external and internal surfaces, it does not appear to have been in consequence of its non-conducting properties, but merely for the purpose of cementing the two surfaces together. This, I think, is entirely correct and amounts to a complete repudiation of any authority or application of said reference to the present case, and this, it is thought, is all the answer to that reference which ought to be made on this appeal. If, however, anything more could be required to show the commissioner's meaning, it appears in his having placed and rested his decision on the reference to Stimpson's case, which claim, according to the specification, it will be proper here to state that it may be seen how far the tests adopted by the commissioner can be used in application to the differences between what the appellant claims to be his invention and that which Stimpson claims to be his. The object with both

certainly is that they should be water-cooling pitchers with double walls. The interior as well as exterior wall of Stimpson's are of metal; of the appellant's the interior is of porcelain and the exterior of metal. In the further particular description of his claim, Stimpson, in his specification, says: "I do not claim the double wall as a means of intercepting heat, nor do I intend to claim such a device as applied to any structure or vessel whatsoever for the purpose of economizing in ice, unless attended with all the advantages and results of my double-wall ice pitcher. It is obvious that refrigerators, urns, tumblers, double plates, and such like articles occupy special positions in household economy, and distinct from my double pitcher, and that no one of them can be made to subserve all its purposes and ends, and I therefore disclaim them, one and all, and confine my claim to the double-wall pitcher. What I claim, therefore, as my invention is the double-wall pitcher, the same consisting in a pitcher with double sides, double bottom, and a hinged cover, from which the liquid contents are to be poured through or over a nose or lip, substantially as herein set forth. I am aware that a lever has been used upon the covers of molasses pitchers for raising the covers, and this I do not claim; but I do claim the employment of a chain or string attached to the handle and lid of the pitcher so described."

From the statements contained in the commissioner's decision in Stimpson's case, it appears that the principal ground upon which the decision rested was his own observation of the practical utility of the pitcher, opposed to his former decision rejecting the application on theoretical principles. He said: "This application has been before the office on a previous occasion. It was then rejected, and the rejection affirmed by me. Since that time I have seen one of the articles in use, and, being satisfied of its great utility, have come to the conclusion that the previous action was erroneous. Vessels have before been made for a similar purpose and constructed upon the same principle, and therefore it was held on the previous occasion that making a pitcher was not patentable where urns had before been constructed in a substantially similar manner. I have now some difficulty in making the necessary discrimination, though satisfied that the pitcher should be patented. I think, however, it may be regarded as substantially a new commodity; and, although it preserves water from cooling or becoming warm upon the same principles and in substantially the same manner as some urns that have been known, still it is essentially a new article, differing sufficiently from the urn to be worthy of a patent. The urn does not suggest the pitcher. It requires no small degree of ingenuity to contrive the latter after seeing the former; and, besides, where an invention is really useful, it requires a smaller exhibition of ingenuity to justify the granting of a patent than where the utility is doubtful."

Upon a careful examination of the specification in the aforegoing case of Stimpson, I have not been able to find in the description of his object and intention any intimation that he meant to interpose a non-conducting agent between the external and internal walls or surfaces by means of confined air, or otherwise. No such consequence was looked to by him. On the contrary, he expressly disclaims the use of the double wall as a means of intercepting heat or as a device intended to be applied to any structure or vessel whatsoever for the purpose of economizing in ice, &c. He confines his claim to the double-wall pitcher simply. And further, to show that such a device was foreign to his intent, he has provided "that if the vessel should be constructed of materials that are not sufficiently strong to prevent collapse by the pressure of the atmosphere, a small vent should be applied to the space g." Nor does it appear that any such device or contrivance was thought of, or formed any part of the ground upon which the commissioner's decision was made to rest. Such, on a comparative view, appear to be the facts and circumstances of the two pitchers. Can they be said, on principles of patent law, to be substantially the same? Now, as to the other aspect of the case—that the structure and combination of which the two inventions are formed are different—that has not been and cannot be denied; but it is said that the differences presented as the appellant's invention are not new substantially, being nothing more than mere equivalents for what was before known. The rule of patent law relied on for the position is said to be found in the case of Bean v. Smallwood [supra]. It will be seen that that was the case where the first two specifications of claim were admitted to be the same as Simmons' patent, and therefore not new and patentable. The third and last was proved to be the same apparatus, long in use, and applied, if not to chairs, at least in other machines or purposes of a similar nature. "If this be so, (says the judge in laying down the rule,) then the invention is not new, but, at most, is an old invention or apparatus or machinery applied to a new purpose." Such is not this case. The combination here is claimed and admitted to be a new combination applied to an old purpose. If so, the rule is entirely different.

The rules most applicable to this case, I think, are to be found in Curt. Pat. § 95. Referring to Whitmore v. Cutter [Case No. 17,601], the rule is thus stated: "The great question, of course, when an alleged invention purports to be an improvement of an existing machine, is to ascertain whether it is a real and material improvement or only a change of form. In such cases it is necessary to ascertain with as much accuracy as

the nature of such inquiries admits the boundaries between what was known and used before and what is new in the mode of operation. The inquiry, therefore, must be, not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation and the same combination of powers in both machines, or whether some new element, combination, or feature has been added to the old machine which produces either the same effect in a cheaper or more expeditious manner, or an entirely new effect, or an effect that is in some material respect superior, though in other respects similar, to that produced by the old machine." It may be proper also to state further the rule respecting equivalents, which I take to be this: "If the change introduced by the applicant constitutes a mechanical equivalent in reference to the means used by a patentee, and, besides being such an equivalent, it accomplishes some other advantages beyond the effect or purpose accomplished by the patentee, such further advantage may make it a patentable subject as an improvement upon the former invention."

I will refer to one more authority and close. It gives the rule in relation to the combination of various materials and a new method of application—3 Mer. 629, referred to in 4 Barn. & Ald. 599. The chancellor says: "There may be a valid patent for a new combination of materials previously in use for the same purpose or for a new method of applying such materials." In order to a satisfactory conclusion on this point, I shall endeavor to make a due application of the aforegoing settled principles to the facts and circumstances connected with this part of the case.

The combination in this case must be considered to be new, unless it is substantially like some other which has been discovered. The only remaining one, as such, which has been referred to, now to be noticed, is that of Stimpson's, one view of which has been already taken. Stimpson's claim, as before said, is for a combination having two parts; Hebbard's is for three, as before said, the nature and character of which, as imported on the face of the pitcher and contended for in the argument, is: First. The appellant's is a porcelain pitcher, which does not oxidize like metals when used for acidulated liquids, (lemonade, &c.,) has no galvanic action to "sour milk" if left standing in it, like metal would have, and at the same time can be kept purified, and cleaned easier than metal. Second. That felt packing is one of the best non-conducting substances known of; is light, and therefore does not add to the clumsiness of a large pitcher; is elastic, and therefore has a great tendency to protect the porcelain pitcher from fracture, by absorbing the force of the blow; and is easy of application, as well as cheap. Third. The external metallic shell acts as a shield to protect the porcelain pitcher and the packing, as well as being used for a frame to hold the porcelain-packed pitcher. The great benefit of having a non-conducting agent as a part of the invention is conceded; and that some are much better than others for that purpose, is equally clear. In the appellant's invention this device, with a view to its most suitable and perfect adaptation, (to use his own language,) has been manipulated into special form for the specific duty required, possessing invariable constancy and certainty. On the contrary, as it respects Stimpson's pitcher, if air got confined between the sides of the two pitchers, it was an incident, and not from any ingenious efforts of Stimpson to effect any such arrangement; and also, if it be true, as alleged, that air is not a good non-conductor, but, on the contrary, may be said to be one of the best conductors of heat known of, (as however thin the stratum of air, if exposed on opposite sides to the least difference of temperature, that will cause a change of the particles of the air and a circulation to take place, and that circulation will transmit the heat with more celerity than if passing through a solid metallic substance of the same thickness,) the device of the appellant must be considered not only different, but much superior. Its superiority has been still further shown by actual, practical experiment. The facts relating to the experiment, and proved to my satisfaction, are, that one of Hebbard's water-cooling pitchers, made as described in his specification for a patent, and one of Stimpson's of equal size and capacity for holding water, were taken and placed upon a counter or work-bench side by side, so as to be exposed in all respects to the same currents of external air, and other like causes for varying their temperature, and that when thus placed, there was put into each an equal quantity of water from the same pail, which being done, two square blocks of ice each of the weight of one and a half pounds avoirdupois weight were put respectively into the said pitchers, and they were closed by the covers thereof. After allowing the pitchers to stand several hours, the fact was noted that the ice in the said Stimpson's pitcher was all melted, but that in Hebbard's pitcher —having the felt elastic packing—the ice did not entirely melt or dissolve for one and one-half hours after the ice in Stimpson's pitcher had entirely disappeared. (This proof was informally admitted under the special circumstances of this case.)

For the aforegoing reasons, I think the appellant's claim to a patent for his improved water-cooling pitcher, as described in his specification, is sustained, and that a patent ought to be granted to him therefor accordingly.

[An order was accordingly entered reversing the commissioner's decision, and directing the issuing of letters patent to the applicant.]

Case No. 6,315.

HEBBARD v. BANK OF UNITED STATES et al.

[See Case No. 6,815.]

HECKER (FOWLER v.). See Case No. 5,001.

HECKER (RUMFORD CHEMICAL WORKS v.). See Cases Nos. 12,131-12,134.

Case No. 6,316.

HECKSCHER v. BINNEY.

[3 Woodb. & M. 333.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

JURISDICTION — DECLARATION IN ASSUMPSIT — PROMISSORY NOTE—PAROL EVIDENCE—RECOVERY ON MONEY COUNTS.

1. Where a company to dig and sell coal was incorporated in the state of Pennsylvania, and sold coal in Massachusetts by its agents, Thwing & Co., to the defendant, a citizen of this state, and Thwing & Co. took a promissory note for the price, running to them "as agents" for the company, or order, and then indorsed it to the plaintiff, a citizen of New York and president of the company, the case, on the face of the record, having money counts, as well as a special count on the note, gives jurisdiction to this court. This collateral parol evidence of the above facts, in addition to the note, is competent, as it does not contradict, but merely explains the note and the transaction, and in any view it is competent under the money counts.

2. The corporation having been chartered in another state, and all its members residing out of this state, could recover here on the money counts, or on the note as it stood before indorsed, and hence they can probably recover on those counts for the original consideration in the name of the plaintiff, if an amendment was made adding that he sues in their behalf, and as their president.

3. But such a recovery could not be had on the special count on the note, by him as indorsee, without averring in the declaration, also, that the note was payable to the Thwings, as their agents, and that they could have sued in this count without any assignment of the note.

4. Again, there seems to be no valid objection to a recovery by the plaintiff in this case, on the money counts, as the declaration now stands without amendment, the note being proof of money had in favor of an indorsee, as well as payee, and this court having had jurisdiction over it originally, as payable to the agents of the coal company, and hence recoverable in their names in this court without an assignment, they belonging to another state.

[Cited in Lee v. Luther, Case No. 8,196; Milledollar v. Bell, Id. 9,549.]

This was an action of assumpsit in several counts, describing the plaintiff as a citizen of New York, and the defendant as a citizen of Massachusetts. One was a special count in the usual form, as indorsee of a promissory note given to Thwing & Co., or order, and by them indorsed to him, without any averments as to their residence. The other counts were for money had and received, goods sold, &c. A note was offered in evidence, a copy of which is annexed, accompanied by a statement of facts to be considered, if they are competent evidence.

(Copy of Note.)

Boston, September 18, 1846. Value received, I promise to pay Messrs. S. C. Thwing & Co., agents For. Impt. Co., or order, seven hundred fifty-eight 67-100 dollars in four months.

$758.67. C. J. F. Binney.

(Indorsed.)

Pay to Charles A. Heckscher, Esq., president Forest Improvement Company.

S. C. Thwing & Co., Agents in Boston.

District Massachusetts. U. S. Circuit Court, May Term, 1847. Charles A. Heckscher v. Charles J. F. Binney. Facts Agreed: The plaintiff is a citizen of the state of New York. Defendant is a citizen of Massachusetts. Messrs. S. C. Thwing & Co. are citizens of Massachusetts, and are the agents of the Forest Improvement Company, a corporation established by the legislature of Pennsylvania, for selling their coal in Boston. The plaintiff is the president of the company, and some of the stockholders of the corporation are citizens of Massachusetts. The note was given for coal belonging to the corporation, and for sole account and risk of the corporation. Notes are taken in New York, payable to the plaintiff as president, and in Boston to S. C. Thwing & Co. as agents, and are collected here or transmitted to the president in New York. Thwing & Co. never had any interest in the note declared on. This note was duly indorsed and laid over at bank in Boston, and was put in suit in pursuance of general instructions of the plaintiff. S. C. Thwing.

Suffolk, ss., June 19, 1847.

Sworn to before me.

(Indorsed.)

Facts agreed. (If the facts are competent testimony by parol evidence.)

D. A. Simmons, for plaintiff.

William Brigham, for defendant.

WOODBURY, Circuit Justice. As this case is submitted without argument, I am left to conjecture what are the real questions in issue between the parties, unless it be the competency of the testimony proposed to be given by parol. Whether all these facts are admissible evidence or not, under the special count on the note, may be a matter for argument, but that they are competent under the other counts, is undoubted. They show a delivery of property belonging to the corporation, of which the plaintiff is president, the receipt of it by the defendant, and his promise, as well as duty, to pay for the same. The note, also, is admissible evidence under the money counts, no less than under the special count, and shows the right of the cor-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

poration, in one view, and in the name of the plaintiff, perhaps, to recover, and in another view, which will in the end be considered, his right in his private capacity to recover. See cases cited in Brown v. Noyes [Case No. 2,023].

The first question, after the admission of the evidence, is, whether it contains facts defeating our jurisdiction. The right just named would give jurisdiction to this court over the matter in behalf of the corporation, under the general counts, if proper averments are made, as the corporation exists by the laws of another state, and all its members, including its president, reside elsewhere, and the defendant is a citizen of Massachusetts. Louisville R. Co. v. Letson, 2 How. [43 U. S.] 497, reviewing [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 84, and [Commercial & Rail Road Bank of Vicksburg v. Slocomb] 14 Pet. [39 U. S.] 60. In this view the action would be considered direct on the original consideration which arose between a corporation having its members and charter belonging to another state, on the one hand, and a citizen of this commonwealth on the other hand. The jurisdiction in such a view is clear, and is one daily exercised.

But there is in this aspect of the case one remaining question, and that is, whether a corporation or its agent can, as here, institute a suit on the general counts in the name of its president, for the original consideration. Because we cannot now consider the plaintiff as prosecuting to recover the note on the special count as indorsee. No averment is made that the note could originally have been sued in this court without an assignment, and such an averment is necessary to give jurisdiction under that count claiming through an assignment, since the judiciary act forbids a recovery here in such a case, unless we had jurisdiction over the demand as it stood originally in the name of the promisee. 1 Stat. 79; Towne v. Smith [Case No. 14,115]; Brown v. Noyes [supra]. In settling this question of jurisdiction, we must look to the law of congress for power, and not to state laws. But after getting jurisdiction, then we must often look to state laws for the rule of decision. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; U. S. v. New Bedford Bridge [Case No. 15,867]. In deciding whether the plaintiffs can recover on the general count for money due to the corporation, and thus obviating the difficulty as to our jurisdiction, it is to be noticed, in the first place, that this action is instituted in the name of Charles A. Heckscher, and not of the corporation, and that no averment is made that he sues in behalf of the corporation. Perhaps it would not be a fatal objection in ordinary actions in behalf of monied corporations, to have them prosecuted in the name of their president. It depends somewhat on the provisions in the charter itself. It is not unusual for banking corporations thus to sue, as in the case of the old United States Bank it was "the president and directors" who sued. [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 62. In 2 Strange, 1238, it is "the mayor, etc., of Northampton," and in 2 W. Bl. 1116, it is "the mayor of Norwich," and in 6 East, 438, it is the bailiff's burgesses, etc., of Tewksbury. Sometimes it is by "the master and recorder." 1 Perry & D. 235. Sometimes the suit is by or against the "treasurer." See Hull v. Treasurer of Richmond [Case No. 6,861]; 5 Coke, 63; 1 Wils. 235; 3 Burrows, 1847. And at times there is an express provision in the charter that suits may be by or against "the secretary," or certain members or "directors," or the "treasurer." Rex v. St. Katharine Dock Co., 1 Nev. & Man. 121; 4 Mees. & W. 510; 1 Chit. Pl. 15; 7 Dowl. 28; 1 Horn. & H. 410; Watts v. Scott, 1 Dev. 291. Sometimes the suit is in the name of the governor of a state for the state. McNutt v. Bland, 2 How. [43 U. S.] 19. See more cases in Ang. & A. Corp. 580. This is not one of those instances of a defective description of a corporation in the writ, which is asked to be cured, but an entire omission of an allegation, that the suit is for the corporation in the name of its president. The cases of a defective description of a corporation may be seen in 10 Mass. 360; 1 Bos. & P. 40; 1 Chit. Pl. 286; 1 Barn. & Ald. 699; 13 Johns. 38; 7 Mass. 444; 3 Salk. 103; Kyd, Corp. 281. Taking it as probable that this corporation might sue by its president, yet I have no doubt that it would be proper to aver specially that he prosecutes in behalf of the corporation, when such is the fact, as that seems necessary, in order to show he does not count on a private right, and seems necessary to connect him with the original consideration belonging to the corporation, or with obligations running to the corporation, rather than to himself individually or in his private capacity. 11 Mass. 338; 5 Mass. 99.

In this case, therefore, as it would appear in point of fact, that the action for the original consideration was now brought by the plaintiff on a corporate right, and as president of the corporation, and as he cannot recover for the original consideration, except as president, and on that right, it follows that an action cannot be sustained, as the declaration now stands, on the general counts for the original consideration, without an averment of those additional facts of his suing for the corporation, or some others, which would confer jurisdiction. But as this averment, if introduced, would be made in conformity with the truth of the case, and not to give jurisdiction, I see no impropriety in allowing it to be now made by way of amendment, if the difficulty could not be otherwise overcome. This would prevent the suit from failing on account of a defect in form, as seems to be our duty under the statute of jeofails (4). Davis v. Garland, 4 How. [45 U. S.] 131. But as such an amend-

ment would be late in the cause, it should be on terms of no cost to the plaintiff, since the case was made up and the objection raised. See 5 Mass. 99; 11 Mass. 338. All the amendment necessary in this view, would be to add, after the description of the plaintiff in the writ, "And president of the Forest Improvement Company of Pennsylvania, in whose behalf this action is brought." Also, after "indebted to the plaintiff," add "in his said capacity." There is, however, one other view of the subject, in which a recovery might, I think, be sustained without any amendment. It would be by the plaintiff as indorsee, and not in behalf of the corporation, rejecting his title in the indorsement, or considering it as mere surplusage. It would be, also, by virtue of the note as evidence of money had and received, and for such money, and not for the original consideration. Thus, in Brown v. Noyes [supra], this court held that such a note was evidence of money had and received of the indorsee, as well as payee, and furthermore, that when the suit could originally have been brought here, it might be now, if the indorsee also lived out of the state and could sue here. It further held in that case, when money counts were in the writ, and the present parties appeared in the writ to belong to different states, enough was averred to give jurisdiction under the money counts. The only doubt left under this view is, whether the corporation could have sued in this court and recovered on the original note, or whether it must have been done in the name of the agents. The note runs to "S. C. Thwing & Co., agents For. Improvement Company, or order." The evidence is that it was taken for the company's coal. On its face it is on behalf of the company, and I entertain no doubt that a suit on it, under proper averments, could have been sustained in this court by the corporation. Ang. & A. Corp. 254; 5 Vt. 500; Gilmore v. Pope, 5 Mass. 491; Koning v. Bayard [Case No. 7,924]; Taunton & S. B. Turnpike Corp. v. Whiting, 10 Mass. 336. The agents could also have sued, according to some views, though others are against it. 1 Bos. & P. 346, note; Id. 316; 3 Bos. & P. 98; 2 Kent, Comm. 630. And at least they are authorized to indorse the note, as they did, having full authority over those sales and the securities for them. See Story, Ag. 150, 151, 160, 161, etc. See Paley, Ag. 21. Under this aspect of the case, then, a recovery can be had as the record now stands, without an amendment. The facts on which it rests are also competent in evidence, though by parol, as they do not contradict, but merely explain the transaction in conformity with what is consistent with the face of the note, appearing thus to have been in behalf of the company. 10 Mass. 336; Drummond v. Prestman, 12 Wheat. [25 U. S.] 515; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113; Lee v. Dick, 10 Pet. [35 U. S.] 482; Bell v. Bruen, 1 How. [42 U. S.] 169.

HECKSCHER (UNITED STATES v.). See Case No. 15,388.

HECTOR, The. See Case No. 6,317.

Case No. 6,317.

The HECTOR.

The WISCONSIN.

[4 Blatchf. 199.] [1]

Circuit Court, S. D. New York. Sept. 10, 1858.[2]

COLLISION—TOW.

Where a tow is under the exclusive command and direction of the master of a steam-tug which is towing her, her owners are not liable for damages caused by a collision occurring through mismanagement in the navigation of the tug.

[Cited in The Atlas, Case No. 633; The Belknap, Id. 1,244.]

[See note at end of case.]

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

This was a libel in rem, filed in the district court, by the owners of the lighter Republic, against the steam-tug Hector and the ship Wisconsin, to recover damages for a collision that occurred in the East river, in October, 1855, near the foot of Dover street. The district court decreed for the libellants, against both the steam-tug and the ship [Case No. 1,756], and the claimants of both vessels appealed to this court.

NELSON, Circuit Justice. I agree with the court below, that the tug was in fault, and liable for the damage done to the lighter and her cargo. But I cannot agree that the ship in tow is also responsible. She was lashed firmly to the tug on the larboard side, and was under the exclusive command and direction of the master of that vessel; and I do not see, upon principle, that her owners should be made liable for the mismanagement in the navigation of the tug, any more than the owners of cargo on board of the colliding vessel. The case is different where the tug is under the command of the master of the tow. In that case, it is but the substitution of steam power for sails, in the navigation of the vessel by the master. I had occasion to examine this question in the case of The Express [Case No. 4,596], though the point was not directly involved in the decision. The decree below must be reversed as to the ship, and affirmed as to the tug.

[NOTE. From this decree the claimants of the tug appealed to the supreme court, and the libellants also appealed from so much of the decree as pronounced the ship not liable. The

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

[2] [Affirming Case No. 1,756 as to The Hector, and reversing it as to The Wisconsin. Decree of circuit court affirmed by supreme court in 24 How. (65 U. S.) 110.]

opinion of the court was delivered by Mr. Justice Clifford (24 How. [65 U. S.] 110), in which he held that whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessarily or usually employed, she must be held responsible for the proper navigation of both vessels. By their employment the master and crew of the tug do not necessarily become the agents of the owners of the tow; they are still responsible to the owners of the tug. The decree of the circuit court was affirmed.]

Case No. 6,318.

HEDDEN v. EATON et al.

[2 N. J. Law J. (1879) 49.]

Circuit Court, D. New Jersey.

PATENTS—NOVELTY—PRIOR USE AND ABANDONMENT—FERROTYPES.

[1. Prior uses, merely experimental, and abandoned as unsuccessful, are not sufficient to show want of novelty in a perfected improvement, made some years later.]

[2. Hedden's patent of March 7, 1876, reissue No. 6,982, for improvement in ferrotype plates and ferrotypes, is valid.]

Bill for infringement of patent of March 7th, 1876, reissue No. 6,982, for improvement in ferrotype plates and ferrotypes. Claim 1. A ferrotype plate covered by a coating composed of linseed oil and India red, substantially as and for the purpose set forth. 2. A ferrotype when taken upon a reddish brown or chocolate colored plate prepared substantially as described. Infringement of 1st claim was proved, and the question was whether the patent is void for want of novelty.

Wm. W. Swann and Chauncey Smith, for complainant.

Leonard E. Curtis, for defendants.

NIXON, District Judge (after reviewing the evidence), held that the evidence establishes: 1. That sheet iron coated with varnish composed of substantially the same ingredients and having the same color, was in use for other articles long before the alleged invention of Hedden. 2. That the use of varnish of a chocolate color, composed mainly of India red and linseed oil, was known and used for the backs of ferrotype plates several years before the date of complainant's patent. 3. That these backs were not finished with a sufficiently smooth and glazed surface, to make the pictures produced on them such an improvement on the pictures taken on the black plates as to attract public attention, or secure the public favor. 4. That the production of pictures in the chocolate colored plates, ceased some years before the date of the alleged invention of Hedden. 5. That by more perfectly finishing the chocolate or reddish brown plate, according to the directions of Hedden, a better and more lifelike picture was obtained, evinced by the popularity of the pictures taken on his plates. (Authorities cited as to patentable improvements in processes leading to a better and cheaper production of iron: Smith v. Nicholas, 21 Wall. [88 U. S.] 112; 1 Webst. Pat. Cas. 14; Crane v. Price, Id. 409; Neilson v. Harford, Id. 295.

The complainant's success attests the improvement; the prior uses alleged were experimental and abandoned as unsuccessful. Hedden took up the matter and led the way to a perfected improvement which they groped after but never quite attained to. There is patentability in such improvement, and a decree must be entered against the defendants for infringement of the 1st claim of the complainant's patent.

Case No. 6,319.

HEDGES et al. v. PAULIN.

[5 Biss. 177.] [1]

Circuit Court, N. D. Illinois. Oct., 1870.

TITLE UNDER STATUTES OF LIMITATION.

Where a party claims land under the Illinois limitation laws, he must deduce a title directly from a specified source, and by a chain, each link of which is a genuine conveyance.

[This was an action at law by Catherine Hedges and others against Paulin's lessees.]

Mattocks & Mason, for plaintiffs.

Milton Peters, for defendants.

BLODGETT, District Judge (charging jury). The defendants claim to recover the property under one of the limitation acts of this state (1 Gross' Laws, 429, § 8; Rev. St. 1874, c. 83, § 4), which provides that a person in possession of property under a title deducible of record, either from the United States or from any person authorized to sell land for taxes, or from a marshal's or sheriff's sale, or any other judicial proceeding, having had possession under a connected title deducible from either of these specific sources, shall be deemed the owner as against any other person claiming title. It becomes my duty to instruct you that a person claiming title under this statute, that is, under this limitation law, must deduce a title directly from either of the specified sources, each link in the chain of which shall be genuine; that is to say, the parties setting up such a title cannot claim under a title where any of the links are forged, no matter how innocent the person setting it up may be. He is bound to know and to stand by the genuineness of the respective conveyances in his title, and if any of them fail, his title under this statute, then, would fail; that is to say, he would not have made out the case provided for in the statute. In order to

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

make out a defense under this statute, he must deduce a title by a chain of genuine conveyances. Then, if you shall believe, from all the evidence that has been adduced, that the deed from Timothy Hedges to Thomas Mullen was not a genuine deed, you will, of course, find for the plaintiffs on that point, because the defendants will not have made out the defense which they set up under that branch of the case. If you shall come to the conclusion that this deed was not forged, or that there is not sufficient proof of the forgery, then they will have made out a chain of title which would answer the requirements of the statute.

Verdict and judgment for defendants.

HEDGES (UNITED STATES v.). See Case No. 15,339.

Case No. 6,320.

HEERMAN v. BEEF SLOUGH MANUF'G, ETC., CO.

Circuit Court, W. D. Wisconsin. Dec., 1878.

[Cited in Huse v. Glover, 15 Fed. 296. See 1 Fed. 145.]

Case No. 6,321.

In re HEFFRON.

[6 Biss. 156;[1] 10 N. B. R. 213; 6 Chi. Leg. News, 358.]

District Court, N. D. Illinois. July, 1874.

WITHDRAWAL BY CREDITORS FROM BANKRUPTCY PROCEEDINGS.

1. Creditors who, since the amendment of June 22, 1874 [18 Stat. 178], have joined in the petition cannot afterwards be allowed to withdraw from the proceedings.

[Cited in Re Western Sav. & T. Co., Case No. 17,442; Re Philadelphia Axle Works, Id. 11,091.]

[Distinguished in Re Hawkes, 70 Me. 215.]

2. Such a practice would lead to underhand agreements betwen the debtor and a part of his creditors at the expense of the others, and cannot be allowed.

[Cited in Re Sheffer, Case No. 12,742; Re Vogel, Id. 16,981.]

3. Semble,—if all desire to dismiss the proceedings it could be done.

[In bankruptcy. In the matter of P. H. Heffron.]

Bonfield & Swezey, for creditors.

Eldridge & Tourtellotte, for debtor.

BLODGETT, District Judge. The original petition in this case was filed before the passage of the amendment of June 22, 1874, to the general bankrupt law. After the amendment had been passed, the debtor alleged that a fourth in number of his creditors, representing a third of the debts provable against him in bankruptcy, had not joined in said petition, and filed a list of his creditors. Thereupon time was given for the requisite number of his creditors to join said petition, and an amended petition was subsequently filed by the requisite number of creditors. Now, a portion of the creditors who have joined in said petition come into court and ask leave to withdraw their names from said petition, and that said petition and proceedings be dismissed so far as they are concerned, thereby leaving less than the requisite number of parties to said petition.

After careful consideration of the matter, I am of opinion that this request should be denied, and that none of the creditors who have joined in the petition should be allowed to withdraw unless all do so. Of course if all the creditors of a debtor express a desire to dismiss the proceedings, they should, as a rule, be allowed to do so. But as the bankrupt law now stands, I am satisfied it would be a mischievous practice to inaugurate, to allow a quorum to be broken after they have united in good faith for the prosecution of the proceedings. It would lead to underhand and secret negotiations between the debtor and a portion of the creditors, and be a strong incentive for showing favors to a few creditors at the expense of the many.

It may be said that the same influence may be brought to bear upon those holding the balance of power before bankrupt proceedings are commenced, but my answer to that is, that the court has naught to do with the parties until they commence proceedings, and then should not allow those who do commence proceedings to break faith with their associates, and desert the standard they have united to raise.

I do not intend to say that creditors who have been misled by false representations should be prevented from withdrawing on discovery of the truth, if the court is satisfied that they were so misled; but in this case there is no such suggestion, and all the surrounding circumstances tend to show that the creditors who wish to withdraw have been wrought upon by the debtor. Leave to withdraw denied.

NOTE. A creditor who has in good faith joined in an involuntary petition cannot withdraw, nor can he afterwards object to an amendment thereof, which is necessary to the prosecution of the same to final effect; but a creditor who was induced to join by misrepresentation may be allowed to retire at any time before adjudication. In re Sargent [Case No. 12,361].

HEFT (AMERICAN WOOD PAPER CO. v.). See Case No. 322.

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

Case No. 6,322.

Ex parte HEIDELBACK.

In re GLYN.

[2 Lowell, 526;[1] 15 N. B. R. 495; 23 Int. Rev. Rec. 73; 9 Chi. Leg. News, 183; 1 Cin. Law Bul. 21.]

District Court, D. Massachusetts. Dec., 1876.

DAMAGES ON BILLS OF EXCHANGE.

1. The rate of interest and damages which the drawee of a bill is to pay ex mora is governed by the law of the place where the bill is drawn.

2. If a bill is made and dated at the business domicile of the drawee, his undertaking is to pay it there, in case of dishonor, though it may have been negotiated elsewhere.

3. Damages in a case of this sort are a part of the law of the performance, and not of the execution and validity of the contract, nor of the remedy.

4. Such a question, arising in the courts of the United States, is one of general jurisprudence, and not of local law.

The amount of debt which the holders of certain bills of exchange should prove against the estate of the bankrupt was submitted to the court upon agreed facts. Heidelback, Frank, & Co., of New York, hold two similar bills, of one of which the following is a copy:

"£2,500. Boston, May 6, 1875. Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of myself twenty-five hundred pounds sterling, value received, and charge the same to account. Charles H. Glyn. To Messrs. Robert Benson & Co., London." Indorsed: "Pay to Heidelback, Frank, & Co., or order. Value received. New York, May 7, 1875. Charles H. Glyn." "Accepted May 18, 1875, at Messrs. Glyn, Mills, & Co. Robert Benson & Co."

The other holders have bills like this, excepting that the indorsement of Glyn is thus: "Pay A. B. or order. Charles H. Glyn." The question presented is, whether the interest and damages are to be assessed according to the law of New York or that of Massachusetts. At the time the bills were drawn, Glyn had an office and did business in Boston, and these bills were written and indorsed in blank by Glyn in Boston, and were by him sent to his agent in New York, who negotiated them to Heidelback, Frank, & Co., and received the amount of the same, and remitted the same to Glyn. Heidelback, Frank, & Co. forwarded the bills to London for acceptance, where they were accepted, and subsequently duly protested for non-payment, and returned to Heidelback, Frank, & Co. The words, "Pay to Heidelback, Frank, & Co., or order. Value received. New York, May 7, 1875,"—were written in New York over Glyn's indorsement at the time of the negotiation of the bills. The bills held by the other petitioners were drawn, indorsed, and negotiated in like manner. The Revised Statutes of New York (part 2, c. 4, p. 18) provide as follows: "The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange drawn or negotiated within this state shall, in the following cases, be as follows:" "(4.) If such bill shall be drawn upon any person or persons, at any port or place in Europe, ten dollars upon the hundred, upon the principal sum specified in the bill." The General Statutes of Massachusetts provide as follows: "When a bill of exchange, drawn or indorsed within this state and payable without the limits of the United States, is duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent upon the contents thereof, together with interest on the contents, to be computed from the day of the protest. And said amount of contents, damages, and interest shall be in full of all damages, charges, and expenses. Gen. St. c. 53, § 11.

A. S. Wheeler and C. Demond, for the holders of the bills.

(1) A bill or note takes effect as a contract, not at the place where it is written, drawn, or indorsed, but where it is delivered. Cook v. Moffat, 5 How. [46 U. S.] 295; Brownell v. Freese, 35 N. J. Law, 285.

(2) The damages to be paid by the drawee depend upon the law of the place of drawing, that is (if we apply the law above mentioned in our first point), the place of delivery and negotiation. Allen v. Kemble, 6 Moore, P. C. 314; Gibbs v. Fremont, 9 Exch. 25; City Savings Bank v. Bidwell, 29 Barb. 325; Pine v. Smith, 11 Gray, 38; Tilden v. Blair, 21 Wall. [88 U. S.] 241; Young v. Harris, 14 B. Mon. 556; Depau v. Humphreys, 10 Mart. (La.) 1; First Nat. Bank v. Morris, 1 Hun, 680; Bank of Georgia v. Lewin, 45 Barb. 340; Sylvester v. Swan, 5 Allen, 134; Whitten v. Hayden, 7 Allen, 407; Whart. Confl. Laws, § 503.

Mr. Lothrop, R. R. Bishop, and W. S. Hall, for the general creditors.

(1) The contract of Glyn was, that if the acceptors did not pay the bills at maturity, he would, on due notice, pay the holder the sum which the acceptors ought to have paid, together with damages, which, in the absence of statute regulation, would be the expense which the holder would incur to indemnify himself at the place of payment with interest. Suse v. Pompe, 8 C. B. (N. S.) 557, 562.

(2) The statutes which New York and Massachusetts have made on this subject have no extra-territorial operation, and affect the remedy only. Ayer v. Tilden, 15 Gray, 178;

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

Ives v. Farmers' Bank, 2 Allen, 236; Gale v. Eastman, 7 Metc. (Mass.) 14.

(3) The courts of the United States sitting in Massachusetts will follow the law of that state in the matter of damages. Rev. St. § 721; Brown v. Van Braam, 3 Dall. [3 U. S.] 344; Haussknecht v. Claypool, 1 Black [66 U. S.] 431.

(4) If not a matter of remedy, still Boston was the place of the contract of Glyn. Snaith v. Mingay, 1 Maule & S. 87; Barker v. Sterne, 9 Exch. 684; Lennig v. Ralston, 23 Pa. St. 137.

LOWELL, District Judge. The principles of law upon which this case must be decided have been thus laid down by the supreme court in Scudder v. Union Nat. Bank, 91 U. S. 406. Matters pertaining to the execution, validity, and interpretation of a contract are determined by the law of the place where it is made; those connected with its performance, by the law of the place of performance; those respecting the remedy, by the lex fori. The distinction between the law applicable to the validity and that governing the performance was first clearly announced in this country, I believe, in the very able opinion of the court in Depau v. Humphreys, 10 Mart. (La.) 1. A bill of exchange given in Louisiana for money advanced in that state, with a reservation of interest lawful there but usurious in New York, was held to be valid, though the payment was to be in New York. This decision is criticised by Judge Story, who inclines to refer all contracts, even as to their validity, to the place of performance. Confl. Laws, § 304. Judge Curtis, in arguing the important case of Carnegie v. Morrison, 2 Metc. (Mass.) 381, assailed the same case, and maintained the doctrine of Story; but the court decided that the contract, which was a letter of credit issued in Boston, authorizing bills of exchange to be drawn at Gottenburg in Sweden on London, was to be governed, as to its validity and effect between the original parties, by the law of Massachusetts, though the bills drawn under it must conform to the law of Sweden, and the acceptance of the bills to the law of England; which is precisely the doctrine of Depau v. Humphreys and Scudder v. Union Nat. Bank, above cited.

Mr. Wharton, in his valuable work on the Conflict of Laws (section 401), proposes, as a rule which best harmonizes the authorities, one substantially like that of the decisions above referred to, though carrying the division one step farther: "Obligations, in respect to the mode of their solemnization, are subject to the rule locus regit actum; in respect to their interpretation, to the lex loci contractus; in respect to the mode of performance, to the law of the place of performance. But the lex fori determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

In the case of a bill of exchange, the contracts of the various parties are distinct, and the drawer is bound, generally speaking, according to the law of the place where the bill is drawn, which is in most cases the same as that in which it is to be paid by him, if he pays it. Still he is to a certain extent involved in the same law with the acceptor, because upon due protest, demand, and notice he is bound to make good to the holder what the acceptor ought to have paid at the place where he was to pay, which makes it necessary to ascertain what that amount was by the law of that place, and whether by the same law due demand was made of the acceptor and due protest upon the dishonor. What the drawer should pay as interest, ex mora, or as damages, does not depend upon the law of the place where the acceptor was to pay the bill, if that is different from the place where the drawer's contract is to be performed.

So far the parties to this petition are agreed, and I have therefore cited no authorities for some of my positions; but here they divide. The general creditors contend that the law of Massachusetts governs this matter of damages in the present instance, because the remedy is sought here; and, if that be not so, because Boston is the place of performance. The petitioners maintain that the law of New York is to be followed, because the bill was negotiated there, and the first holder lived there.

I am of opinion that the Massachusetts law governs, not because the damages are part of the remedy, which they are not, but because Boston was the place in which the drawer undertook to perform his contract.

In Massachusetts, it is held that the rate of interest to be recovered, ex mora, for default in paying a promissory note, is a mere matter of remedy. The decisions which establish this point, if applicable to bills of exchange, are not binding on this court, because the law of bills of exchange is part of general commercial jurisprudence, and not of local law or usage,—Swift v. Tyson, 16 Pet. [41 U. S.] 1; Watson v. Tarpley, 18 How. [59 U. S.] 517,—and so is any question of the conflict of laws. When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.

In most cases, the place where a note is made or a bill is drawn, indorsed, or accepted, is, in fact, the place where the parties respectively undertake to pay it; and therefore questions rarely come up of any distinction between the law of the contract and that of the performance; and the courts, in pronouncing on such cases, have had no such distinction in mind, and any general statements as to the contract being governed by the law of the place where it is made or is to be performed must be taken with that allowance. When they say that a bill is to be paid by the acceptor at the place where he accepts,

and by the drawer where he draws, they are stating the general presumption of fact, that a bill or note is probably dated at the place where the party intends to pay it. The petitioners do not deny that it is the place of performance whose law must govern the decision of this controversy, if that is a different place from the place of entering into the contract; but they insist that unless the contract provides expressly for a different place, that of making the contract is conclusively and always the place of performance, and that a contract is made where it is delivered.

My opinion is, that where no place of performance is mentioned in a note or bill, it is to be paid by each person liable upon it, at the place of his own "domicile," using that word in a sense large enough to include an established place of business as well as one of residence. Mr. Justice Story (Confl. Laws, § 293c, note 3) says, that if a note is made in one state and negotiated to an indorsee in another, the contract of the maker with the indorsee takes effect as a promise in the state where the note was made, and not where it was indorsed. It will be recollected that Judge Story refers all contracts to the place of performance, and therefore his meaning here is, that the maker of a note is to pay it at his own home. So Westlake (section 235) affirms that the acceptor promises to pay the bill, if no place of payment is named, at the known place of business from which he dates his acceptance. And Wharton (section 451) says, that if an indorser indorses a note when casually absent from his domicile, it is the law of such domicile that binds, that being construed to be the place, so far as he is concerned, of payment. The eminent jurist, Savigny, as quoted by Mr. Wharton (section 426), gives several rules of law on this subject, of which two are pertinent to this case. One is, that the seat of a continuous business supplies its local law to all obligations emanating from him who conducts the business; and the other, that the debtor's domicile supplies the law to his obligations emanating from the domicile.

These remarks agree with the general opinion of business men, as I suppose. I take it that if a banker issues bills or notes to circulate as money, there is no doubt that his undertaking is to pay them over his counter. I take it that this bill would be called a Boston bill on London, and that all merchants would understand that the drawer's undertaking is to pay in Boston if the drawee shall not do so in London, and he is duly notified thereof in Boston. Boston bills on London are bought in large quantities by merchants in New York, sometimes in Boston by agents of the buyers, and sometimes in New York from agents of the sellers, and sometimes, I dare say, on the cars between the two places. Now, it seems to me inadmissible to say that the same apparent contract between the same parties may have three different modes of performance, according as it is delivered in one place or another. It is true that all contracts take effect from delivery; but the question in every case is, what does the contract mean after it has been delivered. And I am of opinion that a banker's draft, dated at his usual and only place of business, is payable there on the default of the drawee, by the implied terms of the contract itself, and by the usage of merchants, and by law.

Let us look now at some of the decisions. It is well settled, that, in order to hold the indorser of a note not by its terms payable at any place, demand must be made upon the maker at his domicile; that the date of the note is presumptive evidence of the domicile, and in Massachusetts, at least, the date proves the domicile for the purposes of demand and notice, unless the holder knows of some other. But if the holder knows the real domicile, payment must be demanded there. If the promisor has changed his domicile after the note is made, the holder is not obliged to follow him beyond the jurisdiction; but if his new domicile is within the same jurisdiction, he must demand payment there. Fisher v. Evans, 5 Bin. 541; Stewart v. Eden, 2 Caines, 127, per Livingston, J., explained in Anderson v. Drake, 14 Johns. 114; Woodworth v. Bank of America, 19 Johns. 391; McGruder v. Bank of Washington, 9 Wheat. [22 U. S.] 598; Reid v. Morrison, 2 Watts & S. 401; Taylor v. Snyder, 3 Denio, 145; Smith v. Philbrick, 10 Gray, 252; Bank of Orleans v. Whittemore, 12 Gray, 469; Pierce v. Whitney, 22 Me. 113; 29 Me. 188.

The meaning of these rules is, that the contract of the maker of a note is to pay it at his domicile, no matter where he makes or negotiates it; that the domicile being usually the same as the date, he may be held to the latter as his domicile, if he has not notified the taker or holder of his note to the contrary; that the domicile, so far as jurisdiction is concerned, is that which he had when the debt was contracted, and his contract is not to vary with every removal which he may make. Many of the cases turn on due diligence; but diligence in what? In demanding payment of the note at the place where the maker of it is bound and is presumed to be ready to pay it, that is to say, the place of performance. The decisive proof of this is, that if a place is agreed on for the performance, no demand need be made elsewhere; so that actual diligence and actual demand are not the important things, but a compliance with the law which requires demand to be made at the place of performance.

Coming now to decisions of particular cases more or less like that at bar, the first which I shall cite is a leading Scotch decision, which is given at large by two learned writers on the Conflict of Laws,—Sir R. Phillimore (volume 4, p. 612, 1st Ed.)

and Mr. Wharton (section 452). In that case, a Scotchman residing in Edinburgh made a note payable to a banker, named and described as manager of the British & Australian Bank, 55 Moorgate street, London. This was held to be a Scotch debt; nothing was proved about the place of delivery or of negotiation, from which we may infer that they were not considered important.

In Hicks v. Brown, 12 Johns. 142, A. drew at New Orleans a bill on B. in Pennsylvania, in favor of C. in Tennessee, and it was held that the law of the drawer's contract was that of Louisiana. That is precisely this case; the bill taking effect when it reached the hands of the person who had given consideration for it in a state other than that in which it was drawn.

In Pine v. Smith, 11 Gray, 38, a citizen of Massachusetts negotiated in New York for a loan from a citizen of that state at eight per cent interest, which would make the contract void for usury in New York, and this was secured by note with a mortgage of land in Massachusetts. Held, a Massachusetts contract; not, however, by reason of the mortgage, which is not once mentioned in the opinion of the court.

The case of Grimshaw v. Bender, 6 Mass. 157, goes much beyond the present. There, a bill was drawn in England upon a firm whose domicile was in Boston; but the bill was payable in London, and was accepted in England by a member of the Boston house who happened to be there. The bill not having been paid, was sued against the acceptors in Boston, and the court held that the measure of damages was regulated by the law of Massachusetts, because that was the domicile of the acceptors. That case is not considered sound by Judge Story (Confl. Laws, § 419). Mr. Wharton cites both the case and the criticism, without giving his own opinion (Confl. Laws, § 451, note a). The bill was expressly made payable in London, and of course the acceptors should pay in Boston what would have produced the amount of the bill in London, which, in the absence of statute or local usage, is exactly what a drawer in Boston would be obliged to pay, and therefore the substance of the decision is sound; but in making the acceptors technically drawers in Boston, and liable to damages as such, the court overlooked the circumstance that they were not the drawers, but stood as London acceptors casually sued in Boston. After this allowance is made, the case remains a high authority for holding the domicile to be the place of performance, when none other is appointed by the contract itself.

It has been twice held in England that a bill drawn abroad and filled up and negotiated in England, is valid, if sufficiently stamped according to the law of the place of apparent drawing, though not sufficiently by the law of England. Snaith v. Mingay, 1 Maule & S. 87; Barker v. Sterne, 9 Exch. 684. These decisions have been supposed to depend upon an estoppel worked by the negotiation of the bills to innocent holders; but this explanation is not sound; they are put by the judgments upon the plain and simple reason that the contract of the drawer was made abroad; and not only so, but estoppel does not avail against the stamp laws of England. Steadman v. Duhamel, 1 C. B. 888.

In Pennsylvania, too, it was decided that the drawer of a bill, signed by him in blank as to amount, &c., in that state, though filled up and passed in England, must pay damages according to the law of Pennsylvania at the date of the drawing, and this, though the rate of damages had been diminished by a statute passed before the bill was actually negotiated. Lennig v. Ralston, 23 Pa. St. (11 Harris) 137. In Campbell v. Nichols, 33 N. J. Law, 81, the precise distinction is taken that the validity of an acceptor's contract depends upon the law of the place where the bill is negotiated and first becomes a contract, but that in all matters concerning the interest to be paid by him upon that of the place where he undertook to pay. In a later case, cited by the petitioners here, the same court, citing Campbell v. Nichols, say, though they do not decide, that a drawer's contract may differ from an acceptor's in this respect (Brownell v. Freese, 35 N. J. Law, 285); but there is neither reason nor authority for any distinction: each is liable to make good his promise when and where he undertook to make it good, as I have already shown; and if that means at the acceptor's domicile for his part, it means at the drawer's for his.

In Vanzant v. Arnold, 31 Ga. 210, the maker and the indorser of a note both lived in Georgia, but they made and indorsed it in Tennessee, where it took effect as a contract by being delivered to an agent of a creditor of the maker who lived in New York. It was held to be a contract governed by the law of Georgia as against the indorser, because he was domiciled there.

Many cases are cited by the petitioners to prove that the lex loci contractus is where the bill or note is actually negotiated. I have assumed that to be the general rule; though, if it were needful, I could point out many exceptions to it. It is not necessary, because every case but one which touches that point turns upon the validity of the contract, and not upon the mode of performance, nor upon the damages for a breach. Thus in Tilden v. Blair, 21 Wall. [88 U. S.] 241, a bill for $5,000 was drawn in Illinois and accepted in New York, and then sent back to Illinois, where it was indorsed and negotiated at a rate of interest which would be usurious in New York, and avoid the contract. The acceptor was sued in the circuit court of the United States sitting in New York; and the court held that the validity of the acceptance depended on the place of negotiation, and gave judgment for the plaintiff for an amount which it considered the law of Illinois made the contract

available for, in its inception: The supreme court said that the bill was good for its face, and that the only error was in not giving judgment for the whole $5,000 and interest. They could not correct the error nor say whether the interest should be reckoned at the legal rate in Illinois or in New York, because the plaintiff had acquiesced in the ruling below. The only point in this case, therefore, is not reached by that decision.

All the other cases cited are open to a similar remark, excepting Cook v. Moffat, 5 How. [46 U. S.] 295, which is said to be decisive of this question in favor of the petitioners. I do not so understand it. That case was, that A., in New York, sold goods there to B., of Baltimore, who gave his note for the price, and afterwards took the benefit of the insolvent law of Maryland. The court held that the discharge in Maryland did not release the debt due to A. Mr. Justice Grier, in delivering the opinion of the court, says, that the notes, being delivered in New York in payment of goods purchased there were, of course, payable there, and governed by the laws of that place; citing Boyle v. Zacharie, 6 Pet. [31 U. S.] 635; Story, Confl. Laws, § 287. The case cited decides that advances made by a factor are to be reimbursed to him at the place where he makes them; and Judge Story, at the place cited, repeats the same doctrine. I cannot suppose that Mr. Justice Grier intended to overrule all the cases and opinions which I have cited above. There is undoubtedly much authority for the proposition, that the whole contract of sale of goods, including the payment, is governed by the law of the place of sale; this is to say, the buyer is to seek out and pay the seller if the goods are sold on credit, and if for cash, he must pay him on the spot. By the law both of New York and of Maryland, the note given for the price of goods is merely security for the payment; and on surrender of the note an action for the price of the goods may be maintained. If, therefore, an action for goods sold would not be barred by a discharge in Maryland, because its performance was to be in New York, the security ought not to be destroyed thereby. This is what I understand Mr. Justice Grier to mean in the brief remarks above quoted, though he speaks in the popular way of the note being given in payment for the goods. There are, likewise, I believe, decisions that an ordinary loan is to be reimbursed where it is made, at least if no note or bill is given for it, though the cases are, perhaps, not reconcilable on this point.

This transaction was not a sale of goods nor a loan of money, but the transfer of a credit. The undertaking of Glyn was, that if Benson & Co. should not accept or should not pay in London, and due demand and protest were made there, he would pay in Boston, on due notice and demand here.

[If New York were the place of payment, a constructive demand on Glyn there would be enough to charge him as drawer or indorser; but I have seen no cases to that effect, excepting that there are a few which hold that the date is conclusive and controls everything; and if these should be followed, the demand and notice to Glyn as indorser might be made in New York, in respect to the two drafts in which, by his authority, the indorsements were dated there; but the better opinion is, as shown by the authorities which I have cited, that if the date and domicile differ, to the knowledge of the party taking the paper, he must go to the domicile to demand payment, and so of the holder at the date of the dishonor. Glyn was not bound to tender payment in New York. If New York were the place of performance, a second or other later holder would have no information from the bill itself, what the contract of the drawer was in respect to performance, or when, where, and how he should demand it of him, excepting in respect to the two bills above mentioned, which are on their face indorsed in New York, which in this particular case might notify him, but would not have that effect, if the bills had in fact been delivered elsewhere. There is sound reason as well as strongly preponderating authority for the rule, that where the domicile and date coincide, it fixes the place of performance, if none other is mentioned in the bill. This course of reasoning shows that Glyn's indorsing two of the bills in New York, if he is to be held to have done so, is immaterial, the place of performance being indicated by the face of the bill.] [2]

The interest and damages to be proved against Glyn's estate are to be assessed by the law of Massachusetts.

HEIDELBAUGH (HAYS v.). See Case No. 3,318.

Case No. 6,323.

In re HEILBRONN.

[12 N. Y. Leg. Obs. 65.]

District Court, S. D. New York. March, 1854.

HABEAS CORPUS—FUGITIVE FROM JUSTICE.

1. Under the treaty between Great Britain and the United States, of 1842, for the reciprocal rendition of fugitive criminals, the act of congress passed August 12, 1848 [9 Stat. 302], and the opinion in Case of Kaine, 14 How. [55 U. S.] 145, *held*, that the requisition had been properly made through the executive of the United States.

[Cited in Re Henrich, Case No. 6,369. Approved in Re Stupp, Id. 13,563.]

2. That the documentary evidence, before the United States commissioner, of the prisoner having committed the offence charged, was sufficient, both in form and substance, to warrant the commissioner's commitment of the fugitive for extradition.

[Cited in Re Macdonnell, Case No. 8,772.]

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[2] [From 15 N. B. R. 495.]

At law.

J. R. Whiting, for the British Government.
R. Busteed, for fugitive.

INGERSOLL, District Judge. The relator, Alexander Heilbronn, makes his petition to this court, in which petition he alleges that he is imprisoned and restrained of his liberty by the marshal of the United States, of the Southern district of New York; and that he is not committed or detained by reason of any process issued by any court of the United States, or by any judge thereof, or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree. But that the reason of such restraint and imprisonment, according to his best knowledge and belief, is, that John W. Nelson, Esq., upon the 6th day of January, A. D. 1854, issued a warrant of commitment against the relator, as an alleged fugitive from justice from Great Britain, after the hearing by said Nelson of the evidence adduced in support of the charge made against the relator. And in that petition he further alleges that the said warrant was without color of law, and that there was no evidence before said Nelson that the relator had committed any crime, and for these reasons, and for these reasons only, he prays in that petition that a writ of habeas corpus may issue, directed to the said marshal, commanding him to have the body of the relator before this court, that he may be discharged from such imprisonment, so alleged to be made without color of law.

The first question that presents itself is, what right has this court to interfere upon the facts set forth in the petition, and taking it for granted that all the allegations therein set forth are true? Neither the courts of the United States, nor the judges thereof, can interfere by way of habeas corpus in all cases of illegal imprisonment; of imprisonment made without any color of law. They can interfere only in certain specified cases; in cases specified by some particular act of congress, and where the unlawful imprisonment is under some color of law, and not where it is without any color of law. And if the party who presents his petition does not bring himself within the description of some one of the specified cases provided for by some one of the acts of congress, which authorize the issuing of the writ of habeas corpus, then no court of the United States or judge thereof, can interpose and grant the relief sought.

The power granted to the courts of the United States and the judges thereof, to interfere in cases of unlawful imprisonment, and to issue a habeas corpus, is contained in the judiciary act of 1789 [1 Stat. 73], where it is provided that "all the courts of the United States may issue writs of scire facias, habeas corpus, and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law. And either of the judges of the supreme court, as well as judges of the district courts, may grant writs of habeas corpus for the purpose of inquiry into the cause of commitment; but writs of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." In order to justify a United States court, or judge thereof, to discharge a prisoner on a habeas corpus, who is in jail, he must, by this provision of law, be "in custody under, or by color of the authority of the United States." And that must appear in the petition which is presented. It does not satisfactorily appear from the petition (though the fact is so) that the relator is in custody by color of the authority of the United States. Indeed, the petition states that he is in custody, "without any color of law." And if this is so, he cannot be in custody under color of authority of the United States. The petition does not state that John W. Nelson was acting under any such color of authority. It merely states that he, as an individual, without color of law, issued the warrant of commitment. It does not state or show that the marshal holds the relator under any such color of authority. It merely states that he is imprisoned and restrained of his liberty by the marshal, by virtue of the warrant issued by John W. Nelson, "without color of law." It might then be urged that the case, as presented by the petitioner, is not such a one as would authorize the court, by any law of the United States, to interfere, for the reason that it does not sufficiently show that the relator is unlawfully imprisoned, under or by color of the authority of the United States. But I do not feel inclined to dispose of the case on this ground, but to treat it as it is presented by the marshal's return, and the evidence which has been taken, by which it appears that the relator is "in custody under and by color of the authority of the United States."

The return of the marshal to the writ of habeas corpus which issued, sets forth that he holds and detains in his custody the said relator, under and by virtue of a commitment of John W. Nelson, Esq., a commissioner duly appointed by the circuit court of the United States for the Southern district of New York, under and by virtue of an act of congress entitled "An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders," approved August 12, 1848, which said commitment is dated the 6th day of January, 1854. And the marshal appends to his said return a copy of said commitment. This warrant of commitment issued by Commissioner Nelson, after reciting that on the 21st day of Novem-

ber, 1853, complaint on oath was made to him, he being a commissioner duly appointed by the circuit court of the United States for the Southern district of New York, under and by virtue of an act of congress entitled "An act for the giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders," approved August 12, 1848, charging the relator with having committed, within the city of London, within the jurisdiction of the government of Great Britain, the crime of forgery, by forging the name of Charles McIntosh & Co. upon the back of a bill of exchange, for the amount of forty-three pounds seven shillings and sixpence, dated the 2d day of July, 1853, drawn by and signed "For the Governor and Company of the Bank of Ireland—James Jackson, Cashier," and directed "To the Cashier of the Bank of England, London;" and reciting also, that whereas a treaty for "the extradition of persons committing such crime existed between the governments of the United States and Great Britain, and that the president of the United States, upon the claim by the government of Great Britain, for the extradition of the said relator, upon the charge aforesaid, in pursuance of the said treaty, did issue his warrant requiring all competent officers to investigate such charge; and that he, as such commissioner, on the 21st day of November, did issue his warrant for the apprehension of the said relator upon the said complaint, and the evidence laid before him, to the end that the evidence of his criminality might be heard and considered; and reciting also, that the said relator was apprehended and brought before him, the said commissioner, by virtue of his said warrant, and that he did hear and consider the evidence of his criminality upon said charge of forgery, and that upon such hearing he did adjudge and deem the evidence of the criminality of said relator, as charged, sufficient, under the provisions of said treaty to sustain the charge of forgery; did command the marshal of the Southern district of New York to commit the said relator to the proper jail, there to remain until he should be surrendered, in pursuance of the said treaty, or be otherwise discharged by due course of law.

By the tenth article of the treaty of 1842, entered into by the United States and Great Britain, it is stipulated by the contracting parties, that they shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with certain crimes, (among which crimes is forgery,) and committed within the jurisdiction of either, shall seek an asylum and be found within the territories of the other; provided that this only shall be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed. And by that article of the treaty it was further stipulated and provided, that the respective judges and magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive, or person so charged, that he may be brought before such judge or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to maintain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.

By an act of congress approved August 12, 1848, and passed for the purpose of giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders, it is enacted, that in all cases in which there exists, or thereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and may be lawful for any of the justices of the supreme court, or judges of the several district courts of the United States, and the commissioners authorized so to do by any of the courts of the United States, and they shall have power, upon complaint made upon oath or affirmation, charging any person, found within the limits of any state, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge, under the provisions of the proper treaty or convention, it shall be the duty of such judge or commissioner to certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, on the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. And it is further provided by that act of congress, that in every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person or per-

sons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended. And that it shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed by such judge or commissioner to be delivered to such person as shall be authorized in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and that such person shall be delivered up accordingly. And it is further provided by that act of congress how, under certain circumstances, a person so committed by such judge or commissioner to await the order of the executive for his extradition, may by a judge be discharged on a habeas corpus. For it is further enacted, that when any person who shall have been so committed by any judge or commissioner to remain until delivered up in pursuance of a requisition, shall not, after such commitment, within two calendar months be delivered up in pursuance thereof, (and he cannot be so delivered up without an order from the executive through the secretary of state,) and conveyed out of the United States; that in such a case it shall be lawful for any judge, upon application made to him by or in behalf of the person so committed, and upon proof made to such judge that reasonable notice of the intention to make such application has been given to the secretary of state, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge why such discharge ought not to be made. In such a case, however, where there has been a lawful commitment, no discharge at any time can be had upon the order of any judge, unless reasonable notice of an intention to make an application for a discharge has been given to the secretary of state.

Commissioner Nelson, as appears by his warrant of commitment, finds and certifies, before he proceeded to act, that a complaint on oath was made, charging the relator with having committed within the city of London, within the jurisdiction of the government of Great Britain, the crime of forgery; that the president of the United States, upon the claim by the government of Great Britain for the extradition of the said relator, upon the charge aforesaid, in pursuance of the treaty, did issue his warrant requiring him (Commissioner Nelson) to investigate said charge; that he did, after such complaint on oath and after such warrant from the president, issue his (the said Commissioner Nelson's) warrant for the apprehension of the said relator upon the said complaint; that the said relator was apprehended in pursuance of said last-mentioned warrant, and brought before him; that he did investigate the said charge; that he did consider and hear the evidence brought before him of the criminality of the relator, upon the said charge of forgery; and that, upon such hearing, he did adjudge and consider the evidence of the criminality of the relator, as charged, sufficient, under the provisions of the treaty, to sustain the charge of forgery; and that, therefore, he did issue his warrant to commit the relator to the proper jail, to give an opportunity to the government of the United States, if in the opinion of the executive the facts in the case authorized and required it, to issue a warrant for his (the said relator's) extradition. There can be no question, if this warrant of commitment is a legal and valid warrant; if the facts stated therein by Commissioner Nelson are true and not false, but that the relator is in the lawful custody of the marshal, and that he is not unlawfully imprisoned. This is admitted by the counsel for the relator. And it is farther admitted that this warrant of commitment, on the face of it, is a good and valid warrant. And if it is a good and valid warrant, although Commissioner Nelson has found the facts certified to by him, it will not necessarily follow that a warrant for the extradition of the relator will issue. The commissioner, by the act of congress of August 12, 1848, must certify to the secretary of state a copy of all the testimony taken before him, upon which he forms his opinion, so that the president can determine whether upon the testimony so taken the necessary facts are established, to justify the government in granting a warrant of extradition. By the testimony taken, and submitted to the commissioner, he in the first place determines whether, in his opinion, a complaint on oath has been made, and if it has, then he issues his warrant of arrest, and when upon that warrant the accused is brought before him, he determines upon the evidence to him submitted whether it is sufficient to sustain the charge made. If he does deem it sufficient, then he orders the accused to be holden in custody, to await the decision of the government thereon. And his doings are declared by the act of congress to be good and available to all intents and purposes. The commissioner, then, after he shall have sent to the secretary of state a copy of all the testimony taken before him, has performed his duty. The president then is to perform his duty. And that duty is to examine the testimony so taken before the commissioner, and to determine upon his responsibility and the responsibility of his constitutional advisers, whereupon it appears from such testimony that a complaint on oath was made, and whether the evidence so taken, in the opinion of the government, is sufficient to sustain the charge made. And if either of these facts, in the opinion of the government, are not sufficiently and satisfactorily made out by the evidence so taken, then it is the duty of the president not to grant a warrant of extradition. But if these facts, in the opin-

ion of the government, are satisfactorily established by such evidence, then it is the duty of the president to grant such warrant, and by so doing, faithfully carry out the stipulations in the treaty contained. And the object of the application before me, is, not only to have me determine that Commissioner Nelson has made a false finding, and to declare that his doings, which the act of congress has said should "be good and available to all intents and purposes," shall not be good and available to any intent or purpose, (for to have this application successful I must do this,) but, also, that I should prevent the president from deciding upon the evidence so transmitted by the commissioner to the secretary of state, whether a complaint on oath was made, as certified by the commissioner, and whether such evidence is sufficient, in his opinion, aided by his constitutional advisers under the provisions of the treaty, to sustain the charge of forgery against the relator; or, if such decision has already been had in the affirmative, that I should determine that such decision, so made by the president, was also a false decision.

The warrant of commitment issued by Commissioner Nelson, is attacked on several grounds. The relator, in his reply to the return of the marshal, says: First, that before the commissioner issued his warrant of arrest and had proceeded to act, upon the order of the president, no complaint under oath had been made, charging the relator with having committed the crime of forgery within the jurisdiction of Great Britain. Second, that there was no evidence before the commissioner, such as is required, to sustain against him any such charge. Third, that if there was any such evidence, that evidence was not sufficient to sustain any such charge. And upon these grounds the demand is made, that the warrant of commitment should be declared to be of no effect.

Previous to any action taken by Commissioner Nelson, certain papers, which purported to be copies of certain depositions taken and sworn to before Henry Muggeredge, an alderman and justice of the peace for the city of London, upon which original depositions a warrant of arrest had been granted, which papers were duly certified by the said Muggeredge, who issued the original warrant, under his hand, to be true copies, and which charged the relator with the crime of forgery, committed by him in London, were transmitted from England to this country, and were presented by the British minister at Washington to the president, accompanied with a demand, in behalf of the government of Great Britain, that a warrant of extradition should issue in pursuance of the treaty, in order that the relator might answer to the charge of forgery, in London, where it was said to have been committed. These papers were transmitted by the president to Commissioner Nelson, accompanied with a warrant to him to investigate the charge, as made and set forth in such papers. Those papers and this warrant from the president were handed to Commissioner Nelson, and before he issued his warrant of arrest, he took the deposition of Edward Funnell, one of the police officers of London, in which he swore that he was acquainted with Henry Muggeredge; that he was an alderman and justice of the peace of the city of London; that he had known him to act repeatedly as such; that he saw him sign the certificate to the papers purporting to be copies; that he compared the papers purporting to be copies with the original papers in the possession of said Muggeredge, and that he saw the original affidavits sworn to and signed by the parties thereto in the presence of the said Muggeredge; and that the papers then before him, Commissioner Nelson, were true and correct copies of the original depositions. There was then abundant proof submitted to Commissioner Nelson, before he issued his original warrant of arrest, that Henry Muggeredge was an acting alderman and justice of the peace of the city of London; that certain papers were submitted to him, copies of which were before Commissioner Nelson, the same having been transmitted to him by the president, charging the relator with having committed the crime of forgery in the city of London; and that those papers were sworn to before the said Muggeredge. If then the said Muggeredge, as such alderman and justice of the peace, had power and authority over the crime charged, to investigate the same, to administer an oath to the parties who signed such papers, and to issue the warrant which was issued by him, then there was, before Commissioner Nelson proceeded to act, a complaint under oath, made, charging the relator with having committed the crime of forgery in the city of London, and such a complaint under oath as satisfies the provisions of the treaty. For the treaty does not require that the complaint under oath should be made directly to a magistrate in the country to which the alleged fugitive has fled; but if it is made in the country where the crime was committed, to a magistrate who has power to administer oaths and to investigate the criminal charge made, and take jurisdiction of the same, and the same, or a duly certified copy of the same, is transmitted to the government of the country where the fugitive has sought an asylum, and the government of the country to which the same has been transmitted recognizes it as authentic, then the terms of the treaty, which requires a complaint under oath to be made, has been satisfied. When the Case of Kaine was before the supreme court of the United States, 14 How. [55 U. S.] 103, some of the judges differed in opinion as to the effect of such testimony as was given by Edward Funnell before Commissioner Nelson in this case. While all agreed that such testimony was sufficient to prove that the foreign

magistrate was duly appointed to the office which he assumed to have and hold, there was a difference of opinion whether it was sufficient to prove that he had power and authority to act in the way that he had assumed to act,—some of them contending that such testimony was also sufficient to prove that such foreign magistrate had jurisdiction and authority to act in the matter in the way that it is proved the said magistrate did act, while others contended that it was not sufficient to prove any such jurisdiction and authority in the foreign magistrate. We are not, in this case, troubled with any such question. In the Case of Kaine the government of Great Britain made no demand upon the government of this country previous to the examination before the commission. They presented no papers to the president, purporting to be copies of depositions which charged any crime. The president issued no warrant to the commissioner to have him investigate the case. But in the case of the relator, the government of Great Britain did make demand upon the government of this country that the relator must be delivered up to them, and accompanied that demand with papers charging the relator with the crime of forgery, committed in London, and purporting to be a copy of a complaint, under oath, made to a magistrate having jurisdiction and power to act. Upon the receipt of these papers by the president, he issued his warrant to Commissioner Nelson to investigate the case. By issuing this warrant the government of this country recognized and acknowledged the papers to be genuine, and that the foreign magistrate had jurisdiction over the crime as charged, and power to act as he had assumed to act. By requiring Commissioner Nelson to investigate the facts, the government of this country admitted that the papers were genuine; that a complaint under oath had been made in pursuance of the treaty; for Commissioner Nelson could not investigate the facts until such complaint, on oath, had been made. When these papers, which purported to be copies of certain proceeding had before the foreign magistrate, were presented by the British minister to the government of this country, the good faith of his nation was pledged that the foreign magistrate, before whom the originals were taken, had authority to act, and had jurisdiction over the crime charged, and that the facts stated in them were true. They were received by this government upon that pledge. And this is sufficient to establish the fact, not only that Henry Muggeredge was an alderman and justice of the peace for the city of London, but also the further facts, that he had jurisdiction over the crime charged, and power to administer oaths to the persons who gave their depositions before him. And the authority and jurisdiction of the said Muggeredge being thus proved, these papers, executed before him, fully proved that a complaint on oath was made against the relator, charging him with having committed the crime of forgery in London, before Commissioner Nelson issued a warrant for his arrest. See opinion of Judge Nelson in Case of Kaine, 14 How. [55 U. S.] 145.

It is further claimed by the relator that there was no evidence of any kind before Commissioner Nelson to prove that he had committed the crime of forgery, as set forth and charged in the complaint under oath. The evidence that was submitted to Commissioner Nelson were copies of certain depositions upon which an original warrant in London had been granted by Henry Muggeredge, alderman and justice of the peace for the city of London, and which constitute the complaint on oath, certified under the hand of the said Muggeredge, and attested by the person producing them to be true copies of the original depositions, and this was the only evidence before him of the criminality of the relator. Such copies are, by the act of congress of the 12th of August, 1848, made evidence in a case of this kind, upon a hearing before a commissioner, upon the return of a warrant of arrest, as well as to prove that a complaint on oath had been made. It has been already shown that the action of the two governments upon the demand made by the British minister for the extradition of the relator, afforded sufficient proof that Henry Muggeredge was not only an alderman and justice of the peace for the city of London, but that he had jurisdiction and authority over the offence charged, and power to administer oaths and take depositions. And it has been proved that the papers produced as copies were true copies of the original depositions taken. These depositions go to prove that the relator—he being in the employ of McIntosh & Co., as their clerk—did, without any authority from them, and in fraud of their rights, endorse their name in the similitude of the handwriting of one of the partners, to a bill of exchange payable to their order at the Bank of England, and did procure from the bank the amount of said bill, and immediately thereafter absconded to this country. The facts, then, in these depositions, tend and go to prove, and are evidence to prove, that the offence charged has by the relator been committed. But it is claimed by the counsel of the relator that no depositions taken in England, or copies of any such depositions, would or could be evidence before Commissioner Nelson; that on the trial of the case he should have disregarded and rejected them, for the reason, as he alleges, that the law of congress authorizing this kind of testimony is a nullity; that it is void, opposed to the treaty, and unconstitutional. By the treaty the United States stipulated that they would, upon a certain kind of proof being produced to establish the crime of forgery committed in Great Britain, by any one who should fly to this country, deliver up, to the authorities of the country where the offence was

committed, the individual charged with the crime, that he might there be tried. That treaty became the law of the land. But it did not prevent the congress of the United States from making further enactments on the same subject, unless such further enactments annulled or restricted the stipulations contained in the treaty; and I cannot conceive how the act of August 12, 1848, either annuls or restricts any of the stipulations in that treaty contained. The law of congress does not, in any way, interdict or restrain the engagements of the treaty; and as it does not and is not opposed to the provisions of the constitution, it was in the competency of congress to pass it. Judge Betts, when the Case of Kaine was before him, acknowledged the validity of this act of congress. When that case was before Judge Nelson, he acknowledged its validity. And when the case was before the supreme court at Washington, the judges there acknowledged its binding force. The law must, therefore, be considered a valid law. And being so considered, there was evidence before Commissioner Nelson to prove that the crime of forgery, as charged against the relator, was by him committed in London.

The counsel for the relator further claims that, if there was evidence before Commissioner Nelson to establish the charge that he was called upon to investigate; that that evidence was not sufficient to establish such charge; that he erred when he found that the evidence was deemed by him sufficient to sustain the charge; and that, therefore, the relator ought not to be holden under the warrant of commitment which he issued. The first question that presents itself on this branch of the case is, what right had I to interfere, even if I should be of the opinion that he erred in judging of and weighing the evidence, when he found that the evidence was deemed by him sufficient to establish the charge he was called upon to investigate? Commissioner Nelson has the same authority, in a matter of this kind, as a judge of the supreme court would have, had he undertaken to investigate the charge. And I have no more right to sit in judgment on the opinion by him framed, that the evidence was deemed by him sufficient to sustain the charge, when there has been any legal evidence before him to prove the charge, than I should have to sit in judgment on the opinion of a judge of the supreme court in a case under the like circumstances. I have no such power given to me by the law; and I have no disposition to exercise a power to discharge upon a habeas corpus, or to attempt to exercise such power, unless it is given to me by law. The act of congress, in prescribing the duties and the powers of the commissioner, provides that "if on such hearing the evidence be deemed sufficient by him (the commissioner) to sustain the charge, under the provisions of the proper treaty," it shall, among other things, be his duty to issue his warrant of commitment of the person accused, to wait the determination of the president, whether or not he will, upon the evidence taken before the commissioner, issue a warrant of extradition. Where there is any legal evidence before the commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it, or to render it ineffectual, at least not until the expiration of two calendar months after it shall have been issued. In such a case no one can revise the opinion of the commissioner but the president. The president has that power. If he should be of the opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If he should be of the opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the commissioner. As that evidence has been produced before me, however, I will state that, in my judgment, it was sufficient to hold the relator to a trial, and that the determination of the commissioner was fully authorized and justified. It was his duty to decide as he did. I will not give my reasons for this opinion, for I do not feel disposed to furnish an argument which may be used by others against the relator on the trial. His youth and apparent simplicity would induce me rather to aid in his acquittal than to aid in his conviction. My duty, however, compels me to declare that he must remain in the custody of the marshal, under the warrant of commitment issued by Commissioner Nelson, in pursuance of the requirements thereof.

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Case No. 6,324.

HEINE v. APPLETON et al.

[4 Blatchf. 125.] [1]

Circuit Court, S. D. New York. Dec. 24, 1857.

COPYRIGHT—EXCLUSIVE RIGHT TO SKETCHES MADE WHILE IN EMPLOY OF GOVERNMENT.

1. The plaintiff, an artist, accompanied the expedition to Japan, fitted out by the United States government, as a master's mate, and signed the shipping articles, and received pay in that capacity, with the distinct understanding that all sketches and drawings he might make were to be the exclusive property of the government. He made sketches and drawings which were, on his return, incorporated, with his assent, in a report of the expedition, made to the navy department, and congress ordered a large

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

number of copies of the report, containing prints and engravings made from such sketches and drawings, to be published for distribution. Afterwards, the plaintiff undertook to obtain a copyright for some of the prints and engravings so incorporated in the report to the navy department. *Held*, that he was not author or proprietor of the prints and engravings, in such a sense as to be capable of acquiring an exclusive right to the same, at the time he undertook to do so, and that they had been given to the public.

2. But, in this case, even if the plaintiff were the proprietor of the copyright of the prints and engravings in question, he had been employed and paid by the defendants to prepare some of the prints for publication by them, and he could not now be allowed to ask that the sale of the prints he had so prepared should be stopped by injunction.

In equity.

This was an application for a provisional injunction. The plaintiff [William Heine], by profession an artist, accompanied the late expedition to Japan and the China seas, which was fitted out by the government of the United States, and was under the command of Commodore Perry, of the United States navy. He was shipped as a master's mate, and served as such, on board of one of the public ships which accompanied the expedition. During the expedition, he made several original sketches, and drawings of many of the prints and illustrations, which were incorporated in the report made by Commodore Perry to the secretary of the navy, and published in large numbers, by order of congress, under the title of "A Narrative of the Expedition of an American Squadron to the China Seas and Japan, Performed in the Years 1852, 1853 and 1854, under the Command of M. C. Perry, United States Navy; Compiled from the Original Notes and Journals of Commodore M. C. Perry and His Officers, at His Request, and under His Supervision, by Francis L. Hawks, D.D., LL.D., &c." For certain of the prints and illustrations so incorporated in the report of Commodore Perry to the secretary of the navy, and published by order of congress, the plaintiff, in June, 1856, obtained from the clerk of the district court of the United States for the Southern district of New York, a certificate of copyright, as author and proprietor. This was after the report had been made to the secretary of the navy, and after it had been ordered to be published by congress. The defendants [William H. Appleton and others], in July, 1856, published two several editions of the report so made to the secretary of the navy, in both of which were contained the prints and illustrations in question. One of the editions so published by the defendants was precisely like, both in form and in matter, (with the exception of the title page,) the work published by order of congress. The defendants, about the same time, published another work, which contained the prints and illustrations in question. The plaintiff now brought his bill, in which, among other things, he prayed that the defendants might be enjoined against selling or otherwise disposing of any of the works so published by them, in which were contained any of the prints or illustrations so claimed by the plaintiff as author and proprietor.

Dexter A. Hawkins, for plaintiff.
William Emerson, for defendants.

INGERSOLL, District Judge. The view I take of this case renders it unnecessary to consider it in some of the aspects in which it has been presented. It can be satisfactorily disposed of by considering two questions only: First. Was the plaintiff, at the time he obtained a certificate of copyright, entitled to the exclusive right to the prints and illustrations in question, as author and proprietor? Second. Admitting that he was, are there any facts in the case, which should restrain the court from granting the injunction prayed for?

That the plaintiff made the original sketches and drawings of the prints and illustrations in question, admits of no doubt. But, notwithstanding this, he was not an author or proprietor of the prints and illustrations, in such a sense as to be capable of acquiring an exclusive right to the same, at the time the certificate of copyright was granted. This appears very clear by the affidavits introduced on the part of the defendants. Previous to the sailing of the expedition to Japan, the plaintiff applied to Commodore Perry, to be employed as an artist, and to accompany the expedition, as such. He was informed by the commodore, that congress had made no provision for an artistic or scientific department, and that he could not be employed. He renewed his application, and finally the commodore consented to receive him in the capacity of a master's mate, on condition that he should sign the shipping articles as such master's mate, and do whatever duties might be required of him, and be subject to all the rules and regulations of the squadron. When the commodore consented that the plaintiff might join the expedition, he informed him that all the sketches and drawings which should be made by any one attached to the expedition were to be the exclusive property of the government of the United States, and that no one could appropriate to his own use any sketch or drawing that might be made. To this the plaintiff gave his assent, and he joined the expedition as master's mate, and received pay as such, with the distinct understanding that the sketches and drawings which he might make were to be the exclusive property of the government of the United States. Although the plaintiff was shipped as master's mate, his chief duty was to make sketches and drawings for the government. Upon the return of the expedition to this country, the sketches and drawings which the plaintiff made, were, with his assent, incorporated in the report made by the commodore to the secretary of the navy, and were placed at the disposal of congress; and congress, long before the cer-

tificate of copyright was obtained by the plaintiff, ordered a large number of copies of the report, containing the prints and engravings made from the original sketches and drawings, to be published for distribution. Under these circumstances, the plaintiff was not such author of the prints and engravings in question, as to be able to acquire an exclusive right to the same as author or proprietor, by virtue of the certificate of copyright which he obtained. The sketches and drawings were made for the government, to be at their disposal; and congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public at large, has thereby given them to the public.

But, even if the plaintiff had an exclusive right to the prints and engravings in question, by virtue of the certificate of copyright which he obtained, there are certain facts which have appeared in evidence, which would restrain the court from granting the preliminary injunction now asked for. The certificate of copyright was obtained by the plaintiff early in the summer of the year 1856. The several works of the defendants, now sought to be enjoined, were published by them in the summer of the year 1856, and soon after the plaintiff obtained his certificate of copyright. One of these works is a quarto edition of the Expedition to Japan, the same as published by order of congress. Another is an octavo edition of the same work. As early as January, 1856, the plaintiff met, by appointment, the Rev. Dr. Hawks, who wrote the narrative of the Expedition to Japan, for the purpose of selecting sketches to appear in the octavo edition of the work, then about to be published by the defendants. No mention was made by the plaintiff of any claim to copyright on his part; and it was understood by Dr. Hawks, that any of the drawings which should be selected were to be used for the octavo edition of the defendants' work. At a subsequent period, the plaintiff was employed by the defendants, to reduce several drawings from the size of the quarto edition to that of the octavo edition, for which service he was to be paid by the defendants, and there is no complaint that he never was paid. The plaintiff thus aided in the publication of some of the works of the defendants. When he thus aided in their publication, he made no claim of copyright. It would be inequitable now to permit him, when he has been paid to aid in their publication and sale, and has thus aided in their publication, with a view to their sale, to stop their sale, even if he had a valid copyright in them. By aiding in their publication, he agreed to their publication, and, by agreeing that they might be published, he agreed that they might be sold; and he cannot now, with success, ask that the defendants may be restrained from doing that which he has agreed they may do. The motion for a preliminary injunction must, therefore, be denied.

Case No. 6,325.

HEINE v. LEVEE COM'RS.

[1 Woods, 246.] [1]

Circuit Court, D. Louisiana. April Term, 1872.[2]

SPECIFIC PERFORMANCE — TAXATION — POWER OF UNITED STATES COURT TO ORDER—BONDS OF PARISHES IN LOUISIANA.

1. When every part of a contract has been executed except the payment of money, the remedy at law (if one exists) is fully adequate to the case; for by an action at law it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention.

[See note at end of case.]

2. A bill in equity against a board of levee commissioners to obtain, by means of the enforcement of the levy and collection of a tax by them, payment of money due on bonds, which they had issued under authority of an act of the legislature, and which directed them to levy an annual tax to pay the interest, and to create a sinking fund for the payment of the principal of the bonds, cannot be maintained as a bill to enforce the specific performance of a contract.

[See note at end of case.]

3. Nor can such a bill brought by the holders of the bonds against the board of levee commissioners be maintained as a bill for an account.

4. A court of equity has general jurisdiction of liens, inasmuch as a court of law cannot, except by execution, order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto.

5. The power of taxation belongs to the legislative department of the government. The judicial department has no general jurisdiction over the subject.

[Cited in U. S. v. City of New Orleans, Case No. 15,871; Northern Pac. R. Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. 201; Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 143.]

[See note at end of case.]

6. If officers who are charged with the duty of laying or collecting taxes, refuse to perform their functions, the courts, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary.

[Cited in U. S. v. City of New Orleans, Case No. 15,871; Meriwether v. Garrett, 102 U. S. 517.]

7. The power of compelling parties, after a judgment has been rendered, to pay the amount thereof, or of raising the money by the sale of their property, is an entirely distinct power from that of taxation, and is the special prerogative of the courts.

[See note at end of case.]

8. A bill praying that a board of levee commissioners, the state district judge or a receiver or commissioner to be appointed by the court, be required to levy a tax for the purpose of raising the money alleged to be due to complainants, in a case where no judgment has been obtained, cannot be maintained.

[See note at end of case.]

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

[2] [Affirmed in 19 Wall. (86 U. S.) 655.]

[This was a bill in equity by Amand Heine, Michael Heine, Hippolite Piquet, and A. Tattet, bondholders, against the board of levee commissioners for the levee district parishes of Madison and Carroll. Heard on demurrer to the bill.]

Thomas Allen Clark and Thomas L. Bayne. for complainants.

John A. Campbell, S. R. Walker, C. L. Walker, J. C. Seale, and J. E. Leonard, for defendants.

BRADLEY, Circuit Justice. This bill is filed by the holders of bonds issued by the levee commissioners, defendants, to compel them to levy a tax as required by law, to pay the interest due on said bonds, and the installments due on the sinking fund provided therefor. The defendants have filed a demurrer.

It is unnecessary to examine several interesting questions that were raised in the argument of the cause. It may be disposed of by a reference to the main point involved, the general equity of the bill. The power of taxation belongs to the legislative branch of government. The judicial department has no general power over the subject. If the officers, who are charged with the duty of laying or collecting taxes, refuse to perform their functions, the courts, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers. No such power seems to have been conferred in the present case. The power of compelling parties in judicial proceedings to pay sums of money awarded against them, or, of raising the money by a sale of their goods, lands and other assets, is an entirely distinct power from that of taxation, and is the special prerogative of the courts, by which they are enabled to enforce their judgments. But this power is never exercised until a judgment has been rendered; and is then exercised directly upon the person of the debtor, commanding him to pay, and attaching his person on his failure to comply; or directly upon his property by seizure and sale. In this case no judgment has been obtained; and the prayer of the bill is, not to issue an execution for the seizure and sale of the property, but to require the board of levee commissioners for the levee district in the parishes of Madison and Carroll, or the judge of the Thirteenth judicial district, or a receiver or commissioners to be appointed by the court, to levy a tax for the purpose of raising the money alleged to be due to the complainants. I am not aware of any precedent for such a bill, and am of opinion that it cannot be maintained. Where a political district is incorporated and becomes liable to pecuniary obligations, the corporation may be sued and judgment may be rendered for the debt. Execution may then issue against the property of the corporation; but if it have no property, the creditor has no remedy except to apply for legislative aid. The legislature usually extends its aid in such cases, by directing special proceedings to be had in order to raise the amount of the judgment by taxation. But no such legislation is referred to in this case. The bill must be dismissed.

This cause was afterwards argued on a motion for rehearing by Mr. Clarke and Mr. Campbell at chambers, in Washington City, before Mr. Circuit Justice BRADLEY, who expressed his views of the case more fully in the following opinion:

The complainants are holders of certain bonds of the defendants, dated April 1, 1859, and issued about that period. They file this bill on behalf of themselves and other bondholders, for the purpose of obtaining payment of these bonds or the interest due thereon, by means of a tax to be assessed upon the levee district represented by the defendants, consisting of the alluvial lands of Madison and Carroll parishes, or for such other relief as the court can grant. It appears by the bill, that on the 10th day of March, 1859 [1 Laws La. 12], the legislature of Louisiana passed an act by which the board of levee commissioners for the levee district in the parishes of Madison and Carroll was invested with corporate powers, and authorized to issue bonds to the amount of $400,000 to enable it to take up its outstanding liabilities. The bonds were not to run longer than eight years, and the board was directed to levy an annual tax on the district to pay the interest and create a sinking fund for meeting the principal; the tax to be five cents per acre on the alluvial lands, and a sufficient percentage on the state and mill tax to raise in the whole $70,000 the first year, and $65,000 the subsequent years. One of the New Orleans banks was to be selected as the fiscal agent of the board, to receive and disburse the moneys. If the levee commissioners should neglect to levy the tax, it was to be levied by the judge of the district, in connection with the several parish recorders. Under this act the board issued its bonds to the prescribed amount, and the proceeds thereof were applied to the purposes for which they were authorized; and the complainants became the holders of a large amount of the loan. The board assessed the prescribed tax in October, 1859, and in May, 1861, but no tax has ever been levied since, although repeated applications for that purpose have been made to the board and to the district judge. In March, 1867, the legislature, to relieve the parishes, authorized the board of levee commissioners to

issue new bonds for the arrears of interest, and to extend original bonds for a period of twenty-five years; and reduced the annual assessment to $55,000. This arrangement was accepted by the bondholders and carried out by the levee commissioners. But no money has ever been raised, and the levee commissioners have pretended to resign their offices; and as a corporation, they have no property on which execution can be levied. The bill prays for an account, and an assessment of the necessary tax for paying the arrears due on the bonds; and, in case of refusal on the part of the commissioners and the district judge, that commissioners or a receiver may be appointed by the court to levy the tax. To this bill the defendants demurred, and on argument in May last, a decree was made dismissing the bill. A rehearing having been granted, the case has now again been argued before me.

At the first view it struck me as unusual to file a bill in equity for the mere collection of money due on a bond. The obvious remedy seemed to be an action at law. The allegation of apprehended difficulties in obtaining satisfaction of a judgment, if one were obtained, did not seem to me sufficient excuse for omitting to obtain one. A decree for compelling the defendants to levy a tax seemed tantamount to a mandamus under a different name; and the alternative of appointing commissioners or a receiver to levy the tax under the direction of the court, especially before the recovery of a judgment at law, seemed like an assumption of the taxing powers which belong exclusively to the legislative department. But the counsel for the complainants has very strenuously insisted that there are grounds on which the bill may be sustained. Amongst others, he contends that it may be rested on the doctrine of specific performance; that the statute of 1859 raised an implied contract, on the part of the levee commissioners, to levy an annual tax for defraying the interest and the installments of the sinking fund accruing on the bonds; and that this contract could be specifically enforced. It seems to me that the whole contract of the board with the complainants is contained in the bonds. It is simply a contract to pay money. It was the duty of the board, it is true, as officers of the levee district, to levy the tax. But this was a duty imposed by law—equivalent (and no more) to the duty of ordinary parish or county officers, to levy the necessary taxes for discharging the liabilities and meeting the wants of their several jurisdictions. The statute may be a contract on the part of the state with the bondholders; but it is not a contract on the part of the levee commissioners. It simply imposed on them an administrative duty as public officers. Regarding the contract of the levee commissioners as a contract for the payment of money only, and binding at law, I can find no authority for decreeing its specific performance. The cases referred to, in which contracts for the purchase of stock, debts, and other chattels, have been enforced, have always had in them the circumstance of the defendant's refusal to accept the purchased articles and carry out his purchase. It was to enforce the purchase, and to obtain the price as a consequence, that the decree was sought. Had the articles been delivered and accepted, an action at law would have lain for the price, and chancery would have had no jurisdiction. The cases would then have been more like the present case—simply a claim for money on an executed consideration.

The case of Buxton v. Lister, 3 Atk. 383, which was much relied on, was one in which the defendants repudiated their contract, by refusing to cut and take the timber which they had agreed to purchase, so that the complainant could not recover the price, but could only maintain an action for damages for the breach of the contract. Lord Hardwicke entertained the bill, which he would not have done for the mere recovery of the price. The other cases referred to under this head are all to the same effect. When every part of a contract has been executed except the payment of money, the remedy at law (if one exists) is fully adequate to the case; for by an action at law, it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention. "The ground of this jurisdiction," says a late writer, referring to specific performance, "being the inadequacy of the remedy at law, it follows that where that remedy is adequate, chancery will not interfere to compel specific performance. It is on this ground that the court refuses generally to entertain suits in respect of government stock or chattels, and in all cases where the contract is satisfied by a mere payment of money." Fry, Spec. Perf. p. 6. But even if the bonds had contained a covenant to levy the tax prescribed by the statute, I question whether the contract could have been specifically enforced. It would have amounted to nothing more than a covenant to raise the money in a particular way, which (unless something be hypothecated or pledged) can hardly be a ground for a specific performance. Suppose that John Doe gives me his bond for ten thousand dollars, payable in ten equal annual installments, with interest, and agrees to raise the money by cutting the wood on five acres of his timber land each year, and fails to do it, can I file a bill for specific performance? Must I not sue at law on my bond? Does the special manner in which he agrees to raise the money lay any foundation for an equitable proceeding? I think it does not. In my judgment, therefore, this bill cannot be sustained as a bill for a specific performance. If it could, why should not such a bill be resorted to for the collection of all debts against municipal corporations? Their liabilities have to be discharged by means of taxation, and it is the legal duty of their officers to lay the taxes to

do it. Why compel their creditors to sue at law when they could take the short course of a bill to compel an assessment of taxes and payment at once?

Another ground on which it is urged that the bill may stand is, that of account. But I fail to perceive its admissibility. The fundamental idea of an account is, that the accountant has received moneys of the claimant which he ought to pay over. The moneys received by a bailiff, agent, receiver, trustee, etc., are not his own. They do not become his. They belong to his principal, and for them he should account. Mutual accounts of debts and credit have also (though somewhat inaccurately), been added to the general head of account. But, generally speaking, a mere debt is not ranked under that head; that is, it cannot be proceeded for by an action or a bill for an account. Now, here, there is nothing but a debt due. Nothing is charged to be held by the defendants for the complainant by way of agency, trust, or other fiduciary relation. The mandamus cases referred to do not apply. In all the county bond cases cited from the Reports of Howard and Wallace, judgments had been first obtained, and then writs of mandamus were sought to compel the county officers to perform their clear duty levying the tax requisite to pay the judgments. No mandamus is sought in this case, and if there were, none could be granted on this bill. But the counsel for the complainants contend that they have a lien or privilege upon the lands of the levee district for the payment of these bonds, and that this court can enforce that lien. It is true, as supposed, that a court of equity has general jurisdiction of liens, inasmuch as a court of law cannot (except by execution) order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto. But I have not been able to perceive any lien or privilege existing in this case. The lands referred to are not under mortgage to the complainants. The act of 1859 does not make the bonds a lien on them. It only authorizes a tax to meet the installments accruing; and this tax is not directed to be levied solely on the lands; it is partly personal. By the general laws of the state, when these bonds were issued, it is true, riparian owners were bound to keep up and repair levees on or in front of their lands; and in case of their failure so to do, it was made the duty of the police jury of the parish to have the necessary repairs made, either by a requisition on other planters in the neighborhood, or by adjudicating the work to the lowest bidder; and the parties doing the work (as well as the parish) had as security for repayment, a privilege on the property to whose levees the work was done in preference to other creditors. Civ. Code, art. 3216; Act 1829, §§ 31, 40. But the special laws relating to the parishes of Madison and Carroll, took the duty of repairing the levees out of the hands of the riparian proprietors, and imposed it upon the board of levee commissioners, subjecting the lands and inhabitants benefited to an annual tax to be assessed by the commissioners, for the purpose of raising a general fund to pay all expenses incident to all levee constructions and repairs in the district. Therefore the land owners are not delinquent as regards the levees. Their whole duty consists in paying the taxes when they are lawfully assessed; and the lands themselves are no longer subject to a lien or privilege for the work done. What the court would do on a creditor's bill filed after judgment at law, to aid the complainants in obtaining satisfaction, is not now the question. Whether, if every effort to get an assessment made, should fail, the court would put forth its hand and find a remedy, or whether further legislation would be necessary to enable it to do so, I am not called upon to decide. I am satisfied that the bondholders, simply as such, have no equity upon this bill.

In this view of the case, it is unnecessary to examine the objection raised by the defendant's counsel against the claim of the complainants, on the ground that it is retrospective in its character, and that a retrospective tax (that is, a tax which ought to have been levied in previous years, and was not levied) cannot be levied. It may be remarked, however, that the English parish cases referred to as authority for this proposition are hardly applicable, inasmuch as there, the parish officers had no authority to borrow money on the credit of the parish, and, of course, none to raise a tax to pay loans. But, in this case, the legislature expressly authorized the loan to be made, and its authority to do so cannot be questioned. I am still of opinion that the bill must be dismissed, and the decree is therefore affirmed. The clerk will enter a decree accordingly.

[NOTE. From this decree the complainants appealed to the supreme court (19 Wall. [86 U. S.] 655), where, in an opinion by Mr. Justice Miller, the decree of the circuit court was affirmed. Mr. Justice Clifford and Mr. Justice Swayne, however, dissented, and Mr. Justice Bradley did not sit. It was held that the power of taxation was a legislative, and not a judicial, function. It was not possible to treat the bill as a petition for a writ of mandamus, for to do that would be to ignore the line between equitable and common-law jurisdiction. Because a creditor cannot collect his debt at law, it is not the duty of a court of equity to devise a means of collection for him. Nor could the claim of the appellants be enforced on the ground of a lien, because taxes not assessed are not liens. Specific performance will be decreed only when, aside from real-estate contract, there is no adequate compensation to be had at law.]

Case No. 6,326.

HEINECKE v. RAWLINGS et al.

[4 Cranch, C. C. 699.] [1]

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

APPRENTICESHIP—INDENTURE—AGE.

A stranger to the indenture of apprenticeship cannot take advantage of the omission to insert the age of the apprentice.

Case for enticing and harboring the plaintiff's apprentice.

The plaintiff [Samuel Heinecke] offers, in evidence, the indenture, under seal of Joseph R. White, the apprentice, Ambrose White, his father, and the plaintiff, by which the apprentice, with the consent of his father, binds himself, as apprentice, to the plaintiff, to learn the art and mystery of a tailor, for three years, from the 2d of January, 1833.

Mr. Brent, for defendants [Rawlings and Langdon], objected that the age of the apprentice is not stated in the indenture, nor does it appear thereby, that he was a minor, as required by the 4th section of the Maryland act of 1793 (chapter 45). Ballard v. Edmondston [Case No. 817].

Mr. Bradley and Mr. Lee, for plaintiff, cited the 7th section of the same act, which provides, that, "in case the contract, whether defective in form or not, hath been partly executed," "the master or mistress of any apprentice may detain the said apprentice in his or her service till such apprentice is or shall be discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

Mr. Brent, in reply, contended that this indenture was not defective in form only, but in substance, and that therefore the 7th section of the act was not applicable to the case.

THE COURT (nem. con.) was of opinion, that the objection to the validity of the indenture, because the age was not inserted therein, cannot be made by a stranger. As to him, the indenture is, under the 7th section of the statute, valid until set aside by the court under the provisions of the same statute. Verdict for the plaintiff, $16.

HEINEGAN (UNITED STATES v.). See Case No. 15,340.

HEINEKE (VAN NESS v.). See Case No. 16,866.

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

Case No. 6,327.

HEINRICH v. LUTHER.

[6 McLean, 345.] [1]

Circuit Court, Ohio.[2] April Term, 1855.

PATENTS—INFRINGEMENT—TAILORS' SHEARS.

1. A patent is prima facie evidence of the right of the patentee.

2. Where the patentee claims three distinct improvements, he must show himself entitled to each, to sustain an action.

3. Since shears were invented, some contrivance has been used to stop the handles, so as not to strain the joints of the cutting knives. This has been done by the enlargement of the handles so as to come in contact at the proper point. Several witnesses proved that a screw was used for this purpose, others have known wires to be used.

4. The invention consists, not in avoiding the pressure of the joint of the shears, but in accomplishing that result by a new means. The beak which performs this office in the plaintiff's shears, was cast in the handles of the shears, and is as permanent as any other part of the handle. There is no special claim in writing that the beak should be so made, but the drawing shows how it was a part of the upper handle, and the drawing is a part of the specifications.

[This was an action by Rochus Heinrich against John Luther for the alleged infringement of letters patent No. 1,092, granted to the plaintiff, February 27, 1839.]

Stanberry & Parker, for plaintiff.

Andrews & Swayne, for defendant.

THE COURT (charging jury). This action is brought against the defendant for infringing the plaintiff's patent. It was issued to secure to the plaintiff an improvement in tailors' shears. The patent bears date the 27th of February, 1839. The invention claimed, is: (1) The projection at the point of beak e, on the upper bow, as described. (2) The addition of the convex protuberance of, or swelling of f and g, on the right side of the upper and lower bows, so as to fill the palm of the hand in using the shears. The third is the concave lip h, on the left side of the upper bow, for the thumb to rest upon as described.

To entitle the plaintiff to recover, these three inventions as claimed, must be found to have been invented by him as claimed. Before the patent is granted, the invention claimed is examined by one or more examiners skilled in the arts, and compared with the patents which have been issued in this and other countries; and if the invention is found to be new and useful, and the applicant swears that he is the first and original inventor, the patent is granted. And this gives to the patentee a prima facie right.

In this case the patent has been issued for the improvements above specified, so that if

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

[2] [District not given.]

the plaintiff shall fail to establish his right to either of the things specified, he will not be entitled to your verdict. That the improvement in the shears is useful, is abundantly shown. One evidence of this, as stated by several of the witnesses, is, that wherever the improved shears have been known, they have been generally used. It is proved that the defendant, before the commencement of this action, manufactured and sold shears similar to those described in the plaintiff's patent. On a comparison, several witnesses say the shears made by the defendant are the same in principle as the plaintiff's. The improvements, it is alleged, as specified, enable a person to hold the shears with a firmer grasp, by bringing the entire muscles of the hand and thumb in contact with the handles, and to use them with more power and greater ease than the ordinary shears. And that the beak e, which projects from the lower part of the upper handle, checks the action of the handles at the proper point, so as to avoid a strain at the joint of the shears. An objection is made that the plaintiff abandoned his right to the public, by permitting his invention to go into public use. But unless this use exceeded two years, before he applied for his patent, there is no abandonment. A former patent, it seems, had been obtained by the plaintiff, embracing some of the improvements made to the handles of the shears, but these are not claimed in the present patent.

The principal controversy arises on the novelty of beak e, as appears on the drawing. From the first formation of shears, there has been some contrivance to prevent the strain on the joint of the cutting knives. This was generally effected by enlarging the upper and lower handles, so as to come together at the proper point. But this required an additional weight in large shears used by tailors, by an increase in the size of the iron handles, so as to make the use of them unwieldy and tiresome to the hand. Several of the witnesses speak of shears, some one or more years before the date of the plaintiff's patent, on which a screw was used to keep the handles apart, answering the same purpose as the beak. Other witnesses say they have known wires to be used for the same thing. But the plaintiff contends the proof shows that the screw and wires were abandoned as useless, before the plaintiff's beak was invented.

Now the invention does not consist in a resting point for handles, so as to avoid a strain upon the joint of the shears, for that was always guarded against by the enlargement or shape of the handle, or by some other mode. Neither the screw nor the beak, in this respect, produces a new result. But the invention consists in the beak, by which an old result is produced by new means. A knob of porcelain on a door is common. As porcelain was well known before it was so applied, and as knobs were common of other materials, the use of porcelain for this purpose gave no right to a patent. But if a new and useful mode of fastening the knob on the spindle was invented, that is a sufficient invention for a patent. And so in regard to the beak claimed by the plaintiff. If it be more substantial than the screw, being cheaper and fastened to the handle of the shears in a new mode, different from the screw or the wire formerly used, it is an invention for which a patent may issue. The beak, you will observe, gentlemen, is cast with the handle of the shears, so that it is a part of the handle, and as durable as any other part of it. It is true that in the written specifications the beak is not claimed to be cast with the handle, but there is a reference to the drawing which shows how the beak is made, and the drawings are a part of the specifications. It is replied that the drawings would be the same if the beak were soldered on the handle. The model which the plaintiff was required to file in the patent office, when he applied for his patent, showed, as the shears used in evidence show, that the beak was cast. And it is considered that the drawing shows, with reasonable certainty, that the beak was a part of the handles of the shears, as permanently fixed as the thumb piece or the handles. As an evidence that neither the screw nor the wire was of any value is shown, it is contended, by the abandonment of both. What, then, was there in the screw which the plaintiff copied? There is nothing new in preventing the strain of the joint, and if the old mode of producing this result by a wire or a screw should be used, it would be no infringement of the plaintiff's patent; nor would there be an infringement if the handles were so enlarged, as formerly, to produce this result. The invention consists in the beak, which is made a part of the handle of the shears. In this the principle of the invention consists, and in nothing else. The parties have agreed that if the patent of the plaintiff should be sustained, the jury should find in damages a verdict for five hundred dollars.

The jury returned a verdict for that sum.

Case No. 6,328.

HEINSHEIMER et al. v. SHEA et al.

[The case reported under above title in 3 N. B. R. 187 (Quarto, 46); 2 Am. Law T. 107; 1 Chi. Leg. News, 345; 16 Pittsb. Leg. J. 85; 1 Leg. Gaz. 46,—is the same as Case No. 12,729.]

Case No. 6,329.

In re HEIRSCHBERG.

[The case reported under above title in 1 N. B. R. 642 (Quarto, 195), and 1 Am. Law T. Rep. Bankr. 123, is the same as Case No. 6,530.]

HEIRS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the decedents; e. g. "Heirs of Barker v. Barker's Assignee." See Barker v. Barker's Assignee.]

HEISE (TRUNDLE v.). See Case No. 14,207.

HEISER (FRANKLIN v.). See Case No. 5,054.

HEISKELL (SMITH v.). See Case No. 13,056.

HEISSENBUTTEL (McGOVERN v.). See Case No. 8,805.

HELENA, The (UNITED STATES v.). See Cases Nos. 15,341 and 15,342.

Case No. 6,330.

The HELEN E. BOOKER.

CASTE et al. v. The HELEN E. BOOKER.

[5 Adm. Rec. 714.]

District Court, S. D. Florida. July 21, 1857.

SALVAGE—COMPENSATION.

[For saving the materials and cargo of a vessel laden with iron, wrecked on Carysfort Reef, where it was difficult and dangerous to lay alongside, two-thirds of the cargo being dived for, and a large number of salvors taking part, the court allowed $21,050.70 on the cargo, valued at $36,222.70, and $1,704.56 on the materials, valued at $4,193.05.]

[Cited in Roberts v. The St. James, Case No. 11,914. Distinguished in Baker v. The Slobodna, 35 Fed. 542.]

[This was a libel in rem by Edgar Caste and others against the cargo and materials of the ship Helen E. Booker, for salvage.]

S. R. Mallory, for libellants.

S. I. Douglas, for respondent.

MARVIN, District Judge. This ship, laden with railroad iron, was lost upon Carysfort Reef. It is a disastrous wreck to the owners and underwriters, and not profitable to the salvors; for the salvage the court is obliged to give, in order to compensate the salvors for their work and labor, simply, will leave but a small proportion of the savings to the owners and underwriters. The ship lay upon an exposed reef where it was difficult and dangerous to lay alongside to get the iron out of the wreck. Two-thirds of it was under water, and had to be dived for, piece by piece, and the whole service has been laborious, protracted, and performed by a large number of salvors. The total number of bars of iron saved is 6,279, valued at $36,222.70. The total materials saved have been sold for $4,193.05. The total salvage proposed to be allowed is $22,754.73.

It is therefore ordered and decreed that the libellants recover and receive for their services in saving the materials of the said ship the sum of $1,704.56, and that the residue of the proceeds of said materials be charged with the wharfage, storage, labor, and other bills properly chargeable thereto, and their proportion of the costs and expenses of this suit, and the master's bill for his services in taking care of the same and cargo, and that the remainder of said proceeds of materials, amounting to the sum of $1,514.32, be paid to the master, for and on account of whom it may concern. That the libellants recover the sum of $21,050.17 for their services in saving the said cargo, to be apportioned among them according to their respective interests and the schedule hereunto annexed, and that the said cargo be charged with its own wharfage, storage, labor bills, and other bills that belong properly to the cargo alone to pay, and its proportion of the master's bill and of the costs and expenses of this suit, which charges and costs in the whole amount to $4,854.89, and the total salvage costs and charges for the cargo to pay amount to $25,905.06, and upon the payment thereof the mashal restore said cargo to the master of said ship for and on account of whom it may concern. That the clerk pay the said charges, costs, and salvage, as allowed by the court. That it be referred to Mr. Baldwin to divide the salvage into shares among the different salvors according to their respective interests, and that he be allowed therefor fifty dollars, to be paid out of the salvage by the salvors.

HELEN E. BROOKS. The. See Case No. 6,330.

Case No. 6,331.

The HELEN J. HOLWAY.

The ENOCH MOORE.

[6 Ben. 536.][1]

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

COLLISION IN CHESAPEAKE BAY—SAILING VESSELS CROSSING—EVIDENCE—PLEADING.

1. Two schooners, the H. and the M., came in collision at night in Chesapeake Bay. The M. alleged that the wind was east-northeast and she was sailing south; that she saw both lights of the H. a little to windward of her course, coming up the bay, heading north, and close-hauled; that the M. ported, but the H., instead of keeping her course, as she was bound to do, starboarded and caused the collision. The H. alleged that the wind was north-northeast, and that she was heading northwest by north half north, close-hauled, and that the M. was coming down about south, on a course which would have carried her astern of the H., but she ported and caused the collision, and that the H. kept her course, as she was bound to do, till the collision was inevitable, when she ported, in order to ease the blow: *Held*, that the evidence from the H., that she was close-hauled, and as to her course by compass, was more reliable than that of the M., which was sailing free in any event.

2. The M. mistook the course of the H.

3. The courses of the vessels were crossing, and the case fell under the 12th and 18th rules,

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

and the M. was bound to keep out of the way, and the H. was bound to keep her course.

4. On the pleadings, the M. could not claim that the H. was in fault for not porting.

5. The M. was responsible for the collision.

6. Whether, if the vessels had been meeting end on, or nearly so, the case would have been one requiring the H. to port her helm, quaere.

In admiralty.

A. J. Heath, for the Holway.

D. McMahon, for the Moore.

BLATCHFORD, District Judge. These are cross suits growing out of a collision which took place between the schooner Helen J. Holway and the schooner Enoch Moore, in the Chesapeake Bay, on the morning of the 10th of September, 1871, about half past four o'clock. The Moore was a vessel of 313 tons, and was deeply laden with coal, and was on a voyage from Georgetown, D. C., to the city of New York. The Holway was a vessel of 223 tons, and was not as deeply laden as the Moore, and was on a voyage from Boston, Massachusetts, to Georgetown, D. C. Both vessels were injured by the collision.

The libel of the Moore, which was filed on the 9th of October, 1871, alleges, that there was a fresh breeze from the east north-east; that the course of the Moore was south, by the compass; that she had the wind free; that the atmosphere was clear; that, at about twenty minutes past four o'clock a. m., a seaman on the lookout on the Moore, on her top-gallant forecastle, and the master of the Moore, who was walking on her port quarter-deck and was in charge of the deck, made the two colored lights of the Holway ahead, and a little to the windward of the course of the Moore, and between one and two miles off, the Holway heading up the bay, north, having about six points in which to make her course, and being otherwise close-hauled; that the master of the Moore, seeing that the Holway was sailing close-hauled, immediately gave the order to the helmsman of the Moore to port his helm, which was done, and the Moore swung off, and kept swinging off, on a hard a-port helm, until her foresail becalmed, which would be on a course west-southwest; that, in a few minutes, the Holway, instead of keeping her course, as she was bound to do, she being close-hauled, and when, if she had kept her course, no collision would have occurred, starboarded her helm, and kept hard away, and let her main sheet run off, and ran head on, or nearly so, into the Moore, at the port fore chains of the Moore, the Holway, at the time of the collision, heading about west; and that the collision was the result of negligence in the Holway, in not having a proper lookout forward, and in improperly starboarding her helm and letting her main sheet go, and in not having kept on her original course, as she was bound to do, she being close-hauled at the time, and in not being properly manned, her officers and master being below and asleep, and an incompetent mariner being in charge of her helm.

The answer of the Holway, which was filed on the 4th of June, 1872, avers, that, before and at the time of the collision, the Holway was beating up the bay against a strong breeze from the north-northeast, being before, and at the time of, the collision, close-hauled, on her starboard tack, heading about northwest by north half north, as near the wind as she would lie, and moving steadily along at the rate of four or five knots an hour; that, some time before the collision, the master and crew of the Holway discovered the Moore coming down the bay, under full sail, free, on her port tack, and with ample room to pass the Holway at a long distance on either hand, but nearing the Holway, and moving with great speed, heading about south, and across the track of the Holway, and on a course which, if steadily kept, would have carried her free and clear and astern of the Holway; that, when within about a ship's length of the Holway, and about three points off the Holway's starboard bow, the Moore suddenly ported her helm and kept away, and ran across the bows, and afoul, of the Holway; that, up to the instant of the collision, the Holway was close-hauled, on her starboard tack, keeping steadily her course by the wind, as she was bound to do; that, at the moment of the collision, when it was inevitable, she ported, to ease the blow; and that the collision was occasioned by the negligence of the Moore.

The libel of the Holway, which was filed on the 5th of August, 1872, contains the same averments as those above cited from her answer. The answer of the Moore, which was filed on the 4th of December, 1872, contains the same statement of circumstances as that above cited from her libel, except that her answer avers that she swung off on a port helm, while her libel avers that she swung off on a hard a-port helm.

There were on the deck of the Moore three persons, namely, Chambers, her master, and who was one of her owners; Collyer, a seaman, who was forward, on the lookout; and Wilson, a seaman, a Swede, who was at the helm. Chambers was examined orally at the trial. Collyer was examined by deposition on the 27th of November, 1872. Wilson was not examined. Warren, the mate of the Moore, who had been asleep below, and reached her deck just as the two vessels struck, was examined by deposition on the 5th of December, 1872. Thus, there are three witnesses from the Moore, two of whom were of the watch on deck.

There were on the deck of the Holway, her watch, consisting of two persons, namely, her mate, A. L. Thompson, who was forward on the lookout, and a seaman named Wilson, at the wheel. Her master, G. E. Thompson, and who was one of her owners,

had been below, but came on deck before the collision. The master and the mate, who are brothers, were examined by deposition on the 6th of August, 1872, and were also examined orally at the trial. They are the only witnesses from the Holway.

The only case set up by the Moore, in her pleadings, is, that the Holway, being close-hauled on her starboard tack, was bound to keep her course, but failed to do so, and, instead, starboarded, and so thwarted the efforts which the Moore made, by porting, to keep out of the way of the Holway.

There is a dispute as to the wind. The Moore insists that it was east-northeast, and that the Holway could lay her north course up the bay, having six points of wind in which to do so. In this view, the witnesses from the Moore say that they thought at the time that the Holway was on a north course. The Holway contends that the wind was north-northeast, and that she was heading northwest by north half north, thus heading four and a half points off the wind, and making really a northwest by north course, falling to leeward half a point, and unable to make her north course, having been beating and tacking, and sailing as close to the wind as she could. Whether the wind was north-northeast or east-northeast, it was free for the Moore, in either case, being either two points or six points abaft her beam, on her port side.

It is positively testified by those on the Holway, that she was as close-hauled as she could be; that her actual course by the compass, after the Moore was seen by her, and down to the moment before the collision, was northwest by north half north; that her helm was kept steady, and she was kept on the same course, because of the approach of the Moore, and under an order given with that view; that her helm was not starboarded; and that, when the collision was inevitable, her helm was ported, in order to prevent her being run over by the Moore, and to make the blow one of the stem of the Holway against the Moore. The testimony of witnesses from a sailing vessel, as to the course of such vessel, her being close-hauled or not, and her compass course, is much more reliable than the testimony thereto of witnesses from another vessel, which is herself sailing free. The evidence in this case has brought me to the conclusion, that the Moore mistook the course of the Holway. The Holway was really crossing the course of the Moore, at an angle of from two and a half to three points. The colored lights of both vessels were burning. The master of the Moore says that he saw both of the colored lights of the Holway a little off his port bow, and immediately ported, and that afterwards the Holway shut in her red light, her green light continuing visible. Admitting that, if the Moore was on a south course, and the Holway on a course northwest by north half north, the Moore could not have seen the red light of the Holway, still, if one of the two conclusions must be reached, either that the red light of the Holway was not seen by the Moore, before the Moore ported, or that the Holway was not on a course northwest by north half north, the whole evidence makes it impossible to adopt the latter view. I conclude, therefore, that the case is one falling under the 12th rule. The two vessels were crossing, so as to involve risk of collision, and they had the wind on different sides, and the Moore having the wind free, on her port side, was bound to keep out of the way of the Holway, and the Holway was bound, by the 18th rule, to keep her course, and did keep her course. The pleadings of the Moore put the case as one of an observance by the Moore of the 12th rule, and a violation by the Holway of the 18th rule. They do not put the case as one under the 11th rule, where both of the vessels were bound to port, as meeting end on, or nearly end on. For, although the Moore sets up, in her pleadings, that she ported, and did right in porting, yet she does not set up therein that the Holway ought to have ported, and did wrong in not porting. On the contrary, the pleadings of the Moore assert that the Holway was close-hauled; that the master of the Moore saw that the Holway was close-hauled; that, because he so saw he ordered the helm of the Moore to be ported; that the Holway, being close-hauled, was bound to keep her course; and that, if she had kept her course, no collision would have occurred. This being so, the Moore, even if she were to establish that the vessels were meeting end on, could not be permitted to contend that it required porting by the Holway to prevent a collision. The Moore has affirmed in her pleadings, that an adherence by the Holway to her close-hauled course, combined with the porting done by the Moore, would have avoided a collision. It is not meant to be implied by anything I have said, that, if the Holway had been heading north, close-hauled on her starboard tack, so that the vessels were meeting end on, or nearly so, so as to involve risk of collision, the case would have been one requiring the Holway to port her helm. It is certainly true, however, that where the Moore, in her pleadings, asserts, that, the Moore having ported, porting by the Holway was unnecessary, to avoid a collision, the Moore cannot be heard to say that it was a fault in the Holway not to have ported, the Moore having ported.

The libel of the Moore must be dismissed, with costs. On the libel of the Holway, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them.

HELEN MAR, The. See Case No. 10,543.

Case No. 6,332.

The HELEN M. PIERCE.

[2 Hask. 205.] [1]

District Court, D. Maine. Dec., 1877.

SEAMAN'S WAGES—LOSS OF LIEN FOR—MINORS.

1. The mate and cook of a porgy steamer employed for the fishing season at stipulated wages have a maritime lien upon the vessel therefor.

[Cited in The Grace Darling, Case No. 5,651.]

2. A maritime lien for wages is not lost by taking the owner's note on time in settlement, when the circumstances rebut the presumption of payment and an intention to discharge the lien; or when fraud is practiced, or material facts are concealed by the owner.

3. In the absence of fraud or concealment of the true state of affairs, the taking of such note operates as an extension of the time of payment.

4. A minor, employed on such steamer by the master at all-work, has a lien for his wages, even though the owner is authorized by the sharesmen to retain from their shares his wages.

Libel in rem by the master and cook of a porgy steamer to recover their wages and the wages of the cook's son, who served at all-work aboard the vessel. The master was to serve during the fishing season for $600, and the cook for $60 per month, and the minor for $20 per month. The owner filed claim and answer, averring payment of the master and cook by his note to the master on ten months, and by his check to the cook payable at a future day, and that the lad had no lien for his wages. The cause was heard on libel, answer and proof.

Enoch Knight, for libellants.

Nathan Cleaves, Henry B. Cleaves, and Byron D. Verrill, for claimant.

FOX, District Judge. This is a proceeding in rem, instituted by Isaac R. Coombs, the mate, and George Sampson, the cook, against the steamer Helen M. Pierce, to recover for their services on board said steamer during the fishing season of 1876, she having been engaged in porgy fishing on the cost of Maine. There is included in Sampson's claim the wages due his son, a minor of the age of sixteen years, for services on board said steamer during the entire season.

Luther Maddocks is the claimant of the vessel, and was sole owner, subject to certain mortgages; and she was wholly under his management and control, employed for his exclusive benefit. He contracted with Coombs, by written agreement, to employ him as mate of the steamer during the season for $600, commencing May 10th. $300 was payable August 15th, and the balance November 10, 1876. No question is made as to Coombs' performance of his part of the contract. On the third day of November, 1876, after the close of the fishing season, Coombs and Maddocks made an adjustment of their accounts as they had been kept by Maddocks. The adjustment is in the handwriting of Maddocks and his clerk, as follows:

Mr. Isaac Coombs in Account with Luther Maddocks.

Dr.	To cash $300 and Maddocks bill $34.69	$334 69	
	Note, 10 months from Nov. 3, 1876	293 31	
			$628 00
Cr.	By wages as per contract for fishing on H. M. Pierce	$600 00	
	16 days labor on boats and seine at $1.75	28 00	
			$628 00

Settled Nov. 3, 1876, as above, for my service fishing on Str. H. M. Pierce.

Isaac Coombs.

It is claimed by Maddocks that by thus securing his note for $293.31, payable in six months with interest at eight per cent., Coombs discharged and released the lien which he previously had upon the steamer for his wages. There is some conflict of testimony as to what took place when the note was given. Coombs says, when he asked Maddocks to settle with him, "Maddocks said he could not pay me then, but would at close of ten months. I insisted on payment then; he urged me to take his note as he had no money to pay me, and I finally did take the note now produced and signed the settlement. Nothing was said about my releasing my claim on the steamer, and I never intended to do it." On cross examination he says: "Maddocks wanted me to lend him the money for ten months. I told him I could not, as I had no money. At this time I had for collection Maddocks' note to my brother for $100 which Maddocks then paid me. I had let my brother have $100 which he was to repay me if Maddocks did not pay his note. I had no interest in the $100 note, it was not indorsed to me. I had no knowledge of the financial condition of Maddocks at that time."

It appears that Luther Maddocks was then deeply insolvent, owing an immense amount; that he filed his petition in bankruptcy February 13, 1877, and has since effected a composition with his creditors at eight cents on the dollar. Maddocks' version of this interview is: "Coombs told me he had his brother's note and wanted it paid; I told him I was hard up and a good many fishermen had lent me their money for a year and I wanted him to do the same; that I had paid him considerable money and had lost heavily by the year's business; and he finally agreed, if I would pay his brother's note, he would loan me the money for ten months at eight per cent. interest." Sewall Maddocks, the brother and clerk of Luther, corroborates Luther's statement as to the matter.

Upon all the testimony I find the transaction to have been that Coombs received Maddocks' note for the balance due him, payable in ten months with eight per cent. interest, ignorant of Maddocks' insolvency and not intending to discharge any security for the payment which he before had. Maddocks, I

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

find, must have been aware of his insolvency; and if, by this arrangement, he designed to defeat Coombs' security and palm off upon him his mere note for ten months, when he must have known there was not the least prospect of its being paid, he was contemplating a fraudulent practice upon Coombs, and attempted to accomplish a most dishonest purpose, which a court of admiralty will not permit.

In justice to Maddocks, I declare that I do not believe he was actuated by any such motive and purpose. I think all he in truth asked of Coombs, and all he expected to obtain, was an extension of credit for the ten months, and that at the time it did not occur to either party that the lien or security which Coombs then had would be affected by this extension of credit. Certainly, if Coombs had had the slightest suspicion of Maddocks' affairs, and that by taking the note he would discharge his lien on the vessel, he would never have entered into the arrangement; and, as I have before said, I cannot believe that Maddocks designed to defraud Coombs into a release of his security.

As between these parties, owner and seamen, under the circumstances here described, I hold that this note of the owner and claimant should be considered as a mere extension by Coombs of the time of payment of his lien claim on the vessel for ten months, with only the consequences which attend such an extension in a court of admiralty. It is to be remembered that the rights of third parties are not involved in this decision, as Maddocks, who was sole owner of the vessel when the services were performed, is the only claimant before the court, and we are therefore relieved from any questions which might have arisen, if a bona fide purchaser for value, since the note was given, had been claiming of the court protection of his rights.

In the case of The Canton [Case No. 2,388], Sprague, J., says: "There having been no change of ownership in this vessel, the position, that the lien has been lost by delay in enforcing it, is untenable, as no innocent third party is injured." The Paul Boggs [Id. 10,846], and The Eastern Star [Id. 4,254], are to the same effect.

In The Chusan [Id. 2,717], Mr. Justice Story says: "The lien, which is given by the maritime law on the ship, although it is or may be treated as a permanent or abiding lien on the ship until the debt is paid, as between the original owners and the material men and their personal representatives, is liable to a very different consideration when the ship has passed into the hands of a bona fide purchaser for a valuable consideration without notice of the lien. In respect to such a purchaser, the lien must be enforced within a reasonable time after the debt is due, and the credit, if any, has expired; otherwise, a court of admiralty will protect him, as a court of equity would do, against the claim as stale and inequitable."

Upon these authorities, it is certain, that as against Maddocks, this claim is not stale, and there is nothing inequitable in enforcing it against his property originally charged with a lien as security for its payment.

Should Coombs, by taking the note of Maddocks and thereby extending the term of credit, be held in a court of admiralty, under all the attending circumstances, to have received such an absolute payment of his debt as discharged the lien therefor on the vessel?

By the law of Maine, a negotiable note of a debtor, received in settlement of open account, is prima facie evidence of payment of the account. Judge Sprague, in Page v. Hubbard [Id. 10,663], thus states the law in Massachusetts, where the same presumption of payment by negotiable paper is the rule: "But suppose the creditor holds collateral security for the original debt, and afterwards takes a negotiable note, it is clear that by the jurisprudence of England and the other states, the creditor will not thereby lose the benefit of his collateral security, unless such was the intention of the parties; * * * in determining whether the creditor intended that the original contract should be annulled, the fact that he held collateral security for its performance is very material, and has so been considered by the courts of Massachusetts." These remarks were approved by the supreme court of the United States in The Kimball, 3 Wall. [70 U. S.] 37.

In Carter v. The Byzantium [Case No. 2,473], Mr. Justice Clifford, speaking of this rule of presumption of payment by the Maine and Massachusetts courts, says: "It is merely a presumption of fact, and may be controlled by circumstances indicating a contrary intention;" and on page 4, he cites with approval the language I before quoted of Judge Sprague.

In Hudson v. Bradley [Id. 6,833], Judge Clifford's language is: "Courts of justice here and in Maine adhere to this rule in cases where the party accepting the new evidence of the debtor's promise relinquishes no security for the payment of his debt; but whenever the contrary appears, the manifest tendency of the modern decisions is to regard this circumstance as affording strong evidence to rebut the prima facie presumption."

In the case of Moore v. Newbury [Id. 9,772], a libel for supplies to a steamer on which there was a lien, the account was settled and the bill accepted as follows: "Received payment by H. L. Newberry and J. R. Hugenin's note at thirty days." Judge Wilkins says:

"In cases of this description, the material man is not deprived of any of his remedies, except upon the most conclusive proof that exclusive credit has been given to other security than the owners, the master, or the ship. Looking to either of the former, to the exclusion of the latter, releases the lien; but in no case will either be released, except upon the clearest proof that such was

the intention of the parties. * * * It (the note) was but an extension of time for the accommodation of the master; and by taking it for that purpose, and for that purpose alone, there was no abandonment of the previous existing lien."

In the case of The Chusan, before cited, the libellants were material men in New York, furnishing copper to a Massachusetts vessel for which they had a lien. The copper bill was settled by the note of B., one of the owners, on six months, and on settling with the other owner, B charged him with his portion of the bill thus paid. It was held by Story, J., that the barque was not thereby relieved from the lien, but that the interests of all the owners in her were still liable therefor.

In the case of The Betsey and Rhoda [Case No. 1,366], Judge Ware examined this question. In a very full and able discussion by him of the rights of a seaman to assert his lien on a vessel, from the owners of which he had received their note on time in settlement of his wages, the learned judge in this opinion, says: "He (the seaman) was entitled to it (his pay) without delay, and he consented to receive the note upon the assurance that it was the most expeditious mode of obtaining it. The most that can be said is, that it may have suspended his right of suing out process until the note arrived at maturity, or until he surrendered it to the makers. To have given the act the effect of a waiver of his privilege and an extinction of the lien, it should, in the first place, have been distinctly stated to him that such would be the result; and as at present advised, my own opinion is, that the note should have been accompanied with some other security in addition to the personal liabilities of the owner as an equivalent and a compensation for the discharge of the lien."

As nothing of the nature of an equivalent here required by Judge Ware was given to the libellant, the case now presented for decision is identical with that decided by Judge Ware; and according to my knowledge of the practice in this district, it has ever since been ruled in accordance with the decision in The Betsey and Rhoda [supra]; and seamen have in repeated instances recovered their wages from the vessel, when they had received negotiable paper in settlement.

It is said, the payment by Maddocks to the libellant of his brother's note of $100 was a new and sufficient consideration for the release of the lien. The libellant had no interest in this note, he only held it for collection from Maddocks as agent for his brother, and Maddocks only did what he was legally bound to do, paying his own note when it was overdue. At the most, the libellant did not intend to discharge his lien, but only to give Maddocks a further credit of ten months. The payment of the $100 note was a consideration for such extension and nothing further.

If Maddocks is successful in thus defeating the lien, he would practice a fraud upon the libellant which the court ought not to permit. It was held by Judge Clifford in Baker v. Draper [Case No. 766], that although in Maine and Massachusetts the presumption is that negotiable paper is received in payment of the original debt, yet, "if there is any deception or fraud in the giving of the new security, or if it was accepted without a full knowledge of the facts, or under a misapprehension of the rights of the parties, the plaintiff or libellant, as the case may be, is not bound by the acceptance of the note, but may tender it back, or produce it at the trial to be cancelled, and seek his remedy on the original contract." The court held that the libellant must "understandingly and with a full knowledge of all the material facts accept the note in satisfaction and discharge of the parties to whom the original credit was given." In that case the libellants had received a note for supplies furnished by them to a vessel, from a person whom they supposed to be one of the owners of the vessel, but who had previously conveyed to a third party, as security for his liabilities, his interest in the vessel, which fact was not at the time known to the libellants. Judge Clifford ruled that the case was within the exception, and that there was no discharge of the original liability of those to whom the credit was given for want of a full knowledge of all the material facts.

It can not be pretended that Coombs received Maddocks' note with a full knowledge of all the material facts; but he was grossly deceived by Maddocks withholding the information of his insolvency, and that there was not the remotest possibility of his being able to collect the note at the expiration of the credit which he thereby obtained. If Maddocks at the time contemplated this fraud, and meant then to exonerate the steamer from this liability, of course he will not now be permitted to reap any advantage therefrom. If he was silent and did not contemplate this purpose, but permitted Coombs, in ignorance of the condition of his business affairs, to receive the note, the wrong is just as great to Coombs, and he suffers therefrom the same as he would if Maddocks had contemplated defrauding him and is thereby permitted to defeat Coombs' security for his debt.

In my opinion, Coombs did not intend to release and discharge his security by thus accepting Maddocks' note; and it is certain he would never have done it, if fully advised of Maddocks' condition; and if it were not for the exigencies which now surround Maddocks, I do not think he would ever have attempted, by this defense, to wrong Coombs out of his security for payment of his wages.

Sampson served as cook on this vessel under a written agreement for the season with Maddocks, at sixty dollars per month; about this branch of his claim, there is no contest;

but his son, only sixteen years of age, also served the entire season on the vessel as driver, who, I understand, is one of the crew, and who in a small row boat drives the fish into the seine after it is set. The boy, also, went as oarsman in other boats, sometimes steered the vessel and assisted in receiving on board the fish, and in discharging them at Boothbay. In fact, he did all kinds of work on board the vessel in the prosecution of the fishery that a boy of his age was capable of doing. His father testifies that at the time he contracted with Maddocks to serve as cook, it was agreed that the boy should serve on board at $20 per month. Maddocks denies any such agreement, and says he told Coombs that he would not hire the boy, but that afterwards the master told him he had hired him to assist the crew, who were mostly sharesmen, and that the crew would pay his wages from their share of the catch, and that his wages, by an understanding between him and Coombs, were paid to Maddocks by the crew from their shares, and that he, Maddocks, is therefore indebted to Coombs for the boy's wages, but that there is no lien therefor.

I do not deem it necessary to determine which of these statements is correct, as in my view, on Maddocks' own statement that the master hired the boy, he having performed during the fishing season on board the vessel the services above stated, there was a lien for these services upon the vessel. The master had a right, with the sanction of the owner, thus to employ the boy; and the fact, that the owner was authorized to retain the amount to be paid for the services from the crew's portion of the catch, does not exonerate the vessel from liability. The lien is created by the service; and it would require the clearest and most precise testimony to satisfy a court of admiralty that for seamen's wages there was no lien upon the ship.

October twenty-eighth, Sampson received of Maddocks two checks drawn on a Bath Bank for $100 each in settlement of his claims, including his son's wages. These checks were payable December first, and January first, and it is admitted that it was the understanding of the parties that they were not to be presented to the bank for payment, and that Maddocks was without funds to meet them when they became payable. These checks were therefore merely evidence of Maddocks' indebtment to Sampson, and fall within the rule before given.

It is intimated that in porgy fishing there is no lien for seaman's wages. It appears that in this business there are two classes of seamen employed; sharesmen, who receive for their service a certain proportion of the catch, and a second class of men, who are hired at fixed rates of wages, either by the month or for the season. These steamers are employed cruising for fish off this coast, sometimes 30 to 50 miles from the shore, following the fish, which are found in large schools and taken in seines. The steamboats generally return to the shore at night and discharge their catch, starting again early the next day. It is unnecessary to determine whether sharesmen have or not any lien on the vessel for their services, as each of the libellants were to be paid a fixed definite sum for their services on this steamer, which were as clearly maritime, as though they had been rendered in a voyage to Cuba, and being thus maritime, a lien on the vessel attended them.

Decree for libellants with costs.

Case No. 6,333.

The HELEN R. COOPER and The R. L. MABEY.

[2 Ben. 67.] [1]

District Court, E. D. New York. Dec., 1867.[2]

COLLISION—TOW—ICE—GUARANTY.

1. No vessel can lay aside extraordinary care, where the circumstances are extraordinary, without making herself liable for any damage that ensues in consequence.

2. Where a ship was being towed to sea by a single tug, when floating ice made the navigation difficult, and ran into a vessel lying at a pier, which she claimed was caused by the movement of a ferry-boat in suddenly crossing the bows of the tug and causing her to stop, and thus causing the ship to sheer: *Held*, that on the pleadings and proofs that defence was not made out.

3. As it appeared in evidence, that if another tug had been employed the ship could have been controlled, the failure to adopt that precaution was a fault which rendered her liable.

4. The tug, having alleged acts of negligence on the part of the tow as the cause of the collision, of which she gave no evidence, must be *held* liable also. She was negligent in attempting to tow the ship alone under the circumstances.

5. The fact, that before setting out the tug exacted of the ship an agreement to assume all the risk, cannot relieve the tug from liability to an innocent third party.

This was an action brought by the owners of the ship J. F. Chapman against the ship Helen R. Cooper and the tug R. L. Mabey, to recover the sum of $18,500 damages caused by a collision which occurred in the harbor of New York, on the 17th of January, 1866. At the time of the accident, the Chapman was moored at pier 45 in the East river, inside the pier, and while there was run into by the Cooper, then being towed to sea by the Mabey, at the end of a hawser. There was at the time little or no wind. The tide was running ebb, and the river was greatly obstructed by masses of ice moving down with the ebb tide. No fault was charged upon the Chapman by either party.

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

[2] [Affirmed by circuit court in Case No. 6,334, and by supreme court in 14 Wall. (81 U. S.) 204.]

Benedict & Benedict, for libelants.
Beebe, Donohue & Cooke, for the Cooper.
Emerson & Goodrich, for the Mabey.

BENEDICT, District Judge. The two vessels proceeded against in this action have interposed separate defences; that of the ship will be first considered. The amended answer, filed in behalf of the ship, sets forth that she left her berth at the Shinbone stores, on the Brooklyn side of the East river, on the day in question, in tow of the tug Mabey; that while being towed successfully, in such a way as to bring her head directly down the river, a ferry-boat suddenly and improperly crossed the bows of the tug, and, in order to avoid striking the ferry-boat, the tug was necessarily suddenly slowed, whereby the ship, being deprived of her towing power but having headway, shot in toward the piers, and, although both anchors were let go, ran into the Chapman before she could be stopped. And it is insisted that these circumstances make the case one of inevitable accident, for which the Cooper cannot be held liable.

The evidence in support of this defence I have examined with care, and find it vague and unsatisfactory. No witness is able to describe the ferry-boat spoken of, or seems to know where she came from or where she was going. The master of the ship and the pilot in charge are in conflict, as to the course taken by this ferry-boat. No witness is produced from any such ferry-boat, nor from the shore, nor from the tug, who testifies to the presence of any ferry-boat. Furthermore, the answer of the tug, which vessel would be nearest to the ferry-boat and best acquainted with the fact that her headway was stopped by a ferry-boat, if such were the fact, and most interested to give a reason for her stoppage, does not allude to any ferry-boat as causing the disaster or even being present, but distinctly sets forth acts of negligence on the part of the Cooper, which it avers were the sole cause of the collision. Besides this, the original answer of the Cooper herself, filed soon after the occurrence, does not speak of any ferry-boat, but charges the collision to have been caused by an immense field of ice, which it avers caught both ship and tug, and carried them over to the New York side and into the Chapman; while the master of the Cooper, when called, on the day of the collision, to account for its occurrence, assigned no such reason as the presence of a ferry-boat.

In such a posture of the pleadings and evidence, it cannot be held that the collision was the result of a sudden movement of a passing ferry-boat. On the contrary, I am satisfied that the cause of the collision must be held to have been negligence on the part of the ship in undertaking to go to sea, on an ebb tide and in running ice, with a single tug. The condition of the harbor was not an ordinary one. Large masses of ice were moving in it, and at this time of tide in this locality no vessel could move without danger. The Chapman herself, although entirely ready for sea, with her crew on board, and although it was Saturday, remained at her pier because of the dangerous condition of that portion of the harbor.

In the face of a peril clearly to be foreseen, the Cooper set out with a power inadequate to cope with the peril, should it arise. The proof is positive that, if another tug had been alongside of the ship, no disaster would have occurred, and this common precaution should have been adopted by the Cooper. Had she adopted it her course could have been nearer the middle of the river, and any sheer of the ship could have been controlled. The failure to adopt this precaution I consider to have been, under the circumstances, a fault which must render her liable.

No vessel can lay aside extraordinary care, where the circumstances are extraordinary, without making herself liable for any damage that ensues in consequence. Maclachlan, Shipp. p. 281.

The remaining question as to the liability of the tug is not a very material one, inasmuch as it appears, by a stipulation filed in the cause, that the claimants of the ship have assumed the defence of the tug, and undertaken to satisfy any decree which may be rendered against her.

The defence set up by the answer of the tug is not inevitable accident; on the contrary, it sets forth specific acts of negligence on the part of the ship, which alone, it avers, caused the collision. This defence there has been no effort on the part of the tug to prove. In the absence, then, of any testimony to sustain her answer, and upon the evidence in the cause she must be held liable as a co-trespasser with the ship. She was clearly negligent in undertaking, single-handed, to tow a ship like the Cooper in the then condition of the harbor. It is true that it appears in evidence that before setting out she insisted upon a guarantee from the ship to assume all the risk; but this cannot relieve her from liability to an innocent third party whose vessel was injured, in a collision caused by the lack of power in the tug to keep the Cooper in the proper track and off from the piers.

A decree must accordingly be entered against both vessels proceeded against, with a reference to ascertain the amount.

[NOTE. This decree was affirmed by the circuit court in Case No. 6,334. An order was granted (Id. 6,335) directing the libellants to execute the decree against the Helen R. Cooper before proceeding against the R. L. Mabey. The decree of the circuit court was affirmed by the supreme court in 14 Wall. (81 U. S.) 204.]

Case No. 6,334.

The HELEN R. COOPER.

The R. L. MABEY.

[7 Blatchf. 378.] [1]

Circuit Court, E. D. New York. June 18, 1870.[2]

COLLISION—NEGLIGENCE—AMENDED ANSWER—EVIDENCE.

1. Where a vessel is lying properly moored at the side of a wharf, at some distance within the outer end thereof, the fact that she is injured by being run into by another vessel, is prima facie evidence of fault in the latter, and throws upon her the burthen of excusing such fault.

2. Where a steam-tug and a ship in tow of her are both of them sued for the injury caused to another vessel by her being run into by the ship, and the answer put in by the tug is not consistent with an answer first put in by the ship, and an amended answer put in by the ship is not consistent with the answer first put in by the ship, each of the two answers put in by the ship being sworn to by the same person, such inconsistencies are to be taken into consideration in passing on the question of liability for the injury. In this case, the tug and ship in tow of her were both of them *held* liable for an injury caused by the striking of the ship against another vessel lying moored at a wharf.

3. Where witnesses, although otherwise unimpeached, are testifying under circumstances calculated to create a strong bias, and they state what is, in its nature, incredible, their testimony is not necessarily to be believed.

[Cited in United States v. Borger, 7 Fed. 198.]

[See Andrews v. Hyde, Case No. 377.]

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

In admiralty.

Robert D. Benedict, for libellants.

Edwin W. Stoughton and Charles Donohue, for claimants.

WOODRUFF, Circuit Judge. On the 17th of February, 1866, the ship J. F. Chapman, owned by the libellants, was lying on the north-eastwardly side of pier No. 45, East river, her bow towards the shore and her stern twenty feet inward from the end of the wharf. In that position she was run into by the ship Helen R. Cooper, which came in past the pier next above, head on, nearly at right angles to the Chapman, and broke in her side, doing great damage. The Cooper having been at that time in tow of the steam-tug R. L. Mabey, the libellants proceed against both ship and tug, charging both with negligence and misconduct, and have obtained a decree in the district court against both vessels [Case No. 6,333], from which the claimants of both vessels have appealed. On the trial in this court, no other evidence was produced than the testimony given in the district court, and the question before me is, in effect—Are the conclusions of the court below sustained by the evidence? There are no questions of law involved, in respect to which there is any dispute or difference between the counsel. The sole defense, stated in general terms, is, that the collision was caused by inevitable accident. The case has been very fully and ably discussed by counsel on both sides, and the testimony is quite voluminous. I have examined it with great care, and have been aided by elaborate written briefs. But I am compelled to confine myself to stating very briefly my conclusions.

The bare statement of the fact of injury received by the Chapman while she was lying properly moored to her wharf, at a distance to twenty feet inward from the end thereof, is enough, prima facie, to establish her right to recover from those who were concerned in the movement of the Helen R. Cooper, which was thrust with violence against her side. The presumption of fault on their part is clear and not merely speculative. The burthen is at once cast upon them to excuse it.

In judging of the truthfulness, good faith and validity of the excuse which is relied upon, it is not only competent, but it is significant, to observe, that the claimant of the tug, in an answer put in by him at the very outset of the controversy, when the circumstances were recent, averred, that the master of the tug, before he attempted to tow the Cooper, declared to the agent of the latter, that "it was not safe to proceed to sea in that condition of the weather and tide;" that, after the tug made fast to the Cooper, an attempt being insisted upon by such agent, the tug acted under the direction of the pilot on the Cooper, but the Cooper was herself mismanaged in various particulars specified, in such wise that it was impossible for the tug to keep her off the New York shore; and that the damage to the Chapman "was occasioned solely by the negligence, mismanagement and want of care and skill of the persons in charge of the said ship Helen R. Cooper." Here, it will be observed, is not a word or pretense of inevitable accident, or that ice or any other obstacle even contributed to prevent the towing of the ship in a proper direction.

The claimants of the ship, on the other hand, denying all negligence, &c., on her part, alleged, in their answer, that, after she had been towed from her dock on the Brooklyn side, near the Navy Yard, stern foremost, into the stream, and when she was in the act of turning so as to head down the river, she and also the tug were unexpectedly caught in an immense field of floating ice, which, in spite of the efforts of the tug, set both of them towards the New York shore; that, finding that the said field of ice was too powerful for the steam tug to control the ship, both anchors of the ship were let go; that, notwithstanding this, the ice carried

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

[2] [Affirming Case No. 6,333. Decree of circuit court affirmed in 14 Wall. (81 U. S.) 204.]

the ship and the tug across and down the river, so that the ship, having finally got pointed down the river, was carried by the ice, so that her bows were carried into pier No. 45, and into the side of the Chapman; that it was a proper time to go to sea and the effort was made in a proper manner and under the care of a skilful pilot; and that the injury was caused in the manner stated, and was an inevitable accident, and, if not, still was caused by no fault of the Cooper. About six months later, the claimants of the Cooper, put in, by way of amendment, an entirely new answer, in which they not only abandon the theory that they were unexpectedly caught in an immense field of floating ice, which deprived the tug of the control of the ship, and which carried both her and the tug over to the New York side, and carried the ship into the Chapman, but directly and in terms contradict such former answer and, in substance, allege that it was false. Thus, they say, that, when the ship was towed out of her dock, "there was considerable floating ice on the Brooklyn side of the East river, but the river was clear for a considerable distance out on the New York side;" that, owing to the floating ice, the ship was turned with more difficulty, but the tug "had got the ship's head turned down the river, angling towards the New York shore, and with most of the ship in clear water, free from ice;" that, while the tug was thus successfully towing the ship, and when the ship was entirely under the control of the tug, a ferry-boat suddenly and improperly crossed the bows of the tug, and caused her to slow, to prevent striking the ferry-boat, thus slacking the hawser and causing her to lose control of the ship; that the ship, under the impetus of her then headway, shot ahead towards the piers; and that both of her anchors were then let go, but she overran her anchors, dragged them both, and came upon the Chapman, thus doing the damage, &c.

In view of this mass of inconsistency and contradiction interposed for the defence of these two vessels, I think no intelligent and just mind can avoid the reflection, that there is much insincerity and untruthfulness in the attempt made to exculpate them; and when to this is added the fact, now conceded, that the Cooper has assumed the entire defence, and the steam-tug has made no effort to prove the truth of the answer put in on her behalf, in which she cast the whole blame of the transaction upon the Cooper and her negligent, improper and unskilful management, and the further fact, that no witness whatever is produced from the steam-tug, to show that her navigation, or her conduct or control of the ship, was at all hindered or interfered with by any ferry-boat, when, obviously, her master and crew were most competent to speak on the subject, something more than suspicion is warranted, that the theory that a ferry-boat caused the accident has as little foundation as the allegation that the Cooper was unexpectedly caught in an immense field of floating ice, which carried her upon the Chapman.

The counsel for the claimants, with force and propriety, argued, that no condemnation should be had upon suspicion, and that their defence should not be discredited because they found it necessary to amend their answer. Concede all this, and yet, when both answers are sworn to be true by the same party, and one is in direct conflict with the other, when the claimants respectively are in conflict with each other as to the cause of the accident, when no attempt is made to prove by the tug that her movement, or her control of the ship, was impeded or hindered by any fortuitous or unavoidable occurrence or obstacle, the court cannot enter upon the examination of the testimony of the managers of the ship, without great distrust of their credibility. If, nevertheless, the claimants have clearly established that the accident was inevitable, they are not to be condemned because the answers are contradictory.

In my judgment, they have failed to establish their excuse. Even if I could believe that some ferry-boat crossed the track of the tug—in regard to which the testimony is quite unsatisfactory, and the two witnesses who testify on the subject, themselves under heavy responsibility in this matter, do not agree in regard to its course—the defence would be by no means disembarrassed. The passing of ferry-boats to and fro across the East river is not an unusual or an unexpected occurrence. There is probably not one minute between sun-rise and sun-set when there are not a considerable number in the very act of crossing in different directions, and those who navigate the river must be taken to know it, and must be prepared for it; and they are not at liberty to put themselves in such situation that, by due care and caution, they cannot avoid injury to themselves or others from that cause, provided the ferry-boat is in no fault. Here, the proof does not show fault in the ferry-boat, if it be not, indeed, doubtful whether a ferry-boat had any connection with the accident.

The steam-tug, when she undertook to tow the Cooper to sea from her berth near the navy yard, did so in view of all the ordinary risks of navigation through the river, and was bound to be suitably prepared to encounter them, in her effort to control the ship for that purpose; and she further did so in view of the presence of so large a collection of floating ice on that side of the river, in that state of the tide, that it was with difficulty she herself crossed alone to make the effort. To this the witnesses for the claimants testify. The Cooper, in placing herself in charge of the steam-tug, to be towed in the manner she was, did so knowingly, intentionally, and in view of the same risks and hazards, then present or like-

ly to arise, which, as above stated, were in view of the tug which took such charge. It is not shown that they met with any impediment to the safe conduct of the ship of which they were not fully apprised, or which they had not reason to expect when they started. If, then, the state of the river was such, that it was not safe to undertake the towing out when the ebb tide was running strong and had accumulated ice in great quantities in that part of the river, they ought to have known it, and it was want of skill and mismanagement to make the attempt. If, on the other hand, it is just to infer, from the testimony of other pilots, who took vessels to sea that day from other piers, lower down the river, and from the New York side, which is sworn to have been clear of ice, that it was safe and prudent to make the effort then, since they experienced no unusual or extraordinary other impediment, why was it not safely accomplished? If, though, under ordinary circumstances, more than one tug was wholly unnecessary, one tug could not, on that day and in that mass of ice, control the ship, so that she could go to sea in safety, she should have employed two tugs. If, on the other hand, the one was sufficient to manage the ship, the circumstance that they met a crossing ferry-boat, when they must or ought to have expected to meet several, does not excuse them. Indeed, such an occurrence, if, indeed, the presence of a ferry-boat deprived the tug of her control of the ship, tends more strongly than the mere opinions of any witnesses, to show that the ship ought not to have attempted to move from her berth through the floating ice, without being under more effective control. And, again, if it be true that the ice so hindered the management of the ship that she could not be turned and headed in her proper course down the river sooner than she was, she should have been taken farther up, and into the broader part of the river, and turned, before running down upon the wharves on the New York side.

But, I am not at all satisfied that the ship might not have been turned sooner if she had been properly managed. The proof shows, that the great struggle was not to keep her up against the tide until she was turned so as to come down in the middle of the stream, but to get her over to the clear water on the New York side as soon as possible; and the result was, that both vessels were carried down by the tide, and, when they reached the clear water, the Cooper was headed on and ran into the Chapman. It is true, that the master and the pilot of the Cooper say that her helm was kept hard a-starboard; and it is insisted that the court is bound by the testimony of unimpeached witnesses. That is subject to some qualification. Where witnesses otherwise unimpeached are testifying under circumstances calculated to create a strong bias, and they state what is in its nature incredible, their testimony is not necessarily to be believed. Now, it is shown that the river on the New York side was clear of ice. Is it, then, credible, that the Cooper, emerging from the ice with "her head turned down the river, angling towards the New York shore," would or could, "with the impetus the said ship had on, have shot ahead towards the piers," and actually have passed several hundred feet, or nearly half the width of the river, and struck the Chapman, if her helm had been during all that time hard a-starboard?

I do not question the intelligence or good judgment of the numerous pilots who testify that it was safe to take ships to sea on that day, and that it was prudent and proper to take the Cooper out of the dock in the manner it was done, or that one tug like the Mabey is sufficient for the purpose. But I cannot overlook the fact, that, so far as the presence of ice created embarrassment, it was greater up the river where the Cooper lay. The places from which they took vessels were on the New York side, and lower down, or on the North river, of the state of which in respect to ice we are not informed; and they testified from their experience on that day. Nor can I fail to see, also, that the more conclusively it is shown that the state of the river was suitable and the power of the Mabey competent to the undertaking, the greater is the assurance that it was by bad management, on the part of one or both of the vessels, in not turning the head of the ship down the stream sooner, or in not sufficiently guarding against the ordinary incidents of the passage, or in not keeping the helm of the ship a-starboard, that the accident was caused.

It is saying little to add, that the claimants have failed to remove the burthen which rested upon them to show that this accident happened by inevitable accident, or without fault or negligence on their part.

The decree must, therefore, be affirmed, with costs.

[NOTE. From the decree the owner of the Mabey appealed to the supreme court, and moved for a commission to take further evidence to be read in court. The motion was denied in an opinion by Mr. Justice Nelson. 10 Wall. (77 U. S.) 419. Another motion of the same nature was made subsequently,—13 Wall. (80 U. S.) 738,—the ground of it being that the sureties upon the bond (Case No. 6,335) were insolvent. The motion was denied in an opinion by Mr. Justice Clifford.

[Both the owners of the tug and of the ship thereupon appealed to the supreme court. In an opinion by Mr. Justice Clifford the decree of the circuit court was affirmed. 14 Wall. (81 U. S.) 204. "Inevitable accident" must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together.]

Case No. 6,335.

The HELEN R. COOPER and The R. L. MABEY.

[10 Blatchf. 212.] [1]

Circuit Court, E. D. New York. Oct. 4, 1872.

DECREE IN ADMIRALTY — ORDER OF EXECUTION AGAINST TWO VESSELS—SURETYSHIP.

A libellant, in a suit in admiralty, had a decree against two vessels, for damages, which contained no provision for an apportionment of the damages between the two vessels, or otherwise settling the equities between their claimants. After decree, it being shown that the claimant of one vessel, and his sureties, stood in the relation of sureties for the claimant of the other vessel and his sureties, and that the latter had assumed the litigation and agreed to indemnify the former, the court, on the application of the former, made an order that the libellant first issue execution against the latter, and that proceedings against the former be stayed until the return of such execution.

In admiralty.

Benedict & Benedict, for libellants.

Goodrich & Wheeler, for the R. L. Mabey.

Beebe, Donohue & Cooke, for the Helen R. Cooper.

WOODRUFF, Circuit Judge. This is a motion on behalf of the R. L. Mabey, in substance, for an order directing the libellants to execute the decree, (which is, in form, against both vessels,) against the claimants of the Helen R. Cooper and their stipulators, or to exhaust their remedies, under the decree, against such claimants and their stipulators, before proceeding to execute the decree against the R. L. Mabey.

The proofs now laid before me show that, in relation to the subject in controversy, the claimants of the R. L. Mabey, and their sureties, stood in the relation of sureties for the others, and that the latter had assumed the litigation and agreed to indemnify the former. It is, therefore, just and equitable, that the claimants of the Helen R. Cooper, and their stipulators, should pay the damages and costs awarded to the libellants by the decree. This brings the case within the principle of the decision in The D. S. Gregory [Case No. 4,100], and 9 Wall. [76 U. S.] 513, where the court directed, that, as between the two vessels, the recovery be equally apportioned, and that, although each was assumed to be liable for the whole amount to the libellant, and, so, in respect to each one-half, each vessel was surety for the other, the libellant, on receiving from either vessel one-half, should stay proceedings until execution had been issued and returned as against the other. Although no direction was given, in the decree in the present case, as to an apportionment, or otherwise settling the equities between the defendants, and while it is also clear that no modification of the decree should now be made, I think the court has power to control the manner of its execution, so as to do justice between the defending parties, if thereby the libellants are deprived of no right. They must be permitted to collect their whole decree out of some one or all of the parties liable.

In analogy, therefore, to the decision in the case above referred to, an order is granted, that the libellants first issue execution against the claimants of the Helen R. Cooper and their stipulators, and that proceedings against the claimants of the R. L. Mabey and their stipulators be stayed until the return of such executions against the others. Either party is to be at liberty to apply to the court for further direction, as they may be advised.

[The facts upon which the decree referred to was based are given in Cases Nos. 6,333 and 6,334.]

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

Case No. 6,336.

HELLEN v. BEATTY.

[2 Cranch, C. C. 29.] [1]

Circuit Court, District of Columbia. Oct. Term, 1811.

ACTION OF DEBT—PLEA OF PLENE ADMINISTRAVIT.

Under Act Md. 1798, c. 101, c. 8, § 15, the court, and not the jury, is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim.

Debt upon a bond. The defendants [Beatty's administrators] pleaded that they first had notice of the plaintiff's claim on the first of November, 1809, when they had fully administered; and laid a rule on the plaintiff to reply.

Mr. Morsell, for plaintiff, contended that under the Maryland Act of 1798, c. 101, subc. 8, § 7, he was not bound to reply.

Mr. F. S. Key, for defendants. It is not a plea respecting assets, but respecting notice; and the want of notice before paying away all the assets, is an absolute bar to the action under the 15th section of the same chapter of the act.

Mr. Morsell, contrà. The only question is whether the plintiff is bound to reply to the plea of plene administravit. The object of the act of assembly is to prevent the administrator from being liable out of his own estate; not to prevent judgment for assets quando acciderint. The act intends only to discharge the administrator from those assets which he has paid away without notice. All the assets, means all in hand, or of which he had possession. The debt is not discharged.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion, under the 15th section of chapter 8, that no judgment could be

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

rendered, as the defendants showed a plene administravit, and that the court, not the jury, is to ascertain whether the defendants paid away all the assets before notice.

Case No. 6,337.

In re HELLER.

[3 Biss. 153; 4 Alb. Law J. 49.] [1]

District Court, W. D. Wisconsin. Sept. Term, 1871.

BANKRUPTCY—SUFFERING PROPERTY TO BE TAKEN.

1. Under section 39 of the bankrupt act [of 1867 (14 Stat. 536)] it is not necessary that the debtor should be an actor in promoting the taking of his property; the suffering it to be taken is a violation of the act.

2. It is the duty of an insolvent man, when sued, to take measures to secure the equal distribution of his property among his creditors; and if he makes no defense to the actions, does not notify his other creditors of such suits, nor do anything to prevent the obtaining a preference, he suffers his property to be taken within the meaning of that section.

3. When a debtor suffers an act which he might prevent, and the necessary consequence of which is to give a preference to certain creditors, the law presumes that he intended such result.

The bankrupt, a merchant, being insolvent and knowing his insolvency, was sued in August, 1870, by Van Steenwyk, his banker, and by Hendrickson, his father-in-law, by the service of a summons only, in the state court, for amounts exceeding the value of his property, and shortly afterwards was sued by Levi Feigel, another creditor. No papers were filed in the cases until the day before judgments were entered, in November following. The bankrupt, after said suits were commenced against him, was applied to for payment by some of his other creditors, and he put them off, but did not inform them that he had been sued. After those creditors obtained the judgments, by default, they caused executions to be issued and levied upon all the bankrupt's property, and shut up his store, which was the first known by his other creditors of the suits. The bankrupt also represented to the attorneys of some of his other creditors, while the suits were pending, that those creditors who had already sued him were going to give him time. After the levy the petitioning creditors commenced these proceedings in this court, alleging that he suffered his property to be taken by those creditors on legal process with a view to give them a preference. The bankrupt filed a general denial of bankruptcy, and on the trial the foregoing facts appeared in evidence, and were found by the court.

Wing & Hood, for petitioning creditors.
J. J. Cole, for bankrupt.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Alb. Law J. 49, contains only a partial report.]

HOPKINS, District Judge. The acts of bankruptcy charged in the petition in this case are:

First—That the debtor being insolvent, with a view to give a preference to G. Van Steenwyk, of La Crosse, and Henry W. Hendrickson, his father-in-law, two of his creditors, suffered his property to be taken by them upon legal process; and,

Second—That he procured an execution to be issued upon a certain other judgment in favor of Levi Feigel, and suffered his property to be taken thereon with a view to give a preference to such judgment creditor. The debtor denied these acts of bankruptcy, and the evidence has been taken and submitted to me with the written briefs of the attorneys for the parties.

The only question that I deem it necessary to pass upon on this hearing is as to whether the debtor "suffered his property to be taken upon legal process" within the meaning of section 39 of the bankrupt act, "with intent to give a preference to one or more of his creditors." Under that section it is not necessary that the debtor should be an actor in promoting the taking; if he "suffers" the taking, he violates the act, if the necessary consequences of it are to enable the creditor to obtain a preference. If he was insolvent (which is not denied) when he was sued by Van Steenwyk and Hendrickson in August last, it became his duty to apply voluntarily for the benefit of the bankrupt act, so that his property might be distributed equally among all his creditors, and not keep still and permit those creditors who had sued him to go on and obtain judgments and take all his property upon executions.

An insolvent debtor is not only forbidden from aiding or procuring his property to be taken upon legal process, that is, from acting with a creditor for that purpose, but he is on the contrary required to take steps to prevent it, and if, when sued, he keeps silent and does not take measures to prevent a creditor from obtaining a preference by his suit, he, within the meaning of the act, suffers it to be done.

What a party has the power to prevent, he "suffers" to be done when he does not use the means provided to prevent it. If he did not like to proceed voluntarily, he could have notified his other creditors of the fact of his having been sued. He had twenty days before judgment to do so, before judgments could have been recovered.

The debtor in this case neither did anything to prevent Van Steenwyk, Hendrickson and Feigel from obtaining judgments against him and taking his property to satisfy them, nor did he notify his other creditors of the commencement of such suits, but on the contrary, intentionally, it seems to me, concealed from them the fact of the commencement of such suits. I think in this case the testimony clearly shows that the debtor "suffered' his

property to be taken upon legal process, with intent to give a preference to the execution creditors, and thereby committed the act of bankruptcy charged against him in the petition, and the adjudicated cases leave no room for doubt upon this question. In re Black [Case No. 1,457]; In re Craft [Id. 3,316]; In re Dibblee [Id. 3,884]; In re Wells [Id. 17,388]; Campbell v. Traders' Nat. Bank [Id. 2,370]; Beattie v. Gardner [Id. 1,195]; Rison v. Knapp [Id. 11,861].

The debtor, as before stated, was confessedly insolvent when sued and when his property was taken on the execution, and he took no steps to prevent a judgment, or his property from being thus taken; he therefore suffered an act to be done which he might have prevented, which necessarily resulted in a preference in favor of the judgment creditors, and the law presumes that he intended the natural consequences of his acts. The result of his inactivity being necessarily to give a preference to the creditors suing, he is in law chargeable with having intended to effect that purpose.

I think the act of bankruptcy first charged in the petition clearly proven, and I therefore adjudge the debtor to be a bankrupt, and subject to the provisions of the bankrupt act. It is unnecessary at this time to consider the other questions presented by the counsel.

Consult, also, In re Haughton [Id. 6,223]; Wright v. Filley [Id. 18,077]; Kohlsaat v. Hoguet [Id. 7,919].

Case No. 6,338.

In re HELLER et al.

[32 Leg. Int. 136.] [1]

District Court, S. D. New York. March 30, 1875.

BANKRUPTCY—VERIFICATION OF INVOLUNTARY PETITION.

An involuntary petition in bankruptcy cannot be verified before a notary public.

An involuntary petition in bankruptcy was filed by several creditors of the firm of Heller Bros. & Co., for an adjudication of said firm as bankrupts. This was opposed by the counsel for the debtors upon the ground that the original petition was not properly verified—verification having been made before a notary public, and not before a judge, register, or commissioner, as provided by section 5017, c. 2, tit. 61, of the Revised Statutes.

BLATCHFORD, District Judge, rendered a decision dismissing the petition and all the proceedings, and denying the motion for an adjudication, upon the ground that the petition was not properly verified before a notary public.

[1] [Reprinted by permission.]

Case No. 6,339.

In re HELLER.

[5 N. B. R. 46; [1] 41 How. Pr. 213.]

District Court, S. D. New York. June, 1871.

BANKRUPTCY—AMENDMENT TO SCHEDULE.

1. A register has the right to allow amendments to the schedules on the ex parte application of the bankrupt, at any time while the cause is pending before him, but it is the better practice, if there shall have been an appearance on the part of creditors, to issue an order to show cause, &c., and to require due notice of such application to be given.

[Cited in Re Blaisdell, Case No. 1,488; Re Dole, Id. 3,965.]

2. It is the duty of the bankrupt to amend his schedules so as to make them conform to the facts, and that the filing of specifications does not deprive him of that right or release him from that duty.

3. The register should allow all necessary and proper amendments whenever a proper cause therefor is shown.

By JOHN FITCH, Register:

Upon affidavits and upon all the pleadings and proceedings in this cause, the bankrupt moves to amend Schedule A attached to his petition for adjudication in bankruptcy, by striking out certain debts which were inserted in a previous amendment through a mistake of the law, the debts having been contracted by the bankrupt since the filing of his petition. Since the adoption of the code of procedure by the legislature of this state, amendments to any pleadings or proceedings are allowed virtually as a matter of course, and are within the discretion of the court, and being allowed whenever proper cause is shown. Sections 172–174, Code. The practice of the state courts under section 173 of the Code, which section of the Code is as follows: "The court may, before or after judgment, in furtherance of justice and in such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved,"—has been settled by the following decisions: Amendment before trial, matter of course. Troy & B. R. Co. v. Tibbits, 11 How. Pr. 170; Daguerre v. Orser, 3 Abb. Pr. 86. Reasonable excuse for defect sufficient. Harrington v. Slade, 22 Barb. 164. See, further, Merchant v. New York Life Ins. Co., 2 Sandf. 669, 2 Code R. 66, 87; Chapman v. Webb, 1 Code R. (N. S.) 388. Summons may be amended after judgment. Sluyter v. Smith, 2 Bosw. 673. See, also [Davidson v. Powell], 13 How. Pr. 287. Affidavits may be amended [Furman v. Walter] Id. 350. A

[1] [Reprinted from 5 N. B. R. 46, by permission.]

warrant of attachment may be amended. Kissam v. Marshall, 10 Abb. Pr. 424. Where amendment is in furtherance of justice, but little restriction upon power of amendment. Van Ness v. Bush, 14 Abb. Pr. 36; Beardsley v. Stover, 7 How. Pr. 294; 3 Abb. Pr. 86. Court will allow amendment of complaint necessary to conform it to the facts proved. Hunter v. Hudson River Iron & Mach. Co., 20 Barb. 493. By section 174 of the Code of Procedure, whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, on motion, permit an amendment so as to make it conformable thereto.

The motion to amend is properly made. General order 5; In re Morford [Case No. 9,796]; In re Perry [Id. 10,998]; In re Little [Id. 8,390]; In re Watts [Id. 17,293]. The bankrupt is required by the bankrupt act of March 2, 1867 [14 Stat. 517], to make his petition and schedule conform to the provisions of the law. In re Orne [Case No. 10,582]. And the court has authority to allow amendments to be made at any time prior to the discharge of the bankrupt. General order 5. "He shall be at liberty from time to time, upon oath, to amend and correct his schedules of creditors and property, so that the same shall conform to the facts." U. S. Bankrupt Act, § 26; In re Jones [Case No. 7,447]; In re Orne [supra]. In the last cited case Blatchford, J., says: "An error, whenever discovered, must be corrected, no matter what proceedings have theretofore taken place." "The register may order schedule to be amended at any stage of the proceedings." In re Perry [supra]. Additional amendments were allowed after the assignee had made and filed his report. I entertain no doubt of the right of the bankrupt to amend under section 26, nor of the application being properly made to the register.

A bankrupt may amend schedules even after the hearing of specifications against the discharge. In re Preston [Case No. 11,392]. In this cause leave to amend was granted by the register under section 26 of the act, and general orders 5, 7, and 33. Schedule A was amended by the addition of about twenty-five creditors, among these were included the names of eight persons, the indebtedness to whom was subsequent to filing of the petition. As the discharge, if granted, could not release the petitioner from debts contracted after the filing of his petition, those creditors whose names were improperly inserted could suffer no loss or damage by the mistake. They had not proved or attempted to prove their debts, and the proceedings have not been affected in any way by their names being inserted in the amended schedule. The bankrupt, on becoming aware of the error, seeks to correct it by striking out those names from his amended schedule, and asks leave to amend by filing an amended schedule omitting the names of those eight creditors whose names were by mistake placed in the amended schedule. The mistake of placing the names of creditors whose claims did not exist previous to the filing of the petition, on the amended schedule, not having prejudiced a right of any previously existing creditor, and being, in effect, the asking of a relief which the court has no power to grant, is merely surplusage and the last proposed amendment, which is for the purpose of removing manifest imperfections, is an act of good faith, and the court should not merely permit the amendment, but require it to be made.

The bankrupt, on making his motion for leave to amend, states, "under oath, the substance of the matter proposed to be included in the amendments" &c., as required by general order No. 33. It is not reasonable to suppose this rule was intended to restrict amendments to cases of omission. Section 26 of the act, and general orders 5 and 7, are not susceptible of any such construction. The register has power to allow amendments, and no creditor has a right to oppose such application. In re Watts [supra]. In Re Ratcliffe [Case No. 11,578], an amendment was allowed on condition that there should be a new warrant issued, &c., which was necessary under the circumstances of that case. So, also, in Re Perry [supra], additional proceedings were considered necessary. In re Morford [supra], Blatchford, J., I consider as settling the practice as applicable to this case. The register, holding chambers of the district court, either upon his own motion or upon application of the bankrupt or a creditor, or any other person having a standing in court, can make an order allowing such amendments as may be proper. The proceeding is ex parte, and is entirely within the discretion of the register to grant or refuse it; if applied for by the petitioner, no notice thereof is required to be given to any one, neither has a creditor a right to oppose it. Should the register refuse to allow the amendments, the petitioner has a right to appeal to the special term. Whenever any bankrupt or creditor shall make a motion before the register, at chambers, to amend the schedules or to compel the petitioner to amend his schedules, I hold the better practice to be to issue an order requiring the party to show cause why the amendments as asked for should not be allowed, specifying particularly the points in which the schedules are defective. The bankrupt or creditors will then have a right to oppose the application, and appeal from the order at chambers to the special term if dissatisfied with the decision of the register. The authorities on these points are: In re Hill [Case No. 6,481]; In re Orne [Id. 10,582]; In re Jones [Id. 7,447]; In re Levy [Id. 8,296]; In re Patterson [Id. 10,814]; In re Morford [Id. 9,796]; In re Watts [Id. 17,293].

The foregoing decisions are the same, in spirit, as to the allowance of amendments as

are the decisions of the courts of this state, the same liberal spirit prevailing in each; allowing amendments as a matter of course in the discretion of the court, appeals being allowed in all proper cases. In this state the courts have, for a long series of years, allowed the most liberal amendments in all pleadings and proceedings, allowing all necessary amendments in pleadings, before, on and after the trial of causes; no one has opposed, and the bar of the state generally approve of the practice. The act of congress requiring the national courts to follow the practice of the state courts in certain particulars, in the districts in which the United States courts are being held, enables the two courts to assimilate their practice, and enables the United States courts to avoid much of the English common law practice descended to us from the Roman law. In bankruptcy proceedings, it is in furtherance of the ends of justice and as contemplated by the bankrupt act, that the register holding the chambers of the district court, and acting as an United States district judge, clothed with his powers in regard to the case before him, should make all necessary orders in the case. As the registers selected by Chief Justice Chase and approved by the district courts are with few and unimportant exceptions men of the highest order of legal talent, learned in the law, having a full practice in the state courts, standing high in their respective communities—many of them having had legislative and congressional as well as judicial experience—to such men all the workings of the bankrupt law can safely be trusted; they are, as it were, a class of judicial pupils composing a school for judges, constantly increasing their fund of judicial knowledge, acquiring that practice and experience most fitting and qualifying them for judges of our state courts, and promotions to district or circuit judges of United States courts.

The opposing creditors, by their counsel, submit the following objections to the granting of the bankrupt's motion: First. "There is no justification in law for the exercise of such power or discretion by the register at this stage of the proceedings." Second. "The functions of the register have been performed with the exception of filing the specifications." General orders 6, 7, 12, 24, and 29. Third. "The case was de jure remanded to the court after the filing of the specifications." Fourth. "The register has no jurisdiction in the premises. He is limited to granting amendments for omissions in the schedules, and leave to amend in uncontested cases." General orders 5, 7, and 33. Fifth. "It is for the court, and the court alone to decide upon motion for leave to amend in contested cases; the filing of specifications is decisive of the question whether a case is contested or not. The motion should have been addressed to the court." Sixth. "The register has already certified that said petition and schedule are correct in form, as it was his bounden duty to do so according to rules four and seven." Seventh. "It is claimed by the opposing creditors in the specifications, that the matter sought to be amended or withdrawn is evidence of both fraud and perjury under the law."

Upon a careful examination of the views presented by the counsel for the bankrupt, and also of the opposing creditors and the authorities cited, I do not find any which support either of the objections of the opposing creditor. The objection taken that the mere filing of the specifications deprives the bankrupt of his right to the amendments, is not, in my opinion, sustained by the bankrupt law, or by the rules or practice of this court, as the bankrupt act, by section 26 of the act, provides, "That the bankrupt shall be at liberty, from time to time, to amend and correct his schedules of creditors and property so that the same shall conform to the facts;" and for the purpose of such amendments the register is the court, and has the power to grant them, on motion, ex parte, and that any politeness or courtesy shown to counsel for creditors out of personal respect by the register, who was willing that they should be heard in order that their views might be presented to the court, does not bring the cause within the rule of that portion of the bankrupt act defining contested cases, and that this application is ex parte, and not in any respect a contested case. "The mere filing of the specifications does not, ipso facto, adjourn the cause into court, or oust the register of his jurisdiction of the cause. The filing of the specifications is a mere incident to the opposition to the bankrupt's discharge, by a statement of the reasons why a bankrupt should not be discharged. He, (the register) proceeds with the cause notwithstanding the specifications, until his duties are performed. In Re Puffer [Case No. 11,459], Hall, J., decides that if the creditor desires an examination of the bankrupt with a view of using such examination in opposing the discharge, or for any other purpose, he can proceed under district court rule twenty-six (Northern district of New York), such proceedings retain the cause before the register until the testimony shall have been taken; any creditor having a standing in court has a right to have such examination of the bankrupt or any other persons as witnesses. In re Adams, 36 How. Pr. 51. Creditors who have proven, or attempted to prove their claims, although not as yet allowed by the register, are entitled to have an order for such an examination. In re Metcalf [Case No. 9,494]; 36 How. Pr. 51; Bump, Bankr. 64; Bankrupt Act, § 19; General order 3."

1st. Upon all the proceedings in this cause, including the specifications, I decide as a matter of law that this application of the bankrupt, in form of a motion to amend his schedules, is one that he has a right to make

ex parte, and that neither the assignee nor opposing creditors have a right to be heard upon the motion or to oppose the same, but that it is better practice, in order to bring the question fully before the district court, to allow them to do so, and to require due notice of such application to be given.

2d. That the bankrupt has a right to amend his schedules by striking out the names of the eight persons who have become creditors of the bankrupt since the filing of the petition and schedules.

3d. That in this case it was the duty of the bankrupt to amend his schedules, so as to make them conform to the facts, and that he could make such application at any stage of the proceedings before the register had returned the cause to the court, and that the filing of the specifications did not prejudice him in, or deprive him of this right.

4th. That the register has the right to grant an order allowing such amendments whenever a proper cause therefor is shown. This being a proper cause, and the causes shown are in my opinion sufficient, the motion of the bankrupt is granted.

5th. The opposing creditors, by Henry Morris, their attorney, object to the granting of the order, and request a certificate to the district court.

Benjamin Todd, for bankrupt.
Henry Morris, for opposing creditors.

BLATCHFORD, District Judge. I concur in the views of the register stated in his conclusions 1, 2, 3, and 4.

Case No. 6,340.

HELLMAN et al. v. HOLLADAY.

[1 Woolw. 365.] [1]

Circuit Court, D. Nebraska. Nov. Term, 1868.

COMMON CARRIER OF PASSENGERS, BAGGAGE, AND GOLD.

1. The case of Orange County Bank v. Brown, 9 Wend. 116, distinguished.

2. If a passenger surreptitiously introduce into a coach an article of great value, with the view of getting it carried for nothing, when the carrier is accustomed to charge for such service, he is guilty of a gross fraud, and in case of loss cannot recover.

3. But if, notwithstanding the passenger's intention to defraud him, the carrier learns the fact, and, knowing it, charges, and the passenger pays, for carrying the article as extra baggage, and for charges usual therefor, then the carrier is liable for the value of the article, in case of its loss.

4. It is for the jury to say, from the whole evidence, whether the carrier received the compensation knowing the baggage to contain gold.

[Distinguished in Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 719.]

Hellman & Cahn, partners, sued Holladay for $10,114, for gold dust of that value, lost while being transported on the defendant's stages. The circumstances, as detailed in the petition, were, briefly stated, these: The defendant was the proprietor of a line of stages and of a treasure express, running from Great Salt Lake in Utah via Denver in Colorado, to Omaha in Nebraska. Cahn took passage at Salt Lake for Omaha, and paid the usual fare, being $300; and having a quantity of gold dust, the defendant undertook to carry that for $5 per $1000 extra, which said Cahn then and there paid. Near Fort Bridger this gold dust was lost off the coach, by reason of the unskilful driving of the coach by the defendant's driver, who became intoxicated; and also because the gold dust was placed in the boot of the coach, and not there properly secured. To meet this case, the defendant in his answer alleged, that his "treasure express" was conducted by means of messengers, who accompanied all articles to be thereby carried, and used iron safes, and other precautions for carrying them safely, and the charges on articles so carried were at the rate of $50 per $1000; that all passengers on the coaches were advertised of that fact, and that the defendant would not be responsible for, and forbade the carrying of gold dust by passengers, because the line ran through a country little frequented, and where exposures to robberies and Indian attacks were great; that said Cahn introduced the gold dust into the coach surreptitiously, and paid for it as extra baggage, without informing the defendant's agents, and without their knowing that it was valuable; that Cahn placed his baggage in the boot of the coach, and gave to the driver the liquor by which he was intoxicated. The suit was originally commenced in one of the district courts of the late territory of Nebraska, and on the organization of the federal courts in the state was transferred to this court on account of the citizenship of the parties. At this term, it came on to be tried before the court and a jury. It appeared from the evidence that there were several passengers on board the coach, travelling in company with the said Cahn; that they had with them a large quantity of gold dust, for which, neither as treasure nor extra baggage, did they pay anything at Salt Lake City. They had proceeded in the stage some forty miles to a station known as Millersville, when the general superintendent and the local agent of the stage line came to the coach and told them that telegrams had been received from Salt Lake, that they had extra baggage; that the baggage must be weighed, and they must pay for whatever exceeded 100 pounds to the passenger, at prescribed rates as extra baggage. A good deal of baggage was taken out, weighed, paid for, and replaced.

The plaintiffs introduced evidence tending to prove that at this time Cahn told the general superintendent that he had the gold dust here sued for, and before his eyes placed it

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

in a carpet-bag, and the driver placed it in the boot; that he paid for it as extra baggage, with the full knowledge on the part of the defendant's agents of its nature. The defendant showed by the evidence the manner in which he carried treasure, the rates charged by him therefor, and the notice to passengers limiting his liability, as charged in his answer. He also introduced evidence tending strongly to show that the gold dust was surreptitiously and fraudulently introduced into the coach by Cahn at Salt Lake; that his agents neither there nor at Millersville knew his baggage contained articles of such value; and that he or his companions, with his assent and even encouragement, gave to the driver the liquor which he drank; and that he placed the carpet sack in the boot of the coach, or caused the driver to place it there, without knowing its contents.

The defendant requested the court to instruct the jury (among other things) as follows: "If the jury believe from the evidence that Cahn assisted or encouraged his fellow passengers in getting the driver drunk, that he caused him to put the carpet-bag containing the gold dust in the boot of the coach, the driver not knowing that it contained gold dust, that he surreptitiously introduced the gold dust into the coach at Salt Lake, to avoid paying the rates chargeable in the express, and at Millersville paid for it as extra baggage only, and at the rates chargeable therefor, then you will find for the defendant."

Redick & Briggs, for plaintiffs.

Mr. Poppleton and Mr. Woolworth, for defendant.

MILLER, Circuit Justice. I cannot give this request as drawn. There is evidence here which it ignores. It was evidently framed with the purpose of shutting out from the consideration of the case certain evidence introduced by the plaintiff. The credibility of that testimony is not for us to pass on. It is for the jury. The jury must be instructed upon the law as it stands on the whole of the evidence. The testimony which I refer to as not taken account of in the request is, that of the plaintiff tending to show that when the payment was made as for extra baggage, the defendant's agents knew that the carpet sack contained gold dust, and knowing that fact, charged for it only the rates usual for extra baggage.

I agree with the defendant's counsel that if Cahn introduced the gold into the coach secretly at Salt Lake, and attempted to get it carried for nothing, he was guilty of a gross fraud. If that were the whole of the case, he could not recover here. In this view of the case, it may upon the authorities be doubtful even whether it is incumbent to bring home to Cahn notice that the carrier would not be liable for gold thus carried. In that view the case would, without any evidence, show an intentional concealment in order to escape payment for a service rendered to the passenger by the carrier. That would be a fraud; and the law would not aid the party practising it. It would be a fraud by which the passenger, without payment, would secure an advantage, and if he could recover for a loss, it would be a great advantage. It would be forcing a contract on a carrier which he did not make.

The case of Orange County Bank v. Brown, 9 Wend. 116, is precisely in point. A traveller on a steamboat on the Hudson river took $11,250 to be carried for the plaintiff. He placed it in his trunk, which, with its contents, was lost on board. The plaintiff sought to recover the money as lost baggage. Mr. Justice Nelson, in an able opinion, held that this amount of money was too large to come under the head of "baggage," and that an attempt to have it carried free of reward under the cover of baggage was an imposition upon the carrier, and that he was deprived of his just compensation, and subjected to unknown risks by such devices.

But that case and the many others in which it has been followed, is distinguishable from this in the particulars which I have mentioned. Here there is evidence tending to show that the carrier knew that the baggage contained the gold. If he did, he was not deceived. Cahn may have intended to deceive and defraud him. If he did, he failed to do so. If the carrier knew that the carpet sack contained the gold, and took not the usual rates chargeable for gold, but only such as were chargeable for ordinary extra baggage, then he was not defrauded. The Orange County Bank Case proceeds throughout on a state of facts which, as the plaintiffs claim, differs from that shown here. Whether they are right, we must leave it to the jury to say. This instruction does not do so, and we cannot give it as requested.

The other matters referred to in the request are properly submitted to the jury. I will give the request modified according to the views I have expressed.

The jury returned a verdict for half of the sum claimed, thus dividing the loss between the parties.

Case No. 6,341.

HELLMAN v. UNITED STATES.

[15 Blatchf. 13.] [1]

Circuit Court, S. D. New York. July 1, 1878.[2]

TAX ON LEGACIES.

Under the provisions of sections 124 and 125 of the act of June 30, 1864 (13 Stat. 285–287), as amended by section 9 of the act of July 13, 1866 (14 Stat. 140), in relation to a tax on lega-

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

[2] [Affirming Case No. 15,343.]

cies and distributive shares of personal property, the tax on a pecuniary legacy accrues on the death of the testator, though not payable until the legatee becomes entitled to the benefit of the legacy. Therefore, where a testator died in 1869, leaving a will making pecuniary legacies, arising out of personal property, but the legatees did not become entitled to the benefit of the legacies until 1875, it was *held*, that the executor became liable at the latter date to pay the tax on the legacies, although the tax on legacies was repealed by section 3 of the act of July 14, 1870 (16 Stat. 256), from and after October 1, 1870, the liability of such executor being preserved by section 17 of said act of 1870.

This was a writ of error to the district court. The United States brought a suit at law in that court against Angelo Hellman, to recover $860, with interest from February, 1875. The complaint alleged, that, in September, 1869, one Bamberger died, leaving a will, whereby, after making specific legacies, he bequeathed the residue of his property to his executors in trust, and directed that his wife should have the income thereof for her life, and that after her death it should be invested until his youngest child, him surviving, should become of age, at which time his son Abraham was to have $10,000 of it, and the residue was to be divided among all his children, including Abraham, share and share alike; that his wife and his son Levi, and his son the defendant, were appointed by the will the executors and guardians of the infant children; that the defendant qualified and acted as executor, and had in his charge and trust, as such executor, the rest and remainder of the testator's personal property, for said purposes; that said personal property exceeded the sum of $1,000 in actual value; that the said wife died in March, 1871; that the testator's youngest child, him surviving, became of age in February, 1875; that the testator's children became entitled to the possession and enjoyment of the rest and remainder of said estate in February, 1875; that thereupon a tax or duty, at the rate of $1 for each and every $100 of the clear value of the rest and remainder of said personal property, became due and payable to the United States from the defendant; that the clear value of such rest and remainder, in February, 1875, was $86,000; and that the said tax or duty thereon was $860. The defendant demurred generally to the complaint. The district court overruled the demurrer and gave judgment for the plaintiffs. [Case No. 15,343.] The decision of that court (Blatchford, J.) was as follows: "I do not think the decision in Clapp v. Mason, 94 U. S. 589, covers this case. The facts in this case are like those in Mason v. Sargent [Case No. 9,253], and I concur with Judge Shepley in the views announced by him in his decision in that case. The defendant, being executor, is made liable or 'subject' to the tax, and was bound to pay it before paying over the legacies, after the legatees became entitled, in February, 1875, to the possession and enjoyment of the legacies. Judgment is ordered for the plaintiffs on the demurrer, with leave to the defendant to answer in 20 days, on payment of costs."

Siegmund Spingarn, for plaintiff in error.

Stewart L. Woodford, Dist. Atty., for defendants in error.

WAITE, Circuit Justice. The judgment in this case is affirmed. The distinction between taxes on legacies and taxes on successions is so clearly stated by Judge Shepley, of the First circuit, in Mason v. Sargent [supra], that it is only necessary to refer to that case as authority for this decision. In cases of succession, the right to the tax does not accrue until the successor becomes entitled to the possession or enjoyment of the estate to which he succeeds, but in cases of pecuniary legacies it accrues upon the death of the testator, though not payable until the legatee becomes entitled to the benefit of his legacy. Clapp v. Mason, 94 U. S. 589, was a case of a tax upon a succession.

HELLMAN (UNITED STATES v.). See Case No. 15,343.

Case No. 6,342.

In re HELLMAR.

[4 Sawy. 163;[1] 17 N. B. R. 362.]

District Court, D. Oregon. Jan. 17, 1877.

FEE FOR SERVING ORDER TO SHOW CAUSE—CARE OF BANKRUPT'S PROPERTY—INVENTORY OF BANKRUPT'S PROPERTY.

1. The order to show cause and the copy of the petition in involuntary bankruptcy constitute but one writ or process, and the marshal is not entitled to a fee and mileage for the service of each.

2. A charge of one dollar per hour for personal attention to bankrupt's property by the messenger must be at least supported by his own oath showing the fact of such attention and the necessity for it.

3. It is the duty of the messenger to care for and inventory the property of the bankrupt upon the most favorable terms for the estate, and, therefore, he will not be allowed one dollar per hour for time employed in making such inventory except upon proof that it was necessary.

[In bankruptcy. In the matter of F. L. Hellmar.] Exceptions by assignee to marshal's bill of fees.

Joseph Simon and M. W. Fechheimer, for assignee.

Rufus Mallory, for marshal.

DEADY, District Judge. On December 22, 1876, the marshal filed a statement of his fees in the above entitled case, amounting in the aggregate to $137.45, which was taxed and allowed by the clerk.

On the same day counsel for the assignee filed exceptions to the following items of the bill as taxed: (1) Service of order to show

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

cause, $4; and mileage to the Dalles, in serving the same, $11.50, because there is a previous charge in the bill for the same service; (2) Personal care of property from the evening of November 1 to the morning of November 2, fourteen hours, $14, because the marshal is not entitled to the same; and, (3) "Making inventory, two persons from seven a. m. to eight p. m. November 2, twenty-two hours, $22," because the same is unjust and excessive.

Immediately preceding the charge concerning the order to show cause, and under the same date, the bill contains a charge for serving a copy of the petition and mileage therefor, amounting in the aggregate to $14.50. Assuming that if the service of the order and copy of the petition constitute but one service, the charge should be made for serving the order with the copy, the exception will be considered as if made to the separate charge concerning the copy of the petition.

The additional fee for serving the copy of the petition accompanying the order to show cause was probably charged and taxed under the authority of In re Burnell [Case No. 2,171]. In that case, the court held that the fee for serving the copy of the petition was well charged. It is understood that the double mileage is charged upon the authority of paragraph 25 of section 820 of the Revised Statutes, which provides that when "more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs."

I think the exception well taken. The only provision under which the marshal can claim compensation for serving the order to show cause and copy of petition in an involuntary proceeding in bankruptcy, is general order No. 30, which provides that his fees under the bankrupt act [of 1867 (14 Stat. 517)] "shall be the same as are allowed for similar services," by section 829 of the Revised Statutes as modified by section 5126 of the same. The former section provides that the marshal shall receive "for service of any warrant, attachment, summons, capias or other writ, except execution, venire or a summons or subpoena for a witness, $2 for each person on whom service is made." Section 837 provides that the fees of the marshal of Oregon and Nevada shall be double the amount provided for like services elsewhere.

Upon the filing of a petition in bankruptcy by a creditor against a debtor, the court is authorized to make an order requiring the debtor to appear and show cause why the prayer of the petition should not be granted. In effect this order to show cause is the process in the case, the summons to the defendant, upon the due service of which the court acquires jurisdiction over him. With it, and as a part of it, the statute requires that the debtor shall be served with a copy of the petition, whereby he may be informed of what is alleged against him, and against which he is required to show cause. The service of the order without the copy of the petition would not give the court jurisdiction; it would not be a complete service of the process in the case. In this state, a copy of the complaint is required to be served with the summons in an action at law. Taken together, they constitute but one writ or process, and a substitute for the original writ at common law, which contained a full statement of the cause of action as set forth in the praecipe. 1 Chit. Pl. 240. So in this case, instead of the order to show cause reciting the allegations of the petition, it simply refers to it, form No. 57, and directs that a copy of it be served with the order. The order and copy are proper and necessary parts of one process to be served at one time, and upon the same person. Technically, then, there is no ground for treating them as distinct writs or processes, so as to authorize the marshal to charge a distinct fee for the service of each. Neither is there any reason, in fact, for such additional charge. The service of both papers is substantially one act, and the delivery of the copy of the petition devolves no additional labor or responsibility upon the marshal. There being, then, but one writ served in this case, there is no ground for charging more than one mileage for travel performed in serving it. But let it be conceded that the order and copy constitute two writs, still the case does not come within paragraph 25, supra, allowing double mileage in certain cases, because it does not appear that the marshal served more than two writs upon the debtor for the petitioning creditors at the same time. The service of two writs between the same parties at the same time is not sufficient to bring the case within the statute. There must be more than two to entitle the officer to compensation for travel on any two of them.

On the argument it was assumed that the services mentioned in the second of the above items was performed by a deputy, and it was objected that under section 5013 of the Revised Statutes no one is entitled to charge fees as a messenger in bankruptcy but the marshal himself, and, therefore, a deputy marshal cannot charge the fee of $1.00 per hour for the services mentioned in this item.

What a marshal does by his deputy he does by himself, and every deputy marshal charged with the execution of a warrant, or service of process in bankruptcy, is quoad hoc a messenger in bankruptcy. The "assistants" spoken of in section 5013, supra, are not deputy marshals, but such persons as a marshal or deputy in the execution of a warrant in bankruptcy may employ to assist him in the discharge of his duties; such as caring for or making an inventory of the bankrupt's property.

Section 5126 provides what fees the assignee shall pay to the marshal as messenger.

Among other things, he shall be paid "for custody of property, * * * his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable;" and his oath shall not be conclusive as to the necessity of such expenses.

Section 5127 of the Revised Statutes gives the justices of the supreme court power to prescribe fees for other services of the marshal, and to reduce those prescribed by section 5126, supra. Under this authority the justices have prescribed by general order number 31, that "the marshal shall be allowed for each hour actually and necessarily employed in personal attention in taking care of the bankrupt's property $1;" and the same for each hour "necessarily employed in making an inventory of" such property.

Taken together, the reasonable purport of these provisions seems to be that it is expected that a marshal or his deputy, in executing a warrant against a bankrupt's estate, shall have the care and custody of the property until the same is turned over to the assignee, and in the meantime may be called upon to employ a keeper or other person to give personal attention to the matter. But it does not follow that such expenses must be incurred in all instances, or even the majority of them. The services of a keeper can hardly be necessary in the case of an ordinary stock of goods secured in a storehouse, or if needed at all, that anything more is necessary than the committing of the key to some trusty person, who shall sleep in the building at night. And certainly, it can very seldom be necessary that the officer charged with the execution of the warrant shall give his personal attention to the matter, at the great cost to the estate of $1 per hour, when competent persons may ordinarily be employed at from $2.50 to $5 per day. And in any event, where the officer makes a charge for "personal attention in taking care of the bankrupt property," I think he ought, in analogy to the rule prescribed by section 5126, supra, in case of expense incurred for that purpose, show by his oath that such services were actually rendered, and the necessity for them.

This fee bill is neither signed nor verified by the officer, nor does it contain any statement showing the necessity of this personal attention to the property of the bankrupt. The exception to this item is allowed.

The third item is made up upon the assumption that persons employed by the messenger to make an inventory of the bankrupt's property, or assist him in so doing, are entitled to $1 per hour for their services. But this view of the matter is not sustained by general order number three, prescribing the compensation for the time employed in making the inventory, or the reason of the thing. The making of an inventory is a matter which usually requires nothing more than ordinary clerical labor, that can be obtained for much less than $1 per hour. The making of an inventory is an incident to that care and custody of the property which it is the duty of the marshal to provide, upon terms the most favorable to the estate. It is not contemplated that he should engage in it personally at an expense of $1 per hour to the estate, unless there is some positive necessity for so doing. This cannot ordinarily be the case, although it may often, if not always, happen, that he may be called upon to give some time in supervising or overlooking the work. Neither is this item supported by any proof. A charge by the marshal for time necessarily employed in making an inventory, ought, in analogy to the rule prescribed in section 5126, supra, to be at least supported by the oath of the officer as to the fact of the service, and the necessity for it.

This exception is allowed.

Case No. 6,343.

HELLRIGLE v. DULANY.

[4 Cranch, C. C. 473.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

JURISDICTION—AMOUNT OF VERDICT—OFFSETS.

If, in a suit in Alexandria, D. C., the debt be reduced below $50, by offsets, the plaintiff may have judgment for the sum found by the verdict.

Assumpsit for $466.25, for work and labor as overseer, gardener, carpenter, &c. Plea, non assumpsit and set-off, and account in bar, consisting of cash payments, and cash received for vegetables sold, &c. Verdict for plaintiff, for $23.12.

Mr. Neale, for defendant, moved for a nonsuit, because the damages found are below the jurisdiction of this court, and cited Maitland v. McDearman, 1 Va. Cas. 131; Minor v. Goodall, 3 Call, 393; Pitts v. Carpenter, 1 Wils. 19; Gross v. Fisher, 3 Wils. 48; Ferguson v. Highley, 2 Va. Cas. 255; Parker v. Elding, 1 East, 353; Neff v. Talbot, 1 Va. Cas. 140; Hepburn v. Lewis, 2 Call, 497; Newell v. Wood, 1 Munf. 555; U. S. v. McDowell, 4 Cranch [8 U. S.] 316; and the act of 1823 (enlarging the jurisdiction of justices of the peace), § 6 (3 Stat. 743).

Mr. Mason and Mr. Taylor, for plaintiff.

THE COURT rendered judgment for the plaintiff, after considering the following cases and authorities, viz.: Goddard v. Davis [Case No. 5,491], in this court, at Alexandria, July term, 1801; Rutter v. Merchant [Id. 12,179], at the same term; McKnight v. Ramsay [Id. 8,868], at Alexandria, Oct., 1801; Ridgway v. Pancost [Id. 11,818], at Alexandria, April, 1802; Curry v. Fletcher [Id.

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

3,490], at Washington, Dec., 1802; Beale v. Voss [Id. 1,160], at Washington, July term, 1804; Acts Md. 1729, c. 20, § 5; the British statute of 2 Geo. II., c. 22, § 13; Acts Md. 1785, c. 4, § 7; Id. c. 87, § 2; Acts Md. 1791, c. 68, § 9; Hays v. Bell [Case No. 6,270], at Alexandria, July, 1807; McLaughlin v. Stelle [Id. 8,873], at Washington, June, 1808; Smith v. Queen [Id. 13,096], at Washington, June, 1808; Bryan v. Davis [Id. 2,065], at Washington, June, 1810; Skinner v. Caffrey [Id. 12,924], at Washington, Dec., 1819; Cazenove v. Darrell [Id. 2,539], at Alexandria, Nov., 1823; Hooe v. Rees [Id. 6,668], at Alexandria, May, 1824; Burton v. Varnum [Id. 2,220], at Washington, Dec., 1824; Davidson v. Burr [Id. 3,602], at Washington, Dec., 1824; Pitts v. Carpenter, 2 Strange, 1191.

Case No. 6,344.

HELLRIGLE v. OULD.

[4 Cranch, C. C. 72.] [1]

Circuit Court, District of Columbia. May Term, 1830.

SALE FOR TAXES—POWER OF COLLECTOR — WASHINGTON, D. C.

1. In 1828, city lots in Washington, D. C., could not be sold for taxes due to the corporation, if there was upon them personal property sufficient to pay the taxes. The charter of 1820, was the only authority under which such lots could be sold, and that act does not, in such case, authorize the sale, by the collector, even with the assent of the person to whom they are assessed, or even with the assent of the true owner.

2. The collector could not sell the fee-simple, if the tenant was tenant for life only, and if the estate for life was of sufficient value to pay the taxes.

3. Quaere, whether the tenant in whose name a lot is assessed, can, by suffering the taxes to accumulate, get a better title than he had before, by a collector's sale for his own default.

Ejectment for lot No. 7, in the square No. 320, in the city of Washington. The plaintiffs claimed as heirs or devisees of Philip Hellrigle. The defendant [Henry Ould] claimed under a tax-sale.

The cause was tried on the 27th and 28th of May, 1830, when Mr. Key and Mr. Marbury, for plaintiffs, prayed the court to instruct the jury, that the defendant gained no title under the collector's sale given by him in evidence.

The question was fully argued by Mr. Coxe and Mr. Jones, for defendant, and by Mr. Key and Mr. Marbury, for the plaintiffs, and the court being about to deliver the following opinion, in which the judges were unanimous, the parties came to a compromise.

OPINION OF THE COURT. The question is, whether the heirs of Philip Hellrigle were divested of their legal estate in the lot in question, by a sale made in the year 1828, by the collector of taxes for the city of Washington, under the following circumstances. Some time between the years 1820 and 1824, the lot was sold by a collector of taxes in Washington, for taxes assessed to "the heirs of Hellrigle," and was purchased by Mr. James M. Varnum, who obtained a deed for the same from the mayor, and sold it to another, under whom the present defendant entered and built a house on the lot. That sale was void by reason of some irregularity in the proceedings. Subsequent taxes were assessed upon the lot, in the name of the defendant, which he did not pay, but authorized the collector, in writing, to sell the same, although there was personal property enough, of his own, upon the lot, to pay them; and at the same time avowed his purpose to be to cure a defect in his title. The sale was accordingly made after the passing of the act of congress of the 26th of May, 1824 (4 Stat. 43), the same having been advertised agreeably to the second section of that act, in which advertisement the name of the defendant was stated as the name of the person to whom the same was assessed on the books of the corporation. At that sale the defendant became the purchaser; and the property, not having been redeemed within the two years allowed by the act of 1820, § 10 [3 Stat. 589], he obtained a deed in fee form from the mayor under the seal of the corporation of Washington. At the time of the said assignment and advertisement and sale respectively, the legal estate was in Barbara Hellrigle, the widow of Philip, as tenant for life under the last will of her husband, the remainder in fee having descended upon the lessors of the plaintiffs, some of whom were, and yet are minors, under the age of twenty-one years; and who have, therefore, a right still to redeem under the tenth section of the act of 1820, and the sixth section of that of 1824. The lot could have been leased for five or six dollars a month, and the amount of taxes due at the time of sale was ten dollars. The widow died some months after the sale. The whole lot was sold to the defendant himself for the exact amount of the taxes due upon it and the expenses of sale. The question is, whether this sale divested the lessors of the plaintiff of their title? The act of 15th May, 1820, is the only act which authorizes the sale. The lot could not have been lawfully sold by the collector, under that act, if there was upon it personal property of sufficient value to pay the taxes. That act does not authorize it to be sold by the collector, in such case, even with the assent of the person to whom it should be assessed; nor even with the assent of the true owner. The assent, indeed, of the true owner might have barred himself from controverting the validity of the sale; so the assent of the person in whose name it is assessed is, perhaps, sufficient to bar him, but not the true owner, nor any other person. The sale, therefore, was void.

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

as to the true owner; not because it was not assessed or advertised in the name of the lawful owner, nor by reason of the amount of taxes due thereon not being correctly stated, which are the only irregularities cured by the second section of the act of 1824; but because the lot itself was not liable to be sold.

Again. The lot, that is, the fee-simple estate in the lot, could not be sold, when there was a tenant for life, whose estate was sufficient to defray the taxes thereon. The 10th section contains an express prohibition to that effect. "Provided also, that no sale shall be made, in pursuance of this section, of any improved property, whereon there is personal property of sufficient value to pay the said taxes." "And provided, moreover, that where the estate of the tenant in default, as for years, or for life or lives, shall be sufficient to defray the taxes chargeable thereupon, such estate only shall be liable to be sold under the provisions of this act." It is said that the officers of the corporation did not know that there was such a tenancy for life, as the will, under which it was claimed, was made in Bladensburgh, (out of this district,) and proved in Alexandria, where the testator died and had assets. But the prohibition has no exception in such a case. If the corporation sell, they sell at their peril. They are bound to inquire what kind of an estate the person has, to whom they assess the taxes, before they proceed to sell. If the fact was, at the time of sale, that there was a tenant for life, whose estate was sufficient to defray the taxes chargeable thereupon, that estate only could be sold.

Again. The person in whose name the property is assessed may be considered prima facie the true owner until the contrary appears. The defendant in the present case has submitted to the assessment, and admitted that he is the person chargeable with the tax, and for whose default the lot was sold, by giving his assent that it should be sold, although there was upon the lot, at the time of sale, personal property, of sufficient value to pay the taxes then due. Can a person, by suffering a lot to be sold for his own default, and becoming the purchaser at the sale, get a better title than he had before? This is an important question, which the court, at present, is not prepared to answer; and as the opinion, upon either of the two former points, is decisive of the question submitted, the court will not undertake to decide the latter until its decision shall become necessary.

HELMBOLD (WHEELER v.). See Case No. 17,496.

HELMS (SWEETSER v.). See Case No. 13,689.

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

HELRIGGLE (UNITED STATES v.). See Case No. 15,344.

Case No. 6,345.

The HELVETIA.

[6 Ben. 51.] [1]

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

CUSTOMS DUTIES—PENALTY—GOODS NOT ON MANIFEST.

A steamship arrived in the port of New York from England. Certain articles subject to duty were found on board of her after her arrival, concealed in the purser's room and in the ship's storeroom, which had been brought in her from England, and which were not entered on the ship's manifest. The master of the vessel testified that he made up the manifest; that he had no knowledge or information, at any time, that the goods were in the vessel; and that he took all precautions in his power to prevent smuggling. A libel was filed against the ship and the master to recover the value of the goods, but the suit was discontinued against the master: *Held*, that, under the 23d and 24th sections of the act of March 2, 1799 (1 Stat. 644), and the 8th section of the act of July 18, 1866 (14 Stat. 180), the vessel had incurred a penalty to the amount of the value of the goods, which could be enforced against the vessel, even though it had not been enforced against the master; and that the facts stated by the master did not bring the case within the proviso in the 24th section of the act of 1799.

[Cited in The Sidonian, 38 Fed. 442.]

In admiralty.

H. E. Davies, Jr., Asst. Dist. Atty., for United States.

C. Donohue and J. Chetwood, for claimants.

BLATCHFORD, District Judge.. The libel, in this case, is brought by the United States, and alleges that the steamship Helvetia, within this district, and on waters navigable from the sea by vessels of ten or more tons burden, was seized by the collector of the port of New York, for breach of the revenue laws of the United States, and that this suit is brought against the said vessel and against Archibald Thomson, her master, in a cause of forfeiture, on the ground that, on the fifteenth of November, 1869, at the port of New York, certain goods, wares and merchandise, which are enumerated, of the value of $654 92, were imported and brought into the United States in said vessel, of which said Thomson was master, from a foreign port or place, and were not included in the manifest on board, as required by the 23d section of the act of March 2, 1799 (1 Stat. 644), contrary to the 24th section of said act, whereby said master forfeited and became liable to pay to the United States the said sum of $654 92, as the value of said goods; and that, by reason thereof, and by force of the 8th section of the act of July 18, 1866 (14 Stat. 180), said vessel became holden for the payment of said penalty against said master, and became liable to be seized and proceeded against summarily, by libel, to recover the same, in this court. The libel prays for a decree for said forfeiture against Thomson and

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

against the vessel, for said sum of $654 92, as a lien thereon, and that the vessel be condemned for the same and sold to satisfy said lien.

The answer of the claimants of the vessel denies all the statements of the libel, and alleges that the master was not guilty of any fraud or negligence, or other act or omission for which he was liable to the penalty sued for. It also excepts to the libel on the grounds (1), that the libel does not set up or show a cause of action against the steamer; (2) that it does not set up or show a cause of action cognizable in this court; (3) that it does not set up or show that the master or the owners of the vessel, or either of them, has or have been convicted or held liable for any penalty, or that they have evaded service of process, or cannot be served therewith. It also denies the jurisdiction of this court to enforce the penalty in admiralty. The suit has been discontinued as respects the master.

As testimony in the case, there is a written admission that one Chalker "will prove that he was an officer of the United States, that, from information which he received, he searched the steamship Helvetia on the 15th of November, 1869, and found concealed on board of said vessel, in the purser's room, and in the ship's storeroom, in barrels which he was told contained provisions, and which appeared to contain them, and in other places, hidden away and concealed, the articles specified in the list annexed, which are subject to duty under the laws of the United States; that said articles had been brought from England in said steamer by the purser of said steamer, into the United States, concealed as stated; and that neither of the articles in the list was or were entered on the manifest of the vessel, and that the articles in the annexed list are of the value of $654 92, in this market; that said search was made and the said goods seized, and the said vessel also seized, upon waters navigable from the sea by vessels of ten tons and upwards, and within the admiralty and maritime jurisdiction of the United States, and within the Southern district of New York." There is also a written admission that Captain Archibald Thomson "will swear that he was master of the steamship Helvetia, on the voyage in question, that he made up the manifest of the vessel, that the goods in question were not on it, that he had no knowledge or information, at any time, that said goods were on the vessel, and that he took all precautions in his power to prevent smuggling."

The 23d and 24th sections of the act of March 2, 1799 (1 Stat. 645, 646), taken in connection with the 8th and 25th sections of the act of July 18, 1866 (14 Stat. 180, 184), provide, that no goods shall be brought into the United States from any foreign port, in any vessel, unless the master shall have on board a manifest in writing, containing a just and particular account of all the goods laden or taken on board, whether in packages or stowed loose, and that, if any goods shall be imported in any vessel, from any foreign port, without having such a manifest on board, or which shall not be included or described therein, or shall not agree therewith, in every such case the master shall forfeit and pay a sum of money equal to the value of the goods not included in the manifest, and that the vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily, by libel, to recover such penalty, in any district court in the United States having jurisdiction of the offence; provided, that, if it shall be made to appear to the satisfaction of the court in which a trial shall be had concerning such forfeiture "that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master," and that the manifest was incorrect by mistake, such forfeiture shall not be incurred.

It was held by this court in the case of U. S. v. The Queen [Case No. 16,107], and has been held by the circuit court for the Eastern district of New York, in the case of U. S. v. The Missouri [Id. 15,785], on appeal, that a proceeding in admiralty for the enforcement in this case of the penalty against the vessel is proper. It was also held by this court, in the case of The Queen, that a decree for the penalty could be rendered against the vessel, even though the penalty were not in fact enforced against the master. It was held by the district court for the Eastern district of New York in the case of The Missouri [Id. 9,652], that proceedings against the vessel, under the act, could be taken in the absence of any proceeding against the master or owner, and the circuit court, on appeal, concurred in that view.

The only other point to be considered is, whether the fact that the master "had no knowledge or information at any time that said goods were on the vessel, and that he took all precautions in his power to prevent smuggling," affects what is otherwise a clear right to a recovery on the part of the United States against the vessel. I understand the circuit court, in the case of The Missouri (above cited), to have declined to adopt the proposition that a master can, in all cases, protect himself from the penalty and save the vessel from liability, by proof that he had not actual knowledge that the goods were on board. It says: "The statute makes no qualification. It declares that, if the goods are imported or brought in, and do not appear on the manifest, the forfeiture is incurred." The fact that the proviso to the 24th section of the act of 1799 specifies certain cases in which the forfeiture shall not be incurred, taken in connection with the unqualified language preceding such proviso, is conclusive evidence to my mind that the forfeiture is to be incurred in all cases within such language where the excusatory condi-

tions of the proviso are not complied with. Showing that the master "had no knowledge or information" that the goods were on the vessel, does not tend to make it appear affirmatively, to the satisfaction of the court, that the manifest was "incorrect by mistake," and was not incorrect by negligence, or that the want of knowledge or want of information was not itself negligent or even designed. The statement that the "master took all precautions in his power to prevent smuggling," is very vague. It imports no fact. He may have taken all precautions in his power, and yet have taken no precautions whatever, because disabled from some cause from exercising at the time any power to take precautions. The goods were found concealed in barrels which appeared to contain provisions, "and in other places." They consisted of silk in pieces, shawls, opera cloaks, silk umbrellas and other dry goods. It would seem that, if a searching officer found the goods, the master of the vessel ought to be able to show some better reason for not knowing or being informed that the goods were in the places where they were found, than merely that he had no such knowledge or information, and the general statement that he took all precautions in his power to prevent smuggling, if it is desired that the court shall be satisfied affirmatively that the manifest was "incorrect by mistake." But, further, there is no compliance with the other part of the proviso, by making it appear that no part of the cargo of the vessel was unshipped, after it was taken on board, except such as was particularly specified and accounted for in the report of the master.

There must be a decree against the vessel for the $654 92, with costs.

Case No. 6,346.

Ex parte HEMENWAY.

In re STEVENS.

[2 Lowell, 496.] [1]

District Court, D. Massachusetts. Oct., 1876.

TENANT'S FIXTURES.

1. A tenant, who substitutes some fixtures for others, still serviceable, belonging to the landlord, cannot remove them at the expiration of the lease, without accounting to the landlord for those which he removed.

[Cited in Rosenau v. Syring (Or.) 35 Pac. 845.]

2. The right of the tenant to remove fixtures is not lost by non-payment of rent and notice to quit, but only by quitting. If the landlord has prevented the removal by an attachment of the fixtures, the right is not lost even by leaving the premises.

3. A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures.

A special case was submitted to the court respecting the title to certain gas fixtures and bar-room fixtures, situated in the Marlborough Hotel, on Washington street, as between the landlord and the tenant's assignee in bankruptcy. The fixtures of the bar-room had been put in by a former tenant, who held under a written lease not produced in evidence, and the premises had been transferred by him, during his term, and from one tenant to another, and at last to the bankrupt; and each tenant had sold and transferred to his successor, by a bill of sale, all his furniture and fixtures, but without a particular description or a schedule. The original term expired, and no new lease was given; but the several successive tenants held on under parol tenancies, without any agreement with the landlord as to fixtures. Before the bankruptcy of [Nelson B.] Stevens, the landlord had notified him to quit, and had obtained possession of the premises; but, some days before the notice to quit, the landlord had laid an attachment on whatever chattels belonged to the tenant, not specifying what they were. The gas fixtures had been substituted by a former tenant for others belonging to the landlord, for which the tenant had never accounted. It was admitted at the hearing that a part of the fixtures of the bar-room were mere chattels, which belonged to the assignee; but the bar or counter, and certain things annexed to it, were in the nature of tenant's fixtures, which, it was agreed, might have been removed during his term by the tenant who put them in; but the question was, whether that right ever inured to the bankrupt, and, if so, whether he lost it when he lost his tenancy.

J. F. Barrett, for landlord.

R. Stone, Jr., for assignee.

LOWELL, District Judge. The gas fixtures come fairly within the intimation of the court in Whiting v. Brastow, 4 Pick. 310, where it is said: "A padlock can in no sense be called a fixture, for it can be taken away without injuring or defacing the building If put there by the landlord, or by the tenant in lieu of one found there, it would be the landlord's property, though not a fixture." It is proved or admitted that the gas fixtures were put there in lieu of those which the landlord had, and not because they were worn out, but that the tenant preferred a different style and appearance, perhaps more modern. The principle would not be of very extensive application, but in such a case as this the clear presumption is, that the tenant gave these fixtures to his landlord, instead of those which he took out and failed to account for.

As to the counter and its appurtenances, the first question is, whether, by the expiration of the term of the original lease, these fixtures became dedicated to the landlord, so that the bankrupt acquired no property in

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

them; and the second, whether, if he had a title, it was lost before the bankruptcy.

Taking the second question first, it was admitted that the landlord's attachment was intended to hold whatever belonged to the tenant, and that any attempt on his part to remove fixtures would have been resisted by the officer, in due pursuance of his precept. The attachment having been laid by the landlord himself before the notice to quit, and having been dissolved by the bankruptcy, the assignee should be in no worse position than the bankrupt was in on the day that he quitted possession. Did the forfeiture or loss of the tenancy by non-payment of rent and notice to quit destroy the right to sever and remove the fixtures? Mr. Taylor, in a note to the latest edition of his valuable work on Landlord and Tenant, says, in general terms, that the right is determined by an entry for condition broken. Tayl. Landl. & Ten. (6th Ed.) § 551, note 2. Only one of the cases which he cites supports the proposition, or indeed touches on the point at all.[2] That case is Whipley v. Dewey, 8 Cal. 36, in which a tenant, some time after his tenancy was ended, undertook to remove buildings, which, by the agreement between him and his landlord, were removable. The true ground of decision appears to be that the right was lost by laches or non-user. The learned judge who delivered the opinion of the court says that it is well settled that a tenant cannot remove erections made by him on the premises after a forfeiture or re-entry for condition broken. He cites no cases, and I have found none, to support that doctrine, unless in the same sense that no tenant can remove fixtures after his tenancy is out, which, perhaps, is all that is intended.

In Weeton v. Woodcock, 7 Mees. & W. 14, the lease was to be forfeited by bankruptcy. The tenant became bankrupt, and the landlord entered; and the assignees, three weeks after, sold the fixtures. The jury found that they had not sold them within a reasonable time; and the court sustained the verdict for the landlord with a semble or suggestion, in the opinion of Alderson, B., that perhaps the assignee's title was lost as soon as the entry was made. In the later case of Stansfeld v. Mayor, etc., of Portsmouth, 4 C. B. (N. S.) 120, this subject was thoroughly argued at the bar. The lease there contained an agreement that certain machinery should belong to the landlord, and machinery of all other kinds to the tenant; and the court held that the assignees of the tenant could remove his part of the machinery, though the lease was forfeited by the bankruptcy and the landlord had re-entered. They avoided deciding the point as a general one, and put it on the stipulation of the lease, or, rather, on the fact that there was such a stipulation; for there was no very apparent difference between the covenant and what the law would have been without it, its true object being merely to point out which of the fixtures belonged to the one party and which to the other. If this decision is followed in England, it will probably lead to the enunciation of a general principle in favor of the tenant.

These are the only decisions I have had time to find, and none others have been cited to me. I am of opinion that by the law of Massachusetts the right to remove fixtures is not absolutely lost by non-payment of rent and notice to quit, and I say it with no particle of doubt. I will not dwell upon the great injustice which might be worked, especially to a tenant's creditors, if this were the law: they are obvious, and are of themselves enough to make such a rule odious, and I had almost said impossible. It will be observed that here the attachment, which effectually prevented any dealing with the fixtures, was before the notice to quit; and, therefore, to save this part of the case to the landlord, his contention must be that no tenant whose rent is in arrear can take out his fixtures, which will hardly be argued; and, besides, this was not a case of forfeiture for condition broken, but of termination of tenancy by a statutory notice. My own opinion is, that for non-payment of rent the landlord, in case of an oral demise, has his statutory right to recover the premises, and to sue and attach the property of his tenant, and that these are his only remedies, unless the tenant, having an opportunity to remove his fixtures, chooses to leave them behind him when he goes out.

Whether the fixtures were surrendered before the bankrupt's holding began, is the only remaining question. It is clear that the lessee who put up these fixtures could assign them, as he did, during his term. It is equally clear that any number of successive parol occupancies from year to year, or from month to month, by the same tenant, make up, when they are past, but one tenancy. Birch v. Wright, 1 Term R. 380; Rex v. Inhabitants of Herstmonceaux, 7 Barn. & C. 551, per Bayley, J. And the successor of such a tenant, in the absence of evidence of any new or different contract with him, succeeds to the duties and the rights of his predecessor. Buckworth v. Simpson, 1 Cromp. M. & R. 834. So that the true point is, whether, by the expiration of the term of the written lease, the then tenant, by holding over and continuing under terms and conditions not given in evidence, and therefore to be taken to be those of the written lease so far as applicable, lost his right or privilege to remove the fixtures which had been put in during the term of the written lease. It has been decided that a mere holding over of a tenancy from year to year does not affect the tenant's right in this respect, and that so long as he holds under a fair claim of right as tenant he preserves his privilege. See Penton v. Robart, 2 East, 88,

[2] One other case refers to emblements, but they do not seem to me very closely analogous to fixtures. Davis v. Eyton, 7 Bing. 154.

and the remarks in Roffey v. Henderson, 17 Q. B. 574; Heap v. Barton, 12 C. B. 274; Minshall v. Lloyd, 2 Mees. & W. 450; Weeton v. Woodcock, 7 Mees. & W. 14.

On the other hand, it has been decided that one who accepts a new written lease of the same premises, with their buildings, &c., from his landlord, on the expiration of his former tenancy, has impliedly admitted that the fixtures, of which he accepts a demise, belong to the lessor. Loughran v. Ross, 45 N. Y. 792. Another case is sometimes cited for this proposition (Shepard v. Spaulding, 4 Metc. [Mass.] 416), but in that case the tenant had made a written surrender to the landlord, who held the premises for some years, and afterwards let them to one who let them to the original tenant; and it was held that the tenant could not afterwards remove a building which he had put up during his first term.

Both these cases turn on the intent to be derived from a written instrument, and do not govern the case of a mere holding over. Upon that the following dictum is more pertinent: "If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and, I take it, he would be entitled to remove fixtures during the year." Per Woodward, J., in Davis v. Moss, 38 Pa. St. (2 Wright) 353. Those cases, I say, turn on the implied agreement of the parties; and this case finds "there was never any agreement between the landlord and tenants who succeeded said Meserve or said Roberts & Champlin in respect to said fixtures," and goes on to say that bills of sale were made of the chattels and fixtures from one tenant to the next, but without any notice to the landlord.

Under these circumstances, I am of opinion that the fixtures of the bar-room were never surrendered to the landlord. It was said that each tenant should have severed the fixtures when he sold his lease, or whatever he did sell, and the new tenant should have reannexed them. But the law does not compel vain and useless trouble and expense. If that would have saved the right, I am clear that it was saved without it.

Judgment, that the landlord owns the gas fixtures, and the assignee those of the bar-room.

HEMENWAY (BAKER v.). See Case No. 770.

HEMENWAY (WOPE v.). See Case No. 18,042.

HEMINGWAY (FIREMEN'S INS. CO. v.). See Case No. 4,797.

HEMMER (UNITED STATES v.). See Case No. 15,345.

HEMPFIELD R. CO. (FOX v.). See Cases Nos. 5,010 and 5,011.

Case No. 6,346a.

HEMPHILL v. DIXON.

[Hempst. 235.] [1]

Superior Court, Territory of Arkansas. Feb., 1834.

BILL OF SALE—SUBSCRIBING WITNESS—PROOF OF SIGNATURE—EVIDENCE.

Where there were two subscribing witnesses to a bill of sale, and the handwriting of one beyond the jurisdiction of the court was proved, and the other testified to the genuineness of his own signature, although he said he had no recollection of the bill of sale, *held*, that it should have been admitted in evidence.

Appeal from Clark circuit court in an action of detinue [by John L. Hemphill against Mary Dixon].

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. The record presents but a single question, which appears from the bill of exceptions to the opinion of the circuit court, rejecting a bill of sale offered in evidence by the plaintiff, on the ground that its execution was not sufficiently proved. Morgan Cryer and James Cummins were subscribing witnesses to the bill of sale offered as evidence. Morgan Cryer being examined as a witness, stated "that his name, as subscribed as a witness to the bill of sale, was his handwriting, and that the name of James Cummins, the other subscribing witness, was the handwriting of said Cummins; that said James Cummins was in Texas about a month ago, having removed there several years ago; that affiant had no recollection of said bill of sale except the identity of his handwriting." Whereupon the court decided that the execution of the bill of sale had not been sufficiently proved, and refused to permit the same to be read to the jury. We think this decision was erroneous. The supreme court of the United States in the case of Lessee of Clarke v. Courtney, 5 Pet. [30 U. S.] 319, said: "In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. When he is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the next best secondary evidence is the proof of his handwriting, and that, when proved, affords prima facie evidence of a due execution of the instrument."

In the case before the court, there were two subscribing witnesses to the bill of sale offered in evidence, one of whom stated upon his examination that his name as subscribed as a witness, was in his handwriting; that the name of the other subscribing witness, James Cummins, was the handwriting of Cummins, and that Cummins was in

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

Texas, beyond the jurisdiction of the court. The non-production of the witness who was beyond the jurisdiction being satisfactorily accounted for, proof of his handwriting was properly received, and such proof, taken in connection with the testimony of Morgan Cryer the other subscribing witness to the instrument, afforded, in our opinion, prima facie evidence of the due execution of the bill of sale offered in evidence, and the same ought to have been read to the jury. Morgan Cryer stating that he had no recollection of the bill of sale, except the identity of his handwriting, presents, it is true, some difficulty; but still we think there was prima facie evidence of the due execution of the bill of sale, so far, at least, as to authorize it to be given in evidence to the jury.

Judgment reversed.

Case No. 6,347.

HEMSTEAD v. COLBURN.

[5 Cranch, C. C. 655.] [1]

Circuit Court, District of Columbia. March Term, 1840.

REPLEVIN—PLEA OF PROPERTY—JUDGMENT—BOND—DAMAGES.

1. In actions of replevin, in all cases where judgment is to be entered up for the defendant, it should be for a return.

2. If, in replevin, upon the plea of property in the defendant, the jury find for the defendant and assess his damages to the value of the goods replevied, the defendant may still maintain an action upon the replevin-bond, and recover damages beyond the value of the goods.

Debt on a replevin-bond, in the penalty of $150.

Mr. Marbury, for plaintiff [Zadock Hemstead], moved the court to order the clerk to extend the judgment in the action of replevin, so as to include a judgment for a return, the verdict having been for the defendant [James Colburn], in the action upon the plea of property, with $81 damages.

After some conversation between the bench and the bar upon the question of practice, THE COURT said, that in all cases where judgment is to be entered up for the defendant in replevin, it should include a judgment for a return of the property; CRANCH, C. J., doubting as to cases of non-pros of the plaintiff after declaration. Gilb. Dist. (Ed. 1757) pp. 231, 232 (Dublin Ed. 1792, p. 167); Bro. Retorn de Avers, pl. 33; Dyer, 280, pl. 14.

Mr. Marbury then offered to read in evidence to the jury the proceedings in the replevin; and the verdict for the defendant in replevin (the present plaintiff) for $81 damages, being the amount of the appraisement of the goods.

Mr. Redin, contra, objected to his reading the appraisement to show that the $81 damages were given for the value of the goods, and not for general damages for replevying the goods.

THE COURT permitted the appraisement to be read for that purpose.

Mr. Marbury then offered to give evidence of damages over and above the value of the goods replevied; and contended that the jury in replevin cannot give damages for the detention by the replevin, nor for any injury or loss occasioned thereby subsequent to the replevin. These are all covered by the condition of the bond, and can only be recovered by an action upon the bond. Hopewell v. Price, 2 Har. & G. 275.

Mr. Redin, contra. It does not appear for what the damages were given. They did not merely find the value of the goods under the statute, but have given damages for which the defendant in replevin had judgment, and cannot recover damages again upon the bond. If the plaintiff in replevin had become nonsuit the defendant could not have recovered damages against him, but if upon a plea of property the defendant recovers damages, it is conclusive, and no further damages can be recovered upon the bond.

THE COURT (MORSELL, Circuit Judge, contra, and CRANCH, Chief Judge, doubting) permitted Mr. Marbury to give evidence of damages consequent upon the replevin.

Verdict for plaintiff. Damages $150.

HEMPSTONE (CLARKE v.). See Case No. 2,853.

Case No. 6,348.

HENCKLEY v. HENDRICKSON et al.

[5 McLean, 170.] [1]

Circuit Court, D. Ohio. Oct. Term, 1850.

CONTRACT—FRAUD—PRICE—TRIAL—SURPRISE.

1. Fraud is not to be presumed, though it may be proved by circumstances.

2. To disaffirm a contract, the property must be returned, if practicable.

[Cited in Mallory v. Leach, 35 Vt. 172.]

3. Notes being misdescribed in the declaration, the plaintiff may recover on his general counts. In such case he can only recover the value of the property, in the market.

4. When there is no unfairness, the price agreed upon, though extravagant, must be paid.

5. The value of the thing in the market is the rule, no price being fixed.

[Cited in Trunkey v. Hedstrom, 131 Ill. 205, 23 N. E. 587.]

6. Letters of one of the defendants being read on the trial, is no ground for surprise, for which a new trial can be granted.

[This was an action by Samuel R. Henckley against William H. Hendrickson and

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

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

Campbell for damages for breach of contract.]

Mr. Mills, for plaintiff.
Stanbery & Campbell, for defendants.

OPINION OF THE COURT. This suit is founded on the sale of a certain stock of hogs represented to have been imported, and which were sold to the defendants at high prices; one rated at one thousand dollars, another at five hundred dollars. Notes were given for the purchase, on a part of which this suit is brought, amounting to twenty-one hundred dollars. The notes were proved on the trial, before the jury. But they having been misdescribed in the declaration, were objected to, when offered in evidence, and the court sustained the objection. The plaintiff then proceeded on his general counts. The sale was made by Anthony B. Allen, the agent of the plaintiff, to the defendants. In the defence, fraud was alleged, and that the hogs were of little value; some one or two of them, for which a high price was paid, were of no value. One of the witnesses stated that he could have purchased as good a stock for thirty dollars per head. Proof was offered of the representations of the value of the hogs by the agent, at the time of the sale, to which an objection was made; but the court permitted so far as the representations were made by the agent, at the time of the sale, as a part of the res gestae. Several depositions were taken under a notice in pursuance of the statute of the state, at the taking of which the counsel on both sides were present. The plaintiff's counsel left before the last witness was examined, with the understanding that the witness would only be examined on the same points on which the other witnesses testified. But the examination was on other points. The court held, on objection being made, that the deposition could be read only as taken by consent, to obviate the expense of bringing the witnesses to court; but that the latter part of the deposition objected to, could not be read, except by consent of the parties; consent being given, the whole deposition was read. Allen's deposition being read, proved his agency, and that he purchased the hogs with the money of the plaintiff, in England. The notes given were transferred to the plaintiff.

The court instructed the jury that fraud could not be presumed, but that it might be proved by circumstances. That to disaffirm the contract, it was necessary for the defendants to return the property to the vendor, or offer to return it. But where this is not done, and fraud exists, the plaintiff can only recover what the property is worth. The prices appeared to be extravagant, but it was for the jury to say what was the value of the stock, as it was generally estimated in the country. That the true inquiry was, what was the stock really worth in the market. It appears that about this time an extravagant estimate was placed upon this description of stock, and from the letters of one of the defendants read in evidence, his estimate of the value of the property, some time after the purchase, was at least equal to the price he agreed to pay, and that he contemplated a large profit from the contract. The estimate is very different now from what it was then. And it will be for the jury to inquire whether the agent of the plaintiff conduced in any degree, by false representations of the value of the stock, to mislead the defendants. Where no fraud or misrepresentation has been used in the sale of an article, the price agreed upon must be paid, if no unfair means were resorted to, to produce such a result.

The jury returned a verdict for the plaintiff. A motion for a new trial was made on several grounds; among others, that the defendants were surprised at the introduction of the letters of the defendants, speaking of the hogs as of great value, and recommending them to others, &c. But the court overruled the motion, on the ground that there could be no surprise from the letters written by one of the defendants. And that the verdict could not be said to be against the evidence. Judgment on the verdict.

[The defendants subsequently filed a bill in equity seeking relief from this judgment. The bill was dismissed. Case No. 6,357. And, upon appeal by the complainant to the supreme court, the decree dismissing the bill was affirmed. 17 How. (58 U. S.) 443.]

Case No. 6,349.

Ex parte HENDERSON.[1]

Circuit Court, D. Kentucky. May 24, 1878.

COURTS-MARTIAL — JURISDICTION OVER CONTRACTORS FOR MILITARY SUPPLIES — CONSTITUTIONAL LAW — CONSTRUCTION OF STATUTES — HABEAS CORPUS.

[1. The act of March 2, 1863, "to prevent and punish frauds upon the government," and which declares that certain persons therein enumerated, including "contractors," agents, paymasters, etc., shall be subject to trial by court-martial for the frauds therein specified, is expressly limited to persons in the land or naval forces, or in the militia, in the actual service of the United States; and it gives no power to try by court-martial a mere contractor to furnish supplies to the government for the use of the military service.]

[2. The provision contained in the sixteenth section of the act of July 17, 1862, that "any person who shall contract to furnish supplies of any kind or description for the army or navy, shall be deemed and taken as a part of the land or naval forces of the United States for which he shall contract to furnish said supplies," is unconstitutional, in so far as it would operate to subject a contractor to trial by court-martial.]

[3. If not unconstitutional, the provision, by its terms, only makes contractors subject to trial by court-martial for fraud or willful neglect of duty in connection with their contracts, and not for offenses unconnected therewith.]

[1] [Not previously reported.]

[4. The expressions "army and navy" and "land and naval forces" are used in this section, in their strictly constitutional and legal sense, and mean the regular army and navy, and do not include the militia; and hence a charge that defendant was engaged in furnishing supplies "for the military services" is indefinite, and states no offense, for it does not exclude the idea that he may have been engaged in furnishing supplies for the militia, in which case he would not come within the terms of the act.]

[5. In a trial by court-martial the charges cannot be so amended after arraignment as to entirely obliterate the original specifications and insert new ones describing wholly different offences; and hence, where the prisoner, pending his trial, seeks relief from a civil court by habeas corpus, and the charges are found wholly insufficient to show jurisdiction in the court-martial, a discharge will be granted.]

[This was a petition by Isham Henderson for a writ of habeas corpus.]

OPINION OF THE COURT. I have heretofore decided that the Rebellion against the authority of the United States was ended prior to the 23rd day of April, 1866, when the relator Henderson applied to me for a writ of habeas corpus, that consequently by the terms of Act March 3rd, 1863, the privileges of said writ are restored; that to a writ directed to a military officer it was not sufficient for him to return that he held the prisoner under orders of his superior, and was directed by him to obey no writ of habeas corpus, and that he might be compelled, in answer to a writ of habeas corpus, to return the body of any person detained by him even though he should certify under oath that such person was "detained by him as a prisoner under authority of the president of the United States." I also decided that the officer who refused to obey the writ by returning the body of the prisoner was guilty of a contempt of court and might be punished for the same; accordingly process of contempt was actually issued. I am not disposed to retract or modify anything formerly decided, nor anything contained in the opinion then pronounced. The opinion was not rendered until after the fullest consideration, and subsequent reflection has confirmed my conviction of the correctness of all the views then expressed. I find, too, that in every essential particular, they are directly sustained in an able opinion recently pronounced in the state of New York by Mr. Justice Nelson, of the supreme court of the United States, in Re Egan [Case No. 4,303]. I am now gratified to state that, after all the foregoing proceedings took place, General Thomas and General Davis have both appeared in court, and so far purged themselves of the actual or apparent contempt that even the counsel of the prisoner formally requested the court to proceed no further in the process issued in that behalf. General Thomas and General Davis not only declared that no contempt was intended, but the body of the prisoner has been produced in court by General Davis, and submitted fully to its jurisdiction and order. General Davis has also, by permission of the court, filed an amended return. And now the counsel of the prisoner, alleging that the return shows no sufficient cause for his arrest or detention, have moved that he be discharged. The motion made in this form assumes that all the facts legally stated in the return are true, but admitting their truth the prisoner is entitled to his discharge. The return says in substance that the relator was arrested under orders from Major General Thomas for the purpose of being brought to trial before a general court-martial then convened at Nashville, Tenn., upon certain charges and specifications which are made part of the return. It further states that he has been put upon his trial before said court on said charges and that the trial has not yet terminated, but was progressing until it was suspended, in order that the prisoner might be brought before the court in obedience to the writ of habeas corpus.

Jurisdiction of Courts-Martial. The return would perhaps have been more formal if, instead of simply referring to the charges, it had set them out at length. But the same strictness has never been applied to a return to a habeas corpus which is applied to pleadings in civil actions. Hurd, Hab. Corp. p. 259. As the return refers to, and makes part of it, the charges and specifications, I am of the opinion that these charges and specifications must be regarded by this court as part of the return as fully as if they were copied bodily into it. Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special, being confined to military persons charged with military offenses, over such persons charged with offenses defined by law. Their jurisdiction is complete. They are indeed liable to the controlling authority which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them. Grant v. Gould, 2 H. Bl. 107; Wise v. Withers, 3 Cranch [7 U. S.] 336. They may by appropriate proceedings in the civil courts be prohibited from trying a civilian or carrying their sentence into execution, in any case not warranted by law. Pendergast's Law Pertaining to Officers in the Army, p. 202; Wolfe Tones, Case referred to, D, page 10. But in respect to persons subject to their authority, and charged with offenses subject to their jurisdiction, the civil courts do not sit as courts of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of a court-martial cannot be remedied or inquired into by a civil court. The ground work of the jurisdiction and the extent of the powers of courts-martial are to be found in the rules and articles of war, and upon all questions arising on them the civil courts of the United States are competent to decide; but these articles do not alone constitute the military code. They are

for the most part silent on all that relates to the procedure of military tribunals to be organized under them. This procedure is founded upon the usages and customs of war, upon the regulations prescribed by the president under the authority of congress and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline, which would thereby be interposed, to apply to the procedure of courts-martial those rules which are applicable to another and different course of practice. See Lord Denman's opinion in Re Poe, 5 Barn. & Adol. 688. The questions then presented on this motion have no relation to the regularity or irregularity of the proceedings of the court-martial before which the relator has been arraigned. Those proceedings are in fact not before me, and if they were I disclaim all authority to review them. The questions which I have to consider are two, and two only—to wit: First. Do the charges show the relator to be a person who is subject to be tried by a court-martial? Second. Do the charges set forth an offense for which he can be tried by such court? Accordingly as these questions are answered in the affirmative or in the negative must the relator be remanded for trial before the court-martial or discharged from custody.

Looking now into the charges on which the relator has been arraigned before the court-martial, I find it is nowhere alleged that he is or has been an officer or soldier in the army, or that he has ever been in the land or naval forces or in the militia, or that he has ever even been a camp retainer, or that he has served with the armies in the field. It is simply recited that he was "late a contractor engaged in furnishing supplies for the United States government, for the use of the military service thereof," and it is charged that whilst he was such contractor, he committed several of the offenses denounced by the act of congress approved March 2, 1863. These charges and specifications are too long to be here reproduced, nor can their complete reproduction be necessary, since I do not propose to question their sufficiency in form. Suffice it to say, they do not charge the relator with "any fraud or willful neglect of duty" in respect to his alleged contract for supplies, or that whilst he had charge, possession, control or custody of any money or other public property used or to be used in the military or naval service of the United States "he did with intent to defraud the United States, or willfully conceal such money, or other property, deliver or cause to be delivered to any person having authority to receive the same or any amount of such money or other public property less than that for which he received a certificate or receipt" the charges on which he was arraigned are wholly distinct from either of these. This cannot and will not be disputed, and has in fact been admitted throughout the argument of the case before me.

Construction of Act of March 2, 1863.

The only act of congress referred to in the charges is that of March 2, 1863, and is entitled "An act to prevent and punish frauds upon the government of the United States." 12 Stat. 696. It provides:

"Section 1. That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fraudulent, or fictitious; any person in such forces or service who shall for the purpose of obtaining or aiding in obtaining the approval or payment of such claim, make, use or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath, to any fact, statement or certificate, voucher or entry, for the purpose of obtaining or of aiding to obtain any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who for the purpose of obtaining or enabling any other person to obtain from the government of the United States, or any department or officer thereof any payment or allowance, or the approval or signature of any person in the military, naval or civil service of the United States, of or to any false, fraudulent or fictitious claim, shall forge, or counterfeit, or cause or procure to be forged or counterfeited any signature upon any bill, receipt, voucher, account claim, roll, statement, affidavit, or deposition; and any person in said forces or service, who shall alter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy, to cheat or defraud the government of the United States, or any department or officer thereof, by obtaining or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service, who shall steal, embezzle, or knowingly and willfully misappropriate or apply to his own use, or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to

be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used, or to be used in the military or naval service of the United States, who shall with intent to defraud the United States, or willfully to conceal such money, or other property, deliver or cause to be delivered to any other person having the authority to receive the same or any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher or receipt or any other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge or truth of the facts stated therein and with intent to cheat, defraud or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipments, ammunition, clothes, or military stores, or other public property, such soldier, officer or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offense, and shall be subject to the rules and regulations, made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

"Sec. 2. That any person heretofore called or hereafter to be called into or employed in such forces or service who shall commit any violation of this act and shall afterwards receive his discharge or be dismissed from the service shall notwithstanding such discharge or dismissal continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent, as if he had not received such discharge or been dismissed.

"Sec. 3. That any person not in the military or naval forces of the United States nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act he shall forfeit and pay to the United States the sum of two thousand dollars and, in addition double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall, in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years or by fine of not less than one thousand dollars and not more than five thousand dollars."

It is manifest, looking to this act alone, that the only offense for which it professes to subject a contractor to trial by a court-martial is the single one of delivering or causing to be delivered to some person having authority to receive the same, an amount of money or other public property of which he has charge, possession, custody, or control, less than that for which he shall receive a certificate or receipt with intent to defraud the United States or willfully conceal such money or property. I am inclined to think that by the term "contractor" here used is not meant the person who contracts to furnish the government, subsistence, clothing, or other supplies for its army or navy, but some person who has in charge, possession, or control such supplies after they have been furnished. The contractor contemplated by the statute is evidently one who has in his "charge, possession, custody, or control" money or property, which actually belongs to the United States, and not such as has been contracted to be delivered and which does not become the property of the United States until delivered. The only person known to me, connected with the army of the United States, who at all answers to the description of a contractor is the "military storekeeper," mentioned in the thirty-sixth article of war, in the eighth section of Act July 5, 1862 (12 Stat. 509), in the first section of Act May 20, 1862 (12 Stat. 403), and in the sixteenth section of Act July 17, 1862 (12 Stat. 600). These "military storekeepers" are required by law to give bond and security for the faithful performance of their duties. They are therefore in a certain sense contractors, and precisely such contractors as have charge of the property of the United States in the sense contemplated by the above noted provisions of the act of March 2nd, 1863. No other contractor known to the law has such charge. Certainly a contractor for supplies has no such charge. Moreover a "military storekeeper" is a regularly commissioned officer or member of the army. There is no difficulty in subjecting him to a trial by a court-martial; but there is certainly great difficulty, if not an unsurmountable constitutional obstacle to the subjecting of civil contractors for supplies for the army to such jurisdiction. Surely, that construction of the act which makes all of its provisions intelligible and harmonious with the constitution should be adopted rather than one which is unmeaning, and, to say the least, of doubtful constitutionality. Assuming this construction of the act of March 2, 1863, to be correct,—and I think it is,—there is no per-

son who is not literally and really in the land or naval forces, or in the militia in service, that under the provisions of the first section can be tried by a court-martial; all other persons—that is, all that are not in the land or naval service or in the militia when in service—are by the terms of the third section to be tried by a civil court. This construction is fortified by the provisions of the second section, for surely the terms "discharged from service," "dismissed from service" apply to those persons only who are in the service in such sense that they can be discharged or dismissed therefrom. These are technical terms frequently used in our laws and regulations relating to the army and navy, and their signification is well understood. They are evidently used in this section in their well known and common meaning. They have no application to an ordinary contractor for supplies. He is not in the service to be discharged and dismissed. He receives no discharge or dismissal. If he performs his contract, or it is rescinded, he is absolved from his obligation, but I repeat he is not in any correct sense "dismissed" or "discharged" "from service."

It is unnecessary to pursue the discussion of this branch of the subject further, for it is conceded and undeniable that unless the relator was in the land forces (being in the military service might not suffice) at the time he committed the alleged offenses, he is not subject to be tried by a court-martial upon the charges on which he has been arraigned. What I have said respecting the construction of the act of March 2, 1863, has been said chiefly to show that congress have not by that act conferred on courts-martial that enlarged jurisdiction over ordinary contractors which military men have I understand, supposed, and what has been said on this subject will not have been said in vain if it shall enable us to approach with a better understanding the consideration of other acts of congress to which reference will now be made.

Construction of the Act of July 17, 1862.

The act of March 2, 1863, as we have seen, subjects "any person in the land or naval forces of the United States" to trial by court-martial for various offenses. It is not pretended that it is anywhere alleged in the charges on which the relator was arraigned that he was or ever had been in either the land or naval forces, but it is insisted that the charge that he was "late a contractor engaged in furnishing supplies to the United States government for the use of the military service thereof," is equivalent to, and in legal effect the same as, a direct charge that he was lately in the land force of the United States. The proposition that these charges are identical certainly shocks the common understanding. To contend that the assertion that one is a "contractor engaged in furnishing supplies to the United States government for the military service thereof" is the same as the assertion that he is a "soldier," or that he is "in the land forces," is to maintain a most startling proposition; and yet this precise proposition must be maintained in order to furnish any pretense of jurisdiction to the court-martial over the relator. Startling as the proposition is, it is insisted that it is fully supported by the provisions of the sixteenth section of the act of July 17, 1862, entitled "An act to define the pay and emoluments of certain officers of the army, and for other purposes." 12 Stat. 594. This section reads as follows: "That whenever any contractor for subsistence, clothing, arms, ammunition munitions of war, and for every description of supplies for the army or navy of the United States shall be found guilty by a court-martial of fraud or willful neglect of duty, he shall be punished by fine, imprisonment, or such other punishment as the court-martial shall adjudge; and any person who shall contract to furnish supplies of any kind or description for the army or navy, shall be deemed and taken as a part of the land or naval forces of the United States for which he shall contract to furnish said supplies, and be subject to the rules and regulations for the government of the land and naval forces of the United States." This provision does indeed, if it is constitutional, subject a contractor for supplies for the army or navy of the United States to trial by a court-martial for fraud or willful neglect of duty. But I am of the opinion that according to its true construction the provision does not attempt to subject a contractor to a trial by a court-martial for any fraud or neglect of duty except a fraud or neglect of duty in respect to his contract for supplies, for any fraud or neglect of duty committed by him in his private relations as a citizen the government can have no interest in calling him to an account before its military courts, even if it had power to do so; and when the government declares that if he be found guilty by a court-martial of fraud or neglect of duty he shall be punished, it must, by necessary and unavoidable intendment, be understood to mean a fraud or neglect of duty which it has motive to so punish. A contractor for supplies owes no duty to the government except such as grows out of his contract, which is not common to every private citizen; neither can he commit any fraud on the government except in connection with his contract with the government, which may not be committed by any one; and I see no more propriety in subjecting him to trial by a court-martial for such frauds and neglect of duty as have no connection with his contract, than there is for trying any private citizen before that court for like delinquencies. That this would be a correct construction of the statute if it had proceeded no further than to provide that the contractor might be tried by a court-martial

for fraud or neglect of duty cannot, I think, admit of a doubt. Such construction satisfies all that the language of the statute requires, and harmonizes with its policy and purpose. But if it had stopped here, doubt might have existed as to the proper mode of organizing the court-martial provided for, whether it should be organized in the manner required by the rules and articles of war "or according to the general usage of the military service, or what may not unfitly be called the 'customary military law,'" are questions which military men might have found difficulty in solving. A similar question arose respecting the construction of a similar provision contained in the fifth section of the act of February 28, 1795 (1 Stat. 424). And it was answered by the supreme court in the case of Martin v. Mott, 12 Wheat. [25 U. S.] 35, that such a court-martial was not required to be organized as provided in the rules and articles of war, but might be called and formed according to the customary military law. It was to remove this doubt, or rather that there might be an explicit provision respecting the manner of organizing the court-martial, and not that its jurisdiction over the contractor should be enlarged beyond what had already been given, that the statute proceeds to declare that he shall be deemed and taken as a part of the land or naval forces. It does not declare that he is or shall be a part of the land or naval forces, but deemed and taken as a part of them; that is, deemed and taken as a part of them for all purposes of organizing the court-martial and trying him by it for fraud or willful neglect of duty in respect to his contract. That this is the proper construction of the section without reference to the provisions of any other statute is, to my mind, obvious enough, but its correctness is made doubly sure and clear if we turn to the rules and articles of war themselves, to which, it is said, this section makes the contractor subject. An attentive examination of them will satisfy any one that there is not a single provision in them, excepting the provisions relating to the organization of courts-martial, which can by any, even the most constrained, construction be applied to a contractor for supplies; and this exception is not by virtue of the rules and articles of war themselves, but by virtue of the act of 1862, which we have been considering. The contractor is not an officer nor a soldier; but it is against them, and them only, that the articles of war denounce penalties, if we except only a few provisions respecting "sutlers, retainers to the camp, and persons serving with the armies in the field," and one provision respecting spies. If he were arrested and charged with a violation of the ninety-ninth article of war, which applies to him if any does, he could reply, "I am neither an officer nor a soldier, and it is only disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline which are denounced and punishable by that article," and a like or similar reply could be made by him to any charge founded on any other article of war; it being thus manifest, notwithstanding the declaration of the sixteenth section of the act of 1862, that the contractor shall be deemed or taken as a part of the land or naval forces and subject to the rules and regulations (articles) for the government of the land and naval forces; that none of the rules and articles of war are in fact applicable to his punishment and none to his trial except those which relate to the organization of a court-martial. I consider it satisfactorily demonstrated that the only effect of these declarations is to require that the court-martial for the trial of a contractor for fraud or willful neglect of duty in respect to his contract shall be organized as provided in the articles of war. Their effect is not to make him in fact a part of the land or naval forces, but only that he is to be taken as part of the one or the other of these forces, accordingly as the contract relates to one or the other when steps are taken to organize a court-martial and to try him for the specific offense denounced by the statute. I am the more inclined to adopt this conclusion because, though even if it extends the power of congress to the utmost verge of their constitutional authority, there is some plausibility in extending it thus far. The efficiency of military operations depends so much upon the army being promptly and properly furnished with supplies, that there seems to be some propriety in so far subjecting contractors for supplies to military jurisdiction as to punish them for delinquencies in respect to their contracts. But to extend the power of congress one step further, to stretch it over contractors so far as to subject them to trial by court-martial for acts not growing out of their contracts and not affecting military operations more than similar acts performed by any private citizen would affect them, is to stretch it beyond any limit ever assigned by any one who admits that there is any restriction whatever on the constitutional powers of congress. And it is not to be assumed, unless the language of the act imperatively demands it, that congress claim any such extensive and arbitrary authority. It follows from this view that whenever in the act of March 2, 1863, or in any other act of congress, penalties are denounced against "any person in the land or naval forces of the United States or in the militia in actual service of the United States in time of war," contractors cannot be held to be included unless specially named. And it also follows that as the relator stands charged before the court-martial with no offense under the act of July 17, 1862, as all the charges are framed under the act of March 2, 1863, for offenses not denounced against him but

specially against persons in the land or naval forces or in the militia, the court-martial is without jurisdiction to try him on the charges now preferred.

Another construction of the act of July 17, 1862. There is still another view to be taken of the construction of the act of July 17, 1862, with respect to the charges against the relator, to which I will briefly advert. I have already said that in all the "charges and specifications" the relator is described as "late a contractor engaged in furnishing supplies to the United States government for the use of military service thereof." It is not otherwise stated to what branch of the service the relator belonged. More particularity in this respect was demanded, because if he belonged to the naval forces or the militia he could not be tried by a court-martial composed of officers in the land forces or regular army, and if he belonged to the "land forces" or to the militia he could not be tried by navy officers. Now if it can be successfully maintained—which I think more than doubtful—that the term "military service" ex vi termini excludes naval service, it surely cannot be asserted that it excludes service by the militia. If the militia in the actual service of the United States are as much a part of the military service as the land forces, strictly so called, then, it being alleged in the charges simply that the relator was a contractor engaged in furnishing supplies "for the use of the military service of the United States," there is nothing in them to show whether the supplies were for the "militia" or the "land forces" or "army," and consequently nothing to show to which branch of the service the relator belonged, even if it be conceded that his being a contractor to furnish supplies made him a part of that branch of the service which he contracted to supply. There is nothing in the charges or in the return to show whether the court-martial is composed of officers of the land forces or regular army, or of the militia, and consequently it does not appear whether the court has been legally organized or not. As however the illegal organization of the court would not render the arrest of the relator illegal, if he were arrested upon legal charges, but might result only in the dissolution of the present court and the organization of another, the above objection might not, in the form in which it has been presented, result in the discharge of the prisoner; but we have to construe the sixteenth section of the act of July 17, 1862, with much less strictness than is usually applied to penal statutes, to discover that it is only the contractor for furnishing supplies to the regular army or navy, and not the contractor who engages to supply the "militia," that is made a part of the "land" and "naval" forces, and subject to trial by a court-martial for fraud or willful neglect of duty. Unquestionably, in a certain and general sense the terms "army," "land forces," do embrace militia in actual service. The militia do serve on land, and therefore, in the popular sense, are a part of the land forces; but in the contemplation of the constitution and laws of the United States the militia, though in service, and the army or land forces, are quite distinct. This will be made entirely apparent by reference to some of the provisions of the constitution and the acts of congress. In the eighth section of the first article of the constitution it is among other things declared that "the congress shall have power (13) to raise and support armies; (14) to provide and maintain a navy; (15) to make rules for the government and regulation of the land and naval forces; (16) to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions; (17) to provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress." If the militia employed in the service of the United States were in the constitutional sense a part of the "land forces," there could have been no necessity or propriety, after prescribing that congress should have power to provide for the government of the land forces, to provide also by a separate clause that they should have power to provide for governing such part of the militia as might be employed in service. If the former clause invested congress with authority for governing the militia in service there would certainly be no necessity for a distinct clause investing them with this specific authority. We have no right to dispense with either clause. We have no right to say that either is unnecessary. They both stand in the constitution, and thus standing there they do demonstrate beyond cavil that in the understanding of the framers of the constitution "land forces" and "militia in service" are distinct bodies. This is made still more apparent by the fifth article of the amendments to the constitution. That article provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces or in the militia when in actual service in time of war or public danger."

The framers of the constitution thought it was not sufficient to provide that no person, except in cases arising in the land or naval forces, should be held to answer for a capital or other infamous crime unless on a presentment or indictment, but recognizing the militia in service as distinct from the land forces, they have also by a separate provision, excepted cases arising in the militia when in actual service in time of war or public danger. We thus see that whenever in the constitution the term "land forces" is used, it

means the regular army of the United States, and does not include the militia in service. The same thing will be seen when we turn to the various acts of congress relating to the armies and to the militia. These acts are too numerous for me to refer to all of them; I will therefore advert to only a few. By the act of April 10, 1806 (2 Stat. 359), it is provided "that the following shall be the rules and articles by which the armies of the United States shall be governed." By "armies" is meant the regular armies or land forces, and not the militia in service, so the supreme court thought (Martin v. Mott, 12 Wheat. [25 U. S.] 35), and so I think, and hence it is expressly provided by the ninety-seventh article of war that the militia being mustered and in pay of the United States,—that is, in actual service,—when joined or acting in conjunction with the regular forces of the United States shall be governed by the rules and articles of war. There could be no necessity for this provision if the militia when in service were ipso facto a part of the army of the United States. Besides this article, other acts of congress provide that courts-martial for the trial of militia men in military service shall be composed entirely of militia officers, whereas officers and soldiers belonging to the armies or land forces may be tried, if they are required to be tried, by courts-martial composed entirely of officers of the regular army. The same distinction is recognized in the fourth, fifth, and sixth sections of the act of 28th of February, 1795, which act authorizes the president to call forth the militia to enforce the laws of the Union to repel invasion and to suppress insurrections. So also in the first section of the act of 3d March, 1807 (2 Stat. 443), it is provided "that in all cases of insurrection, or obstruction to the laws, * * * when it is lawful for the president of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary." Surely it cannot be said that the term "land forces" is here used synonymously with "militia in service," and indeed the distinction is nowhere more manifest than in the very act under which the relator was arraigned, to wit, the act of 2d March, 1863 (12 Stat.) 696. Its first section provides "that any person in the land or naval forces of the United States, or in the militia in actual service of the United States in time of war, who shall," &c. Congress could not have more explicitly declared that in their understanding the land and naval forces do not include the militia in service, and this understanding is manifested throughout the numerous clauses of this section, and in fact throughout the various sections of the act. I consider it is now demonstrated so as to be apprehended by the commonest understanding that when the act of July 17, 1862, declares that "any person who shall contract to furnish supplies * * * for the army or navy he shall be deemed and taken as part of the land or naval forces" it must be understood to use the terms "army or navy," "land or naval forces," in their strict constitutional sense, and in the sense in which they are used in other acts of congress, and that in this sense, these terms do not embrace the militia in service. The act then, interpreted as I have shown it must be, means that any persons who shall contract to furnish supplies for the army—not the militia in service—shall be deemed and taken as part of the "land forces," and any person who shall contract to furnish supplies for the navy shall be deemed and taken as part of the naval forces, and as I have in the first part of this opinion shown, only so far a part of those forces as it respects the organization of a court-martial and the trial of the contractor for fraud or willful neglect of duty in connection with his contract.

The conclusion from all this discussion is that as the charges on which the relator was arraigned claim only that he was a contractor engaged in furnishing supplies for the use of the military service of the United States, not the army, they are not sufficiently specific, and show no jurisdiction in the court-martial to try him, even if that court otherwise had jurisdiction to try him for any of the offenses set forth in the charges. The act of congress does not confer nor attempt to confer any jurisdiction on a court-martial to try a contractor, unless he be a contractor for supplies for the army or navy, understanding these terms in their constitutional and legal sense as embracing only the regular army or naval forces and not the militia in service. I do not decide, nor have I even considered, the question whether the "volunteer" forces of the United States were a part of the regular army or of the militia in service. In the Mexican War, as well as in the War of the Rebellion, they were treated by the government as militia, and I should be reluctant to hold that this practice of the government is unfounded in law.

But it has been insisted that, although the court-martial before which the relator has been arraigned has no jurisdiction to try him on the present charges, those charges may be amended and so describe the offense and the prisoner as to bring him within the terms of the act of the 17th of July, 1862, as here interpreted, and that, therefore, the foregoing conclusions do not show that the arrest of the prisoner was illegal. I admit that military usage may justify amendment of charges in some respects after the arraignment of the prisoner, but I imagine that "no authority can be found for so amending charges, after arraignment as to entirely obliterate the original specifications and insert new ones, describing or setting forth offenses wholly different from those originally described," and this

I have shown the court-martial would be obliged to do in order to bring the prisoner within even the terms of the act of congress. Moreover, it was not lawful under the articles of war to arrest the prisoner except upon legal charges, and, it being shown that the charges are illegal, it follows that his arrest as well as trial by the court-martial is illegal. Admitting, however, that if the prisoner was a contractor for furnishing supplies for the army of the United States, and that he is, by the terms of the act above mentioned, subject to be tried by a court-martial for frauds or willful neglect of duty in respect to his contract, and admitting further, that whilst he was in custody of the court-martial he might have been retained until these charges were preferred, it does not follow that he can now be remanded to its custody, when it is not shown that he is in fact amenable to any such charges. It is nowhere alleged in the return nor elsewhere shown or averred that the relator is guilty of any offense. It is simply stated that he is charged with certain crimes, and is on trial for them before a court-martial, and it being shown that the court-martial has no jurisdiction to try him for these offenses it follows there is no pretense for longer holding him in custody.

Constitutionality of the Act of 17th July, 1862, Considered.

If, however, this conclusion could be resisted, if it could be shown to be proper to remand the prisoner in order to give the court-martial an opportunity to proceed against him for some supposed fraud or willful neglect of duty as a contractor for supplies for the army, still this could be proper only upon the assumption that the sixteenth section of the act of the 17th of July, 1862, which defines the supposed offenses, is constitutional, and, my opinion on this subject being free from all admixture of doubt, I have no disposition to disguise it or evade its expression. My opinion, then, is that the sixteenth section above mentioned is clearly unconstitutional, and consequently void. And I would have contented myself with stating this opinion, and setting forth my reasons in support of it, without considering the construction of the statute at all, if the learned counsel had not confined their attention wholly to the construction of the statute without making any distinct constitutional question whatever. The constitution of the United States in the third subdivision of section 2 article 3 of the original text provides that "the trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state the trial shall be at such place or places as the congress may by law have directed." The difficulty is in finding, in spite of this provision, any authority in congress to provide for the trial of even persons in the army or navy, or in the militia in service, for crime, otherwise than by jury. We have, however, already seen that congress is empowered not only to "raise and support armies," "to provide and maintain a navy," but "to make rules for the government of the land and naval forces," and not only "to provide for calling forth the militia," but "for governing such part of them as may be employed in the service of the United States." Under these powers it has always been supposed that congress may provide for the trial by court-martial of persons in the land or naval forces or in the militia in service for military offenses. This is the usual mode of trial for these offenses which had prevailed in England, the country from which we borrowed most of our laws, for more than one hundred years prior to the adoption of our constitution, and in fact ever since England has had any standing army at all. It is also the mode which prevailed in the colonies at the time the convention sat, and it has been a part of our code of laws relating to the government of the land and naval forces and of the militia in service ever since we had a government. This mode of trial of military men for military offenses has become too well fixed in our system to now admit of question, nor do I mean to intimate that it would admit of serious question if we were now for the first time engaged in legislating on the subject. Experience has shown when once armies were raised it was so essential to govern them by providing for the punishment of breaches of discipline by military courts in order as well to protect the peace of society as to secure military efficiency, that I think there can be no doubt it was intended by the clauses of the constitution above mentioned to confer on congress the power to govern the land and naval forces and the militia in service in the way they had been usually governed; that is, by punishing military offenses in military courts. That this is the meaning and the limit of authority conferred by these clauses will be still more manifest when we look into the debates in the conventions of the several states which ratified the constitution, and to the amendments to the constitution proposed by the first congress. It has been seen that the original constitution provides only that "the trial of all crimes except in cases of impeachment should be by jury, and that such trial should be held in the state where the crime was committed." There was nothing requiring an indictment by a grand jury, nothing exempting the accused from being compelled to be a witness against himself, and nothing guaranteeing to him the right to be confronted with the witnesses against him or the assistance of counsel for his defense; and there was, moreover, nothing whatever requiring even a trial by a jury in ordinary civil suits. These were serious defects in the constitution, and they were well-nigh defeating its ratification altogether. It probably would have been defeated if it had not con-

fidently been expected that the constitution would be promptly amended after ratification. In the conventions in some of the states amendments relating to the precise matter now before us were actually suggested and agreed to. In Massachusetts the proposed amendments assumed this form, to wit: "That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life until he is first indicted by a grand jury except in such cases as may arise in the government and regulation of the land forces." In Virginia it was in this form: "That in all criminal and capital prosecutions a man hath a right to * * * a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty" (except in the government of the land and naval forces). In New York it was in this form: "That (except in the government of the land and naval forces, and of the militia when in active service, and in case of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes recognizable by the judiciary," &c. We thus see that in the contemplation of these conventions, congress have or should have no power to provide for the trial of any person for crime otherwise than by jury except in the government of land or naval forces or the militia when in actual service. When Mr. Madison came to propose the amendment in the first congress, the proposition assumed this form: "The trial of all crimes except in cases of impeachment and cases arising in the land or naval forces or the militia when in actual service in time of war or great public danger, shall be by an impartial jury," &c. The actual form of the amendment, as it was finally proposed by congress, and ratified by the states, is as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger," &c. Art. 5, Amend. Why the words "except in cases arising in the land and naval forces" were used instead of the words "except for the government of the land and naval forces," which had been, as we have seen, employed in the proposals of the state conventions, does not appear. But it is quite apparent that both forms of expression mean substantially the same thing. This article contains no grant of power to congress. The provision above quoted and all the provisions of the article are limitations upon some power which had been or was supposed to be conferred on congress by some other provisions of the constitution. But we have already seen that no power was in fact conferred on congress to provide for the trial of any person for a crime otherwise than by jury, except in the exercise of their power to make rules and regulations for the government of the land and naval forces, and of the militia in the service of the United States. Congress, doubtless, might under their power "to provide for the calling forth the militia" subject militia men, who refused to obey their call (this not being a crime in the sense of the constitution), to a small pecuniary penalty by the judgment of a court-martial. This was done by the fifth section of the act of 1795, and was recognized as proper by the supreme court. Houston v. Moore, 5 Wheat. [18 U. S.] 1; Martin v. Mott, 12 Wheat. [25 U. S.] 19. But congress have no power and never had to subject a militia man not in the military or naval service of the United States, much less a private citizen, to a trial by a court-martial for any crime, especially one that is capital or infamous. This is plain enough upon the face of the constitution, and it is supported by the opinion of Judge Story. Houston v. Moore, 5 Wheat. [18 U. S.] 62. He says substantially that to prevent, therefore, a manifest breach of the constitution, we cannot suppose that congress meant in the fourth section of the act of 1795 to provide that the militia who were called into service, but who refused to obey, should be subject to the rules and articles of war, but only that the militia in actual employment should be subject to them. As, then, the power of congress is limited to making rules and regulations for the government of the land and naval forces and of the militia in service, it would seem to follow that these regulations cannot extend beyond what is necessary and proper for the governing of these forces as such and in their military character. It is doubtful whether they can be subjected to trial by court-martial for anything except breaches of military duty. Every soldier may be or is a citizen, and it would seem is as much entitled to trial by jury for any alleged crime, not committed by him in violation of his duty as a soldier, as any other person. It would be difficult to maintain that a law which subjected him to trial by a court-martial for such an offense could be properly derived from the authority to provide for governing the land forces, or would have any constitutional sanction. I find indeed that no law subjecting a soldier to such a trial for such an offense committed in time of peace has ever been enacted in either England or America unless the act we are now considering be an exception. The mutiny act of England and our articles of war are confined to the defining and the providing for the punishment of military offenses. The purposes of these acts are so clearly and so accurately stated by Lord Laughborough in the case of Grant v. Gould, 2 H. Bl. 99, that I cannot forbear quoting from his opinion. "The army being established by the authority of the legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army for all offenses in their

military capacity should be subjected to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army. * * * It is one object of that act to provide for the army; but there is a much greater cause for the existence of a mutiny act, and that is the preservation of the peace and safety of the kingdom; for there is nothing so dangerous to the safety of the civil establishment of a state as a licentious and undisciplined army; and every country which has a standing army in it is guarded by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power, but under the command of officers answerable to the civil power they are kept in good order and dicipline. The object of the mutiny act therefore is to create a court invested with authority to try those who are in the army, in all their different description of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army." When war is actually raging it is said that a mutineer or deserter might unquestionably be tried by a military tribunal, according to the customary law of war (Pendergast, p. 3), and perhaps at that time other offenses committed by any one in the camp and in the field may be punished under the same law by the commander; but the common law of England knew nothing of courts-martial, and made no distinction in time of peace between a soldier and any other subject. A soldier, therefore, by knocking down his colonel incurred only the ordinary penalties of assault and battery, and by refusing to obey orders, by sleeping on guard, or by deserting his colors incurred no penalty at all. 1 Macaulay, History of England, p. 276; Pendergast, 15. The English people, with their omnipotent parliament, have ever been exceedingly jealous of granting to courts-martial any jurisdiction over persons except those actually in their army or navy, and over them they have granted jurisdiction to punish only military offenses,—such jurisdiction only as seemed essential for their government as soldiers or sailors. They have never, so far as I can find, attempted to subject contracts for supplies to such jurisdiction, nor indeed any person except officers, soldiers, and sailors and sutlers and camp retainers serving with the armies in the field. Such jurisdiction over contractors has, I know, been conferred by some of the arbitrary governments of Europe, but it has never found any place in English legislation, and it would be an anomaly in the institutions of a free people.

The Case of Tone is memorable in English history—memorable not only for the extraordinary proceedings which took place, but for the denial by the court of king's bench of the jurisdiction of courts-martial to try civilians, even though they were traitors. The cases of Smith v. Gore and —— v. Governor Sabine are hardly less notable for a denial, in the former, of the jurisdiction of courts-martial to try even sutlers for an offense not committed "in the field," and, in the latter, of their jurisdiction to try a carpenter in the train of artillery. Pendergast's Law Relating to Officers of the Army, pp. 10, 11, 149, 150; 1 Cowp. 75. I am at a loss to conceive what relation the trial of a contractor by court-martial for fraud or breach of duty in respect to his contract has to the governing of the land or naval forces, or his prompt and proper compliance with his contract. No doubt the efficiency of military operations greatly depends, but so do the efficiency of these operations greatly depend, on the prompt payment of taxes by private citizens, and on the filling up of the thinned ranks by volunteering or draft. Government can not clothe or feed its soldiers without money; soldiers cannot live, much less fight, without clothing and food; the ranks of armies thinned off by battle or disease must be filled. I cannot therefore conceive of any argument which can be employed to uphold the power of congress to subject contractors to trial by court-martial which may not be employed with equal force to sustain their authority to subject any private citizen to trial by that court for failing or refusing to pay his taxes, or for discouraging volunteering, or for obstructing an enrollment or draft; nay, more, infinitely stronger reasons can be given for subjecting such private citizens to such a jurisdiction for these offenses than can be assigned for so subjecting a contractor for offenses not growing out of his contract, and which have little or no relation to military operations. If the power of congress is thus extensive, it certainly transcends every limit heretofore taught or imagined. Then have congress power to convert the government into a military despotism, and to subject every man in the land to trial by military tribunals. I am not willing to concede any such power, and whilst I am willing to concede to the government vast powers in war,—powers which are indeed extensive over the citizen and almost illimitable when directed against the enemy,—I cannot admit that its powers over the citizen are unbounded. "I cannot admit that, by its mere declaration, it can place every citizen in the country in the land and naval forces, and thus subject him to trial by court-martial for all the delinquencies of life." "Congress may, no doubt, under their power to raise armies, declare who shall be soldiers, —that is, what citizens shall be liable to perform military duty,—but they cannot by mere enactment, place a man in the army who is not. If they could, then they might by a simple declaration place every person in the United States in the army, no matter what his pursuits actually continued to be, and subject him to trial by court-martial,—a proposition so monstrous that no one, I imagine, will be

found so hardy as to maintain it. The declaration of congress in the sixteenth section of the act of July 17, 1862, that "any person who shall contract to furnish supplies of any kind or description for the army or navy shall be deemed and taken as a part of the land or naval forces" is then, in my opinion, simply idle and nugatory. It no more places him in the land or naval forces than he would be without such declaration. If he is not in the forces by virtue of his contract, and without such a declaration, then he is not in them at all; for as we have seen, no simple congressional declaration can possibly alter his status. But it may be said that, as congress may provide how enlistments for the army may be made, they may also provide that every person who voluntarily contracts to furnish supplies, or who does any other act, shall be deemed to have enlisted, and shall be subject to perform military duty. Possibly congress could do this. I will not say they could not. But I must say that such a provision would be most extraordinary, if not absurd, and that no such ridiculous provision is contained in the act on which we have been commenting. Nothing is plainer than that congress did not mean to convert the contractor into an enlisted soldier, subject to perform military duty. They leave him still a contractor, liable to perform no duty which is not stipulated in his contract, and only attempt by a simple declaration to place him in the army so as to subject him to trial by court-martial for delinquencies in respect to his contracts. I have already said, and I repeat, that such a declaration is unconstitutional as well as nugatory.

The conclusions to which I have now arrived are these:

1. That the 16th section of the act of July 17th, 1862, is unconstitutional, but, if it is not unconstitutional,

2. That it only makes contractors for supplies liable to be tried by a court-martial for fraud or willful neglect of duty, in connection with their contract.

3. That the relator is not charged with any such offense.

4. That the terms "army or navy," "land and naval forces," employed in the act, are used in their strictly constitutional and legal sense, and mean the regular army or navy, and do not include the militia.

5. That the relator is by the terms of the act made part of the regular army, and not of the militia, and is liable only in respect to a contract for supplying the regular army.

6. That he is not charged with supplying the army, but the military service; that the militia are a part of the military service as well as the army; and that consequently no offense is charged.

7. That the words, "any person in the land or naval forces of the United States or in the militia," &c., used in the act of March 2, 1863, do not include contractors, but military or naval officers, soldiers, and sailors, and persons in the army or navy only.

8. That the court-martial is, on each and all of these grounds, without jurisdiction, and that therefore the relator must be discharged.

I have not, I confess, reluctantly arrived at this conclusion, because, if the relator is really guilty (which I repeat is neither shown nor alleged in these proceedings) of the offenses with which he is charged, he may, by the express terms of the third section of the act of the 2d of March, 1863, be tried and punished therefor by a civil court. If others may assert, I cannot, that in the civil court justice will not be done between the government and the accused. If others may assert, I cannot, that courts-martial are by their organization and mode of proceeding better fitted to administer enlightened justice than civil courts, presided over by judges learned in the law, aided by impartial juries; and if any one assert that the law is more promptly vindicated in courts-martial than in civil courts, let him also be sure that it is not more abused, and let him not attempt to verify his assertion by referring to the case of the accused who was not even arraigned for trial until nearly two years after the alleged commission of the supposed offenses, and whose trial, after being protracted more than thirty days, was only then suspended that he might be brought before this court.

Few persons, I think, appreciate more highly than I the great services rendered by the military during our late terrible national struggle. Few persons, I imagine, could be found more disposed than I to accord to the government whilst the war was flagrant transcendent powers. But now, that peace has returned, no one can be more fully persuaded than I that we have no hope of preserving our institutions or our liberties except by returning to the ancient channels for the administration of justice. I agree with Sir James McIntosh, that "while the laws are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society, but no longer. Every moment beyond is usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime." Let the relator be discharged.

A true copy from the minutes of the court. Witness my hand and the seal of the circuit court this 24th day of May, 1878.

Saml. B. Crail, Clerk.

HENDERSON (BAILEY v.). See Case No. 737.

HENDERSON (BANK OF ALEXANDRIA v.). See Case No. 848.

HENDERSON (BEVERLY v.). See Case No. 1,378.

HENDERSON (BOWIE v.). See Case No. 1,730.

Case No. 6,350.

HENDERSON v. CASTEEL.

[3 Cranch, C. C. 365.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

REPLEVIN—PLEA OF PROPERTY, TRIAL—RIGHT TO OPEN AND CLOSE.

1. Where the plaintiff holds the affirmative of any of the issues in a cause, he has a right to open and close the whole case.

2. Upon the plea of property, the plaintiff in replevin has the burden of proof, and the right to open and close.

Replevin. Plea,—property in the defendant; general replication, and issue.

THE COURT (THRUSTON, Circuit Judge, absent) said, that whenever the issue was joined upon the right of property, the burden of proof, on that issue, is upon the plaintiff, and he has a right to open and close the case; and that when the plaintiff holds the affirmative of any issue, he has a right to open and close, although there may be other issues in which the affirmative is holden by the defendant.

Case No. 6,351.

HENDERSON et al. v. CLEVELAND CO-OPERATIVE STOVE CO.

[2 Ban. & A. 604; [2] 12 O. G. 4.]

Circuit Court, N. D. Ohio. May, 1877.

PATENTS—SPECIFICATIONS—SIMILARITY OF DESIGN—PRODUCTION OF RESULT—COAL-STOVES.

1. Courts will protect a patentee to the full extent of his actual invention, by giving such a construction to the patent as will uphold it, if possible, and will bear in mind that specifications and claims are frequently drawn by persons unaccustomed to the use of accurate legal phraseology.

2. Where a claim of the patent appears to be for a result, produced substantially "in the manner and for the purposes" described, the claim will be construed to be for the mechanism, set forth in the specifications, by which the result is produced, and not for the result itself.

3. The principle, of construing a claim for a result to be a claim for the means by which the result is produced, is applied to all cases where a result is claimed, whether there is any reference to the specifications in the claim or not.

4. To constitute an infringement, there must be similarity of design, and substantial identity of purpose and result.

5. Where similarity of design exists, and a similar result is attained, in substantially the same way, by the use of a device, which, although intended to operate in a different way, did not so operate, such use will, nevertheless, be an infringement.

6. Reissued letters patent No. 3,523, dated June 29th, 1869, and extended May 28th, 1874, granted to Joseph C. Henderson, *held* valid.

[This was a suit in equity for the infringement of a patent. The bill set forth that the complainants [Joseph C. Henderson and others] were the owners of a patent improvement in coal-stoves, covered by reissued patent No. 3,523, bearing date June 29, 1869, extended seven years from May 28th, 1874,[2] and charged that defendants had infringed the several claims of said patent, the 5th, 6th, and 7th of which are in the following language: "5. In combination with a hopper suspended over the fire and separate from the fire-pot, a circulating current of air around the lower end of the hopper, substantially in the manner and for the purposes above described. 6. In combination with the above-described hopper, a chamber, or its equivalent, in the lower end of the same, and immediately above the fire, for the purpose of preserving the mouth of the hopper, and supplying air to the surface of the fire, substantially as above described. 7. The circulation of a current of air around the lower end or mouth of a supply-cylinder, and entering the combustion-chamber, substantially in the manner and for the purpose above described." The answer denied that Henderson was the original and first inventor of the improvements claimed in the patent; denied the novelty or utility of the invention, as well as its infringement by defendant; avers that the same device had been patented before, and described in a number of foreign publications. The case was heard upon pleadings and proofs.] [3]

Thomas J. Sprague and Esek Cowen, for complainants.

M. D. Leggett, for defendants.

BROWN, District Judge. Many of the defences set up in the answer were abandoned upon the argument; but it was strenuously insisted that the 5th, 6th, and 7th claims could not be supported, by reason of their inconsistency with the specifications, which describe a combination of a combustion-chamber, and a circulating-air chamber surrounding the hopper, as the substance of complainants' invention. The material portions of the specifications are as follows:

"Stoves have heretofore been constructed, in which the fuel has been placed in the hopper or reservoir over the fire and above the grate, for the purpose of supplying to the fire fresh coal as fast as consumption takes place on the grate.

"But hitherto two principal difficulties have attended this method of supplying fuel to the fire, and it is the principal object of my improvement to remedy them: First, the fuel within the hopper is liable to ignite, owing to the great heat surrounding the lower part of the same; and, second, the

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

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

[2] [The original patent No. 28,482 was granted May 29, 1860.]

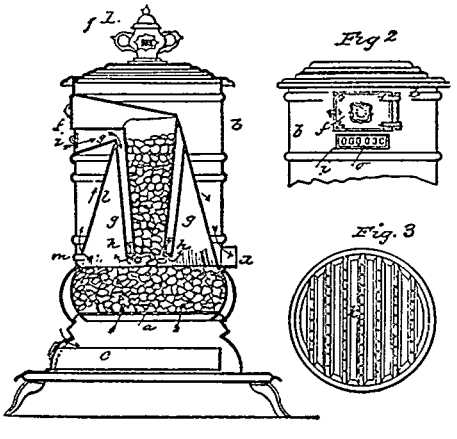
[3] [From 12 O. G. 4.]

gases generated pass off without being consumed, because not brought in contact with the surface of the burning solid fuel. The nature of my said invention consists in suspending a hopper above the fire-pot to receive and supply coal constantly to the surface of the fire, in a condition to ignite freely, and over the surface of the fire, and around the mouth or lower part of the hopper, to construct an expanded combustion-chamber for receiving the gases eliminated, and detaining them in contact with the surface of the incandescent coals until consumed.

"To prevent ignition within the hopper, I cause a current of air to circulate in a chamber formed around the lower part or mouth of the hopper, as shown in Fig. 1 of the annexed drawings. I also design this circulating current of air to protect the mouth of the hopper by keeping it cool, and also to assist in the combustion of the fuel, by supplying a blast of hot or warm air to the surface of the incandescent coal and among the unconsumed gases, by confining the gases by means of my combustion-chamber to the space at and immediately above the surface of the incandescent coals, and by supplying that surface with a current of air I am enabled to effect very perfect combustion.

"In the accompanying drawings, I have represented my hopper as round and conical, and as being directly over the centre of the grate, K, but I do not propose to confine myself to the exact shape or location of the hopper as represented in said drawing, where the shape and character of the stove to which they are applied require deviation in that respect; but, in whatever construction of stove my improvement is to be applied, the air-chamber, g, or its equivalent, and the expanded or conical combustion-chamber, l, above the surface of the incandescent coal, and around the lower end of the hopper, must be preserved for the purpose already described.

[Drawings of reissued patent No. 3,523, published from the records of the United States patent office.]



"If, in the construction or application of my improvements to heating and other stoves, it should be thought desirable to substitute fire-brick in the place or stead of my air-space, g, that may be done by filling the lower portion of said air-chamber between the hopper and the cylinder surrounding it with fire-brick, resting upon the flanges of the lower end of the hopper and cylinder (shown in the drawings), and the operation of the stove substantially preserved, as herein represented, by admitting air within the expanded chamber, l, above and upon the surface of the fire, by openings in suitable places, for that purpose. In such construction, the fire-brick would perform the office of my chamber, g, so far as protecting the fuel within the hopper from combustion, and preserving the mouth of the hopper, and the admission of air to the surface of the fire, from other suitable openings in the chamber, would promote the combustion of the fuel and gases."

In practice, however, the combustion-chamber seems to have proved useless—at least, it is not claimed to be infringed in this case; but defendants were charged with using the circular air-chamber about the hopper, and the question is presented whether—after setting forth in their specifications that "in whatever construction of stove his improvement is to be applied, the air-chamber, g, or its equivalent, and the expanded or conical combustion-chamber, l, above the surface of the incandescent coal and around the lower end of the hopper, must be preserved" —complainants are at liberty to claim the circular current of air about the mouth of the hopper as a feature separate and distinct from the combustion-chamber. I find great difficulty in disposing of this question, while in the case of Vance v. Campbell, 1 Black [66 U. S.] 427, it is said that, if a patentee declares upon a combination of elements, which he asserts constitutes the novelty of his invention, he cannot, in his proofs, abandon a part of such combination, and maintain his claim to the rest, nor prove any part of his combination immaterial and useless. It does not cover the case of one who, in his specification, sets forth a combination as the thing patented; declares that the use of his improvement requires that both elements of the combination shall be preserved; and, subsequently, claims both these elements separately. Though the specifications describe a combination, there is no doubt that the patentee would be protected in claiming each of the elements of the combination separately, if they were, in reality, new, had he not added that to make use of his improvement both elements must be preserved. His claims, however, forbid the idea that he intended to abandon the several elements, and seek protection only for his combination. A person reading the patent could scarcely be misled as to the intent of the patentee in this regard. Constrained, as the court is, to give this

patent such a construction as will uphold it, if possible, and bearing in mind that specifications and claims are frequently drawn by persons unaccustomed to the use of accurate legal phraseology, I think the court ought to protect the patentee to the full extent of his actual invention. It is true, in his specifications, he describes his entire improvement as consisting of two elements, both of which must be preserved whatever the construction of the stove to which the improvement is applied; but, in the light of subsequent claims, I think the court is not bound to infer that he intended by his specifications to abandon any portion of that which was really new.

Coal-stoves fed by a hopper, or base-burning stoves as they are commonly known, have been used for anthracite coal many years prior to complainants' invention; but a difficulty had attended this method of supplying soft coal, owing to its liability to ignite within the hopper. To obviate this, complainants constructed their hopper with a double circular wall, introducing air from above, between these walls, which, naturally following the draft, descended toward the fire, keeping the hopper itself comparatively cool, and at the same time feeding the fire with fresh air, descending directly upon its surface. The three claims in question were intended to secure protection for this device, and, properly considered, are substantially identical. The fifth is for a combination of the hopper with a circulating current of air around the lower end of the hopper, substantially in the manner, and for the purposes above described. The circulating current of air, being a result, cannot be patented; but, as it is said to be produced substantially in the manner described in the specifications, the chamber g, with the inlet i, set forth in the specifications, by which this result is produced, must be regarded as the thing patented. Seymour v. Osborne, 11 Wall. [78 U. S.] 516; Fuller v. Yentzer [94 U. S. 288]; Parham v. American Button-Hole, etc., Co. [Case No. 10,713]; Hitchcock v. Tremaine [Id. 6,538]; Curt. Pat. § 242a.

The seventh is, in its terms, for a result, but a result produced in the manner, and for the purposes above described, and, therefore, for the means by which this result is produced; for this claim must also be interpreted by the rule laid down in Seymour v. Osborne [supra]. In the case of Mitchell v. Tilghman, 19 Wall. [86 U. S.] 287, this principle is still further expanded, and the rule laid down, that in all cases where the claim is for the result, it must be construed to mean the means by which the result is produced, whether there is any reference to the specifications in the claim or not. Therefore, the claim must be construed as being one for a combination of the supply cylinder or magazine, and the means for producing a circulation of the air around the lower end of the supply cylinder or magazine, which is the exterior cylinder, with the inlet, i, in the complainants' drawing of the patent.

Thus, it will be seen, that these claims are for the same device, in effect, although clothed in different language, and the device is a combination of the supply cylinder or magazine with the air-chamber, and the register or inlet, i.

I do not find complainants' invention to have been anticipated by any of the various devices for which priority was claimed. The English patent to Robertson and the French patent to Ten Brinck were chiefly relied upon to establish such anticipation. While resembling this, so far as introducing a current of air to the surface of the burning coal constitutes similarity, they are lacking in an essential feature of the combination, viz., the hopper, suspended over the fire, and separate from the fire-pot. I do not overlook the fact, in this connection, that in his specifications Henderson declares he does not propose to confine himself to the precise shape or location of the hopper as represented in his drawings, where the shape and character of the stove to which they are applied require deviation in this respect; but I think these words must be construed as limited to a hopper separate from the fire-pot, suspended over it, and surrounded by an air-chamber, though it may not be conical or exactly round, or over the centre of the fire. The two devices claimed as anticipations are similar to each other in design, but consist simply of an inclined coal shute or scuttle, with a double top, between the two partitions of which a current of air is drawn down toward the surface of the fire. The scuttle or hopper does not project into the furnace, nor does the circulating current of air surround it. These devices scarcely contain suggestion, to an ordinary mechanic, of complainants' invention. The other devices alleged to be anticipations are still further removed from the Henderson patent, and consist merely of different designs for introducing fresh air to the surface of the fire. Nowhere do the defendants produce, in their list of older patents, the combinations named. Nowhere does Henderson broadly claim the use of air; and where they have shown it applied, in no case does it enter the fire through the walls of a surrounding chamber, and where it protects the mouth of the hopper thus exposed from the additional heat produced by the ignition of the gases escaping from the fuel. I do not regard the suggestion in the specifications that fire-brick, resting upon the flanges at the bottom of the hopper, may be substituted for the air-chamber, g, the air being admitted into the combustion-chamber upon the surface of the fire by openings in suitable places, as impairing the validity of the three claims in question. While the various devices for admitting air to the surface of the fire might have been anticipations of the 8th and 9th claims, it does not follow that they would anticipate the 7th.

The question of infringement was argued at great length and with much elaboration of detail. To constitute an infringement there must be (1) similarity of design; (2) substantial identity of purpose or result.

It is clear that defendants' stove, known as the Baldwin patent, fulfils the first condition, and, in design, is an infringement of the three claims in question. It is true the air-chamber, g, does not encircle the whole length of the hopper, but it encloses the lower end, so as to be capable of admitting a current of air to the surface of the fire, and of keeping the mouth of the hopper cool, if the general construction of the stove will admit of it. It differs from the complainants' device chiefly in having the upper part of the magazine or hopper perforated with holes through which air passes into or out of the hopper. These holes play an important part in determining the question of infringement.

Whether this device effects the same result is open to very considerable doubt. That the encircling air-chamber was originally intended for the same purpose, and was supposed to accomplish, practically, the same result, is evident from the language of the original patent, issued May 8th, 1875. The material portions of the specifications are as follows: "f is a diminished orifice through which the gases that may collect in the chamber, F, are discharged into the combustion-chamber, B. The operation of the device is as follows: Fuel contained in the fuel-reservoir, E, will, when the stove is well heated, emit gases, which said gases will escape into the room and become obnoxious, unless means are provided for their escape or combustion. This is effected by permitting them to escape into the chamber, E; thence carried by the draft downward through the diminutive orifice, f, where they are consumed in the combustion-chamber; and to assist this combustion, and at the same time furnish more oxygen to the flame in the combustion-chamber, a register, H, is provided, whereby external air can be admitted. When it is desired to diminish the heat of the stove, and for that purpose quell the combustion in the combustion-chamber, B, the damper, i, in the flue, I, is opened, and the gases in the chamber, F, permitted to escape directly in the smoke-flue, D, instead of permitting them to descend into the combustion-chamber, B."

It is claimed, however, by the defendants, that Baldwin, the patentee, was mistaken in his theory, and described erroneously the real operation of his device. This mistake he corrected in three subsequent reissues of his patent, in which he describes its operation as follows: "The operation of the device is as follows: Fuel contained in the fuel-reservoir, E, will, when the stove is well heated, emit gases in the process of coking the fuel in the magazine. These gases will escape into the room, and not only become obnoxious, but will be wasted until means are provided for their escape or consumption. This desideratum is accomplished by the provisions of the perforations, e, made through the magazine, whereby the draft, as shown by the arrows in the drawing, is directed from the air-space, F, into the magazine, E, whence it passes down through the fuel, assisting in coking the same before it reaches the fire-pot, A. The opening or orifice, f, at the bottom of the air-chamber, F, is not intended at all to facilitate the draft, the only practical function of the opening, f, being to permit the escape of dirt, or the like, that might collect in the chamber, F."

The substance of defendants' claim is that the operation of the two stoves is radically different; that the effect of the perforations in their hopper is to create a draft of air from the outer chamber, F, into the hopper, and down through the coal to the combustion-chamber, and that this is done for the purpose of coking the coal in the hopper and delivering it at the mouth of the hopper free from the gases, the presence of which, unconsumed, in the combustion-chamber, has hitherto proved such an obstacle to the use of soft-coal in base-burning stoves. It is further claimed in this connection that the double wall around the mouth of the hopper serves neither to keep the mouth of the hopper cool nor to supply air to the surface of the fire, but merely to permit the escape of the ashes and of particles of coal falling from the perforations, when fresh coal is thrown into the hopper.

I have no doubt this theory is true to a certain extent, and that the operation of the two stoves is considerably different. This was shown to my satisfaction by the exhibition of two stoves, one with a solid, and the other with a perforated magazine. Kindlings were placed in the two magazines, both of which had been emptied of their contents, and a fire applied. When the covers were placed on the fire in the solid hopper, it was at once extinguished, while that in the perforated hopper continued to burn with a downward draft, created by a flow of air through the perforations. Indeed, so far as empty hoppers are concerned, this was practically admitted by complainants' counsel to be the fact. It was claimed, however, that when the hopper was full of coal, the air would naturally seek an unobstructed descent through the air-chamber surrounding the hopper, rather than attempt to force its way through the interstices of the coal in the hopper. Indeed, it was insisted that as the coal approached the fire it became viscid, and would operate as an almost total obstruction to the passage of air from above. One important fact, however, seems to be well established in the operation of defendants' stove, viz.: that the coal becomes partly, at least, coked, and deprived of its gases, before it reaches the mouth of the hopper, and that the hottest part of the stove is in that portion of the hopper just below the perfora-

tions, and where the double wall commences. To sustain the fierce combustion at this point, the coal must derive its oxygen from above, since the air ascending from below, instead of finding its way up through the coal in the hopper, would naturally seek the surface of the fire, and be carried off into the chimney by the draft.

The theory of defendants, however, presupposes that all of the air entering his register, H, from above, passes into the perforations in the hopper, and down through the hopper, and that the space between the double walls, around the mouth of the hopper, is substantially a dead-air chamber, and useless either for preserving the mouth of the hopper or supplying air to the surface of the fire, and solely for the purpose of permitting the escape of particles of dust and ashes falling out of the perforations. I cannot understand, however, why the air, which takes a downward draft so freely through the mass of coal in the hopper, would not take the same draft through the unobstructed passage around it. In one experiment I witnessed with defendants' stove, a lighted swab, saturated with alcohol, was applied inside the chamber, F, and near the bottom of the perforations. The flame descended and came out of certain large holes left at the top of the outer wall, and although I could not see the peculiar flame coming out of the opening, f, at the bottom of the double wall, I was satisfied that it must have taken that direction. I also examined, with as much care as a red-hot coal-stove can be examined, whether, in the ordinary operation of the stove, air appeared to descend between the rings through the opening, f, into the combustion-chamber of defendants' stove. The mouth of the hopper was surrounded with a thin sheet of descending flame, apparently not coming from the opening, f, but inside of it, and directly below the inner ring of the hopper. If fresh air came down through the circular air-chamber, this would be the effect produced, since the air itself would not burn, but would communicate its oxygen to the gases coming out of the mouth of the hopper, which would ignite. This was the general result of the experiments conducted with stoves having the circular air-chamber about the mouth of the hopper. Defendants' stove, constructed without the circular air-chamber, and with a hopper having a single solid bottom, showed the same result, though a difference was detected in the fact of the flame coming out of the mouth of the hopper in jets or spurts, instead of surrounding it with a thin sheet of flame, as was observed about hoppers with the double bottom. These spurts of flame were still more plainly observed in a stove constructed with a hopper corrugated at the bottom, showing that the air passed more readily down through the corrugations. These experiments, and a careful criticism of the arguments and the testimony in this case, have satisfied me—1. That there is a downward draft through the hopper in defendants' stove, by which the coal, to some extent, is coked, and the gases expelled, before the coal reaches the mouth of the hopper. 2. That the air also descends through the unobstructed air-chamber surrounding the mouth of the hopper, supplying a current of fresh air to the surface of the fire.

Now, while the theory of defendants' stove does not require that the lower part of the hopper should be kept cool, this current of air must tend to have that effect, and also to supply fresh air to the surface of the coal in the fire-pot. As these are the results accomplished by complainants' invention, I feel constrained to hold that complainants have made out a case of infringement, notwithstanding the difference in the practical operation of the two stoves.

But, in view of the fact that defendants' stove, constructed without the circular air-chamber, and with a single solid wall, appears to operate as perfectly as those constructed with complainants' device, I am inclined to the opinion that the use of this device has been of little or no value to the defendants. These questions, however, with regard to damages will be reserved for the further opinion of the court. The usual decree will be entered for an injunction, and referring it to a master to assess and report the damages.

HENDERSON (DENNY v.). See Case No. 3,806.

Case No. 6,351a.

HENDERSON et al. v. DESHA.

[Hempst. 231.] [1]

Superior Court, Territory of Arkansas. Feb., 1834.

DEBT—INTEREST—USURY.

Judgment may be rendered for ten per cent. interest until paid, where that rate is expressed in the contract.

[Overruled in Byrd v. Gasquet, Case No. 2,268a.]

Appeal from Pulaski circuit court.

[This was an action at law by Benjamin Desha against Joseph Henderson and Richard C. Byrd.]

Before JOHNSON, CROSS, and ESKRIDGE, Judges.

OPINION OF THE COURT. This is an action of debt, brought by the appellee against the appellants, upon the following obligation: "Six months after date, we, or either of us, promise to pay to Benjamin Desha, or order, twenty-one hundred and eighty-one dollars and eighty-six cents, for value received; to bear interest from the date, at the rate of ten per cent. per annum.

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

Witness our hands and seals this twenty-first day of May, 1832. (Signed) Jos. Henderson (seal). R. C. Byrd (seal)." The judgment of the circuit court was rendered in favor of the appellee for the sum of two thousand and ninety-five dollars and seventy-nine cents debt; two hundred dollars thereof having been previously paid, and thirteen dollars and thirty-eight cents interest, and thirty-four dollars and twelve cents damages, together with interest on two thousand ninety-five dollars and seventy-nine cents, at the rate of ten per cent. per annum till paid, and the costs of the suit, which has been brought up to this court by appeal. Numerous objections have been taken by the appellants to the proceedings in the court below, some of which we will proceed to notice. First, it is contended that it is not averred in the declaration that the defendants affixed their scrolls to the writing declared on. By inspecting the declaration, it will be seen that the averment is sufficiently made. Another ground relied upon for reversing the judgment is, that it is rendered for interest at the rate of ten per cent. per annum till paid. By the terms of the contract in this case, ten per cent. per annum was agreed to be paid, and, by referring to our statute on the subject of interest, it will be seen that ten per centum may be lawfully reserved. Geyer, Dig. 240. Judgment affirmed.

HENDERSON (FISHER v.). See Case No. 4,820.

Case No. 6,352.

HENDERSON v. The HANNAH M. BUELL.

[1 Wkly. Notes Cas. 302.]

District Court, E. D. Pennsylvania. March 12, 1875.

ADMIRALTY JURISDICTION—WAGES OF WATCHMAN.

Wages as a watchman on board ship in port not a subject of admiralty jurisdiction.

This was a libel in rem for wages, the libellant [John S. Henderson] claiming to recover $357 for his wages as seaman, mate, and second mate from November 25, 1873, to October 19, 1874. During the first month of the period embraced in libellant's claim he was employed as watchman on board the vessel while in the port of Philadelphia. On January 1, 1874, he signed articles as seaman, afterwards as second mate and mate, and was discharged October 19, 1874.

Mr. Edmunds, for libellant.

Mr. Coulston, for respondents. Libellant has no lien against the vessel for his services as watchman.

PER CURIAM. The court is of opinion that it has no jurisdiction of the demand for watching and refuses to entertain the same; and, as to the residue of libellant's demand, awards him two hundred and eighty dollars without costs. Decree accordingly.

Case No. 6,353.

HENDERSON v. HENDERSON.

[5 Cranch, C. C. 469.] [1]

Circuit Court, District of Columbia. May Term, 1838.

ATTACHMENT—DECEDENT'S ESTATE.

A chancery attachment will not lie against the effects of a deceased person.

Chancery attachment of slaves, the property of the deceased John Henderson, for a debt due by him, in his lifetime, to the plaintiff [Tarlton T. Henderson].

Mr. Semmes, for defendant [John Henderson's administrator], moved the court to quash the attachment. The effects of a deceased person are not liable to be attached for debts due by him in his lifetime. They can only be administered by the executor or administrator according to law. The Virginian administrator has a right to sue in this court, and recover the property. He is not bound to give security upon dissolving the attachment. Wilson v. Wilson, 1 Hen. & M. 15; Wilson v. Kooutz, 7 Cranch [11 U. S.] 202; 1 Story, Eq. Jur. 549.

Mr. Taylor, contra. The sureties of the Virginian administrator are not liable for assets in the District of Columbia. Story, Confl. Laws, §§ 462, 524.

THE COURT (THRUSTON, Circuit Judge, absent) ordered the attached effects to be discharged.

HENDERSON (IRWIN v.). See Case No. 7,084.

Case No. 6,354.

HENDERSON v. LONG.

[Brunner, Col. Cas. 188; [2] 1 Cooke, 128.]

Circuit Court, E. D. Tennessee. 1812.

DESCRIPTION IN GRANT—"ADJACENT" CONSTRUED—GRANT—CALLS IN ENTRY—SURVEY, HOW MADE WHERE CALLS ARE INDEFINITE.

1. Adjacent does not mean adjoining, it signifies convenient, near to, or in the neighborhood.

2. A call in an entry may be made good by description, though the object called for is not notorious.

3. Where the calls in an entry are indefinite the survey should be made either in a square or an oblong.

The plaintiff [Henderson's lessee] claimed under the elder grant. The defendant, for

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

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

the purpose of showing his claim of title produced in evidence a grant younger than that of the plaintiff, and the following entry, which was the foundation of it:—"Samuel Long enters five thousand acres on the south side of Duck river, in Green county, beginning at General Green's southwest corner, and running south and east for quantity. 27th October, 1783." The plaintiff then produced the following entry, upon which his grant was founded, older in date than the entry of the defendant:—"Alexander Martin enters two thousand acres, lying on the first large creek running into Duck river on the south side, below General Green's survey, including a lick on the creek known by the name of Prewitt's Lick, near the center of a survey. 18th October, 1783." This entry was made under a particular law of North Carolina, which directed that Martin's land should lie adjacent to the military boundary line. It was surveyed ten or fifteen miles from the boundary. Several witnesses proved the notoriety of the large creek spoken of in the plaintiff's entry; and some testimony was introduced in relation to the notoriety of Prewitt's Lick. General Green's survey was proved to have been notorious before the date of the plaintiff's entry.

Mr. Whiteside, for plaintiff.
Mr. Haywood, for defendant.

BY THE COURT. The North Carolina legislature authorized Alexander Martin, under whom the lessor of the plaintiff derives title, to enter two thousand acres of land adjacent to the military boundary. It does not seem to the court that the legislature intended, by this expression, to compel Martin to adjoin the line. Adjacent, strictly speaking, does not mean adjoining; it means that it shall be in the neighborhood, or convenient, or near to the place mentioned in the act. The act did not make a location of the land; it only in substance required that when it was made it should lie near to the military line. If the jury should be of opinion that Prewitt's Lick was notorious at the time the entry of the plaintiff was made, the entry is good. And besides, it may be remarked that a call in an entry may be made good by description as well as notoriety. If objects are called for by description, and that description is insufficient, the entry then can only be made good by establishing the notoriety of the object. But if the description is good, and is such as will reasonably lead a subsequent locator to the object, the entry is good, although the object may not be notorious. Upon this idea suppose we discard altogether that part of the entry which mentions the name of the lick; will not the entry still be good? There is but one lick proved to be upon the creek. General Green's survey was well known, and the creek was well known. These are called for in the entry as a description, which may lead to ascertaining the place where Martin made his entry. It seems to the court that a subsequent enterer could, with reasonable diligence, having this description before him, have found the lick; and when he found the lick he would have known that it was the place where the entry had been made.

It has been objected that the plaintiff's survey is made in an oblong, whereas it ought to have been made in a square. We believe that the law authorized surveys to be made either in a square or oblong when the calls were indefinite. If there should be a call, seeming to exclude the idea of an oblong figure, then it ought to be surveyed in a square. In this case the survey is in an oblong, including the lick in the center, and we believe there can be no legal objection to it.

HENDERSON (OFFUTT v.). See Case No. 10,451.

HENDERSON (RICKETTS v.). See Case No. 11,806.

HENDERSON (SILVER v.). See Case No. 12,854.

HENDERSON v. WRIGHT. See Case No. 16,777.

HENDERSON (YEATMAN v.). See Case No. 18,132.

HENDERSON'S Case. See Case No. 16,777.

HENDRIC (UNITED STATES v.). See Cases Nos. 15,346 and 15,347.

Case No. 6,355.

The HENDRICK HUDSON.

[3 Ben. 419.] [1]

District Court, S. D. New York. Oct., 1869.

JURISDICTION—SALVAGE—A FLOATING HOTEL—COSTS.

1. A steamboat had been dismantled, and stripped of her boiler, engine, and paddle-wheels, and fitted up as a saloon and hotel, and used as such for some months, and was being towed to another place, to be there used in a similar way, and, while so being towed, got ashore, and it was necessary to lighten her by pumping, and a steam propeller was employed for that purpose, whose owner afterwards filed a libel against the hulk, to recover compensation for such pumping, as a salvage service: *Held*, that the hulk was not, at the time, engaged in commerce and navigation, in such a sense as to be liable in rem, in admiralty.

[Approved in The Old Natchez, 9 Fed. 477. Cited in Cope v. Vallette Dry-Dock, 10 Fed. 145; S. C., 16 Fed. 925; Snyder v. A Floating Dry-Dock, 22 Fed. 686; The Pulaski, 33 Fed. 384; Ruddiman v. A Scow Platform, 38 Fed. 159; The City of Pittsburgh, 45 Fed. 702.]

2. Whether it would be liable for a tort or injury committed by it, quere.

3. The libel must be dismissed, for want of jurisdiction, without costs.

[Cited in Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273.]

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

In admiralty.

Barney, Butler & Parsons, for libellants.
Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. The libel, in this case, is propounded as one of salvage, against the steamboat Hendrick Hudson, to recover the sum of $546, for services rendered by the steam propeller John Fuller, owned by the libellants, to the said steamboat, on the 20th of May, 1869, in pumping water out of her, and keeping her afloat, and towing her. The principal defence set up in the answer is, that the thing proceeded against was, at the time the service was rendered, and at the time of its seizure under the process in this suit, a hulk, without motive power, not used in commerce in any manner, but used as a hotel, at Polipel's island, in the Hudson river, opposite Newburgh, and that this court has no jurisdiction to proceed in rem against such hulk. The hulk had once been a steamboat, but was dismantled as such, and stripped of its boilers, and engine, and paddle-wheels, and purchased by the claimant. In that condition, it was taken from the city of New York to Saugerties, on the Hudson river, and there fitted up as a saloon and hotel. It remained at Saugerties during the winter of 1868, and until May, 1869, ashore, with the tide rising and falling in it. In May, 1869, the leaks in it were stopped sufficiently to enable it to be floated, and it was towed from Saugerties to Polipel's island by a tug-boat. While the tug-boat was endeavoring to put the hulk in the position in which its owner desired to have it, and before it reached such position, it struck the bottom, near the island, and became immovable. To move it farther, required that more floating power should be given to it, by overcoming, by pumping, the leaks through which the water entered it. For this purpose, the libellants were applied to, and their propeller, by pumping water out of the hulk faster than it came in, gave the hulk more floating power, and then, by pushing or pulling it, or both, moved it to a point designated by its owner, where it was suffered again to sink, and rest on the mud at the bottom, near the island. For this service to the hulk, the suit is brought.

Although this hulk or structure had been once a vessel, in the full sense of the term, and subject to the admiralty and maritime jurisdiction of the proper courts of the United States, and although its form and shape under water continued to be those of a vessel, yet I think that, in the actual circumstances of its physical existence, this court was and is without jurisdiction over it, in rem, in respect of the claim sued on in this suit. This hulk was not, in any proper sense, engaged in commerce or navigation. A floating house of religious worship, or a floating swimming bath, or a floating residence, could be towed, and, in such a sense, navigated, but such a structure would not be engaged in navigation, in such a sense as to be liable in rem, in the admiralty, for a service like the present one. The fact that the structure has the shape of a vessel, or had been once used as a vessel, or could, by proper appliances, be again used as such, cannot affect the question. The test is, the actual status of the structure, as being fairly engaged in commerce or navigation. A contract, claim, or service, to be cognizable in the admiralty, must be maritime, in such a sense that it concerns rights or duties appertaining to commerce or navigation. 1 Conk. Adm. 8; The Belfast, 7 Wall. [74 U. S.] 624, 637. Though the service in the present case was maritime in one sense, because the hulk was in the water, yet it was not maritime in such a sense as to bring the case within the admiralty and maritime jurisdiction of this court, under the grant of judicial power conferred on it by the ninth section of the act of September 24, 1789 (1 Stat. 76, 77), under the authority of the second section of the third article of the constitution. The service did not fairly and legitimately concern any right or duty which appertained to commerce or navigation, or to a structure engaged in commerce or navigation. Whether the structure in question would or would not be liable in rem, in the admiralty, for a tort or injury committed by it on navigable waters, depends on different considerations, and is not necessarily determined by holding it not to be liable in this suit.

The libel must be dismissed for want of jurisdiction, but without costs to the claimants. The McDonald [Case No. 8,756].

HENDRICK HUDSON, The. See Case No. 6,358.

Case No. 6,356.

HENDRICKSON v. The GESNER.

[N. Y. Times, Dec. 6, 1856.]

District Court, S. D. New York. Dec. 4, 1856.

MARITIME LIENS—DOMESTIC VESSELS.

[No lien arises under the maritime law for supplies furnished a vessel in the state in which she is owned.]

This was a libel filed to recover the value of sails furnished to the sloop. The libelant is a resident of New-York, and the work was done there, but the sails were furnished to the sloop while she was in New-Jersey, where she was owned.

HELD BY THE COURT (INGERSOLL, District Judge): That the sloop was domestic to the state of New-Jersey, where the sails were furnished, and there was therefore no lien created in favor of the libelant by the maritime law, whatever claim the libelant might have against the owner of the

sloop, and as it has not been made to appear that any lien was created by the local law of New-Jersey, libel dismissed with costs.

HENDRICKSON (HENCKLEY v.). See Case No. 6,348.

Case No. 6,357.

HENDRICKSON v. HINKLEY.

[5 McLean, 211.] [1]

Circuit Court, D. Ohio. April Term, 1851.[2]

EQUITABLE RELIEF FROM JUDGMENT AT LAW — WHEN EXERCISABLE—SURPRISE—SET-OFF.

1. Where a case was properly examinable at law, and a trial at law has been had, and no exception to the ruling of the court, chancery can give no relief.

[Cited in Lyme v. Allen, 51 N. H. 245.]

[See note at end of case.]

2. Chancery cannot revise a case at law, where there was no obstruction to a full investigation of the merits.

[See note at end of case.]

3. Even if a party neglects to make a full defense, as might have been done, it is no ground for the exercise of an equitable jurisdiction.

[See note at end of case.]

4. A party, in such a case, can obtain a remedy by a bill of exception to the ruling of the court, or a motion for a new trial.

In equity.

Mr. Probasco, for complainant.

Mr. Mills, for defendant.

BY THE COURT. This is a bill in chancery, in which the complainant asks relief against a judgment at law on two grounds: (1) That the complainant's claim be set off against the judgment; or, (2) that the defendant's judgment may be subjected to the payment of the complainant's accounts. Some years since a contract was made between the above parties, in which Hendrickson, in company with —— Campbell, since dead, purchased from the agent of Hinkley, a certain number of imported hogs, for which they agreed to pay a high price, on account of the breed of the hogs. The amount of the purchase was about three thousand dollars. A part of the consideration was paid, and the balance not being paid, suit was commenced by Hinkley. Notes, at the time of the contract, were given for the hogs.

The defendants set up in defense of the action, that they had been influenced to make the purchase by the fraudulent representations of the agent of Hinkley. That several of the hogs, for which they paid the highest price, were worth nothing, and could not be sold in the market, at any price. Also, it was alleged that payments had been made, and that certain expenses had been incurred by the defendants in keeping the hogs, &c., chargeable to the plaintiff. At the trial the jury found for the plaintiff the sum of in damages.

A motion was made for a new trial on the ground of surprise, at the trial, and for other causes. [Case No. 6,348.] The court overruled the motion, and entered a judgment on the verdict, and the present bill was filed for relief. There is no matter set up in the bill which might not have been considered in the action at law. The account set up was connected with the purchase of the hogs, and every item for which a credit on the judgment is claimed in the bill, grew out of that transaction. All these matters were examinable at law. After a full and deliberate trial at law, a verdict found for the plaintiff, a motion for a new trial was submitted on grounds stated. The court overruled the motion. No exception was taken to the ruling of the court on the trial. Under such circumstances a court of equity can give no relief. A court of equity will not revise a proceeding at law, where the subject matter was proper for a court at law. In such a case, equity has no jurisdiction. If the defendant failed to set up in his defense, what he might have done at law, there is no remedy. The laches of a party lays no foundation for the interference of a court of equity. There appears to be no ground on which the present bill can be sustained, and the relief prayed for given. The bill is dismissed at the costs of the complainant.

[NOTE. From this decree the complainant appealed to the supreme court, where the decree of the circuit court was affirmed in an opinion by Mr. Justice Curtis. 17 How. (58 U. S.) 443. It was held that a court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. When a party sued at law has his election to set off his claim or resort to his separate action, and selects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived.]

HENDRICKSON v. The JAMES GESNER. See Case No. 6,356.

HENDRICKSON (SELDEN v.). See Case No. 12,639.

Case No. 6,358.

The HENDRIK HUDSON.

[17 Law Rep. 93; 2 West. Law Month. 343.]

District Court, N. D. New York. Feb., 1855.

MARITIME LIEN—VESSEL UPON THE GREAT LAKES — POWER OF MASTER TO CREATE SUCH LIEN — CONTRACT OF AFFREIGHTMENT—CUSTOM—CHATTEL MORTGAGE—ORDER OF PRIORITY.

1. By the custom existing at the ports of the great northern and northwestern lakes, the

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

[2] [Affirmed in 17 How. (58 U. S.) 443.]

master of a steamboat or vessel, employed as a general ship, has, by virtue of his office of master, full authority upon the receipt of merchandise and other property on board his vessel subject to a lien for prior freight and charges of carriers and warehousemen for previous transportation, storage, &c. of such merchandise and property whilst on its way to its ultimate destination, to contract, in and by his bill of lading, to receive and transport such merchandise and property, to its port of destination; to receive such prior freight and charges on the delivery of such merchandise and property; and to bring back and pay over to such shipper, on the return of his vessel, the moneys received for such prior charges; if such is the ordinary course of the usual employment of such steamboat or vessel.

2. The evidence produced in this case fully established the existence of a custom for the masters of steamboats and vessels to make such a contract; and that such custom had been generally known, for fifteen years or more, by shippers and forwarders, and by the masters and owners of vessels engaged in the business of such lakes. It was therefore *held* that such a contract, made by the master, in this case, bound his vessel, and owners, to its performance.

3. Such a custom is reasonable and lawful; and such a contract, when authorized by a well known, long established and universal custom, and made by the master in the course of the usual employment of his ship, is binding, not only against himself and his owners in personam, but also against his vessel in rem; and not only against the interests of the general owners in the vessel, but also against the interests of other parties having common law liens; or having maritime liens, which from their nature and character, or the time of their creation, can be affected by the lien of the shipper, to whom the ship, in specie, is bound by such contract.

4. It seems such a contract, when made by the master, by virtue of a special and extraordinary authority from the ship owner, and without any known or general custom to authorize it, would not confer a lien on the ship binding upon mortgagees or others having liens; and that a lien, binding on mortgagees, &c., can only exist when the custom is such that the authority of the master to make the contract results from, and is conferred by, his mere appointment as master of the ship, without the delegation of other authority, than such appointment, per se, confers.

5. The ship, in specie, is, by the general maritime law, bound to the performance of all contracts made by the master in the usual course of the employment of the vessel, and the contract made by the master in this case being authorized by the custom, bound the ship to its performance, and the shipper had a maritime lien upon the ship, for his security, which lien can be made available by a proceeding in rem in the admiralty.

6. Such an admiralty lien, (like all other maritime liens,) is a privileged hypothecation, and takes preference of all liens and debts not privileged; and it is entitled to its proper place, in regard to its preferences and priority, amongst other privileged debts secured by a marine hypothecation of the same vessel.

7. An ordinary common law chattel mortgage upon a ship or vessel, though given for the purchase-money, and filed and recorded, as required by the law of the state to which the vessel belongs, and the law of the United States, prior to the making of such a contract as was made in the present case, does not entitle the mortgagee to claim the surplus of the proceeds of a ship sold under the process and decree of a court of admiralty, in preference to the privileged creditor who has a maritime lien under a bill of lading containing such a contract for the receipt, return and payment of the prior charges on merchandise and property laden on board a general ship, under such a custom as was proved in this case.

The steamboat Hendrik Hudson, her tackle, apparel and furniture, were libelled by the Michigan Southern Railroad Company, for the recovery of the amount due them for certain charges of transportation, which were a lien upon sundry different packages, parcels, articles of merchandise, and other property, which the libellants, in the ordinary course of their business, had received and transported upon their railroad while such merchandise and property were on their way to their ultimate destination; and which merchandise and property the railroad company had delivered, subject to the lien thereon for such charges, on board the Hendrik Hudson, in the month of November, 1852, for further transportation to, or towards, the point of final destination. At the several times of the delivery of the merchandise and property referred to on board the Hudson, the master executed and delivered to the railroad company, as the shippers of such merchandise and property, the usual bills of lading therefor. The captions of all these bills of lading were in the following form:—"Shipped, in good order and condition, by the Michigan Southern Railroad Company, on board steamer Hendrik Hudson, whereof Goldsmith is master, the following property, as here marked and described, to be delivered in like good order and condition, (dangers of navigation excepted,) as addressed on the margin, or to his or their assigns or consignees, only upon the payment of the freight, transportation and charges as noted below, which said carriers undertake to collect, return and pay." Following these captions, there was contained in each bill of lading the usual statement of the property laden on board the steamer, with the marks thereon, and the names of the owners or consignees, and also a statement of the prior charges to which the shippers were entitled, as well as the rate or amount of the steamer's freight; and at the end of each bill of lading, were the letters "C. C.," or the words "Capt. Collect," or "Capt. Collect, and pay J. H. Raynor;" thereby indicating that the master of the Hudson was authorized to collect such prior charges, and to whom they were to be paid, at the port of destination, in the cases where they were not to be returned to the shippers. It was satisfactorily proved by the concurring testimony of persons who had been engaged in business upon the lakes, as forwarders, shippers and vessel-owners, from nine to twenty-seven years, that the letters "C. C.," or the words "Capt. Collect," in such a bill of lading, by the known and universal custom and usage of the lakes, were understood to mean that the ship-master who executed such a bill of lading was to collect the prior freight and charges mentioned in

the bill, (and which follow the property,) and return and pay over the amount of such prior freight and charges to the shippers; and that by such usage and custom it was the master's duty to do so; that sometimes directions were given in such bills of lading for the captain to collect the prior freight and charges, and pay them over to some agent at the port of destination, in which case a direction, similar to that in some of the bills of lading in this case directing payment to be made to J. H. Raynor, was given; and that in such cases it was the duty of the master, by the universal custom of the lakes, to collect such prior freight and charges, and pay them over as directed; that shippers sometimes received from the master of a vessel the amount of these prior charges at the time of the shipment of the property on which they were a lien, and then collected them at the port of delivery; but that this advance of the prior charges was not often required; and that property was generally shipped under a bill of lading, like those shown in this case, with the understanding and agreement that the prior freight and charges were to be received by the master of the vessel on the delivery of his freight, and paid over to the shipper's agent, or returned and paid over to the shippers themselves on the return of the vessel, according to the direction and agreement of the bill of lading.

It is deemed unnecessary to state in detail the testimony in reference to the custom of the lakes. It is sufficient to state, that it was such as to leave no doubt that the master of the Hudson, at the time of the receipt of the merchandise and property described in the bills of lading under which the libellants claim, contracted, according to the custom and usage of the lake ports, to collect, on the delivery of such merchandise and property, the prior freight and charges mentioned in the bills of lading, and to pay over to the shippers or their agents the amounts received therefor; and that such testimony satisfactorily established the fact, that in consequence of a long-established custom and usage prevailing upon the lakes and their connecting waters, and at the ports thereon, forwarders, shippers, and masters and owners of steamboats and sailing vessels, well understood that the master was fully authorized, under and by virtue of his simple appointment as master, to make such contracts. It was also shown that the Hudson, during the season of 1852, was employed as a general ship, making frequent trips along the southerly shore of Lake Erie; and it was admitted that the goods mentioned in the bills of lading as shipped by the libellants, had been delivered by the master of the Hudson, and the prior freight and charges thereon received by the clerk of the steamer, and that no part thereof had been paid over, though the vessel had returned to the place of shipment after such delivery, and some time before this suit was commenced. The amount of the libellant's claim was $1,448.50, besides interest.

The claimants, Ansel R. Cobb and Nelson Willard, who had, on special application, been permitted to intervene for their interests and to litigate the claim of the libellants, were mortgagees, holding separate mortgages, upon undivided moieties of the vessel. These mortgages were given to secure part of the purchase-money of the moieties covered by such mortgages respectively. The mortgage under which Cobb claimed was dated April 14th, 1851, and that under which Willard claimed was dated on the 12th day of August, in the same year. These mortgages had been severally duly filed as required by the laws of the state of New York, where the owner of the Hudson, the mortgagor, resided, and they had also been duly recorded in the office of the proper collector of the customs as required by the act of congress. The claimants set up by their answers, and it was conceded at the hearing, that there had been a forfeiture under each of these mortgages, by a breach of its condition, prior to the making of the contracts of affreightment and bills of lading under which the libellants claimed. It was also conceded that they had not taken possession under their mortgages, but that the mortgagor had continued in possession of the Hudson, and had run her on his own account until she was arrested under the process of this court in December, 1852. It also appeared that the Hudson had been sold and the proceeds brought into the registry, and that the amount still remaining in the registry, though sufficient to pay the libellants' claim, was not sufficient to pay the claims of the libellants and claimants.

HALL, District Judge. The contracts made by the master of the Hudson, at the time he received on board his vessel the merchandise and property mentioned in the bills of lading proved in this case, and under which he was to receive the prior freight and charges which were a lien thereon, and to pay over the same as mentioned in the several bills of lading, were unquestionably binding upon the master; and a suit against such master might, undoubtedly, under the circumstances of this case, have been sustained in the common law courts. This was not denied upon the argument, but it was claimed that the master, in respect to these prior charges, was the agent of the shippers and not of the ship owners; and that neither the ship in specie, nor the ship owners were bound to the performance of such contracts. On the other hand it was urged by the libellants that the ship owners and the ship were bound by the master's contract; and that the libellants were entitled to a decree for the payment of their whole claim out of the proceeds of the Hudson still remaining in the registry of the court. In order to charge the owners personally upon such a contract, it is necessary for the libellants to establish the position that the contract

was made by the master as the agent of the owners, and under their authority, either expressly given or tacitly conferred. The general principle that the master of a ship, by the mere force and effect of his simple appointment as such, has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of a general ship, and also in respect to the means of employing her, is not only reasonable, and founded in just principles of commercial policy, but is too well established by authority to admit of controversy or doubt. 3 Kent, Comm. 161, 163; Abb. Shipp. 124; The Aurora, 1 Wheat. [14 U. S.] 96. The course of the usual employment of the ship is evidence of authority given by the owners to the master to make for them, and on their behalf, all the contracts relating to such employment, and, consequently, a contract so made by him is esteemed in law to have been made by them, and binds the owners as well as the master. Abb. Shipp. 124. In respect to most of the ordinary contracts of the master no proof of his authority to bind his owners, or that the contract relates to the usual employment of his ship, is required, because the universal usage and custom of the commercial world, give to the master full power to bind the owners of his vessel in respect to the matters to which such contracts relate. The authority of the master, in such cases, nevertheless, results from the general usage; and proof of the usage and custom is not required, simply because the usage is so general, so well established, and so familiarly known in courts of admiralty, that they will take judicial notice of its existence, and of the master's authority under it. The authority of a master to bind his owners may be extended by a well established usage and custom in respect to vessels engaged in a particular trade, or between particular ports; and, in such cases, the master, while acting in accordance with the usage and custom, is held to act within the scope of his employment, and his owners are liable for the faithful performance of every duty undertaken by the master in regard to property shipped according to the custom proved. And when it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of business, for the master to sell the cargo for cash, and to bring back the money to the shipper, the owners are liable, although no commission or distinct compensation was to be received therefor. The freight of the cargo is the compensation for the whole service, and upon the violation of any portion of the entire contract a suit may be sustained against the owners of the vessel without other evidence of the master's authority, than such as results from the proof of the custom and of his appointment and acts as master. Emery v. Hersey, 4 Greenl. 407; Kemp v. Coughtry, 11 Johns. 107. But to establish such custom it is not enough to prove, that the acts it is said to authorize have been frequently done. It must be shown to be so generally known and recognized that a fair presumption arises that the parties, in entering into their engagements, do it with silent reference to the custom, and tacitly agree that their rights and responsibilities shall be determined by it. The Paragon [Case No. 10,708]. And this is especially true in a case like the present, where the contract made, in accordance with the custom and under its authority, is to affect the interests of persons not parties to the contract.

The proof of the custom in the present case is ample and conclusive, and under this custom and the authorities above cited, I think it may be considered as established that the owners of the Hudson were liable upon the contracts of the master contained in the bills of lading executed to the libellants, and on which this suit is prosecuted. It is doubtless another question whether shippers are entitled to proceed in rem against the vessel for the defaults of the master when acting in the character of factor, or as agent of the shipper in any matter not directly connected with his duty and employment of master. The Waldo [Case No. 17,056]. But that question is not presented in this case. The master of the Hudson was not constituted the factor or agent of the libellants, in respect to the property shipped by them, nor was he invested with any discretion or authority to act as their agent, or in their behalf. His contract related exclusively to the ordinary and usual employment of his ship. The property shipped, and in respect to which the contract was made, was received from the libellants subject to their lien for their freight and charges, and it was for the purpose of obtaining the shipment of that property on board the Hudson for transportation, and thereby earning freight thereon, without advancing the charges which were a lien on the same, that he agreed to receive such property, subject to such charges, to deliver it only on the receipt of the amount of such charges, and to take and carry the money to be received for such charges to the shippers, or pay it over to the shippers' agents. If the prior freight and charges had been payable in railroad iron, and the contract had been to deliver the property shipped only upon the receipt of the railroad iron due for such charges, and to transport such railroad iron to the wharf of the shippers, and there deliver it for their benefit—and such railroad iron had been received and converted to the use of the master, there would have been little hesitation in saying that the vessel and her owners were liable, and yet I am unable to see any substantial difference in principle between the two cases. In my opinion the contracts on which the libellants proceed, related solely to the ordinary and usual employments of the Hudson, and the master's authority to make these contracts, resulted under the custom and usage proved from his mere appointment as master. By the terms

of these contracts, the master did not agree to act as the agent of the shippers, but he agreed as such master, that the subsequent delivery of the property shipped, which he was to make in the ordinary course of his employment and duty as such master, and which was necessary to be done as a condition precedent to his own right to demand the payment of the Hudson's freight thereon, should not be made until he received the prior freight and charges due to the libellants, and that when he received such freight and charges he would pay them over to the shippers or their agents. In all this he was to act as master of the ship, and as the agent of her owners, in carrying out the contract of affreightment under which he received the property in the bills of lading mentioned, and not as the agent of the shippers. After the master had received the property shipped under this contract, the shippers had no longer any control over the property, or over the master in respect thereto. They could neither require the master to re-deliver the property, or to demand the payment of any larger sums for prior freight or charges than were provided for in the bill of lading; nor could they, in any manner rightfully direct or control the master in respect to any matter connected with the delivery of the property or the receipt of the freight. He had a right to deliver it, even in direct disobedience to the express orders of the shippers; being liable to the shippers only for the payment of the sum he had agreed to pay on account of their lien. It is therefore apparent that the master was in no respect the agent of the shippers, but was the agent of his owners, and that they were liable for his default.

Under the admiralty and maritime law of this country, there are some cases in which the master and owners are liable under the contracts of the master, while the ship in specie is not bound for the performance of such contracts. Such are the cases of contracts for materials and supplies furnished a domestic ship. But the law of this country, as well as the general maritime law, gives a lien upon the ship to secure the performance of the lawful contracts of the master in respect to the shipment and transportation of merchandise and property on freight. Chancellor Kent says (3 Comm. 218), "And it appears very clearly, that by the general maritime law, a lien exist in favor of the merchant, who ships merchandise in a vessel on freight, against the vessel for the nonperformance of the contract of affreightment under the bill of lading entered into by the master, in his quality of master, and that it may be enforced by process in rem. The ship itself in specie is considered as a security to the merchant who lades goods on board of her, and it makes no difference whether the vessel be in the employment of the owner directly, or be let by a charter party to a hirer, who was to have the whole control of her," and so it was held by the learned judge of the Maine district in the cases of The Rebecca [Case No. 11,619]; The Phoebe [Id. 11,064]; The Waldo [Id. 17,056]; and The Casco [Id. 2,486]. [See Poland v. The Spartan, Id. 11,246, and the authorities there cited; The Volunteer, Id. 16,991.] [1] Indeed, by the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it as his security. The Paragon, ubi supra; Abb. Shipp. 124. [But see the cases of The Yankee Blade, 19 How. (60 U. S.) 82; The Freeman, 18 How. (59 U. S.) 188; and the Carrington [Case No. 6,029.] [1]

The principle that the ship and freight are bound for the acts of the master, has been incorporated into the maritime jurisprudence of England, though from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it. In this country the lien is not only acknowledged but enforced by our courts of admiralty, and having been borrowed from the general maritime law, or the customs and usages of the sea, we must look to them rather than to our own peculiar maritime jurisprudence for its true character and the cases to which it applies. The Phoebe [supra]. And the learned judge of the district court of Maine, after tracing the principle of this lien back to its source, declares that it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner. That on the contrary, in the origin of the custom the primary liability was upon the vessel. And it was declared in that case that whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as his security. In accordance with that principle, it was held in the case of The Phoebe that the ship, although in the hands and under the entire control and management of a charterer, was liable to the shipper for 136 tons of gypsum, of the value of $259.78, shipped on board the vessel for transportation from Eastport in Maine to Boston, and for which bills of lading were executed by the master under an agreement that the master was to have for his freight all the net proceeds of the sales of the gypsum over the sum above mentioned; the master, instead of carrying the gypsum to Boston, having stopped at Castine, transshipped it on board of another vessel, and wholly failed to deliver the gypsum to the consignees.

These authorities are sufficient to show that the ship, at least as against the owners, is liable in specie, for the performance of such contracts as were made by the master in this case. If the personal liability of the owners and the liability of the ship in specie, as against such owners, be fully es-

[1] [From 2 West. Law Month. 343.]

tablished, there remains another and more serious question, and one which was more elaborately argued and quite as confidently urged by the learned advocates for the claimants. They insisted that the rights of a prior mortgagee, who had filed and recorded his mortgage as required by law, were paramount to those of a creditor holding a maritime lien created under a contract of affreightment made subsequently to the time of the execution, filing and recording of the mortgage; that a subsequent maritime lien, unless for seamen's wages or under a bottomry bond, was inferior and subordinate to the common law lien under the chattel mortgage; and that the common law right of the mortgagee could not be affected or displaced by a subsequent maritime lien and proceedings in rem founded thereon, prosecuted to a decree and sale in a court of admiralty.

To maintain their positions, the advocates for the claimants cited the cases of Thomas v. The Kosciusko [Case No. 13,901], and Schuchardt v. The Angeleque [Id. 12,483a], decided by the learned judge of the Southern district of New York, and they claimed that those cases were directly in point, and fully established the doctrine for which they contended. The distinguished ability, eminent learning, and great experience of Judge Betts are well known and universally acknowledged in this district, and they deservedly give to his opinions almost the force of controlling authority in this court; but my preconceived opinions, adverse to the positions assumed here by the advocates for the claimants, had been so long and steadily entertained, that I was not prepared, on the argument and without further examination and reflection, to yield my assent to the doctrines which it is insisted, and no doubt properly insisted, are sanctioned by the cases cited. In the case of Thomas v. The Kosciusko [supra], it was held that the libellant had, under the general maritime law, a lien for certain supplies furnished the vessel within the district of New York, she then being owned in the state of New Jersey; and that the only defence to that portion of the libellant's demand depended upon the validity of the mortgage held by the claimant who had been permitted to intervene and defend the suit. The mortgage in that case was held to be invalid, and the libellant's right to a decree against the vessel, and a priority over the claimant was declared; but it is insisted, and I am inclined to think with good reason, that the language of the court authorizes the inference that the learned judge would have declared that the mortgage lien was to be preferred, if the mortgage had been properly filed and recorded according to law. I am not aware that any written opinion, containing a full statement of the views and reasoning of the court in the case of Schuhardt v. The Angelique [supra], has ever been published, but the newspaper report states "The court held," first, "that this court, proceeding on the instance side in actions by materialmen, freighters and passengers, against the ship, had no authority to compel the mortgagees to submit their mortgage interest to the order of the court, or to take satisfaction therefor, even at its full amount, much less to order the discharge of its lien on the ship on payment to the mortgagees of less than the mortgage debt." Second. "That the mortgagees never submitted themselves or their mortgage lien or debt to the jurisdiction of this court; but, on the contrary appeared at the place and time of the marshal's sale, and gave notice of the subsistence of their legal incumbrance and right against the ship." Third. "That had such a submission been made, the court of admiralty possesses no power over the creditors or their debts adequate to coerce the parties to an involuntary relinquishment or adjustment of their rights, or enabling it to fix a scale of equities between these numerous suitors, prosecuting distinct interests, or to compel any of them to forego their entire legal rights and remedies." Fourth. "That the libellants establish no right of action against the fund in court as the res chargeable with their debt, and they are not entitled to arrest them, or partake in their distribution as remnants or proceeds of the ship on which they hold an incumbrance, because the court has never displaced that incumbrance from the ship, and because these proceeds are more than absorbed by decrees in court directly against the ship, and they do not, therefore, continue in court, nor are they at the disposal of the court as remnants, so that the court can take cognizance of the equities thereto as between the ship and his creditors." Fifth. "That courts of admiralty have not inherently the faculty to use chancery powers or processes to compel creditors to yield legal rights and give place to claims, clothed with no more than an equitable character; nor as a general principle, to act upon parties or interests not before it by regular course of suit; nor to coerce suitors pursuing by courts of law the remedies appropriate to the jurisdiction of the court; nor others, not parties before the court to submit to a marshalling of assets within the control of the court, for the purpose of putting equitable claims thereto on the same footing with maritime liens in suit, or legal rights." Sixth. "That as a general principle, debts, resting on a maritime privilege alone, become incumbrances, and bind the res under lien when the same is attached thereon, and not before. Accordingly, suitors in admiralty take priority of satisfaction in lien debts in the order of the arrest of the property subject thereto, and not pro rata, nor in the order in which the debts were incurred, nor with reference to the time of indebtment, except in the case of express hypothecation;" and that the court directed "that the lien creditors, other than the libellants,

be paid out of the fund in court in the order in which their attachments were liened respectively, and when no attachment was served in suits under prosecution, then in the order in which the actions were instituted." In this case of The Angelique (as I understand the report), the mortgagees were themselves actors, having filed a libel against the proceeds of the vessel, which then remained in the registry, for the purpose of obtaining a decree for their application in payment of the mortgage upon which the proceeding was founded. The vessel had been previously sold under the decree of the court in favor of material-men. The mortgagees had attended the sale, and before the ship was bid off, gave to the marshal and to the bidders and purchasers at the sale, notice of their mortgage incumbrance, and insisted that the ship would still remain subject to their lien, notwithstanding such sale. This, as it has been seen, was one of the grounds upon which their right to a portion of the proceeds was denied; but the statement of the other points decided seems to warrant the conclusion that Judge Betts held that a prior chattel mortgage, duly filed and recorded, would not be affected or defeated by a sale under the decree of a court of admiralty, made in a suit brought to enforce a maritime lien, which attached after the filing and recording of the mortgage—unless, indeed, the mortgagee voluntarily appeared, and submitted himself and his mortgage to the jurisdiction and decree of the court. The case, if I understand it, fully sanctions the doctrine, that such a sale does not extinguish or defeat the lien of such prior mortgage, and that a court of admiralty has no power, when such mortgagee fails to appear, to sell the vessel discharged from the mortgage lien, or to give, (what it has been generally supposed a purchaser obtained at such a sale,) a good title as against the world.

If I have properly understood the points decided in the cases of The Kosciusko and The Angelique [supra], I cannot, after mature deliberation, assent to the doctrine of those cases. In my judgment, a court of admiralty proceeding in rem against a ship, on the instance side of the court, in suits prosecuted by seamen, material-men, bottomry bond holders, freighters, or others holding admiralty liens under the general maritime law, have a clear and undoubted right to decree, and do ordinarily decree, a sale of the ship free from all previously existing incumbrances, and that such a sale extinguishes the previously existing rights of all mortgagees, and of all others having common law or other rights or interests, in or to the same; and that the rights of such parties, after such sale, exist only against the proceeds of the sale; their only remedy being by application to the court for payment out of such proceeds in the order of priority which ought to be adopted in such cases. I confess that I can scarcely entertain a doubt, even after a careful examination of the cases of The Kosciusko and The Angelique, that such a sale extinguishes the lien of a mortgage (unless the decree and sale are made expressly subject to the lien), and that such lien is extinguished whether the mortgagee fails to appear in the court of admiralty, or appearing, peremptorily refuses to submit his claims and interests to the decision of the court, or to be bound by its decree; and I cannot but think, notwithstanding my high respect for the decisions of Judge Betts, that the decree and sale in the case of The Angelique, displaced, defeated and extinguished the lien of the mortgage held by the libellants in that case. That the claims of a mortgagee are extinguished by such a decree and sale, may, I think, be quite satisfactorily established; not so much, perhaps, by adjudged cases, directly in point, as by the class of authorities which declare generally that such a decree and sale are binding upon all the world, and by the other class of authorities which establish the right of a mortgagee to intervene for the protection of his interest, and contest the claim of a libellant who proceeds in rem against a vessel to enforce a maritime lien. The cases in which mortgagees have been allowed to take from the registry the surplus proceeds of such sales, after all maritime liens were paid, must likewise be considered as sustaining the same doctrine.

It appears to be well settled in England, that the high court of admiralty of that kingdom possesses, in all cases of bottomry and salvage, and also in claims for wages, which are brought before it, undoubted power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied. The jurisdiction of the court in these matters is confirmed by the municipal law of that country, and by the general principles of the maritime law; and the title conferred by the court in the exercise of this authority, is a valid title against the whole world, and is recognized by the courts of England, and by the courts of all other countries. Edw. Adm. Jur. 90, 91; The Tremont, 1 W. Rob. Adm. 163. The decree in rem binds all the world, and all parties may come in and intervene for the protection of their interests. Ben. Adm. §§ 364, 365, 434, 440; Abb. Shipp. (Perkins' Ed.) 26, and note; Conk. Adm. 556; The Mary, 9 Cranch [13 U. S.] 126, 144; The Neptune, 3 Hagg. Adm. 132, 139; The Attorney General v. Norstedt, 3 Price, 97; U. S. v. The Mangin [Case No. 14,461]; The Mary Anne [Id. 9,195]; Whitney v. Walsh, 1 Cush. 29. The cases in which mortgagees have been allowed to intervene for their interests, and contest the claims of a libellant in admiralty, or to take the surplus of the proceeds of sale from the registry after all the maritime liens thereon have been discharged, are evidence that the courts by which such cases were decided supposed

the mortgagee was bound by the decree, and that a decree and sale displaced and extinguished his lien upon the vessel itself. If his interests as mortgagee were not to be affected by the decree and sale, there could be no propriety in allowing him to intervene and contest the claim of a libellant, or in allowing him to take from the registry any portion of the proceeds of a sale. If the sale could only be made subject to his mortgage lien he had no interest in contesting the claim of the libellant; and if a sale when made did not defeat his lien, but was necessarily made subject to its continuance, the surplus in the registry would belong, not to the mortgagee, but to the general owner; and the mortgagee should be left to enforce his prior and paramount right against the vessel mortgaged in the hands of the purchaser. The following are some of the cases in which mortgagees have been permitted to intervene for their interest, and contest claims prosecuted against a vessel on which they held a mortgage. In a case of seamen's wages, though hesitatingly: The Prince George, 3 Hagg. Adm. 376. In cases of bottomry: The Dunvergan Castle, Id. 329; The Mary [Case No. 9,187]; The Duke of Bedford, 2 Hagg. Adm. 294; and see Edw. Jur. 91. In the case of a material-man: Thomas v. The Kosciusko [Case No. 13,901]; and see The Fortitude, 2 W. Rob. Adm. 217; The Repulse, 5 Notes Cas. 348, 354; The Mary Ann, 4 Notes Cas. 376. In the last case the suit prosecuted by the holders of a bottomry bond, was contested by the holders of a common law mortgage of prior date, and Dr. Lushington said:—"I apprehend as mortgagees the defendants have a right to impeach the validity of the bond (of bottomry) to the same extent, and in the same manner as the owners, subject, perhaps, to some distinctions in peculiar cases. But it is of importance, in this and all similar cases, to remember that the title of mortgagee, is a title derivative from the owners, and in no respect, as I conceive, superior thereto." In the case of The Mary, ubi supra, the claim under a subsequent bottomry bond, was preferred to a prior common law mortgage; the holder of the latter appearing and contesting the bottomry claim. And the same decision was made in the case of The Duke of Bedford, above cited. The following are some of the cases in which mortgagees have been allowed to take from the registry surplus proceeds of sale after the maritime liens had been paid: The New Eagle, 2 W. Rob. Adm. 441; The Neptune, 3 Knapp, 94; Harper v. New Brig [Case No. 6,090]. In the cases of The Portsea, 2 Hagg. Adm. 84, and The Exmouth, Id. 88, note, the surplus proceeds remaining in the registry after the maritime claims were satisfied, were applied for by the representatives of the owners of the vessel sold, but the court refused the applications in consequence of the adverse claims of mortgagees. It is true the court did not direct the payment of the surplus proceeds to the mortgagees, but the reason for declining to make such payment was, that the court had then no jurisdiction (as it now has under the statute of 3 & 4 Vict. c. 32) to determine controversies between the mortgagee and the representatives of the general owner, and the right of a mortgagee to the surplus proceeds was fully recognized by the refusal to direct the payment of that surplus to the representatives of the general owner, and continuing to hold them as against such representatives avowedly subject to such order as should come to the court of admiralty from a common law court, or court of equity, competent to settle the questions at issue between the mortgagee and the representatives of the general owner and mortgagor. The power of a court of admiralty to sell a ship and her appurtenances, and to give a perfect title as against all common law and other liens, is also fully shown by the case of The Flora, 1 Hagg. Adm. 298. In that case the vessel had been seized by a sheriff by virtue of a fieri facias, and was in his hands at the time the warrant of arrest issued by the court of admiralty in a suit for seamen's wages was executed, and the decree in favor of the seamen being first satisfied, the surplus proceeds remaining in the registry were paid over to the sheriff to be applied upon the fieri facias. In the case of The Harmonie, 1 W. Rob. Adm. 178, the sails of a ship, which had been arrested under the warrant of arrest issued by the admiralty, under the provisions of the act of 3 & 4 Vict., for necessaries supplied to the vessel, were in the possession of a sailmaker, who had a common law lien therefor for repairs, and claimed to hold them against the process of the court. A monition was moved for and granted for the purpose of compelling the sailmaker to deliver up the sails to the person in possession of the ship under the authority of the court, and in making this decision the court said:—"Undoubtedly the sailmaker has a lien upon these sails to the amount of the repairs he has effected; and under the general law he would be justified in retaining possession of them until his debt is paid, against the owners or others seeking to dispossess him. As against the authority of this court, however, he has no right to detain them when the ship is in possession of its officer under a warrant from the court. The court can protect the sailmaker in his just rights." [And see Certain Logs of Mahogany [Case No. 2,559], where it was held that a suit in a state court by replevin, or by an attachment of the property in question, cannot supersede the right of the court of admiralty to proceed by a suit in rem, to enforce a right or lien against the property. See, also, Poland v. The Spartan [Id. 11,246], where it was held that the cargo of The Spartan, which had been attached under the attachment process of the state courts, was still liable to be arrested and held for the payment of the freight, at the instance of

seamen who had a lien for their wages upon the freight, which was a lien upon such cargo. But see Taylor v. Carryl, 20 How. [61 U. S.] 583.][2] The cases cited are deemed sufficient to establish, by authority, the position that the mortgage lien is extinguished by a sale under the decree of a court of admiralty, but if we look to the nature, origin and objects of admiralty liens, and the principles of commercial policy in which they originated, and by which they are still upheld, it will be seen that these cases are in affirmance of the general principles which have been adopted and maintained in the maritime courts of this country and Europe.

The writer of an elaborate essay on the Peculiarities of Maritime Liens, first published in the Law Magazine (English) for November, 1852, and reprinted in the Monthly Law Reporter (volume 15, p. 556), says, that the "Origin and rationale of the maritime lien are equally plain and obvious. At a period when a registry of shipping was unknown, the difficulty of ascertaining the names and residences of the owners of the vessel against which the plaintiff (whatever might be his cause of action) was interested, would have been insuperable. In our own times, where such registry does exist, the practical difficulty of ascertaining all the precise and accurate facts which are required to be known before a personal action can be brought in the form which the law necessitates is very considerable. In the case of foreign vessels it would of course amount to perfect irresponsibility or impunity on the part of their owners. No other course to protect and indemnify with facility and completeness, the suitors for wages, salvage, bottomry or damage could be imagined or contrived, but the maritime lien and its accompanying process in rem." Id. 557, 558. And again: "In the first place, a maritime lien is a debt privileged to be paid out of the res ipsa, i. e. the ship or its incidents, the cargo and freight; the condition of the privilege being that the debt shall have arisen out of such a transaction connected with the res as is cognizable in that court, e. g. wages, pilotage, towage, bottomry or damage. With these maritime liens no other debt, not even a mortgage of the vessel itself can compete. The Orelia, 3 Hagg. Adm. 83; The Hersey, Id. 407, 408. But the court of admiralty, with an entire disregard of their existence, whatever their number or amount may be, will sell the res to discharge its own peculiar liens. Nor can any other court either possess itself of the vessel, or even retain possession of it in satisfaction of debts of its own cognizance, so long as the court of admiralty has liens to enforce." When once the vessel has been arrested by the admiralty, no other tribunal can take it out of its custody. The Westmoreland, 4 Notes Cas. 174. And it is only the clear balance that may remain in its hands, after the full payment of the maritime liens, that is subject to or available in respect of other debts, even in the case of the bankruptcy or insolvency of the owner of the vessel. A common law lien upon the res cannot be set up and maintained against a maritime lien when the res is about to be sold under the process of the admiralty, but that court, at the same time that in such a case it will forcibly dispossess those who claim to hold a vessel or her sails by virtue of a lien of that kind, (for example, dock and harbor dues, repairs or warehousing,) will protect such persons in their just rights by paying them the amount of their respective debts out of the proceeds of the sale of the res. The Harmonie, 1 W. Rob. Adm. 178.

Courts of admiralty and writers upon maritime law use the terms "maritime lien," The Globe [Case No. 5,483]; Essay on the Peculiarity of Maritime Liens, 15 Law Rep. 555–557, 590, etc.; Conkl. Adm. p. 60, "Privileged Debts"; The Paragon [Case No. 10,708], Essay, etc.; 15 Month. Law Rep. 556, 557, "Implied Liens of Privileged Creditors"; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409, "Implied Hypothecations"; Justin v. Ballam, 2 Ld. Raym. 805, "Privileged Hypothecations"; Skolfield v. Potter [Case No. 12,925], "Privileged Lien"; Id., and The Jerusalem [Case No. 7,294], "Tacit Hypothecations"; Emerigon, Contraits a la Grosse, G. R. § 2; The Rebecca [Case No. 11,619], "A Lien by the General Maritime Law"; The Paragon, ubi supra; Poland v. The Spartan [Case No. 11,246], "A Privilege against the Ship"; The Rebecca [supra], "A Lien on the Vessel"; The Rebecca and The Paragon, ubi supra, and other similar language, to express substantially the same idea. They all imply the existence of a privileged debt or demand, and of a maritime lien to secure its payment. This lien is given according to the general maritime law, and by that law the ship is considered as hypothecated to the privileged creditor in such a manner as to authorize her arrest and sale under the process and decree of a court of admiralty, at the instance of the creditor, and the application of the proceeds of such sale to the payment of the privileged debt.

The object of allowing these maritime liens is to give credit to the ship, and therefore these liens, as a general rule, bind all prior interests. This is so not only in respect to common law interests, but it is usually so in respect to previously existing maritime liens; the general rule adopted by courts of admiralty in settling the preference or right of priority of maritime liens giving preference to those of latest date. For the rule by which that priority is determined, requires that the demand or service for which that privilege is claimed be posterior in date to other liens. The ground of this inversion of rule is just and obvious. In the hazardous trade of the sea, the services performed at the latest hour are most efficacious in bring-

[2] [From 2 West. Law Month. 343.]

ing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefitted by means of the succeeding incumbrance, and the equity of the court of admiralty in adjudicating cases of conflicting liens of this nature takes that as the principle of its decisions. 16 Month. Law Rep. p. 4. In the case of St. Jago de Cuba, ubi supra, Mr. Justice Johnston said:—"The whole object of giving admiralty process and priority of payment to the privileged creditors, is to furnish wings and legs to the (in that case) forfeited hull to get back for the benefit of all concerned; that is, to complete her voyage." "It is not in the power of any one but the ship master, not the owner himself, to give these implied liens in the vessel, and in every case the last lien will supersede the preceding. The last bottomry bond will ride over all that precede it, and an abandonment to a salvor will supersede every prior claim." In the case of The Dowthorpe, 2 W. Rob. Adm. 79, Dr. Lushington is reported to have said:—"It cannot for a single moment be denied that a ship, in whosesoever hands she may be, or whoever has an interest in her, is liable to liens subsequently accruing, such for example, as salvage, bottomry bonds, and seamen's wages. These are liens upon a ship in the strictest sense of the term; and those persons who take a vessel as security, must take it subject to the incumbrances which the law may impose upon it for the benefit of third parties." These incumbrances are imposed for the benefit and encouragement of trade and commerce, and to enable the ship to obtain credit and business where her owners are unknown, or have no personal credit, and the reason and policy which gives these maritime liens as against the general owner and a subsequent bona fide purchaser without notice, and as against prior maritime liens of a similar character, apply with equal force to a case like the present. No very substantial reason has been urged why a mortgagee who allows the owner to remain in possession of the vessel mortgaged and employ it in navigation, even after forfeiture, should be placed in a better position as against seamen, bottomry bondholders material-men and freighters, than a subsequent bona fide purchaser without notice, or prior holder of another maritime lien. A mortgage is but a conditional sale, and where the mortgagee permits the mortgagor to remain in possession of the vessel and employ it in navigation, he doubtless does so to enable the mortgagee, with the profits of such employment, to redeem his mortgage. He thus expects to participate, indirectly, in the earnings of the vessel. And when the vendor of a vessel gives credit for the purchase money, and stipulates to allow the purchaser who gives a mortgage to secure its payment, to use the vessel for the purpose of earning the means of paying off the mortgage, he secures to himself a larger price for his vessel, and should be affected by such liens as the master, the representative for this purpose of all parties interested in the ship, finds it necessary to create to ensure the profitable employment of the ship in the due and ordinary course of its business. [See The Chusan [Case No. 2,717], and The George's Creek [Id. 11,654.][3]

The principle contended for by the claimants would give to the mortgage lien a superiority over bottomry bonds, the claims of material-men, and the holders of other maritime liens of even date; for the latter are subject to other maritime liens of the same character, subsequently accruing, while the mortgage lien is claimed to be substantially indelible. If the mortgage is thus to be preferred, how is a ship to obtain credit in a foreign port where the parties who might be willing to supply her necessities if made secure, can by no possibility of means, determine whether she is not mortgaged to her full value in the country where she belongs? And if it be established that the decree of a court of admiralty and a sale under it give no valid title as against a prior mortgagee, who will bid any thing like the full value of a ship offered for sale under such a decree? When it is once established that the right of a purchaser under such a decree is liable to be wholly defeated by a chattel mortgage, registered, filed and recorded in another country, but in respect to which, or in respect to the existence or non-existence of such mortgage, he has no means of obtaining any seasonable or reliable information, the utility and value of the maritime lien will be so far diminished, that I should doubt the policy or expediency of preserving its form after its substance had departed. Once establish this doctrine and the real owners of many, not to say most, of our vessels may be persons of wealth holding chattel mortgages thereon, while the nominal owners appearing upon the registry of the custom house, are persons of no responsibility, willing, because they have little or nothing to lose, to subject themselves to all the risks which those engaged in commerce necessarily assume.

Having heretofore discussed the question of preference among maritime liens, and incidentally their character and objects (in the case of The America [Case No. 288]) I do not propose now to pursue that discussion, but to say that I adhere to the opinions there expressed, and that the cases in our own and the English courts, then or now referred to, are in my judgment sufficient to establish the position that every creditor, who holds a maritime lien upon a ship or vessel as a security for his debt, has a "privileged debt," secured by the "hypothecation" of the vessel. These terms, "privileged debt" and "hypothecations," have a known and fixed meaning,

[3] [From 2 West. Law Month. 343. See note at end of case.]

both in the maritime and civil law, and if they did not have their origin in the civil law, in which it has been frequently suggested the implied hypothecation of the maritime law had its origin, they have the same effect and definition in the maritime and civil law. The learned judge of the Maine district, whose research and learning entitle his opinions to the highest respect, evidently inclines to the opinion that the maritime lien had its origin in the maritime usage of the middle ages rather than the civil law. However this may be, the privilege and the hypothecation are both well known and well defined terms of the civil law, and the precise character and effect of the marine hypothecation of a ship which secures the payment of a privileged debt against it, may, I think, be very satisfactorily ascertained by a reference to the civil law, where it treats of privileges and hypothecations. For the doctrines of the civil law on these subjects I shall refer to Domat (Little & Brown's Ed.) sections 1732, 1736, 1738, and 1769. Sec. 1732. "We must distinguish between three sorts of creditors: those who have neither mortgage nor privilege, such as he who has only a bare promise for money lent; those who have a mortgage without a privilege, as he who has an obligation for money lent, passed before notaries public; and those whose credit has some privilege that distinguishes their condition from that of other creditors, and which gives them a preference to those whose credit is prior to theirs. Thus he who has lent money to buy a house or repair it, is preferred as to that house before other creditors of the same debtor, although they have mortgages on it which are prior in date." Volume 2, p. 680. Sec. 1736. "The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time, and who have mortgages." Id. 681. Sec. 1738. "All the privileges of creditors have this in common, that the least of them gives the preference before creditors who are such only by writing, or by mortgage, and others who have no manner of privilege. And among those who are privileged there are some who have the preference before others, according to the different qualities of their privileges." Id. 681. Sec. 1769. "It follows from all the preceding" (contained in the sections above quoted and others,) "that among creditors there are three orders. The first is, of those that are privileged, who go before all the others, and take place amongst themselves, according to the distinctions of their preferences. The second is, of those that have mortgages who have their rank after the privileged creditors, according to the dates of their mortgages. And the third is, of creditors who have only personal actions, who not being distinguished either by privilege or mortgage, come in therefor jointly together, and share equally in proportion to their debts." Id. 694. Perhaps it was not strictly necessary in this case to resist the authority or criticise the doctrines of the cases of Thomas v. The Kosciusko and Schuhardt v. The Angelique [supra], for it strikes me that if the doctrines of those cases are carried out, their legitimate results must necessarily be to exclude the claimants from any participation in the proceeds of the sale of the Hudson. If the lien of the claimants' mortgages still exists in full force, notwithstanding the sale, if the Hudson was in law and fact actually sold subject to that lien, there can be no propriety in giving these claimants a portion of the proceeds of such sale, to the total or even partial exclusion of those who had maritime liens upon the vessel, and which, it is conceded, have been displaced and defeated by the decree and sale. I have preferred, however, to examine the questions which have been discussed, rather than to rely upon the ground just stated as the basis of my decision, for the reason that these questions are of great practical importance to those engaged in the commerce of the lakes. After a deliberate consideration of these questions I have, with some hesitation and reluctance, determined it to be my duty to dissent from the opinions of the learned judge of the Southern district in the cases of the Kosciusko and The Angelique, and I should have felt still more reluctant in doing so, if there had not been a higher tribunal before which my decision can be taken for revision. And I sincerely hope that the claimants will take this case to that higher tribunal, that the important questions involved may be finally determined and settled by the appellate court. The clerk will enter a decree for $1448.50 and interest, from the 28th Nov. 1852.

NOTE [from original report in 2 West. Law Month. 343]. February, 1855. In the case of Ruder v. The George's Creek [Case No. 11,654], in the district court of the United States for the Maryland district, Judge Giles held, that a recorded mortgage of a vessel did not take precedence of a subsequent lien obtained by a material man for necessary supplies or repairs; and he referred to a case decided in the same way by Judge Sprague, in the district court of Massachusetts, in January, 1855.

Case No. 6,359.

HENDY v. SOULE.

[1 Deady, 400.] [1]

Circuit Court, D. California. March 15, 1868.

INTERNAL REVENUE—APPEAL—INVOLUNTARY PAYMENT—LIABILITY UNDER ACT OF JULY 13, 1866.

1. Section 19 of the act of July 13, 1866 (14 Stat. 152), declared that no suit should be maintained for the recovery of any tax illegally assessed or collected until after an appeal to the commissioner of internal revenue: *Held*, that in an action against a collector to recover a tax alleged to have been so assessed and collected,

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

a failure by the plaintiff to take such appeal must be pleaded by the defendant in abatement of the action, and unless it is, he will be deemed to have waived the objection.

2. When taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary.

[Cited in Balfour v. City of Portland, 28 Fed. 739.]

[Cited in Stephan v. Daniels, 27 Ohio St. 540; Westlake v. City of St. Louis, 77 Mo. 49.]

3. The plaintiff was the owner of a patent for the exclusive manufacture and sale of a certain "concentrator," and employed others to construct the machines for him at so much apiece, and then sold them at about 100 per centum advance on the price paid for their construction: *Held*, that under sections 79 and 86 of the act of July 13, 1866 (14 Stat. 119, 122), the plaintiff was the manufacturer of such machines and liable for a tax upon the sum realized by the sale of them.

[This was an action at law by Joshua Hendy against Frank Soule, a collector of internal revenue, to recover the amount of a tax paid under protest.]

Elisha Cook, for plaintiff.

R. F. Morrison, for defendant.

DEADY, District Judge. This action is brought against the defendant, as collector of the internal revenue for the First district of California. It was commenced in the Twelfth district court of the state, and removed to this court on the application of defendant. The cause was tried upon the amended complaint, filed in this court, and the answer of the defendant, without a jury. The object of the action is to recover from the defendant the sum of $329.10, paid to him for a manufacturer's license and as a manufacturer's tax. From the evidence and the admissions in the pleadings, it appears that the plaintiff was the owner of a patent right for the manufacture and sale of "Hendy's Patent Concentrator." The plaintiff employed certain foundrymen to construct a number of those machines for him, for which he paid them from $125 to $150 apiece. The foundrymen had a manufacturer's license, and paid the manufacturer's tax upon the money which they received from the plaintiff for constructing the machines. The contractors constructed these machines exclusively for the plaintiff, and were not authorized to sell any of them, except in pursuance of his special directions. The plaintiff kept the machines for sale, and sold them at $250 and $300 apiece—about one hundred per centum more than the cost of construction. The assessor of the district assessed the plaintiff for a manufacturer's license and with the manufacturer's tax upon the sums received by him from the sale of machines, over and above the cost of construction. In the course of his official business, these assessments were collected from the plaintiff by the defendant—the former paying the sum under protest, and after the issuing and exhibition to him of a warrant to distrain his property for the same.

This is the case. But before considering it upon its merits, it is proper to refer to the provision in section 19 of the act of July 13, 1866 (14 Stat. 152), which enacts as follows: "That no suit shall be maintained in any court for the recovery of any tax, alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue." No notice is taken of this provision, in either the pleadings or the argument. Does the statute operate to prevent the jurisdiction of the court, unless the complaint shows that an appeal has been taken? or does it merely furnish a defence to the action, which the defendant, as his personal privilege, may plead and insist upon, or waive by his silence? By the statute of limitation, it is declared that an action shall not be maintained, upon certain causes of action, unless commenced within a specified time. But this statute was never held to affect the jurisdiction of the court, and the defendant, to obtain the benefit of it, must set up and insist upon the bar. In my judgment the cases are parallel. This statute should not be construed to limit the jurisdiction of the court, but as a qualified restraint upon the general right of the plaintiff to maintain an action "for the recovery of a tax erroneously or illegally assessed or collected." The right of action exists in favor of the party injured by the collection of the tax, independent of the statute. The statute, to save the government, now represented by the defendant, the trouble and expense of unnecessary litigation, requires the plaintiff to first present his claim for relief, by appeal, to the commissioner. In this view of the matter, it is not necessary to the maintenance of the action, for the complainant to show that an appeal has been made to the commissioner. If no appeal has been made, the defendant may protect himself, by plea to that effect, in abatement of the action, or he may by his silence waive this defence, and then it becomes immaterial whether an appeal was made to the commissioner or not. The defendant in his answer avers that the plaintiff paid these taxes voluntarily, and therefore is not entitled to recover them back, even if they were illegally assessed. But the proof establishes the contrary. The taxes were demanded by an officer having authority to collect them by distraint—without action. That is sufficient duress of the plaintiff's property, to make the payment involuntary. Mariposa Co. v. Bowman [Case No. 9,089]. If then, the plaintiff was not the manufacturer of these machines, he is entitled to judgment for the amount claimed.

For the purpose of indicating who are required to take out a manufacturer's license, a "manufacturer" is defined by the act of July 13, 1866 (14 Stat. 119), as follows: "Any per-

son, firm, or corporation, who shall manufacture, by hand or machinery, any goods, wares, or merchandise, not otherwise provided for, exceeding annually the sum of one thousand dollars, or who shall be engaged in the manufacture, or preparation for sale, of any article or compound, * * * shall be regarded as a manufacturer." By the same act (14 Stat. 122) it is provided that the manufacturers shall pay a certain tax ad valorem upon "goods, wares and merchandise" therein mentioned, "produced and sold or manufactured, or made and sold * * * within the United States;" and that the "return of the value and quantity" of goods, etc., manufactured, shall contain "an account of the full amount of actual sales made by the manufacturer or producer," and that the "value and quantity of the goods, etc., shall be estimated by the actual sales made by the manufacturer." The tax is not imposed upon goods manufactured merely, but upon goods manufactured and sold or removed for consumption, etc. The tax imposed upon the manufacture of these machines was ad valorem—a per centum of their market value—the sum received for them on actual sales. From these premises it is evident that the tax imposed upon the manufacturer of these machines, should have been assessed upon the amount for which they sold, and not the mere cost of construction. Who is liable for it? To whom should the assessment be made? the plaintiff or the mechanics who constructed the machines? The government is entitled to the tax, and one or the other of them must pay it. Justice at once suggests that the person who sold the machines and received the money arising from the actual sales, should pay the tax. This is the plaintiff. Besides, the plaintiff comes exactly within the latter clause of the definition of a manufacturer, in the act already cited. He is a person engaged in the manufacture or preparation of these machines for sale. To be engaged in the manufacture of machines, it is not necessary that a person should make them with his own hands, or that the work should progress under his personal inspection. Properly speaking, the plaintiff should have been assessed with the whole value of the machines, but the omission to do so, is no reason why he should not have paid what he did. The persons who constructed these machines for the plaintiff, did not manufacture them for sale, or sell them—they simply made them as workmen for wages or hire. The plaintiff, on the other hand, was engaged in the manufacture of the machines for sale, and sold them. In his hands, their value consisted of the cost of production, and the price he could induce the public to give in addition, rather than do without them, as his patent gave him a monopoly of the article. The plaintiff is within the statute definition of a "manufacturer," and therefore liable to pay the license tax. He is the manufacturer also of these machines, and ought to pay a tax upon the sum realized by the sale of them. It can make no difference that fifty per cent. of this value arises from the fact that the plaintiff has a monopoly of this production. Like causes or the exact converse enter into and modify the market price of all articles of manufacture. The tax is imposed upon the result—the price obtained—be it more or less, from whatever cause. The greater the sum realized the greater the tax, and vice versa. The plaintiff might employ all the manufacturers or producers of a particular article, in this community, to work for him for a given period. By this means he might control the market so as to command a large price for his goods. But if so, he is taxed accordingly. In other words, it is immaterial what conduces to give an article its market value. Whatever that value is, the tax must be imposed upon that basis. Judgment must be given for the defendant.

[NOTE. In Case No. 6,800, a bill filed by the plaintiff in conjunction with others against the same defendant, to restrain him from assessing or collecting a tax on the ground of its illegality, was dismissed, under section 10 of the act of March 2, 1867 (14 Stat. 475), which amends section 19 of the act of July 13, 1866 (14 Stat. 152).]

Case No. 6,360.

HENFIELD'S CASE.

[Whart. St. Tr. 49.]

Circuit Court, D. Pennsylvania. 1793.

VIOLATION OF NEUTRALITY — LAW OF NATIONS — TREATY—INDICTMENT—JURISDICTION OF FEDERAL COURTS.

[1. Under the constitution of the United States, treaties with foreign nations comprise a portion of the public and supreme law of the land, and a violation of such treaty by a citizen of the United States may be punished in the federal courts by indictment.]

[2. The participation by the citizens of a neutral state in an attack by one belligerent power upon another is an offense against the law of nations, and may be punished as such by such neutral state.]

[3. Though there may have been no exercise of the power conferred upon congress by the constitution "to define and punish offenses against the law of nations," the federal judiciary has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law; and it seems that the federal courts have common-law cognizance of offenses against the sovereignty of the United States.]

A charge delivered by the Honourable JOHN JAY, Esquire, Chief Justice of the United States, to the grand jury impannelled for the court of the United States, holden for the Middle circuit in the district of Virginia, at the capitol in the city of Richmond, on the 22d day of May, 1793.[1]

[1] This prosecution, which has been referred to frequently in the subsequent reports as the earliest case on the subject of the common law jurisdiction of the federal courts, and which was considered of so much importance by General Washington, as to justify a special meet-

Gentlemen of the Grand Jury: That citizens and nations should [so] use their own as not to injure others, is an ancient and excellent maxim; and is one of those plain precepts of common justice, which it is the interest of all, and the duty of each to obey, and that not only in the use they may make of their property, but also of their liberty, their power and other blessings of every kind.

To restrain men from violating the rights of society and of one another; and impartially to give security and protection to all, are among the most important objects of a free government. I say a free government, because in those that are not free, these objects being in certain respects secondary to others are less regarded, and less perfectly provided for. Where the conduct of the citizens is regulated by the laws made by themselves and for their common benefit, and executed by men deriving authority from, and responsible to them, the most regular and exact obedience to those laws is to be expected, required and rendered. By their constitution and laws, the people of the United States have expressed their will, and their will so expressed, must sway and rule supreme in our republic. It is in obedience to their will, and in pursuance of their authority, that this court is now to dispense their justice in this district; and they have made it your duty, gentlemen, to inquire whether any and what infractions of their laws have been committed in this district, or on the seas, by persons in or belonging to it. Proceed, therefore, to inquire accordingly, and to present such as either have, or shall come to your knowledge. That you may perceive more clearly the extent and objects of your inquiries, it may be proper to observe, that the laws of the United States admit of be-

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ing of congress, and by Mr. Jefferson as to require a distinct explanation to the British government, is now for the first time reported. The charges of Chief Justice Jay and Judge Wilson, it is true, were printed by the government for the purpose of explaining abroad the position of the United States, but they have never yet been presented to the professional eye. Fortunately, however, among the papers of the late Mr. Rawle, who, as district attorney, conducted the prosecution; and those of Mr. Duponceau, who, with Mr. Sergeant and Mr. Ingersoll, were counsel for the defence, the editor has been enabled to discover notes which give an almost complete report of the case. The causes which led to it are best given by the following letters, which were obtained from the same source, and which are now for the first time published:

Mr. Hammond to Mr. Jefferson.

The undersigned, his Britannic Majesty's Minister Plenipotentiary to the United States of America, has the honour of informing the Secretary of State, that he has received intelligence from his Majesty's Consul, at Charleston, South Carolina, that two privateers have been fitted out from that port under French commissions. They carry six small guns, and are navigated by forty or fifty men, who are, for the most part, citizens of the United States. One of these privateers left the harbour of Charleston on the 18th ult., and the other was on the 22d ready to depart.

The undersigned does not deem it necessary to enter into any reasoning upon these facts, as he conceives them to be breaches of that neutrality which the United States profess to observe, and direct contraventions of the proclamation which the president issued upon the 22d of last month. Under this impression, he doubts not that the executive government of the United States, will pursue such measures as to its wisdom may appear the best calculated for repressing such practices in future, and for restoring to their rightful owners any captures which these particular privateers may attempt to bring into any of the ports of the United States. Geo. Hammond.

Philadelphia, 8th May, 1793.

The Secretary of State.

Norfolk, May 5, 1793.

Sir: We have taken the liberty, considering it a duty, to give you information of two schooner boats, cruizing off our capes, as privateers, under French commissions, who are daily chasing vessels bound in and out, to the great prejudice of our trade, and contrary to the law of nations to be chasing and boarding vessels within our territories. One of these vessels is called the Sans Culotte, and commanded by a Mr. Farre, the other called the Eagle; they are about the size of the largest pilot boats, and rigged as they are, mounting four carriage guns each, and fitted from Charleston. By reference to Captain Tucker's report, you will find how the Sans Culotte is manned; and from report of negro Caesar, the pilot, the Eagle has but one Frenchman on board her, the others Americans and Englishmen. One of these vessels belonged to Mr. Hooper, of Cambridge, in Maryland. Mr. Hooper is gone with Captain Tucker's vessel to that place, where his father lives, and Captain Tucker says, he understood she was to be laid up in some creek thereabouts. From the circumstances of erasing the name out of her stern, it appears as if some fraud was intended. We are, with the greatest respect, &c.,

Thos. Newton. Jr.
Wm. Lindsay.

Captain Lindsay, of the schooner Greyhound, in twenty-three days from Jamaica, reports that he arrived here the 4th inst. That on the day before, about half past 11 o'clock, a. m., he fell in with the pilot boat Ranger, of Hampton, belonging to Mr. Latimer, who hailed him and asked what vessel he commanded. to which he replied, the Greyhound of Norfolk, (Captain Lindsay having erased the name of the port he belonged to, and substituted Norfolk,) and added, that he was from St. Eustatius, upon which Mr. Latimer gave information to a small schooner privateer, at not more than twenty-four yards from them, and not a half mile from Cape Henry: by this deception, Captain Lindsay supposes, he escaped being taken.

Captain Tucker, of the schooner Eunice of New Providence, reports that he was, on the 29th last month, taken by a privateer schooner, called the Sans Culotte, commanded by Captain Farre, in the latitude 36, in 27 fathom water. That after being in possession of the privateer, the name of his schooner was erased from the stern, and a Mr. Hooper, of Cambridge, in the state of Maryland, was put on board as prize master, and he understood she was to be carried there and laid up in some creek, and that Mr. Hooper was to go to Philadelphia on some business. That whilst he was prisoner, both the privateer and the prize came into Hampton Road, and lay in Hawkin's Hole part of two days and two nights, and then sailed out on a cruise. He says that a Major-General, of New England, was on board the privateer, and acted as a marine officer, and a lieutenant in the absence of Mr. Hooper.

Mr. Hooper owned the schooner Eagle, and

ing classed under three heads of descriptions. 1st. All treaties made under the authority of the United States. 2d. The laws of nations. 3dly. The constitution, and statutes of the United States.

Treaties between independent nations, are contracts or bargains which derive all their force and obligation from mutual consent and agreement; and consequently, when once fairly made and properly concluded, cannot be altered or annulled by one of the parties, without the consent and concurrence of the other. Wide is the difference between treaties and statutes—we may negotiate and make contracts with other nations, but we can neither legislate for them, nor they for us; we may repeal or alter our statutes, but no nation can have authority to vacate or modify treaties at discretion. Treaties, therefore, necessarily become the supreme law of the land, and so they are very properly declared to be by the sixth article of the constitution. Whenever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations applicable to the case. The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements; and every virtuous citizen (for every citizen is a party to them) will concur in observing and executing them with honour and good faith; and that, whether they be made with nations respectable and important, or with nations weak and inconsiderable, our obligation to keep our faith results from our having pledged it, and not from the character or description of the state or people, to whom, neither impunity nor the right of retaliation can sanctify perfidy; for although

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plied from this to Georgia and Charleston as a packet. She was fitted originally from Cambridge. From every circumstance, Captain Tucker was of opinion, they would take vessels in the Bay of Chesapeake, as they lay along side one all night, but she proved to be an American vessel.

Mr. Jefferson to Mr. Rawle, Enclosing the Above.

Philadelphia, May 15, 1793.

Sir: By the enclosed papers, you will perceive, there is reason to believe that certain citizens of the United States, have engaged in committing depredations on the property and commerce of some of the nations at peace with the United States. I have it in charge to express to you the desire of the government, that you would take such measures for apprehending and prosecuting them as shall be according to law. I am not able to point out to you the individuals against whom suggestions have been made, but take the liberty of referring you to Mr. Deblois and Mr. Sharpe Delany, who may give you information on the subject. I am, with great esteem, sir, your most obedient and most humble servant, Th. Jefferson.

Mr. Rawle.

Mr. Rawle to Mr. Baker.

Sir: I have received information that a citizen of the United States, named Gideon Henfield, late of Salem, Massachusetts, has arrived at this port in the quality of an officer of a privateer, lately fitted out in Charleston, So. Carolina, on board a British vessel, taken as prize by the said privateer.

As I have received orders to prosecute, in every instance, those who commit breaches of the neutrality, declared to exist on the part of the United States, during the present war between the European powers, it is my duty to request, that you will be pleased to summon Mr. Lewis Deblois to appear before you, and if he verifies the above information upon oath, to issue your warrant for apprehending the said Gideon Henfield, in order that he may be dealt with according to law.

Yours, &c., W. Rawle.

17 May, 1793.

The following paper was certified from the department of state to be used on the trial:

Marine Francaise.—Liberté, Egalité.—Au nom de la République Francaise.

Le Conseil Exécutif provisoire de la République Francaise permet, par les présentes, à ——— de faire armer et équipper en guerre un ——— nommé le ——— du port de ——— tonneaux, ou environ, actuellement au port de ———, avec tel nombre de canons, boulets, et telle quantité de poudres, plombs, et autres munitions de guerre et vivres qu'il jugera nécessaire pour le mettre en état de courir sur les pirates, forbans, gens sans aveu, et généralement sur tous les ennemis de la République Francaise, en quelque lieu qu'il pourra les rencontrer, de les prendre et amener prisonniers avec leurs navires, armes, et autres objets dont ils seront saisis, à la charge, par ledit ——— de se conformer aux Ordonnances de la Marine, aux Lois décrétées par les Représentans du Peuple Francais, et notamment à l'article IV. de la Loi du 31 Janvier, concernant le nombre d'hommes devant former son équipage, de faire enregistrer les présentes Lettres au Bureau des Classes du lieu de son départ, d'y déposer un rôle, signé et certifié du lui, contenant les noms et surnoms, âge, lieu de naissance et demeure des gens de son équipage, et à son retour, de faire son rapport pardevant l'Officier chargé de l'Administration des lasses, de ce qui se sera passé pendant son Voyage.

Le Conseil Exécutif provisoire requiert tous Peuples, amis et allies de la République Francaise et leurs agens, de donner audit ——— toute assistance, passage et retraite en leurs ports avec sondit vaisseau et les prises qu'il aura pu faire, offrant d'en user de même en pareilles circonstances. Mande et ordonne aux Commandans des Bâtimens de l'Etat, de laisser librement passer ledit ——— avec son vaisseau et ceux qu'il aura pu prendre sur l'ennemi, et de lui donner secours et assistance.

Ne pourront, les présentes, servir que pour ——— mois seulement, à compter de la date de leur enregistrement.

En foi de quoi le Conseil Exécutif provisoire de la République, a fait signer les présentes Lettres par le Ministre de la Marine, et y a fait apposer le sceau de la République.

Donné à Paris le ——— jour du mois d ——— mil sept cent ——— l'an ——— de la République Francaise.

Nul. (Signé) Monyes, (L. S.)
Par le Ministre de la Marine.
Pour servir remodel.
(Signé.) Cottrau.

Department of State, to wit: I hereby certify, that the aforegoing is one of the blank forms of commissions, issued by the French Republic, communicated to me officially by the Minister of France. In testimony whereof, I have caused my seal of office to be hereto affixed. Given under my hand, this first day of June, 1793. Th. Jefferson.

perfidy may deserve chastisement, yet it can never merit imitation.

2. As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us. We are with other nations, tenants in common of the sea—it is a highway for all, and all are bound to exercise that common right, and use that common highway in the manner which the laws of nations and treaties require. On this occasion, it is proper to observe to you, gentlemen, that various circumstances and considerations now unite in urging the people of the United States to be particularly exact and circumspect in observing the obligation of treaties, and the laws of nations, which, as has been already remarked, form a very important part of the laws of our nation. I allude to the facts and injunctions specified in the president's late proclamation; it is in these words: "Whereas, it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands of the one part, and France of the other, and the duty and interest of the United States, require that they should with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers: I have, therefore, thought fit by these presents, to declare the disposition of the United States to observe the conduct aforesaid towards these powers respectively, and to exhort and warn the citizens of the United States, carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition. I do hereby make known, that whosoever of the citizens of the United States, shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to them those articles which are deemed contraband, by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons who shall within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them."

By this proclamation, authentic and official information is given to the citizens of the United States:—That war actually exists between the nations mentioned in it: That they are to observe a conduct friendly and impartial towards the belligerent powers: That offenders will not be protected, but on the contrary, prosecuted and punished. The law of nations, considers those as neutral nations "who take no part in the war, remaining friends to both parties, and not favouring the arms of one to the detriment of the other;" and it declares that a "nation, desirous safely to enjoy the conveniences of neutrality, is in all things to show an exact impartiality between the parties at war; for should he, when under no obligation, favour one to the detriment of the other, he cannot complain of being treated as an adherent and confederate of his enemy, of which no nation would be the dupe if able to resent it." The proclamation is exactly consistent with and declaratory of the conduct enjoined by the law of nations. It is worthy of remark that we are at peace with all these belligerent powers not only negatively in having war with none of them, but also in a more positive and particular sense by treaties with four of them.

By the first article of our treaty with France it is stipulated that "there shall be a firm, inviolable and universal peace, and true and sincere friendship between his Most Christian Majesty, his heirs and successors, and the United States; and between the countries, islands, cities and towns situate under the jurisdiction of his Most Christian Majesty and of the United States, and the people and inhabitants of every degree, without exception of persons or places." By the first article of our treaty with the United Netherlands, it is stipulated that "there shall be a firm, inviolable and universal peace, and sincere friendship between their High Mightinesses, the Lords and States General of the United Netherlands and the United States of America, and between the subjects and inhabitants of the said parties, and between the countries, islands and places situate under the jurisdiction of the said United Netherlands and the United States of America, their subjects and inhabitants of every degree, without exception of persons or places." The definitive treaty of peace with Great Britain begins with great solemnity, in the words following: "In the name of the most holy and undivided Trinity." By the seventh article of this treaty it is stipulated that "there shall be a firm and perpetual peace between his Britannic Majesty and the United States, and between the subjects of the one and the citizens of the other." By the first article of our treaty with Prussia it is stipulated that "there shall be a firm, inviolable and universal peace and sincere friendship between his Majesty, the King of Prussia, his heirs, successors and subjects on the one part, and the United States of America and their citizens on the other, without exception of persons or places."

By the laws of nations, the United States, as a neutral power, are bound to observe the line of conduct indicated by the proclamation towards all the belligerent powers, and that although we may have no treaties with them. But with respect to France, the United Netherlands, Great Britain and Prussia, the be-

fore-mentioned articles in our treaties with them, create additional obligations, to wit: all those obligations which result from express compact and from national faith, mutually, explicitly and solemnly pledged. Surely no engagements can be more wise and virtuous than those whose direct object is to maintain peace and to preserve large portions of the human race from the complicated evils incident to war. While the people of other nations do no violence or injustice to our citizens, it would certainly be criminal and wicked in our citizens, for the sake of plunder, to do violence and injustice to any of them. The president, therefore, has with great propriety declared "that the duty and interest of the United States require that they should, with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers." A celebrated writer on the law of nations very justly observes that "as nature has given to man the right of using force only when it becomes necessary for their defence, and the preservation of their rights, the inference is manifest that since the establishment of political societies, a right so dangerous in its exercise no longer remains with private persons, except in those kind of rencontres, where society cannot protect or defend them. In the bosom of society, public authority decides all differences of the citizens, represses violence and checks the impulse of revenge. It woud be too dangerous to give every citizen the liberty of doing himself justice against foreigners, as every individual of a nation might involve it in a war, and how could peace be preserved between nations if it was in the power of every man to disturb it? A right of so great moment, the right of judging whether a nation has a real cause of complaint, whether its case allows of using force, and having recourse to arms; whether prudence admits, and whether the welfare of the state demands it; this right," he says, "can only belong to the body of the nation, or to the sovereign its representative. It is doubtless one of those without which there can be no salutary government." It is on these and similar principles that whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture. But this is not all, it is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them. The same writer very justly remarks that "the nation or sovereign ought not to suffer the citizens to do any injury to the subjects of another state, much less to offend the state itself; and that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature which forbids all injuries, but also because nations ought to respect each other, to abstain from all abuse, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself. In short, the safety of the state and that of human society require this attention from every sovereign. If you let loose the reins of your subjects against foreign nations, these will behave in the same manner to you, and instead of that friendly intercourse which nature has established between all men we should see nothing but one nation robbing another." The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected and obeyed, and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established than that all strangers admitted into a country, are, during their residence, subject to the laws of it; and if they violate the laws they are to be punished according to the laws; the design of pains and penalties being to render the laws respected and to maintain order and safety. Hence, it follows that the subjects of belligerent powers are bound, while in this country, to respect the neutrality of it, and are punishable in common with our own citizens for violations of it, within the limits and jurisdiction of the United States. It is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction, whether attempted by a foreign prince, or by his subjects, with or without his order. "It is a manifest consequence of the liberty and independence of nations, that all of them have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is doubtless the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury." These are general principles—the laws to which they apply are numerous, and need not be particularized in detail—on the present occasion, it will be sufficient to lead your attention to one or two, which will serve to explain the reason and extent of these principles. "The right of levying soldiers is a sovereign right belonging only to the nation. No foreign power can lawfully exercise it without permission, nor without previous permission can such attempts be otherwise regarded, than as improper interferences with the sovereignty of the country; on this head the law of nations is explicit. It declares, That the right of levying soldiers belongs solely to the nation: this important power is the appendage of the sovereign; it

makes a part of the supreme prerogative. No person is to enlist soldiers in a foreign country without the permission of the sovereign. They who undertake to enlist soldiers in a foreign country, without the sovereign's permission, or alienate the subjects of another, violate one of the most sacred rights both of the prince and the state; it is a crime punished with great severity in every policied state. Foreign recruiters are hanged immediately, and very justly, as it is not to be presumed, that their sovereign ordered them to commit the crime; and if he did, they ought not to have obeyed his order, their sovereign having no right to command what is contrary to the law of nature; usually they who have practised seduction only are severely punished. But if it appears that they acted by order of the sovereign, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he condescends to make suitable reparation."

From the observations which have been made, this conclusion appears to result, viz.: That the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition to maintain it: that, therefore, they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished; and consequently, that it is your duty, gentlemen, to inquire into and present all such of these offences, as you shall find to have been committed within this district. What acts amount to committing or aiding, or abetting hostilities, must be determined by the laws and approved practice of nations, and by the treaties and other laws of the United States relative to such cases. I doubt the expediency of anticipating such cases, and endeavouring now to distinguish acts which do, from others which do not, involve the criminality in question. Singular cases may arise.—If, in the course of your inquiries, you should experience difficulties, the attorney general and, if necessary, the court, will assist you.

Before I dismiss this subject, it cannot be improper to remark, that a state of neutrality leaves us perfectly at liberty to exercise every humane, benevolent, and friendly office towards the powers at war and their subjects; and to continue our usual commerce with them, excepting only those offices and that kind of trade, which may be designed and calculated to give to one party a military preponderancy to the detriment of the others. While we contemplate with anxiety and regret the desolation and distress which a war so general and so inflamed will probably spread over more than one country, let us with becoming gratitude wisely estimate and cherish the peace, liberty, and safety with which the Divine Providence has been pleased so liberally to bless us. By the favour of Heaven, we this day enjoy a degree of prosperity unknown to any other nation in the world—let it be among our enjoyments to render our happiness instrumental in alleviating the misfortunes to which many have already been, and more will yet be, reduced by those national contentions—in a word—let us be faithful to all—kind to all—but let us also be just to ourselves.

The people of the United States have exhibited too many proofs of virtue and intelligence, to leave room to doubt their continuing to be so guided by their usual integrity and good sense—but in every nation individuals will always be found who, impelled by avarice or ambition, or by both, will not hesitate to gratify those passions at the expense of the blood and tears even of those who are free from blame. Such men are to be restrained only by fear of punishment. There is, however, another consideration connected with the subject which merits much attention. It is natural in all contests, even for the best men, to take sides, and wish success to one party in preference to the other; our wishes and partialities becoming inflamed by opposition, often cause indiscretions, and lead us to say and to do things that had better have been omitted. It is not certain that the irritability of the belligerent powers, combined with some indiscretions on our part, will not involve us in war with some of them. Prudence directs us to look forward to such an event, and to endeavour not only to avert, but also to be prepared for it. Among our preparations, there can be none more important than union and harmony among ourselves. It is very desirable, that such an event do not find us divided into parties, and particularly into parties in favour of either foreign nation. Should this be the case, our situation would be dangerous as well as disgraceful. While blessed with union in sentiments and measures relative to national objects, we shall have little fear; and, therefore, it is sincerely to be wished that our citizens will cheerfully and punctually do their duty to every other nation, but at the same time carefully avoid becoming partisans of any of them. There is not a history of any nation which does not record the mischiefs they experienced from such parties, and they rarely present us with an instance of a nation being conquered and subjugated, without the detestable aid of its own degenerate or deluded citizens. Nothing is more certain than, that if such parties should arise among the people, they will find their way into every department of government, and carry distrust and discord with them—dark and dreary would then be the prospect before us, and we should in vain look for the speedy return of those happy days, when the government was peacefully, wisely and prosperously administered, under the care and auspices of a patriot, in whom the United States have by repeated unanimity

in their suffrages, manifested a degree of confidence, no less reputable to their own wisdom and virtue than to his. But, if neither integrity nor prudence on our part should prove sufficient to shield us from war, we may then meet it with fortitude, and a firm dependence on the Divine protection; whenever it shall become impossible to preserve peace by avoiding offences, it will be our duty to refuse to purchase it by sacrifices and humiliations, unworthy of a free and magnanimous people, either to demand or submit to. The subject presented by the proclamation, appeared to me to be highly interesting, and I thought it useful to treat it with much plainness, as well as latitude. I was aware that I was treading on delicate ground; but as the path of my duty led over it, it was incumbent on me to proceed.

On the third branch of the laws of the United States, viz: their constitution and statutes, I shall be concise. Here, also, one great unerring principle, viz: the will of the people, will take the lead. The people of the United States, being by the grace and favour of Heaven, free, sovereign and independent, had a right to choose the form of national government which they should judge most conducive to their happiness and safety. They have done so, and have ordained and established the one which is specified in their great and general compact or constitution—a compact deliberately formed, maturely considered, and solemnly adopted and ratified by them. There is not a word in it but what is employed to express the will of the people; and what friend of his country, and the liberties of it, will say that the will of the people is not to be observed, respected and obeyed? To this general compact every citizen is a party, and consequently, every citizen is bound by it. To oppose the operation of this constitution and of the government established by it, would be to violate the sovereignty of the people, and would justly merit reprehension and punishment. The statutes of the United States, constitutionally made, derive their obligation from the same source, and must bind accordingly. Happy would it be for mankind, and greatly would it promote the cause of liberty and the equal rights of men, if the free and popular government which from time to time may result, should be so constructed, so balanced, so organized and administered, as to be evidently and eminently productive of a higher and more durable degree of happiness than any of the other forms. It is not sufficient to tell men by a bill of rights, that they are free, that they have equal rights, and that they are entitled to be protected in them; men will not believe they are really free, while they experience oppression—they do not think their title to equal rights realized until they enjoy them; nor will they esteem that a good government, whatever may be its name, which does not uniformly, impartially and effectually protect them. The more free the people are, the more strong and efficient ought their government to be, and for this plain reason, that it is a more arduous task to make and keep up the fences of law and justice about twenty rights than about five or six; and because it is more difficult to fence against and restrain men who are unfettered, than men who are in yokes and chains. Being a free people, we are governed only by laws, and those of our own making—these laws are rules for regulating the conduct of individuals, and are established according to, and in pursuance of that contract which each citizen has made with the rest, and all with each. He is not a good citizen who violates his contract with society; and when society execute their laws, they do no more than what is necessary to constrain individuals to perform that contract, on the due operation and observance of which the common good and welfare of the community depend; for the object of it is to secure to every man what belongs to him, as a member of the nation; and by increasing the common stock of property, to augment the value of his share in it. Most essentially, therefore, is it the duty and interest of us all, that the laws be observed, and irresistibly executed. I might now proceed to call your attention to certain statutes which merit particular attention, and it would not be difficult to place them in points of view, in which their importance to the public would appear in strong lights—but having already detained you so long, and these subjects not being new to you, I will forbear enlarging on them on the present occasion. The manner in which you are to fulfil the duties now incumbent on you, is specified in the oath you have taken. The experience of ages commends the institution of grand juries; it has merited and received constant encomiums, and I trust, gentlemen, that your conduct on this and similar occasions, will afford new proofs of its utility and excellence.[2]

Charge of Judge WILSON, as president of a special court of the United States, for the Middle circuit and Pennsylvania district, holden at the court house, in the city of Philadelphia, on the 22d day of July, 1793, to the grand jury of said court:

Gentlemen of the Grand Jury: It is my duty to explain to you the very important occasion on which this court is specially convened, and to state the points of law not less important to the application of which that occasion gives rise.

To the judge of the Pennsylvania district information was given on oath, that certain

[2] This charge, though not delivered to the particular grand jury by whom the bill against Henfield was found, was prepared for the purpose of settling the law generally as applying to the class of offenders, of whom Henfield was one, and in this light it is here introduced.

citizens of the United States had acted in several capacities as officers on board an armed schooner, said to be commissioned by France as a cruiser or private ship-of-war; and with others on board that schooner did capture and make prize of several ships or vessels belonging to his Britannic Majesty, and otherwise assist in an hostile manner in annoying the commerce of the subjects of his said Britannic Majesty, who is at peace with the United States, contrary to their duty as citizens of the United States. On receiving this information the judge issued his warrant for apprehending the persons against whom complaint was made, that they might answer for their doings in the premises, and be dealt with according to law. That legal proceedings in this and some other business might be had speedily, one of the judges of the supreme court of the United States and the judge of the Pennsylvania district issued their warrant, directing that on this day, and at this place a special session of the circuit court for this district should be held, and that grand and traverse jurors should be summoned to attend it. As the court however is authorized generally to try criminal causes, if any other crimes or offences cognizable in it be laid before you or are in your knowledge, it is your duty to present them. But to the business to which you have been particularly called, and to articles intimately connected with it, I shall confine the remarks which I have to give you in charge. I introduce them by noticing, with pleasure, the near and endearing relation between the freedom and the dignity of man. In governments unfavourable to both, treaties and the construction of treaties are numbered among the arcana imperii, the secrets of empire, enclosed within the cabinets of princes and secluded from the judgment of the citizens, whose lives and fortunes however they chiefly affect; under our national constitution, treaties compose a portion of the public and supreme law of the land, and for their construction and enforcement are brought openly before the tribunals of our country. Of those tribunals juries form an essential part; under the construction given by those juries, treaties will suffer neither in their importance nor in their sanctity.

"Sapientissima res tempus"—says the profound Bacon in one of his aphorisms, concerning the augmentation of the sciences—time is the wisest of things. If the qualities of the parent may be expected in the offspring, the common law, one of the noblest births of time, may be pronounced the wisest of laws. This expression, says a great lawyer (Finch, Law, 74, 75), is not new and strange, or barbarous and peculiar to England. It is the proper term for other laws also. Euripides mentions the common laws of Greece; and Plato defines common law to be that, which being taken up by the common consent of a country, is called law. In another place the same illustrious philosopher names it the golden and sacred rule of reason which we call "Common Law." To the common law of England, however, the phrase is often peculiarly appropriated. Of this common law, the antiquity is unquestionably very high. But the precise era of its commencement, and the several springs from which it originally flowed, it is very difficult, if not altogether impracticable to trace. One reason for this may be drawn from the very nature of a system of common law. As it is accommodated to the situation and circumstances of the people; and as that situation and those circumstances insensibly change, a proportioned variation of laws insensibly takes place; and it becomes impossible to ascertain the period when this change began, or to mark the different steps of its progress.

It might be amusing and instructive, but at this time it would be improper, to sketch the general outlines of the system through the government of the Saxons down to the conquest of the Normans. Suffice it to observe, and the observation is important, that the common law, as now received in America, bears, in its principles and in many of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the former, than to that law as it was disfigured under the latter. The accommodating principle of a system of common law will adjust its improvement to every grade and species of improvement (Fortes, 257, 264), in consequence of practice, commerce, observation, study or refinement. As the science of legislation is the most noble, so it is the most slow and difficult of sciences. Willing to avail itself of experience, it receives additional improvement from every new situation to which it arrives; and in this manner attains, in the progress of time, higher and higher degrees of perfection, resulting from the accumulated wisdom of ages. On some occasions the spirit of a system of common law is accommodating; but on others its temper is decided and firm. The means are varied according to times and circumstances, but its great ends are kept steadily and constantly in view. How effectually has the spirit of liberty animated this system in all the vicissitudes, revolutions and dangers to which it has been exposed! In matters of a civil nature the common law works itself pure by rules drawn from the fountain of justice. In matters of a political nature it works itself pure by rules drawn from the fountain of freedom. It was this spirit which dictated the frequent and formidable demands on the Norman princes, for the complete restoration of the Saxon jurisprudence. It was this spirit which, in Magna Charta, manifested a strict regard to the rights of the Commons as well as those of the Peers. It was this spirit which ex-

tracted sweetness from all the bitter contentions between the rival houses of York and Lancaster. It was this spirit which preserved England from the haughtiness of the Tudors and from the tyranny of the Stuarts. It was this spirit which rescued the states of America from the oppressive claims and from all the mighty efforts made to enforce the oppressive claims of a British parliament. The common law, says my Lord Coke (Calvin's Case, 7 Coke, 1), is a social system of jurisprudence. She receives other laws and systems into a friendly correspondence; and associates to herself those who can give her information, or advice, or assistance. Does a contract bear a peculiar reference to the local laws of any particular foreign country? By the local laws of that foreign country the common law will direct the contract to be interpreted and adjusted. Does a mercantile question occur? She determines it by the law of merchants. Does a question arise before her, which properly ought to be resolved by the law of nations? By that law she will decide the question. For that law in its full extent is adopted by her. The infractions of that law form a part of her code of criminal jurisprudence. 4 Bl. Comm. 67.

In our present business, gentlemen, this great subject deserves a full and a pointed illustration. Such as it is in my power, on a short notice, to give, I now proceed to lay before you. The law of nature when applied to states or political societies, receives a new name, that of the law of nations. But though it receives a new appellation, it retains unimpaired its qualities and its powers. The law of nations as well as the law of nature, is of obligation indispensable. The law of nations as well as the law of nature is of "origin divine." There are, it is true, laws of nations—perhaps it is to be wished that they were designated by another name—there are laws of nations which are founded altogether on human consent; of this kind are national treaties. But the municipal laws of a state are not more distinct from the law of nature than those consentual laws of nations are in their source and power distinct from the law of nations properly so called. Indeed those consentual laws of nations are not less controlled by the law of nations properly so called, than municipal laws are controlled by the law of nature. The law of nations is the law of states and sovereigns. On states and sovereigns it is obligatory in the same manner and for the same reasons, as the law of nature is obligatory upon individuals. Universal and unchangeable is the obligation of both. How great, how important, how interesting are these truths! They announce to a free people how solemn their duties are! If a practical knowledge and a just sense of those duties were diffused universally among the citizens, how beneficial and lasting would the fruits be! It seems to have been thought that the law of nations respects and regulates their conduct only in their intercourse with each other. A very important branch of this law containing the duties which a nation owes to itself, has in a great measure escaped attention. Of a state, as well as of an individual, self-preservation is a primary duty. To love and to deserve an honest fame is another duty of a state as well as of a man. To a state as well as to a man, reputation is a valuable and an agreeable possession. It represses hostility and secures esteem. In transactions with other nations, the dignity of a state should never be permitted to suffer the smallest diminution. Need it be mentioned here, that happiness is the centre to which states as well as men are universally attracted! To consult its own happiness, therefore, is the duty of a nation. When men have formed themselves into a political society, they may reciprocally enter into particular engagements and contract new obligations in favour of the community or of its members. But they cannot, by this union, discharge themselves from any duties which they previously owed to those who form a part of the political association. Under all the obligations due to the universal society of the human race, the citizens of a state still continue. To this universal society it is a duty that each nation should contribute to the welfare, the perfection and the happiness of the others. If so, the first degree of this duty is to do no injury. Among states as well as among men, justice is a sacred law. This sacred law prohibits one state from exciting disturbances in another, from depriving it of its natural advantages, from calumniating its reputation, from seducing its citizens, from debauching the attachment of its allies, from fomenting or encouraging the hatred of its enemies. Vatt. Law Nat. 127. But nations are not only prohibited from doing evil, they are also commanded to do good to one another. On states as well as individuals the duties of humanity are strictly incumbent; what each is obliged to perform for others, from others it is entitled to receive. Hence the advantage as well as the duty of humanity. It may be uncommon, but it is unquestionably just to say, that nations ought to love one another. From the pure source of benevolence the offices of humanity ought to flow. By a nation these enlarged and elevated virtues should be cultivated with peculiar assiduity and ardour; of an individual, however generous his disposition may be, the sphere of exertion is frequently narrow; but of a nation this sphere is comparatively boundless. By exhibiting a glorious example in her constitution, in her laws, and in the administration of her constitution and laws, she may diffuse instruction, she may diffuse reformation, she may diffuse happiness over the whole terrestrial globe. These

maxims of national law, though the sacred precepts of nature, and of nature's God, have been too often unknown and unacknowledged by nations. Even where they have been known and acknowledged, their calm still voice has been drowned by the clamours of ambition and by the thunder of war.

Is it then unnecessary or improper here to say, peace should be deemed the basis of the happiness of nations, "peace on earth!" This is a patriotic as well as an angelic wish. But with war and rumours of war our ears in this imperfect state of things are still assailed. Into this unnatural state ought a nation to suffer herself to be drawn without her own act, or the act of him or them, to whom for this purpose she has delegated her power? Into this unnatural state should a nation suffer herself to be drawn by the unauthorized, nay by the unlicensed conduct of any of her citizens? These, gentlemen, are questions to which you are now called to give the closest and deepest attention. That a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country, is a position so plain as to require no proof, and to be scarcely susceptible of a denial.

Under the treaty of amity and commerce between the United States and France, it may be made a question, whether the privateers of that power have a right to "fit out their ships in our ports." This question arises from the twenty-second article of that treaty. "It shall not be lawful for any foreign privateers, not belonging to the subjects of his Most Christian Majesty, nor citizens of the United States, who have commissions from any other prince or state in enmity with either nation to fit out their ships in the ports of either the one or the other of the aforesaid parties." It may be alleged, that this prohibition against fitting the ships of privateers belonging to any other nation implies a permission to fit the ships of privateers belonging to France.—But this inference cannot justly be drawn. If, by a promise made to one person, I restrain myself from lending money to any others, I am not surely by that restraining engagement, obliged to lend my money to him. It may be convenient, it may be necessary for me to reserve its application exclusively for my own purposes. In the same manner, by a stipulation, that in a war between France and Britain, we will not lend the use of our ports to the privateers of the latter, we are by no means obliged to lend it to those of the former. It may be convenient, it may be necessary for us to refuse it to both. True it is, that by the treaty we are obliged to refuse it to Britain, and this to one of the parties was probably an important object. But it remains in our option whether we will or will not grant it to France. Both the nations which made this treaty, might have the most unexceptionable, nay, the most commendable motives for reserving to themselves this option. France, particularly, might have the strongest reasons for refusing to bind herself, at all events, to permit even the United States to fit out in her ports privateers against any nation however united to her by compact, with which the United States might be at war. This option, perhaps with France a favourite one, each of the parties to the treaty reserved the power of making. This option our nation, or its representatives for that purpose, have not yet made. This option private citizens are certainly unauthorized and unwarranted to make. Private citizens, therefore, assisting in a business of this kind, offend the law, and for their offences are amenable to the justice of the nation. If you know of any such, it is your duty to present them here.

In some instances citizens may be accountable for the conduct of their nation. In other instances the nation may be accountable for the conduct of its citizens. It is impossible indeed that even in the best regulated state, the government should be able to superintend the whole behaviour of all the citizens and to restrain them within the precise limits of duty and obedience (Vatt. Law Nat. 144); it would be unjust, therefore, immediately to impute to the nation the faults or offences which its members may commit. In every state, disorderly citizens are unhappily to be found. Let such be held responsible, when they can be rendered amenable for the consequences of their crimes and disorders. If the offended nation have the criminal in its power, it may without difficulty punish him, and oblige him to make satisfaction. Vatt. Law Nat. 145. When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him according to the measure of his offence. Vatt. Law Nat. 75; Burrows, 1480; 4 Bl. Comm. 68, 69. If the nation refuse to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury. Vatt. Law Nat. 145. To what does this responsibility lead? To reprisal certainly (Vatt. Law Nat. 251); and if so, probably to war (Id. 2; 4 Bl. Comm. 68, 69). And should the fortunes or the lives of millions be placed in either of those predicaments by the conduct of one citizen, or of a few citizens? Vatt. Law Nat. 2, 89. Humanity and reason say no. The constitution of the United States says no. Id. 2, 89. By that constitution, many great powers are vested in the first executive magistrate: others are vested in him, "by and with the advice and consent of the senate." But neither he, nor he and they in conjunc-

tion, can lift up the sword of the United States. Congress alone have power to declare war, and to "grant letters of marque and reprisal." Who indeed should have the power to declare war but these, as the immediate representatives of those who must furnish the blood and treasure upon which war depends? With regard to this very interesting power, the constitution of the United States renews the principles known and practised in England before the conquest. This indeed may be reckoned one of the chief differences between the government of the Saxons and that of the Normans. In the former, the power of peace and war was invariably possessed by the Wittenagemote (Millar, Eng. Const. 305), and was regarded as inseparable from the allodial condition of its members. In the latter, it was transferred to the king; and this branch of the feudal system, which was accommodated perhaps to the depredations and internal commotions prevalent in that rude period, has remained in subsequent ages, when from a total change of manners, the circumstances by which it was recommended, have no longer any existence. There is, by the way, a pleasure in reflecting on such important renovations of the venerable Saxon government; and in discovering that our national constitution is rendered illustrious by the antiquity, as well as by the excellence of some of its leading principles.

The principle now under our view was urged as one reason why this constitution should be adopted by Pennsylvania: if urged with propriety then, it may be urged with propriety now. For what was then adopted, ought now to be supported. "This system will not hurry us into war. It is calculated to guard against it. It will not be in the power of a single man or a single body of men to involve us in such distress. For the important power of declaring war is vested in the legislature at large.—This declaration must be made with the concurrence of the house of representatives. From this circumstance we may draw a certain conclusion, that nothing but our national interest will draw us into a war." I cannot forbear on this occasion, the pleasure of mentioning to you the sentiments of the great and benevolent man, whose works I have already quoted (Mr. Neckar), who has addressed this country in language important and applicable, in the strictest manner, to its situation, and to the present subject. Speaking of war, and the great caution that all nations ought to use, in order to avoid its calamities—"And you, rising nation," says he, "whom generous efforts have freed from the yoke of Europe! Let the universe be struck with still greater reverence at the sight of the privileges you have acquired, by seeing you continually employed for the public felicity. Do not offer it as a sacrifice at the unsettled shrine of political ideas, and of the deceitful combinations of warlike ambition: avoid, or at least delay, participating in the passions of our hemisphere; make your own advantage of the knowledge which experience alone has given to our old age, and preserve for a long term, the simplicity of childhood; in short, honour human nature by showing, that when left to its own feelings, it is still capable of those virtues that maintain public order, and of that prudence which ensures public tranquillity." Deb. Conv. Pa. 434. On this great subject of peace and war, the voice of all France is responsive to the language of our national constitution. "When the interesting question was before her national assembly, its deliberations, we are told, were watched with anxiety by countless thousands. All Paris was in agitation, and when the decree was pronounced, that the lives and fortunes of twenty-five millions of men should not be at the disposal of a single individual, there was a shout of acclamation raised, which reached from the garden of the Tuileries to the extremest province of France." Can we believe, for a moment, that this generous nation would wish to bereave us of a security, which they themselves so highly and so justly prize?

On July 27, 1793, the following indictment was returned by the grand jury:

At a special circuit court of the United States for the Middle circuit and the Pennsylvania district, holden at the city of Philadelphia, in the district aforesaid, on the twenty-second day of July, in the year of our Lord one thousand seven hundred and ninety-three, the grand inquest for the United States, in the Middle circuit of the said United States, and in the district of Pennsylvania, upon their respective oaths and affirmations, present: That, whereas, an open and notoriously public war for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted, between the Republic of France and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a treaty of amity and commerce was, and still is, in force between the said States General of the United Netherlands and the United States of America, whereby it is, among other things, provided that there shall be a firm, inviolable, and universal peace and sincere friendship between their High Mightinesses the Lords the said States General of the United Netherlands and the United States of America, and between the subjects and inhabitants of the said parties, and between the countries, islands, cities, and places situated under the jurisdiction of the said United Netherlands and the said United States of America, their subjects and inhabitants of every degree, without exception of persons or places: And, whereas, by the constitution ordained

and established for the said United States of America it is, among other things, provided that all treaties made, or which shall be made under the authority of the said United States, shall be the supreme law of the land; and, whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal granted by the Republic of France, a certain ship-of-war called the Citizen Genet was, among others, set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens, to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, and the King and people of Great Britain, and especially of the United Netherlands and the subjects thereof, and against them to wage war on the high seas, and within the jurisdiction of this court,—Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States of America, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm, inviolable and universal peace and sincere friendship aforesaid between the said United Netherlands and the said United States of America, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, with force and arms, on the high seas, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship between the said United Netherlands and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, on the high seas aforesaid, and within the jurisdiction of this court, and being a prize-master on board the said ship-of-war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and especially of the said States General of the United Netherlands, to the evil example of all others in like case offending, against the treaty aforesaid, against the laws of the said United States in such case made and provided, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present:—That, whereas, an open and notoriously public war for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted, between the Republic of France and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a treaty of amity and commerce was, and still is, in force between the said King of Prussia and the United States of America, whereby it is, among other things, provided that there shall be a firm, inviolable, and universal peace and sincere friendship between his Majesty the King of Prussia, his heirs, successors, and subjects, on the one part, and the said United States of America and their citizens on the other, without exception of persons or places: And, whereas, by the constitution ordained and established for the said United States of America it is, among other things, provided that all treaties made, or which shall be made, under the authority of the said United States, shall be the supreme law of the land; and, whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal granted by the Republic of France, a certain ship-of-war, called the Citizen Genet, was, among others, set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens, to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys of the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, the States General of the United Netherlands and their subjects, and especially of the King and people of Prussia, and against them to wage war on the high seas, and within the jurisdiction of this court,—Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States of America, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship aforesaid, between his said Majesty the King of Prussia and the said United States of America, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, with force and arms, on the high seas, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship between his said Majesty the King of Prussia and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, on the high seas aforesaid, and within the jurisdiction of this court, and being a prize-master on board of the said ship-of-war, unlawfully and maliciously sailed and cruised to

several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and moneys of the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, the States General of the United Netherlands and their subjects, and especially of the King and people of Prussia, to the evil example of all others in like case offending against the laws of the said United States in such case made and provided, against the treaty aforesaid, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the said grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present:—That, whereas an open and notoriously public war for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted between the Republic of France and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a definitive treaty of peace and commerce was, and still is, in force between the said King of Great Britain and the said United States, wherein and whereby it is provided that there shall be a firm and perpetual peace between the said King of Great Britain and the said United States, and between the subjects of the one and the citizens of the other, wherefore all hostilities should from thenceforth cease, by virtue whereof the said United States became, and still are neutral in relation to the said King and people of Great Britain and the said Republic of France: And, whereas, by the constitution ordained and established for the said United States of America, it is, among other things, provided that all treaties made, or which shall be made under the authority of the said United States, shall be the supreme law of the land; and, whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal, granted by the Republic of France, a certain ship-of-war, called the Citizen Genet, was, among others, set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens, to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the States General of the United Netherlands and their subjects, and especially of the King and people of Great Britain, and against them to wage war, on the high seas, and within the jurisdiction of this court,—Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm and perpetual peace between the said King of Great Britain and the said United States of America, and to disturb the said neutrality so, as aforesaid, existing on the part of the said United States in relation to the said King and people of Great Britain and the said Republic of France, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, with force and arms, on the high seas, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm and perpetual peace between the said King of Great Britain and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, on the high seas aforesaid, and within the jurisdiction of this court, and being a prize-master on board of the said ship-of-war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms, to take the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the States General of the United Netherlands, and especially of the King and people of Great Britain, and then and there, in and on board of the said ship-of-war, with divers others, whose names to the grand inquest aforesaid are yet unknown, with force and arms, unlawfully and maliciously, in prosecution of the said unlawful and malicious intent and purpose, attack, seize, and take a certain ship or vessel, called the William, belonging to a subject or subjects of his said Britannic Majesty, against the definitive treaty aforesaid, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present:—That, whereas, the said United States of America, on the said fifth day of May, in the year aforesaid, were, and now are, by treaties of peace and amity, allied unto and at peace with the States General and the people of the United Netherlands, and the King and people of Prussia, and also at peace with the King and people of Great Britain and the said States General and the people of the United Netherlands, the said King and people of Prussia, and the said King and people of Great Britain, on the said fifth day of May aforesaid, in the year aforesaid, were at war with the Republic of France, the said Gideon Henfield then and there, being a citizen and inhabitant of the United States, unlawfully and maliciously contriving and intending to disturb and destroy the peace of the said United States, and to involve the said United States

in a war with the said States General and people of the United Netherlands, and with the said King and people of Prussia, and the said King and people of Great Britain, on the said fifth day of May, in the year aforesaid, on the high seas, and within the jurisdiction of the said court, in and on board a certain vessel, armed and fitted out for warlike purposes, and commanded by a certain Peter Johannen, having a commission from the Republic of France to attack, seize, and take prisoners all the enemies of the said Republic of France, with their ships, arms, and other articles of property, did, with force and arms, unlawfully and maliciously, and contrary to his duty as a citizen of the said United States of America, attack, seize, and take as a prize a certain ship called the William, then and there belonging to certain subjects of the said King of Great Britain, to the evil example of all others in like case offending, in violation of the laws of nations, against the laws of the United States in such case made and provided, and against the constitution of the United States, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present:—That, whereas, on the said fifth day of May, in the year aforesaid, a treaty of peace, amity, and commerce subsisted, and was in full force, between the States General and the people of the United Netherlands and the said United States of America, between the King and people of Prussia and the said United States of America, and also a treaty of peace between the King and people of Great Britain and the said United States of America,—the said Gideon Henfield, late of the district aforesaid, yeoman, then and there, being a citizen and inhabitant of the said United States, well knowing the premises, did, on the said fifth day of May, on the high seas, and within the jurisdiction of this court, unlawfully, violently, and injuriously combine and confederate with divers others whose names to the grand inquest aforesaid are yet unknown, to attack, seize, capture, burn and destroy the vessels, goods, and merchandise, of the States General and the citizens and subjects of the said United Netherlands, and the said King and people of Prussia, and the said King and people of Great Britain, and to assault, imprison, and kill the said citizens and subjects of the said United Netherlands, of the said kingdom of Prussia, and of the said kingdom of Great Britain; in violation of the laws of nations and the constitution and laws of the said United States of America, and against the peace and dignity of the said United States of America.

And the grand inquest aforesaid, upon the respective oaths and affirmations aforesaid, further present:—That, whereas, on the said —— day of ——, in the year aforesaid, a treaty of peace, amity, or commerce subsisted, and was in full force, between the States General and the people of the United Netherlands and the said United States of America, between the King and people of Prussia and the said United States of America, and also a treaty of peace between the King and people of Great Britain and the said United States of America,—the said Gideon Henfield, late of the district aforesaid, yeoman, then and there, being a citizen and inhabitant of the said United States, well knowing the premises, did, on the said fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, on the high seas, and within the jurisdiction of this court, unlawfully, violently, and injuriously combine and confederate with divers others whose names to the grand inquest aforesaid are yet unknown, to attack, seize, capture, burn, and destroy the vessels, goods, and merchandises of the States General and the citizens and subjects of the said United Netherlands, and the said King and people of Prussia, and the said King and people of Great Britain, and to assault, imprison, and kill the said citizens and subjects of the said United Netherlands, of the said kingdom of Prussia, and of the said kingdom of Great Britain, and in prosecution of the said wicked and unlawful attempt, the said Gideon Henfield afterwards, on the said day and year aforesaid, on the high seas, and within the jurisdiction of the said court, in and on board a certain vessel armed and fitted out for warlike purposes, and commanded by a certain Peter Johannen, having a commission from the Republic of France to attack, seize, and take prisoners all the enemies of the said Republic of France, with their ships, arms, and other articles of property, did, with force and arms, unlawfully and maliciously, and contrary to his duty as a citizen of the said United States, attack, seize, and take as a prize, a certain ship called the William; then and there belonging to certain subjects of the said King of Great Britain, in violation of the laws of nations, to the evil example of all others in like case offending, against the laws and constitution of the United States, and against the peace and dignity of the said United States.

Whereas, an open and notoriously public war for a long time hath been and yet is, by sea and by land, had, carried on, and prosecuted between the Republic of France and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a treaty of amity and commerce was and still is in force between the said States General of the United Netherlands and the United States of America, whereby it is among other things provided, that there shall be a firm, inviolable, and universal peace and sincere friendship between their High Mightinesses the Lords, the

said States General of the United Netherlands, and the United States of America, and between the subjects and inhabitants of the said parties, and between the countries, islands, cities, and places situated under the jurisdiction of the said United Netherlands and the said United States of America, their subjects and inhabitants of every degree, without exception of persons or places: And whereas, by the constitution, ordained and established for the said United States of America, it is among other things provided, that all treaties made, or which shall be made under the authority of the said United States, shall be the supreme law of the land: And whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal, granted by the Republic of France, a certain ship of war, called the Citizen Genet, was among others set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, and the King and people of Great Britain, and especially of the United Netherlands and the subjects thereof, and against them to wage war in the river Delaware, and within the jurisdiction of this court, Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States of America, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship aforesaid, between the said United Netherlands and the said United States of America, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, there with force and arms, on the high seas, to wit, in the river Delaware, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship between the said United Netherlands and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, in the river Delaware, and within the jurisdiction of this court, and being a prize-master on board of the said ship-of-war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and especially of the said States General of the United Netherlands, to the evil example of all others, in like case offending against the laws of the United States in such case made and provided, against the treaty aforesaid, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present, That whereas, an open and notoriously public war for a long time hath been and yet is, by sea and by land, had, carried on, and prosecuted between the Republic of France, and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a treaty of amity and commerce was and is still in force between the said King of Prussia and the United States of America, whereby it is among other things provided, that there shall be a firm, inviolable, and universal peace and sincere friendship between his Majesty the King of Prussia, his heirs, successors and subjects, on the one part, and the said United States of America, and their citizens, on the other, without exception of persons or places: And whereas, by the constitution, ordained and established for the said United States of America, it is among other things provided, that all treaties made, or which shall be made under the authority of the said United States, shall be the supreme law of the land: And whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal, granted by the Republic of France, a certain ship of war, called the Citizen Genet, was among others set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys of the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, the States General of the United Netherlands and their subjects, and especially of the King and people of Prussia, and against them to wage war in the river Delaware, and within the jurisdiction of this court, Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States of America, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship aforesaid, between his said Majesty the King of Prussia and the said United States of America, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, with force and arms, in the river Delaware and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship, between his said Maj-

esty the King of Prussia and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, in the river Delaware, and within the jurisdiction of this court, and being a prize-master on board the said ship of war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and moneys of the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, the States General of the United Netherlands and their subjects, and especially of the King and people of Prussia, to the evil example of all others, in like case offending against the treaty aforesaid, and against the laws of the said United States in such case made and provided, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the said grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present:—That, whereas, an open and notoriously public war for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted, between the Republic of France, and the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and the States General of the United Netherlands and their subjects, during all which time a definitive treaty of peace was, and still is, in force between the said King of Great Britain, and the said United States, wherein and whereby it is provided, that there shall be a firm and perpetual peace. between the said King of Great Britain, and the said United States, and between the subjects of the one, and the citizens of the other, wherefore, all hostilities shall from thenceforth cease: And, whereas, by the constitution ordained and established for the said United States of America, it is among other things, provided, that all treaties made, or which shall be made, under the authority of the said United States, shall be the supreme law of the land, and by reason thereof, the said United States became, and now are neutral in relation to the said King and people of Great Britain, and the said Republic of France: And, whereas, at the time of the said war, by virtue of a certain commission, and certain letters of marque and reprisal granted by the Republic of France, a certain ship-of-war, called the Citizen Genet, was, among others, set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens, to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the States General of the United Netherlands and their subjects, and especially of the King and people of Great Britain, and against them to wage war in the river Delaware, and within the jurisdiction of this court,—Gideon Henfield, late of the district aforesaid, yeoman, being an inhabitant of the said United States, well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm and perpetual peace, between the said King of Great Britain, and the said United States of America, and to disturb the said neutrality so as aforesaid existing, on the part of the United States, in relation to the said King and people of Great Britain, and said Republic of France, on the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-three, with force and arms, in the river Delaware, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm and perpetual peace between the said King of Great Britain and the said United States of America; and that he, the said Gideon Henfield, so being an inhabitant of the said United States of America, on the same day and year aforesaid, in the river Delaware, and within the jurisdiction of this court, and being a prize-master on board of the said ship-of-war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods and moneys of the King and people of Sardinia, the King and people of Prussia, the King of Hungary his subjects and people, the States General of the United Netherlands, and, especially, of the King and people of Great Britain, and then and there, in and on board of the said ship-of-war, with divers others, whose names to the grand inquest, aforesaid, are yet unknown, with force and arms unlawfully and maliciously, in prosecution of the said unlawful and malicious intent and purpose, attack, seize and take, a certain ship or vessel, called the William, belonging to a subject or subjects of his said Britannic Majesty, to the evil example of all others in like case offending, against the definitive treaty aforesaid, against the laws of the United States, in such cases made and provided, against the said constitution of the United States of America, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present: That, whereas, the said United States of America, on the said fifth day of May, in the year aforesaid, were, and now are, by treaties of peace and amity allied unto, and at peace with the States General, and the people of the United Netherlands, and the King and people of Prussia, and also at peace with the King and people of Great Britain, and the said States General, and the people of the United Netherlands, the said King and people of Prussia, and the

said King and people of Great Britain, on the said fifth day of May aforesaid, in the year aforesaid, were at war with the Republic of France, the said Gideon Henfield, then and there being a citizen and inhabitant of the United States, unlawfully and maliciously contriving and intending to disturb and destroy the peace of the said United States, and to involve the said United States in a war with the said States General, and the people of the United Netherlands, and with the said King and people of Prussia, and the said King and people of Great Britain, on the said fifth day of May aforesaid, in the year aforesaid, in the river Delaware, and within the jurisdiction of the said court, in and on board of a certain vessel, armed and fitted out for warlike purposes, and commanded by a certain Peter Johannen, having a commission from the Republic of France, to attack, seize, and take prisoners all the enemies of the said Republic of France, with their ships, arms, and other articles of property, did with force and arms unlawfully and maliciously, and contrary to his duty as a citizen of the said United States of America, attack, seize, and take as a prize a certain ship, called the William ——, then and there belonging to certain subjects of the said King of Great Britain, in violation of the laws of nations, against the laws and constitution of the United States, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present: That, whereas, on the said fifth day of May, in the year aforesaid, a treaty of peace, amity and commerce subsisted and was in full force between the said States General and the people of the United Netherlands and the said United States of America, between the King and people of Prussia and the said United States of America, and also a treaty of peace between the King and people of Great Britain and the said United States of America, the said Gideon Henfield, late of the district aforesaid, yeoman, then and there being a citizen and inhabitant of the said United States, and knowing the premises did, on the said fifth day of May, in the year aforesaid, in the river Delaware and within the jurisdiction of this court, unlawfully, violently and injuriously combine and confederate with divers others, whose names to the grand inquest aforesaid are yet unknown, to attack, seize, capture, burn and destroy the vessels, goods and merchandise of the States General and the citizens and subjects of the said United Netherlands and the said King and people of Prussia, and the said King and people of Great Britain, and to assault, imprison and kill the said citizens and subjects of the said United Netherlands, of the said kingdom of Prussia, and of the said kingdom of Great Britain, in violation of the laws of nations and the constitution and laws of the said United States of America and against the peace and dignity of the said United States of America.

And the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further present: That, whereas, on the said fifth day of May, in the year aforesaid, a treaty of peace, amity or commerce subsisted and was in full force between the States General and the people of the United Netherlands and the said United States of America, between the King and people of Prussia and the said United States of America, and also a treaty of peace between the King and people of Great Britain and the said United States of America, the said Gideon Henfield, late of the district aforesaid, yeoman, then and there being a citizen and inhabitant of the said United States, well knowing the premises did, on the said fifth day of May, in the year aforesaid, in the river Delaware and within the jurisdiction of this court, unlawfully, violently and injuriously combine and confederate with divers others, whose names to the grand inquest aforesaid are yet unknown, to attack, seize, capture, burn and destroy the vessels, goods and merchandise of the States General and the citizens and subjects of the said United Netherlands and the said King and people of Prussia and the said King and people of Great Britain, and to assault, imprison and kill the said citizens and subjects of the said United Netherlands, of the said kingdom of Prussia, and of the said kingdom of Great Britain, and in prosecution of the said wicked and unlawful attempt, the said Gideon Henfield afterwards, on the said —— day and year aforesaid, in the river Delaware and within the jurisdiction of the said court, in and on board a certain vessel armed and fitted out for warlike purposes and commanded by a certain Peter Johannen, having a commission from the Republic of France to attack, seize and take prisoners all the enemies of the said Republic of France, with their ships, arms and other articles of property, did, with force and arms, unlawfully and maliciously, and contrary to his duty as a citizen of the said United States attack, seize and take as a prize a certain ship called the William, then and there belonging to certain subjects of the said King of Great Britain, to the evil example of all others in the like case offending, in violation of the laws of nations, against the laws and constitution of the United States and against the peace and dignity of the said United States.[3]

W. Rawle,
Attorney of the United States in and for the Pennsylvania District.

Hilary Baker, Esq., sworn,
Lewis Deblois, Esq., sworn,
John Morgan, sworn,
James Bassett, sworn.

[3] Among Mr. Rawle's papers is the following draft of indictment, in the handwriting of Mr.

It appeared in evidence that Gideon Henfield was a citizen of the United States and that his family resided in Salem, Massachusetts. Being a sea-faring man he had been absent from them some time, and about the 1st of May, 1793, being then at Charleston, South Carolina, and desirous of coming to Philadelphia, he applied to the master of a packet, who asked him more for his passage than he could afford to pay, whereupon he entered on board the Citizen Genet, a French privateer, commissioned by the French Republic and commanded by Pierre Johannen. Captain Johannen, it appeared, promised him the berth of prize-master on board the first prize they should capture, and the ship William, belonging to British subjects, having been captured about the 5th of May, he was put on board her as prize-master, with another person, and arrived in that capacity at Philadelphia. It appeared that on his examination before the magistrate, he protested himself an American, that as such he would die, and therefore could not be supposed likely to intend anything to her prejudice. He declared if he had known it to be contrary to the president's proclamation, or even the wishes of the president, for whom he had the greatest respect, he would not have entered on board. About a month afterwards, being before the same magistrate, he declared he had espoused the cause of France, that he now considered himself as a Frenchman, and meant to move his family within their dominions.

Mr. Rawle, district attorney, with whom was Mr. Randolph, attorney general, made the following points:

1. Every member is accountable to society for those actions which may affect the interest of that society.

2. The United States being in perfect peace with all nations, and allied in friendly bonds with some, their national situation requires a perfect neutrality from every motive applicable to our common interest.

3. An aggression on the subjects of other nations done in an hostile manner and under colour of war is a violation of that neutrality.

4. If not under the colour of war it would be an act of piracy. But by the laws of nations if one of the belligerent powers should capture a neutral subject fighting under a commission from the other belligerent powers he could not punish him as a pirate, but must treat him as an enemy, and it would be a good cause of declaring war against the nation to which he belonged; and if treated as an enemy without just cause it is the duty of the nation to which he belongs to interfere in his behalf; and thus arises another cause of war. Hence the act of the individual is an injury to the nation, and the right of punishment follows the existence of the injury.

5. The right of peace and war is always vested in the government. In the United States, but congress alone possesses it. By the formation of the society every individual

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Randolph, with marginal corrections, apparently by Mr. Hamilton:

"For that, whereas, an open and notoriously public war for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted between (here name the nations at war) —during all which time a treaty of amity and commerce was, and still is in force between the said States General of the United Netherlands and the United States of America, whereby it is, among other things, provided that there shall be a firm, inviolable, and universal peace and sincere friendship between their High Mightinesses the Lords the said States General of the United Netherlands and the U. S. of America, and between the subjects and inhabitants of the said parties, and between the countries, islands, cities, and places situated under the jurisdiction of the said U. Nthds. and the said U. S. of America, their subjects and inhabitants of every degree, without exception of persons or places: And, whereas, by the constitution ordained and established for the said U. S. of A., it is, among other things, provided that all treaties made, or which shall be made, under the authority of the U. S., shall be the supreme law of the land: And, whereas, at the time of the said war, by virtue of a certain commission and certain letters of marque and reprisal, granted by the Republic of France, a certain ship-of-war, called the Citizen Genet, was, among others, set out and equipped, of which a citizen of the said Republic of France was commander, with several other French citizens, to the number of fifty persons, in a warlike manner, to take and destroy the ships, goods, and moneys (name the nations), and especially of the U. Nethds. and the subjects thereof, and against them to wage war on the high seas, and within the jurisdiction of this court. A. B., &c. (with the additions) being an inhabitant of the said U. S. of A. well knowing the premises, and intending and contriving, and with all his strength purposing to interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship, as aforesaid, between the said U. Nethds. and the said U. S. of A. on the —— day of ——, &c., with force and arms, on the high seas, and within the jurisdiction of this court, unlawfully and maliciously did interrupt, destroy, and break the said firm, inviolable, and universal peace and sincere friendship, between the said U. N. and the said U. S. of A., and that he, the said A. B., so being an inhabitant of the said U. S of A. on the same day and year aforesaid, on the high seas aforesaid, and within the jurisdiction of this court, and being a —— on board of the said —— of war, unlawfully and maliciously sailed and cruised to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and moneys (name the nations), and especially of the said States General of the U. Nethds., against the treaty aforesaid, against the said constitution of the U. S. of A., and against the peace, &c.

"A like count as to Prussia, substituting the words of the treaty with that nation, observing the words of the treaty minutely.

"A count as to England, substituting the words of the treaty with England, and charging an actual taking, observing the words of the treaty minutely.

"The two counts, with the alteration suggested by Mr. Lewis, appear advisable, as does the third general one recommended by him.

"I confess, that I would repeat all those counts as within the river Delaware.

"I would lay, too, a general trespass on the high seas, without reference to allies or treaties.

"It may, perhaps, be found advisable separately to indict under the 19th article of the Dutch treaty."

has consented to its being thus exclusively deposited for the general benefit. No individual, therefore, can assume the exercise of this right. For if one could do it one thousand might, and while the government declared peace the tragedy of war would be acted in its defiance.

6. If one individual has a right to associate with the subjects of one of the belligerent powers, another individual has an equal right to do the same with the other belligerent power; thus the citizens of the neutral nation might be fighting with each other. Under this unhappy prospect, the national character and existence of America are lost; and instead of being members of a great nation, we become a band of miserable Algerines.

7. The facts here show: (1) That Henfield is a citizen and inhabitant, though afterwards he takes counsel and alters his note. (2) That he entered on board the privateer, Citizen Genet, at Charleston. (3) That she was a commissioned vessel. (4) That he aided and assisted in taking the prize, and came in on board her as prize-master. The sufferings and character of Henfield can have no operation here: it is a point for the court, and no justification. France is at war with Austria, Spain, Portugal, and Sardinia, with whom we are at peace; with Great Britain, with whom a treaty of peace exists; and with the United Netherlands and Prussia, with whom there is peace, amity, and commerce. To the first two we are related as having neither given nor received offence. But the want of a treaty with them will not justify the individual in his aggression on them. With Great Britain is a treaty of peace, by article 7 of which it is provided that there shall be a firm and perpetual peace between his Britannic Majesty and the United States, and the subjects of the one and the citizens of the other. With the United Netherlands and Prussia, treaties not only of peace but of mutual friendship and liberal commerce. The commission under which the proceedings of defendant took place is generally against all these powers, though actual aggression is charged as to one only. That one is one with whom we have a treaty of peace, which is the supreme law of the land, and this is the positive prohibitory law. Thus, an infraction of this kind, unless punished, becomes a good cause of war on the part of the offended nation. Vatt. Law Nat. bk. 4, § 52; Bynk. bk. 1, p. 178, c. 8. It is an offence against our own country, at common law, because the right of war is vested in the government only. Puff. Law Nat. bk. 8, c. 6, § 8; Vatt. Law Nat. bk. 3, § 4; Id. bk. 4, § 223. In a state of nature the right adhered to the individual. It is lost by joining society. The common welfare requires this position in its fullest extent, otherwise a few individuals, for avaricious purposes, might involve the nation in a war; otherwise, the members of the nation, taking opposite sides, might destroy the nation in detail (Vatt. Law Nat. bk. 3, § 8); otherwise, the primary duty due from the citizen to the nation would remain unperformed while his labours and his life were devoted to the service of foreigners. Nor are these only the speculations of the closet. We see them carried into effect in England in affirmation of national common law, i. e. the law of nations. 4 Bl. Comm. 69. The English statute is not in force here, because the specific remedy for which alone it was made cannot be had, but the law which it aided, not introduced, is in force. The law of nations is part of the law of the land. 4 Bl. Comm. 66; [Respublica v. De Longchamps] 1 Dall. [1 U. S.] 111; C. L. 11b. This is an offence against the laws of nations. It is punishable by indictment on information as such. [Respublica v. De Longchamps] 1 Dall. [1 U. S.] 114, &c.; 3 Burrows, 1480. It is agreed that the laws of nations point out different methods of proceedings:—(1) By the belligerent power treating the offenders as pirates. (2) By negotiation, or the declaration of war. But the answer is that these are concurrent remedies.

True, that some writers say they may be treated as pirates, and certain, that they may be treated as enemies. But these do not preclude the national right of proceeding against the delinquents judicially. 3 Bl. Comm. 2, 3, 4, &c. So a man may defend himself against violence, but the assailant may be indicted. A man may peaceably retake his own property, but he may also have a replevin. A man may enter, &c., but he may have his ejectment. The same observations apply to negotiation. We may negotiate as well on national as on private concerns, but without prejudice to the judicial remedy. But it is the honour of free states that the judicial remedy is necessary. 4 Bl. Comm. 67. That the executive should be inadequate to sudden and unusual exertions of power is our pride and happiness; and that our courts should, with that impartial and unbiased dignity which characterizes their judicial investigations of truth, apply the law of nations to men, of which nations are composed, and substitute the scales of justice for the sword of war.

But it is said that there is a want of precedent for this prosecution. The first answer is, that it is demonstrated that the law of nations is part of the law of the land. The second answer is, that in numerous other instances, enumerated by Blackstone, the law of nations is enforced by the judiciary. In cases of this nature, we find provisions have been made by statute in affirmance of the law, providing more speedy and specific relief than the common course of the law will admit. Thus the 31 Hen. VI. c. 4, was passed, and then, 3 Jac. I. c. 4, which makes it felony to go out of the realm to serve a foreign prince without oath of allegiance. That an indictment will lie on the latter is un-

questionable. On the former, see 3 Bulst. 28—a case in point.

It is urged, also, that the right of emigration is natural to freemen. It is no crime to become a French subject, and being a French subject, the defendant may lawfully enlist in this command. The answer is, that when a man has fairly and deliberately emigrated—when he has renounced his own country, and has been received and domiciliated by the other—when all this has been done previously to the commission of the hostile act, and without a view to it, there is no offence in an act of this kind. But the power of emigrating, and the power of renouncing the original country, are widely different. Te emigrate is declared to be, in most instances, lawful for a private citizen, in some it is dishonourable—as to leave a country under difficulties, as in a dangerous war, &c. But, at all events, if at the time the act was committed, the party was unquestionably a citizen, had not renounced his country, and was not domiciliated elsewhere, he cannot escape punishment by becoming a citizen afterwards. Still less, when as expressly stated and proved, he was then an inhabitant. Is not the defendant's family still at Massachusetts? Is he not still upon the roll of their citizens; were his family in want, would they not be entitled to public relief? Did he not declare that, as an American he would die? It is said, it is true, that without actual expatriation, a freeman, in a free country, may consistently with the law of nations enter as a volunteer. 2 Lee, 251. The answer is to be found in Vatt. Law Nat. lib. 3, § 13, in addition to what is already cited.

2. The principles of Lee are as questionable as those of Vattel are solid. It is prostrating the right of civil society, to support the right of man in a state of nature. The latter is destructive to civil society—which is instituted to prevent the pernicious effects of those rights. Grotius, whom he quotes, does not say so. Grotius treats simply of the right of emigrating, and there is not a syllable of the matter treated on by Lee in the whole section of Grotius. Grot. lib. 2, c. 5, § 24. But in the same section Grotius very justly says, that one ought not to go out of a state, when the interest of the state requires otherwise. And surely the interest of the state is affected by going out for these purposes. Lee himself excepts those states in which it was not allowable by the custom, as he terms it. That this is the case in England is in proof. And it has not been altered here. The bill of rights declares, emigration shall not be prohibited.

It is contended, however, that the act done —having been done on board the vessel—it is there French country, and the act there is lawful. The answer is, that in no respect is a foreign vessel a foreign country. Suppose the defendant had on board that vessel committed a private offence, the indictment lays it as having been done by a citizen—an inhabitant. There is really no technical difficulty. The evidence comes fully up to the case. The defendant was in Charleston; he there entered the vessel, and to argue that the instrument by which the offence is committed shall protect him from punishment, is an absurdity. By this the old doctrine of deodands is reversed; there the instrument partook of the offence; here the offender is to be incorporated into the innocence of the instrument. Let us suppose America engaged in war, and that one of her faithless children prefers the other party, joins an hostile detachment which has already invaded his own country, or enters on board a foreign privateer lying in our bay, and commits those acts, which in war are lawful, in peace, crimes. Does the right to emigrate, the right to choose his country, to renounce his former allegiance protect him here? It will be said that this is not a parallel case. What is the difference? (1) The offender in the latter case has a right to leave one country and become a citizen of another. (2) He has a right to disengage himself entirely from the obligations of duty and obedience to the first country. (3) The act of joining the other country, of itself, exempts him from those primary obligations. So far, the parallel is exact. To escape its effect, it may be asserted, that a man can never lift his hand against his native country. But, then, what becomes of all these rights? If the slavish doctrine of an unalienable allegiance is admitted, it totally destroys the right of emigration.

Thus after all this circuit we are let down where we began, viz: That the emigration from one country and the reception in another must be substantially and definitely effected before the acts of hostility. Let it not be said that this doctrine violates the rights of man. It is on the rights of man that it is established. The rights of man are the rights of all men in relation to each other, and when voluntarily assumed in society founded on principles of genuine freedom, they form a useful, benevolent, and endearing system, in which as much is received as is given. Perfect equality is one of those rights. We render ourselves equal when we all submit to the laws. That equality is destroyed if one man can set himself above them. That equality is destroyed if one man with impunity may involve three millions in war. With the honour of being the first in the eighteenth century to unfurl the standard of freedom we unite the glory of being the first in the records of man who deliberately composed a constitution of government, combining every noble, every useful, every rational, every patriotic object, and containing within itself the means of acquiring and securing them all. Of this the prominent effects strike the most careless eye. The world does not exhibit a fairer picture of fe-

licity, more useful industry, more wholesome laws, more public and private virtue, more genuine and uniform improvement, more to attract the admiration of the traveller and secure the affections of the citizen than the land we inhabit. Yet it is on such a country that inconsiderate and selfish men would pour the miseries of war. Is it not fair to ask them by what authority have you or I delegated to an individual the right of subjecting us to the pressure of heavy taxes, to the desolation of property, to the destruction of agriculture and of commerce, to the dangers of military service, in short, to the havoc and miseries of war? Has Pennsylvania, have the United States? No. Our excellent constitution has wisely vested this solemn, awful step in the collected wisdom and patriotism of the whole country. There the necessity of the war and the means of defence will be compared by men selected by their country and responsible to it, but not by men who involve us in what they profess they will not share with us, and in the very act which draws on us the greatest political affliction renounce the very connexion which has alone rendered us liable for their conduct. Have the convention of France requested it? No. They have requested our neutrality. The French people who assisted us formerly did it under the sanction and approbation of their sovereign. Instead, however, of his having no power over them, as stated by the other side, the operation of most positive and powerful laws was suspended, with a view to that public assistance which afterwards took place. 2 Vatt. Law Nat. 235. The intention of France was soon known; she declared herself when she thought the time mature.[4]

[4] The solicitude felt in the case by the officers of the government is illustrated by the following notes to Mr. Rawle during the progress of the trial:

(From Mr. Hamilton.)

Dear Sir: I send you all the books you sent me. There appears to me a passage important to Mr. Rawle—Questiones Juris Pub. lib. 1, chap. viii. p. 178.—I mean what relates to the people of Munster who made out of the territories of Spain incursions into those of Holland. It shows by an example that military expeditions out of the territory of a neutral power cannot rightfully be made by a power at war, and that if permitted the neutral nation is answerable. A fortiori, the means of such expeditions cannot be prepared in a neutral territory.

A.

Endorsed { Mr. Lewis or Mr. Rawle. } United States *vs.* Henfield.

(From Mr. Randolph.)

E. Randolph, with best respects to Mr. Rawle:—The nineteenth article of the Dutch treaty was adverted to; and it was presumed that you would operate with it, if any of the crew were found to come within the description. The captain of the privateer seems, from your information, to be of doubtful character. May it not, therefore, be advisable to inquire, whether he be an American or foreign citizen, before you get into motion against him?

Sunday.

Mr. Duponceau, Mr. Ingersoll and Mr. Sergeant addressed the jury at great length; and insisted—

1. That the indictment did not include an offence at common law.

2. That if the president's proclamation created such an offence, the case before the court was committed before the proclamation was made.

3. That though the treaty with Morocco prohibited the enlisting of American citizens under such circumstances as the present, yet there was no such provision in the treaty with France, and hence the inference from its express introduction into the former treaty is that it was intentionally omitted from the latter.

4. That independently of these grounds, as there was no statute giving jurisdiction, the court could take no cognizance of the offence.

On the question under the laws of nations were cited, 6 Hume, Hist. Eng. 433; 1 Hutch. Hist. Mass. Bay, 251; 3 Vatt. Law Nat. 15; Bynk. 22d, c.; Syn. Gal. Rep. 94.[5]

Judge WILSON (with whom were Judge IREDELL and Judge PETERS) charged the jury as follows:

This is, gentlemen of the jury, a case of the first importance. Upon your verdict the interests of four millions of your fellow-citizens may be said to depend. But whatever be the consequence, it is your duty, it is our duty, to do only what is right.

(After stating the substance of the charges against the defendant, the learned judge proceeded:)

It has not been contended, on the present occasion, that the defendant has any peculiar exclusive right to take a part in the present war between the European powers, in relation to all whom the United States are in a state of peace and tranquillity. If he has no peculiar or exclusive right, it naturally follows, that what he may do every other citizen of the United States may also do. If one citizen of the United States may take part in the present war, ten thousand may. If they may take part on one side, they may take part on the other; and thus thousands of our fellow-citizens may associate themselves with different belligerent powers, destroying not only those with whom we have no hostility, but destroying each other. In such a case, can we expect peace among their friends who stay behind? And will not a civil war, with all its lamentable train of evil, be the natural effect? Yet what is right must be done, independent of the consequences, which

[5] Unfortunately for the profession the only notes the editor has been able to obtain of the argument for the defence are those taken at the time by Mr. Rawle. The newspapers, however, speak of the speeches of both Mr. Sergeant and Mr. Ingersoll as of great power; and in the Daily Advertiser of August 5, 1793, a communication appears, in which, by a critic of no mean abilities, Mr. Sergeant's speech is referred to as most efficient and unanswerable.

I have only stated, in order to lay before you the necessity of seriously considering the case entrusted to you before you decide upon it.

Two principal questions of fact have arisen, and require your determination. The first is, that the defendant, Gideon Henfield, has committed an act of hostility against the subjects of a power with whom the United States are at peace: this has been clearly established by the testimony. The second object of inquiry is, whether Gideon Henfield was at that time a citizen of the United States. This he explicitly acknowledged to Mr. Baker; and, if he declared true, it was at that time the least of his thoughts to expatriate himself.

The questions of law coming into joint consideration with the facts, it is the duty of the court to explain the law to the jury, and give it to them in direction. It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed. There are, also, positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land. The constitution of the United States has declared that all treaties made, or to be made, under the authority of the United States, shall be part of the supreme law of the land. I will state to you, gentlemen, so much of the several treaties in force between America and any of the powers at war with France, as applies to the present case. The first article of the treaty with the United Netherlands, declares that there shall be a firm, inviolable, and universal peace and sincere friendship between the States General of the United Netherlands and the United States of America, and between the subjects and inhabitants of the said parties. The seventh article of the definitive treaty of peace between the United States and Great Britain, declares that there shall be a firm and perpetual peace between his Britannic Majesty and the United States, and between the subjects of the one and the citizens of the other. And the first article of the treaty with Prussia declares that there shall be a firm, inviolable, and universal peace and sincere friendship between his Majesty the King of Prussia and his subjects, on the one part, and the United States of America and their citizens on the other. It may be observed, that the treaty would not be less sufficient in relation to the present question, if "subjects" and "citizens" had not been mentioned. These treaties were in the most public, the most notorious existence, before the act for which the prisoner is indicted was committed. The notoriety may, indeed, be said to have been greater than that of the general acts of congress; since, besides the same mode of publication, they are expressly referred to in the constitution. Much has been said on this occasion, by the defendant's counsel, in support of the natural right of emigration; but little of it is truly applicable to the present question. Emigration is, undoubtedly, one of the natural rights of man. Yet it does not follow from thence that every act inconsistent with the duty is inconsistent with the state of a citizen. Nothing is more inconsistent with the duty of a citizen than treason; but it is because he still continues a citizen that he is liable to punishment.[6]

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[6] From the several charges in the text may be deduced three points:

(1) That the participation by the citizens of a neutral state in an attack by one belligerent power upon another, is an offence against the laws of nations, and may be punished as such by such neutral state.

(2) That though there has been no exercise of the power conferred upon congress by the constitution "to define and punish offences against the laws of nations," the federal judiciary has jurisdiction of an offence against the laws of nations, and may proceed to punish the offender according to the forms of the common law.

(3) That a violation by a citizen of the Union of a treaty with a foreign state, may be punished in the federal courts by indictment.

Perhaps to these may be added the much controverted position that the federal courts have common law cognizance of offences against the sovereignty of the United States.

The first point can give but little trouble. It is fully supported by the citations given by Chief Justice Jay from the civilians; and the late accomplished and lamented Mr. Wheaton, in his Commentary on the Law of Nations, lays down the same doctrine though without reference to this case. Wheat. Law Nat. 471.

The second and third points, however, so far as they involve the third, have been the subject of frequent discussion, and of a variety of adjudication which on a former occasion was traced as follows:

"The inclination of authority, as has been already noticed, is, that the federal courts have no common law jurisdiction whatever in criminal cases. See 4 Tuck. Bl. App. 10. In the first case in which the question was mooted—U. S. v. Ravara [Case No. 16,122]—it was argued that the offence committed was not an offence at common law, nor made so by any positive law of the United States, but it was not urged that, unless defined by statute, it could not be punished; and the court found the defendant guilty, the offence being held indictable at common law. In a case arising shortly afterwards—U. S. v. Worrall [Case No. 16,766]—Mr. Dallas, counsel for the defendant, argued that, by the 12th article of the amendment to the constitution, 'the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people.' In relation to crimes and punishments, the objects of the delegated powers of the United States, he urged, are enumerated and fixed. Every power is matter of definite and positive grant, and the very powers that are granted cannot take effect until they are exercised through the medium of the law. Congress has, undoubted-

After some other observations, explanatory of the legal principles which had been agitated in the course of the trial, the judge concluded by remarking, that the jury, in a general verdict, must decide both law and fact, but that this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both.

The jury retired about nine on Saturday evening, and came into court again about half-past eleven, when they informed the court they had not agreed. They were desired to retire again, which they did, and re-

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ly, power to make a law which shall render it criminal to offer a bribe to the commissioner of the revenue, (the case before the court,) but not having done so, the crime is not recognized by the federal code, and consequently it is not a subject on which the judicial authority of the Union can operate. Mr. Dallas cited but three cases, which are probably all that had at that time been decided; the case of Henfield, who had been punished expressly for a violation of a treaty; that of Ravara, which he endeavoured to weaken; and that of Com. v. Schaffer, decided in the mayor's court of Philadelphia (4 Dal. [4 U. S.] App. 26) where it was held that, although all powers which are essential to the independence, protection or defence of the government, ought to be considered as granted by the constitution, yet where it is found that congress has not by any act legislated on a point, and thereby divested a state of a jurisdiction which, at the time, it constitutionally possessed, such jurisdiction continues in the state courts. The court were divided in their opinions, Chase, Circuit Judge, holding that there could be no indictment under the constitution for a common law offence, and Peters, District Judge, maintaining the contrary doctrine.

"In the following year (1799), at a circuit court in Connecticut, the defendant was indicted for accepting a commission from the French Republic, and cruising against and capturing British property. No question of jurisdiction was raised, and he was convicted, it being held that he could not expatriate himself. See Williams' Case [Case No. 17,708]. Shortly afterwards, Judge Washington seems to have held that there could be no indictment for perjury at common law in the courts of the United States (see Anon. [Id. 475], the report of which case appears to be defective in the conclusion of Judge Washington's opinion); and Chief Justice Marshall (U. S. v. Burr [Case No. 14,693]) hints that he too is of the opinion that no common law offence, not specified by statute, is indictable in the federal courts; and such certainly is the assumption on which he reasons in more than one succeeding case (U. S. v. Bevans, 3 Wheat. [16 U. S.] 336; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76). But in a case which occurred in the circuit court of Massachusetts,—U. S. v. Coolidge [Case No. 14,857],—on an indictment for an offence committed on the high seas, the question arose, directly, whether the circuit court had jurisdiction to punish offences against the United States, which had not been defined, and to which no punishment had been affixed. The judge, admitting that the courts of the United States were of limited jurisdiction, and could exercise no authority not expressly granted to them, contended, that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law, and that, if this distinction was made, it would dissipate the whole difficulty and obscurity of the subject. Congress, he said, might, under the constitution, confide to the circuit courts jurisdiction of all offences against the United States, and they had conferred on them jurisdiction of almost all; that by the judiciary act the circuit courts have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that or another statute of the United States otherwise provides; that, in order to ascertain what are crimes and offences against the United States, recourse must be had to the common law, taken in connection with the constitution; and that congress has provided for the punishment of many crimes which it has not defined, an explanation and definition of which can only be found in the common law. The inference, he urged, was plain, that the circuit courts have cognizance of all offences against the United States; that what these offences were depended upon the common law, applied to the powers confided to the United States; that the circuit courts, having such cognizance, might punish by fine and imprisonment where no punishment was specially provided by statute; that the admiralty was a court of extensive criminal, as well as civil, jurisdiction; and that offences of admiralty were exclusively cognizable by the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed. The district judge dissenting, the case came before the supreme court of the United States; and it is evident, from the reported case,—[U. S. v. Coolidge] 1 Wheat. [14 U. S.] 415,—that a strong desire existed in the minds of the judges to hear the whole question of the extent of jurisdiction re-argued. The attorney general, however, declining to do so, being unwilling to attempt to shake U. S. v. Hudson, 7 Cranch [11 U. S.] 32, by the authority of that case the court felt themselves bound, and so certified to the circuit court. Chancellor Kent does not seem to think that the case of U. S. v. Coolidge [supra] should be governed by the same principle as those of U. S. v. Hudson and U. S. v. Worrall [supra], the one a libel and the other an attempt to bribe a commissioner of the revenue, the two latter being decided on the ground that the constitution had given to the courts no jurisdiction in such cases; whereas, the Case of Coolidge was one of admiralty, over which the federal courts seem to have a general and exclusive jurisdiction." Kent, Comm. p. 338; Whart. Cr. Law, p. 40. See, also, Rawle, Const. 258; Serg. Const. 272.

But even assuming that the doctrine that the common law, as a source of jurisdiction, does not control the federal courts, is now finally established, it by no means follows that the common law, as a rule for the exercise of a jurisdiction previously given, does not apply undiminished except so far as it interferes with positive statute. Thus it may be argued, that as congress has power to "define and punish offences against the law of nations," the jurisdiction of the states is thereby divested of the particular subject matter; and that consequently as the jurisdiction exists somewhere, it exists in the federal courts, ready to be exercised through the statutory medium, when congress specifies the procedure, but when no legislation has taken place, through the agency of the common law. Marbury v. Madison, 1 Cranch [5 U. S.] 137, tends to the doctrine that the federal jurisdiction in this and kindred cases is exclusive; and such is the express ruling of Com. v. Kosloff, 5 Serg. & R. 545, where Chief Justice Tilghman refused to take cognizance of a suit respecting a consul. The pregnant inquiry pressed home in the latter case:—"Is the constitution to be so construed as to exclude the jurisdiction of all inferior courts, and yet suffer the authority of the supreme court to be dormant until called into action by law," &c., gives no obscure intimation of the leaning of that wise and clear headed judge on this very point. It is not inconsistent, therefore, with the doctrine discarding the common law as an origin of ju-

turned on Monday morning, having delivered into the hands of Judge WILSON a privy verdict on Sunday morning, soon after the adjournment of the court.

One of the jurymen now expressed some doubts, which occasioned the judges separately to deliver their sentiments on the points of law adverted to in the charge on Saturday evening, each of them assenting to the same, particularly as to the change of political relation in the defendant, from his having been some time absent from home previous to his entering on board the privateer.

The jury again retired, and the court adjourned. At half-past four the court was convened, and the jury presented a written verdict, which the court refused to receive, as being neither general nor special. Another adjournment took place, and about seven o'clock a verdict of "Not Guilty" was delivered.[7]

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risdiction to the federal courts, to hold that where an express subject matter is ceded to the federal government by the constitution, that subject matter is to be acted upon through the medium of common law forms. This distinction is dwelt upon by the late Mr. Duponceau in his notice of this very case.

"Judge Wilson, who presided at this trial, in his charge to the jury, took the ground of its being also an offence at common law, of which the law of nations was a part, and maintained the doctrine that the common law was to be looked to for the definition and punishment of the offence. This ground had not been adverted to in argument, or, at least, very slightly. But it would seem that the common law considered as a municipal system had nothing to do with this case. The law of nations, being the common law of the civilized world, may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere proprio rigore, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state. Judge Wilson, therefore, in my opinion, rather weakened than strengthened the ground of the prosecution in placing the law of nations on the same footing with the municipal or local common law and deriving its authority exclusively from the latter. It was considering the subject in its narrowest point of view." Dup. Jur. 3. A distinction of a parallel character is taken by Mr. Dallas, in his speech in Worrall's Case [supra], which will be presently given, where he argues that in the case in the text the defendant was indicted for an infraction of a treaty, which is the supreme law of the land, and that consequently that case is no authority for the position that at common law alone any offence against the sovereignty of the United States is indictable.

There are, however, great difficulties in the way of giving the federal courts criminal jurisdictions over infractions of treaties, or of the law of nations, and at the same time refusing them such jurisdiction over common law offences. If the common law is inadmissible to execute the jurisdiction in the latter case, the question is a critical one, whether the former can be taken in to help out the jurisdiction of the latter; and such, in fact, appears to have been the view of Judge Wilson, who, declining to place the case on the narrow ground of the law of nations alone, declared the offence to be cognizable at common law. Supposing, therefore, that Henfield's Case is in such direct conflict with U. S. v. Coolidge, and U. S. v. Hudson [supra], that either the former or the two latter must fall, the question arises, which is to be considered as law?

Henfield's Case, it is true, was not reviewed by the court in banc, but the ruling of the court at the trial was made after a full and ample discussion by counsel distinguished for their learning and sagacity, and received the assent both of Judge Peters, the district judge, and of all the judges of the supreme court but one. Chief Justice Jay, to whom as a constitutional lawyer, no one can be pronounced superior, and to whom of all the judges who ever sat on that bench the character of a cotemporaneous expositor most properly belongs, announces the jurisdiction in advance with great solemnity, in a charge which exhibits grave deliberation. Judge Wilson and Judge Iredell, both of whom sat in the constitutional convention, proclaimed the same doctrine at the trial. The prosecution was instituted by Mr. Edmund Randolph, certainly not one of that class which leaned to an enlarged view of the judicial power, and his official opinion as attorney general was given beforehand that the offence was one which the federal courts have power to punish. Mr. Jefferson, almost at the same moment, in substance directs Mr. Morris to explain to the British court that the acquittal arose not from a want of power to punish, but a doubt in the minds of the jury as to the guilty intent; (see next note) and Chief Justice Marshall many years afterwards, laments over the verdict of the jury, not as the necessary result of a lack of jurisdiction but as a melancholy exhibition of party zeal. Id. By none of these is there the least intimation of a doubt as to the jurisdiction of the court; and when the character of the men themselves is recollected—the sound, wary, experienced judgment of Chief Justice Jay—the singular sagacity of Mr. Jefferson in every branch of our system, and his peculiar sensitiveness to judicial encroachments—and the excellent capacity and long experience of Judge Iredell, Judge Wilson, and Judge Peters—it cannot now be said that the jurisdiction was assumed inconsiderately or acquiesced in blindly. It undoubtedly was exercised because the united opinion of the day required its exercise. It was exercised in conformity with the opinion announced by Washington in his proclamation of neutrality—a paper unanimously adopted by the cabinet, as a correct exposition to foreign states of the power of the federal government—that the federal government in such cases could through its courts punish the offender. 10 Wash. Writ. by Sparks, 535, ante, p. 53. How far this opinion is to be considered as shaken in U. S. v. Hudson, where the proceedings were ex parte, and U. S. v. Coolidge, where the attorney general abandoned the question, is yet to be determined.

[7] Chief Justice Marshall (Life of Washington, vol. 2, pp. 273, 274) thus notices the result: "The administration received additional evidence of the difficulty that would attend an adherence to the system which had been commenced in the acquittal of Gideon Henfield. A prosecution had been instituted against this person, who had enlisted in Charleston on board a French privateer equipped in that port, which had brought her prizes into the port of Philadelphia. This prosecution had been directed under the ad-

Case No. 6,361.

In re HENKEL.

[2 N. B. R. 546 (Quarto, 167);[1] 2 Pac. Law Rep. 212.]

District Court, D. California. 1869.

BANKRUPTCY—INVOLUNTARY—HOMESTEAD—EXEMPTION.

1. The homestead act of California [Hitt. Dig. § 3541] contemplates the selection of a homestead out from an entire estate, which was sufficient to pay all the just debts of its owner, and leave a surplus equal to the value of the homestead declared.

2. The declaration of the homestead is not to be held operative to prevent creditors from converting the homestead into a fund for their benefit, when such declaration is made in fraud of their rights as creditors of the bankrupt.

[Cited in Re Boothroyd, Case No. 1,652.]

In the case of Wm. Henkel, voluntary bankrupt, a decision was given by Asher B. Bates, as register, which, if sustained, will

[1] [Reprinted from 2 N. B. R. 546 (Quarto, 167), by permission.]

vice of the attorney general, who was of opinion that persons of this description were punishable for having violated subsisting treaties, which by the constitution are the supreme law of the land, and that they were also indictable at common law, for disturbing the peace of the United States. It could not be expected that the Democratic party would be inattentive to an act so susceptible of misrepresentation. Their papers sounded the alarm, and it was universally asked, 'What law had been offended, and under what statute was the indictment supported? Were the American people already prepared to give to a proclamation the force of a legislative act, and to subject themselves to the will of the executive? But if they were already sunk to such a state of degradation, were they to be punished for violating a proclamation which had not been published when the offence was committed, if indeed it could be termed an offence to engage with France, combating for liberty against the combined despots of Europe.'" "As the trial approached, a great degree of sensibility was displayed, and the verdict in favour of Henfield was celebrated with extravagant marks of joy and exultation. It bereaved the executive of the strength to be derived from an opinion, that punishment might be legally inflicted on those who should openly violate the rules prescribed for the preservation of neutrality; and exposed that department to the obloquy of having attempted a measure which the laws would not justify." The verdict was considered by Washington of such moment, as to lead him to enumerate it as a principal reason to be considered in the question of calling an extra session of congress, respecting which he asked the opinion of his cabinet on August 3, 1793. See 10 Wash. Writ. by Sparks, 362.

In a letter from Mr. Jefferson to Mr. Morris, then in England (3 Jeff. Cor. 271), it is said: "It has been pretended, indeed, that the engagement of a citizen in an enterprise of this nature, was a divestment of the character of citizen, and a transfer of jurisdiction over him to another sovereign. Our citizens are entirely free to divest themselves of that character by emigration, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the criminal from their coercion. They would never prescribe an illegal act among the legal modes by which a citizen must disfranchise himself; nor render treason, for instance, innocent, by giving it the force of a dissolution of the obligation of the criminal to his country. Accordingly, in the case of Henfield, a citizen of these states, charged with having engaged, in the port of Charleston, in an enterprise against nations at peace with us, and having joined in the actual commission of hostilities, the attorney general of the United States, in an official opinion, declared that the act with which he was charged was punishable by law. The same thing has been unanimously declared by two of the circuit courts of the United States, as you will see in the charges of Chief Justice Jay, delivered at Richmond, and Judge Wilson, delivered at Philadelphia: both of which are herewith sent. Yet Mr. Genet, in the moment he lands at Charleston, is able to tell the governor, and continues to affirm in his correspondence there, that no law of the United States authorizes their government to restrain either its own citizens or the foreigners inhabiting its territory, from warring against the enemies of France. It is true, indeed, that in the Case of Henfield, the jury which tried, absolved him. But it appeared on the trial, that the crime was not knowingly and wilfully committed; that Henfield was ignorant of the unlawfulness of his undertaking; that, in the moment he was apprized of it he showed real contrition; that he had rendered meritorious services during the late war, and declared that he would live and die an American. The jury, therefore, in absolving him, did no more than the constitutional authority might have done, had they found him guilty; the constitution having provided for the pardon of certain offences in certain cases, and there being no case where it could have been more proper than where no offence was contemplated. Henfield, therefore, was still an American citizen, and Mr. Genet's reclamation of him was as unauthorized as the first enlistment of him." See, generally, Wait, St. Pap. 85, 86, 143.

Mr. Genet's proceedings during the trial were marked with his usual turbulence. Starting with the inception of the prosecution, he addresses the secretary of state as follows: "I have this moment been informed that two officers in the service of the Republic of France, citizens Gideon Henfield and John Singletary, have been arrested on board the privateer of the French Republic, the Citizen Genet, and conducted to prison. The crime, laid to their charge—the crime which my mind cannot conceive, and which my pen almost refuses to state—is the serving of France, and defending with her children the common glorious cause of liberty. Being ignorant of any positive law which deprives Americans of this privilege, and authorizes officers of police arbitrarily to take mariners in the service of France from on board their vessels, I call upon your intervention, sir, and that of the president of the United States, in order to obtain the immediate releasement of the above mentioned officers, who have acquired by the sentiments animating them, and by the act of their engagement, anterior to every act to the contrary, the right of French citizens if they have lost that of American citizens." Keeping even pace with the prosecution, at every fresh step taken by it he sends in a fresh protest; and immediately on the rendition of the verdict, issues cards to a dinner party "to meet Citizen Henfield;" following up this last stroke by announcing that "the citizen" had been formally taken under the protection of the French Republic. Unfortunately, however, for Henfield, this "protection" was not very potent, for, elated with the honour of French citizenship, he sallied forth in a new excursion, which resulted in his capture by a British cruiser.

relieve the homestead laws of this state from the odium of being an enactment aiding dishonest debtors in placing their property beyond the reach of their honest creditors. The facts of the case upon which his opinion was given are as follows:

In November, 1866, the bankrupt was in debt to an amount of two thousand and fifty-six dollars, and was carrying on a millranch, owning the personal estate connected therewith. In December of the same year he purchased real estate for three thousand dollars, and borrowed two thousand dollars on a mortgage of the same, and one thousand dollars on his personal responsibility, and paid the purchase-money. At a later date he sold his personal estate, except his household furniture, for three thousand dollars, and with the proceeds paid off the mortgage and personal liability incurred in the purchase of his real estate, and in January, 1867, declared the real estate a homestead, and in August, filed a petition to be declared a bankrupt and discharged from his debts existing at the time he declared his homestead. Upon this statement of facts the bankrupt applied to the register for an order that the assignee shall set off the homestead as exempt, and not subject to be distributed for the payment of his creditors.

After the hearing of the facts, and the argument of counsel, the register delivered an elaborate opinion, sustaining the following conclusions of law:

First. The homestead act only contemplates the selection of a homestead out from an entire estate which was sufficient to pay all the just debts of its owner, and leave a surplus equal to the value of the homestead declared.

Second. If the language of the homestead act permits a homestead to be declared in a case like the one under consideration, it is unconstitutional and void, as it impairs the obligation of a contract. When the debts were contracted the creditors had a remedy against the entire estate of the bankrupt, which was sufficient to pay his debts and leave a large surplus. If the declaration of the homestead is to be held operative to prevent the creditors from converting the homestead into a fund for their benefit, they are without remedy, while the bankrupt is enjoying their property and his own.

Third. But assuming the foregoing conclusions of law, as not well sustained, the bankrupt act [of 1867 (14 Stat. 517)] provides: "All the property conveyed by the bankrupt in fraud of his creditors * * * * * shall, in virtue of the adjudication of bankruptcy, and the appointment of assignee, be at once vested in the assignee,"—and must be regarded as the law of this case.

The declaration of a homestead under the statutes of this state possesses all the attributes of a conveyance, as it changes the nature of the estate and vests it in other parties, who control its disposition, and in this case was made in fraud of the creditors of the bankrupt.

[For hearing on exceptions to the opinion of the register, see Case No. 6,362.]

Case No. 6,362.

In re HENKEL.

[2 Sawy. 305.] [1]

District Court, D. California. Dec., 1872.

BANKRUPTCY—HOMESTEAD EXEMPTION.

1. Under the laws of the state of California, the exemption of the homestead from forced sale remains, notwithstanding that an insolvent has devoted moneys which equitably belonged to all his creditors, to the payment of a debt which was a lien on the homestead.

[Cited in Re McKenna, 9 Fed. 36.]

[Cited in Crawford v. Richeson, 101 Ill. 357.]

2. A person even adjudged to be indebted may, at any time before the lien of the judgment has attached, declare a homestead.

3. A general creditor of an insolvent cannot subject a homestead to liability for his debts, notwithstanding that the insolvent had applied property in his hands to the payment of a debt which was a lien on the homestead.

[In bankruptcy. In the matter of William Henkel. Heard on exceptions to the finding of the register. Case No. 6,361.]

Gray & Casey, for petitioners.

L. S. Clark, for creditors.

HOFFMAN, District Judge. The assignee having determined in this case that certain real estate claimed as a homestead, passed to him, under the assignment as part of the assets of the bankrupt, and that as such it should be sold, and its proceeds distributed among the creditors, exceptions were taken to his determination, and the question referred to the court for final decision, under the fourteenth section of the bankrupt act [of 1867 (14 Stat. 522)].

The facts are admitted. They are as follows: In November, 1866, the bankrupt purchased the property claimed as a homestead, for the sum of $3,000. This sum he obtained by borrowing $2,000 on a mortgage of the property, and $1,000 on his note. On the sixth of December he sold his entire personal estate for $3,000, and with the proceeds paid the mortgage and the note. On the twelfth of January he declared the real estate to be a homestead in accordance with the laws of this state. At the time he made this declaration, he was indebted in the sum of $2,056. From this indebedness he now seeks to be discharged. The assignee and register were of opinion that this declaration is to be deemed "a conveyance of property by the bankrupt in fraud of his creditors," and that the property so conveyed passed to the assignee, and is assets in his hands.

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

The provision of the bankrupt law, under which the exemption is claimed, is as follows: "Provided, further, that if there shall be excepted from the operation of the provisions of this section, * * * and such other property not included in the foregoing exception, as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864."

By the laws of California, the homestead, consisting of a quantity of land, together with the dwelling house thereon, and its appurtenances, not exceeding in value the sum of $5,000, to be selected by the husband and wife, or either of them, or other head of a family, is declared not to be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after the passage of the act. Hitt. Dig. § 3541. This legislation is in obedience to section 15, art. 11, Const. Cal., which requires the legislature "to protect by law from forced sale, a certain portion of the homestead and other property of all heads of families." The fourteenth section of the bankrupt act provides, "that all property conveyed by the bankrupt in fraud of his creditors, shall, in virtue of the adjudication in bankruptcy, and the appointment of the assignee, be at once vested in such assignee." But it is evident that this provision was not intended to limit or impair the effect of the previous provisions, by which all property exempted from forced sale by the law of the state was exempted from the operation of the assignment. The language of the first clause is clear, emphatic and comprehensive; it admits of no exception. "In no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." The bankrupt act, like all other statutes, must, if possible, be so construed as to make its provisions consistent and harmonious; but if the subsequent clause, respecting property conveyed in fraud of creditors, is construed as suggested, the provisions of the act become conflicting and inconsistent.

Such a construction, unless imperatively required by the language, must be erroneous; but it is clearly inadmissible when it can be adopted only by wresting the language from its natural sense, and attaching to it a meaning which can with difficulty be attributed to it. The declaration of a homestead is in no sense "a conveyance." He who declares land which he already owns to be a homestead does not "convey" it; he merely avails himself of a legal right to place it in a condition where it will not be liable to forced sale. The right of property remains unchanged, except that the law, mindful of the object for which homesteads are allowed to be declared, provides that after the declaration the homestead cannot be alienated, except with the concurrence of the wife, and that on the death of the husband it survives to her for the benefit of herself and the family. It is evident that to call the declaration of a homestead a "conveyance of the property" would be doing extreme violence to the language; and in view of the previous provisions of the same section, such a construction is wholly inadmissible. If, then, by the laws of this state, the homestead declared by the bankrupt in this case was exempted from forced sale on execution, it did not pass to the assignee, and "the title of the bankrupt thereto was in no way affected or impaired by any of the provisions of the act." The question thus arises: was it exempted? In Riddell v. Shirley, 5 Cal. 488, it was held, where an insolvent sold his property in order to raise funds to discharge debts which were liens on his homestead, that the sale was fraudulent and void as against creditors, and that the property might be attached in the hands of a vendee who had bought with full knowledge of the circumstances. In this case no claim against the homestead was asserted, nor does the court intimate that it could be made liable to the general creditors, even to the extent of the liens on it which were discharged with the proceeds of the fraudulent sale. In Randall v. Buffington, 10 Cal. 493, it was held that a general creditor of an insolvent cannot subject a homestead to liability for his debts, notwithstanding that the insolvent had applied the property in his hands to payment of a debt which was a lien on the homestead. I cannot discover that the authority of this case has since been shaken. It must, therefore, be regarded as deciding that under the laws of California the exemption of the homestead from forced sale remains, notwithstanding that an insolvent has devoted moneys, which equitably belonged to all his creditors, to the payment of a debt which was a lien on the homestead.

The case under consideration is much stronger, for the bankrupt, when he paid off the incumbrances on his real estate, was not in insolvent circumstances, and the real estate remained for a month, and until it was declared a homestead, liable for his debts, and more than sufficient to satisfy them. That a person even adjudged to be indebted may, at any time before the lien of the judgment has attached, declare a homestead, was held in Culver v. Rogers, 28 Cal. 526. In that case, a decree of foreclosure on a mortgage, and a judgment for the unsatisfied balance had been obtained. The court held that the judgment did not become a lien on his other real estate until after the sale of the mortgaged premises, the ascertainment of the unsatisfied balance, and the docketing of the judgment for the sum so ascertained, and that a declaration of homestead made

before the sale of the mortgaged premises, exempted the homestead from sale, under the judgment subsequently docketed.

From these authorities it results: (1) That under the laws of California, an insolvent may apply funds in his possession to the discharge of incumbrances on his homestead, without impairing its inviolability as such; and (2) that a homestead may be declared at any time before the lien of a judgment has actually attached to the land.

Whether or not the object intended to be attained by the homestead laws is of sufficient importance to compensate for the ill effects of the frauds which may be committed under them, is a question for the legislature and not the courts to decide. If the views of the register be adopted, every declaration of a homestead must be held void as against all existing creditors at the time of the declaration. That such is not the construction given to the law by the highest tribunal of the state, we have seen from the cases above cited. That such was not the intention of the legislature may also be inferred from other laws on the same subject. By the act of March 13, 1860 [St. Cal. 1860, p. 87], the privileges of the homestead laws are extended to unmarried persons, but with important modifications. The homestead is not to exceed the value of $1,000, and by section 9 it is declared to be "not exempted from forced sale to satisfy any debt or liability created or assumed by the applicant prior to the filing of the said homestead title for record." By the general homestead law, the only liabilities to which the homestead is subjected, are for mechanics', laborers' or vendors' liens, and for mortgages or other liens given to secure the purchase money. The legislature has thus clearly discriminated between the two classes of persons who may declare homesteads. In the hands of heads of families who are the more favored, it is exempt from liability for all debts except those to mechanics or laborers upon it, or to those who have furnished the funds for its acquisition. In the hands of the less favored class, it is exempt from liability for those debts only which are incurred subsequently to its creation. We have no authority to interpolate into the general homestead law the limitations and liabilities which the legislature have imposed only in the case of homesteads declared by unmarried persons.

In the opinion rendered by the register, it is suggested that the words "to be selected," in the homestead law, "imply a prohibition to the creation of a homestead by any person when the creation thereof will make him insolvent; or, in other words, that the statute does not permit the creation of a homestead when it is the only property or the representative of it, upon the possession of which the credit was obtained." The effect of this construction would be to render the declaration of a homestead invalid in all cases where the person declaring it did not possess property independently of the homestead sufficient to pay his debts. I am unable to see how so important consequences can be derived from the words referred to.

The homestead is to be selected, that is, set apart and designated as such; for a new character is impressed on the property, not only in respect to its exemption from forced sale, but also as to its inalienability without the consent of the wife, and as to her right of survivorship. But the statute does not declare that to make this selection valid, the remaining property shall be sufficient to pay all the debts of the party selecting the homestead. I can see no warrant for interpolating such a provision. Nor would the practical effect of the construction suggested be reasonable or just. The most that even the register would desire would be to make the homestead liable for all the debts existing at the time of its creation. But if the fact that the remaining property of the party selecting a homestead is insufficient to pay his debts, renders the declaration invalid, the homestead will be exposed to public sale at the suit of any creditor, or will pass to the assignee in bankruptcy, to be distributed amongst all the creditors, including those whose debts were contracted subsequent to its creation, and who have no equitable or moral right to look to it for payment.

That the legislature has intentionally omitted from the general homestead law the provisions which, in the special act of 1860, render the homestead liable for any debt existing at the time of its creation, has already been shown, and the decisions above cited clearly establish that a person indebted, or even insolvent, may apply his property to the acquisition of, or the discharge of encumbrances upon, a homestead, without depriving it of the exemption from forced sale.

It is further suggested by the register that, if the homestead law be construed to exempt the homestead from forced sale, for debts existing when it was created, it impairs the obligation of contracts, and it is therefore unconstitutional. To this it is sufficient answer to say, that the debts were contracted subsequent to the passage of the homestead act. No law has, since the creation of the debt, been passed, by which the creditor's remedy is in any way affected. When he gave credit he knew, or is presumed to have known, what rights and privileges the debtor is allowed by law, and to what property he must look for a satisfaction of his debt.

I conclude, therefore, that, under the laws of this state, the homestead of the bankrupt in the case at bar was exempted from forced sale, and that, therefore, no title to it passed under the bankrupt law to the assignee. The clerk will certify this decision to the assignee.

Case No. 6,363.

HENLEY v. BROOKLYN ICE CO.

[8 Ben. 471; 14 Alb. Law J. 19.] [1]

District Court, S. D. New York. June, 1876.[2]

DEMURRAGE—CUSTOMARY DISCHARGE.

A cargo of ice was brought to New York by the schooner M. H., under a bill of lading which contained no condition as to the discharge of the cargo, except that the vessel was "to be discharged by the consignee with the assistance of the crew." At the time of her arrival there were several other vessels in port with cargoes of ice for the same consignee. They were discharged in the order in which their arrivals were reported, as was customary; and the M. H. was not discharged till fifteen days after notice of her arrival was given to the consignee: *Held*, that the consignee was not liable for demurrage.

[Cited in Finney v. Grand Trunk Ry. Co., 14 Fed. 172; Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 729; The Z. L. Adams, 26 Fed. 656; Bellatty v. Curtis, 41 Fed. 480.]

This was a libel by Alpheus Henley, master of the schooner Marcus Hunter, to recover $390, as demurrage for thirteen days' detention of the vessel. The vessel brought a cargo of ice from Dresden, Maine, to New York, under a bill of lading, by which it appeared that the cargo was shipped by the Dresden Ice Company, and was to be delivered at New York to George E. Holyoke, agent of the Brooklyn Ice Company. The libel alleged that the vessel arrived in New York on September 27th, 1874, and gave notice to the respondent on the 29th that she was ready to deliver cargo, that two days' time would have been sufficient for the discharge of the cargo, but that it was not received by the respondent till the 12th of October. The answer averred, that, when the vessel arrived, there were already several vessels with similar cargoes consigned to the respondent, which had arrived before the Hunter; that it was customary to discharge vessels in the order in which their arrival had been reported; that these vessels were so discharged; that, when the turn of the Hunter came, she was discharged in a day; and that, therefore, no demurrage was due.

Beebe, Wilcox & Hobbs, for libellant.
E. B. Cowles, for respondent.

BLATCHFORD, District Judge. There is not, in the bill of lading in this case, any clause as to the number of days to be allowed for discharging the cargo, or as to demurrage, or any clause requiring dispatch in discharging, or relating to discharging, except that ice and dunnage are "to be discharged by consignees with assistance of crew." Under these circumstances, the only obligation resting on the respondents, under the bill of lading, was to take the ice in the usual and customary way, with reasonable diligence. Their liability resulted from implication of law and extended only to the exercise of proper diligence in the customary manner. Ford v. Cotesworth, L. R. 4 Q. B. 127, L. R. 5 Q. B. 545; Cross v. Beard, 26 N. Y. 85; Coombs v. Nolan [Case No. 3,189]. In this case no fault or negligence is shown on the part of the respondent. A fleet of vessels all laden with ice arrived together, having been delayed by bad weather. They were discharged in the order of their arrival, in the customary way. The case is not like that of Keen v. Audenried [Id. 7,639], where the charter party required "dispatch in discharging," and where it was held that the vessel was not obliged to await her turn, in respect of other vessels which the consignees of her cargo were discharging, nor to yield to any custom to that effect obtaining with such consignees. In cases like the present, it is not sufficient to show delay, but some deliquency or fault must be shown. In the present case, with such a cargo as ice, and under the course of dealing with such cargoes by the respondents, as shown by the evidence, I think the respondents were entitled to all the time they took to unload the cargo of this vessel. The libel is dismissed, with costs.

This decision was affirmed by the circuit court, on appeal, June, 1878. [Case No. 6,364.]

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Alb. Law J. 19, contains only a partial report.]

[2] [Affirmed in Case No. 6,364.]

Case No. 6,364.

HENLEY v. BROOKLYN ICE CO.

[14 Blatchf. 522.] [1]

Circuit Court, S. D. New York. June 21, 1878.[2]

DEMURRAGE—DISCHARGE OF CARGO—DUTY OF CONSIGNEE.

1. Where there is no special agreement as to the time within which a vessel is to be unloaded, the law implies that it is to be done within a reasonable time after her arrival.

[Cited in Finney v. Grand Trunk Ry. Co., 14 Fed. 172; The Mary Riley v. Three Thousand Railroad Ties, 38 Fed. 255; Bellatty v. Curtis, 41 Fed. 480.]

[Cited in Scholl v. Albany & Rensselaer Iron & Steel Co., 101 N. Y. 604, 5 N. E. 782.]

2. In the present case, it was *held* that the consignee was required only to use proper diligence in taking off his cargo in the customary way, and that he had used such diligence.

[Cited in Carsanego v. Wheeler, 16 Fed. 254; Houge v. Woodruff, 19 Fed. 137; Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 730; The Z. L. Adams, 26 Fed. 656.]

This was an appeal from a decree of the district court, dismissing the libel [Case No. 6,363], in a suit in personam, in admiralty.

Franklin A. Wilcox, for libellant.
Edward B. Cowles, for respondent.

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

[2] [Affirming Case No. 6,363.]

WAITE, Circuit Justice. In the summer of 1874, the respondent was engaged in the business of shipping ice from Dresden, Maine, to Brooklyn, New York, for sale to consumers. It had no storehouses in Brooklyn, but occupied a wharf in Wallabout Basin, for the purpose of unloading vessels. Its course of business was to send out from three to six vessels a week from Dresden, according to the demand in Brooklyn, and, upon the arrival of a vessel at Brooklyn, as sales were made to consumers, unload into carts upon the dock for delivery. All the work of unloading was done between sunrise and sunset, and the business was the most active in the morning and evening, but little being usually done at midday. The usual time for the discharge of a cargo of 235 tons was three days. On September 10th, 1874, the schooner Marcus Hunter, of which the libellant was master, took on at Dresden a cargo of 235 505/1000 tons, and sailed for Brooklyn. Her bill of lading stipulated that the ice and dunnage should be discharged by the respondent, with the assistance of the crew, but made no provision for demurrage or detention. The vessel was detained unusually long upon her voyage, by calm weather, fog, head winds, and the usual accidents of navigation, and did not arrive in Brooklyn until about the 27th of September. The usual voyage was four or five days. While she was on her way, twelve or fourteen other vessels were out. All these vessels arrived about the same time. Five or six came in before she did, and the rest during the next three days. Upon his arrival, the libellant reported to the respondent, and asked to be unloaded. The vessels arriving before the Hunter were given the preference, and, owing to the difficulty of disposing of their cargoes in the usual way, as well as the unusual accumulation of arrivals, she was detained with her load on board until October 9th. The respondent then made sale of six or seven cargoes, including that of the Hunter, at a great sacrifice, to the Washington Ice Company, which had storage houses, and at once sent her to that company to unload. This was completed the next day, and she was then ready to leave. The freight due upon the ice was not all paid before the libel was filed in this case, but, although, at first, objection was made against paying unless all claim for demurrage was released, before the libel was filed, this objection was waived, and an agreement made to pay, leaving the libellant to enforce his claim for detention as he might see fit. The most of the freight was paid before the libel was filed, and the balance, upon demand, a few days thereafter.

There being no special agreement, in this case, as to the time within which the vessel should be unloaded, the law implies that it was to be done within a reasonable time after her arrival. What is reasonable in a particular case depends upon the special circumstances of that case. The libellant is presumed to have known the course of dealing by the respondent with its shipments upon their arrival in Brooklyn, and to have assumed the risks of delay in discharging which were necessarily incident to such a mode of doing business. He might have protected himself against extraordinary detention by a stipulation to that effect in his bill of lading. Having failed to do this, all he can require of the respondent is to use proper diligence in taking off his cargo in the customary way. Under the application of this rule the respondent is not in fault. While there was delay in unloading, it happened through no neglect of the respondent. The unusual accumulation of vessels at Brooklyn, caused by the accidents of navigation, necessarily occasioned delay in unloading them in the customary way. This was one of the risks of the business in which the libellant accepted employment, and against which he should have made provision by special contract, if he desired to throw the loss upon the respondent. The respondent used all the diligence which could properly be required of it, under the circumstances, to unload the vessel, after her arrival.

As the respondent had consented to pay the freight before the libel was filed, and the whole litigation has been in respect to the claim of damages for the detention, the respondent, having in fact paid the freight in full, is entitled to costs. The libel is dismissed, with costs, in both courts.

Case No. 6,365.

HENNESSEY et al. v. The VERSAILLES.

[1 Curt. 353; 2 Liv. Law Mag. 366.] [1]

Circuit Court, D. Massachusetts. May Term, 1853.

SALVAGE—SERVICE AND COMPENSATION.

1. What constitutes a salvage service.

[Cited in Bowley v. Goddard, Case No. 1,736; The Cheeseman v. Two Ferry-Boats, Id. 2,633; The Louisa Jane, Id. 8,532; The Williams, Id. 17,710; Maltby v. Steam Derrick-Boat, Id. 9,000; The Plymouth Rock, 9 Fed. 416; The Queen of the Pacific, 21 Fed. 471.]

2. What is necessary to displace the ordinary principles of adjudication, touching such service.

[Cited in Adams v. The Island City, Case No. 55; Coffin v. The John Shaw, Id. 2,949.]

3. The elements upon which the amount of compensation depends.

[Cited in Winso v. The Cornelius Grinnell, Case No. 17,883; The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 477; Baker v. Hemenway, Case No. 770; The Independence, Id. 7,014.]

[Appeal from the district court of the United States for the district of Massachusetts.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice. 2 Liv. Law Mag. 366, contains only a partial report.]

[This was a libel by Richard Hennessey and others against the ship Versailles and cargo, for compensation for salvage.]

CURTIS, Circuit Justice. On the night preceding the first day of March, the ship Versailles, having on board a very valuable cargo, and a crew of eighteen, officers and men, bound to Boston, in approaching that port, struck on a sunken ledge of rocks called the Collamores, near the shore of Cohasset, was forced over the reef, and brought to anchor. The wind was then about north-east; and with both anchors out, and the yards braced back with the larboard braces, the ship lay broadside to some rocks, which were about fifty feet off, on her larboard beam. The pumps were immediately sounded, and two feet of water found; and from midnight to seven, a. m., the water gained on the pumps, which were kept constantly going, from four to five inches an hour. At seven a. m., the master and eight men, in the long-boat, landed on the Cohasset shore, taking with them the wife, child, and a maid-servant of the master, and the ship's chronometer. The master's wife was sent immediately to Boston, by railroad, taking a message to the owners of the ship in Boston, that the vessel had been ashore, was leaking, and if they would send a steamboat, it would be all right. The long-boat and crew returned to the ship, leaving the master on shore, to procure assistance; and at a signal from him, came back, bringing the clothes of a part of the crew, and took him off. Subsequently, the clothes of the residue of the crew, and one man, who was disabled, were brought ashore, and there left. About eight, a. m., men from the shore came to the assistance of the crew, and continued to arrive from time to time, so that, at about nine, a. m., they were twenty-eight in number. When the first party arrived, the vessel had from seven to nine feet of water in her hold; and these additional men, with the crew, were able to keep the water from increasing, but not to reduce it. In this condition, the ship remained until about two, p. m., when the steamer Rescue came in sight, approached near enough to take a hawser on board, and after failing in the first attempt, in consequence of one of the ship's chains getting foul when shipped, the steamer took the ship in tow, and brought her to a wharf in Boston. These facts are not contradicted; but the principal question made at the hearing was, whether the steamer was entitled to be compensated, as for a salvage service, according to the principles which regulate that compensation in a court of admiralty. The relief of property, from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage; and when its compensation is not fixed by such a contract as a court of admiralty will enforce, it is to be adjusted according to those liberal rules which have been found beneficial to commerce, and have long formed a part of the marine law. The inquiries, therefore, are, whether a peril of the sea was impending over this property; whether it was relieved therefrom by the steamer; and whether such a contract existed, as either deprives the libellants of the character of salvors, or fixes the measure of their compensation.

Upon the first of these questions, I entertain no doubt. An examination of this ship, upon the railway, after her arrival, showed that when she was forced over the reef, about thirty feet of her keel, from the stem, aft, was entirely destroyed; two floor timbers, four or five naval timbers, and about twenty futtock timbers, were broken; her plank upon those timbers was stove in, and the ceiling started inboard. She had from seven to nine feet of water in her hold; and upwards of forty men, including her crew and the men from the shore, had then been able only to keep the leak in check, without reducing the water in her hold. She was at anchor within fifty feet of a ledge of rocks, upon her larboard beam, from which she was kept by her sails, in the then state of the wind, which would not serve for that purpose if it should haul to the eastward, an event certainly not improbable in the month of March, on that shore. Besides the ledge of rocks on which she had struck, there were others in the immediate neighborhood. Without coming to any conclusion here, as to her precise degree of peril, where she lay, or the chance of her escape unassisted, both of which must be considered hereafter, it is enough to say, that a peril of the sea, in the sense of the marine law, was impending over her; that she was in a condition to need assistance, and capable of having a salvage service rendered to her. In estimating the amount of compensation to be allowed, the degree of peril from which the property has been delivered, is most material. To determine the nature of the service, so far as it depends upon this element of sea peril, it is only necessary to find that some extraordinary peril, something beyond the ordinary action of winds or waves, some unusually hazardous condition of the vessel, existed. And in this case, this element is too marked, to admit of the least doubt. Nor is any question made, that in point of fact, the ship was withdrawn from her dangerous predicament, and restored to ultimate safety, by the assistance of the steamer. But it is insisted, that the service of the steamer was rendered upon a contract, which deprives the libellants of the character of salvors, and reduces their claim to a quantum meruit for work and labor; that what was done was merely a towage service, and not a salvage service. I do not think there is such a thing as a towage service, known as such to the marine law, as contradistinguished from a salvage service.

Towage, like pumping or steering, making sail, or any other ship-work, may occur in the ordinary course of navigation, or may be a means of salvage. And whether it is to be paid for according to a quantum meruit, or at an agreed price, or by way of wages, or by a salvage compensation, must depend upon the circumstances under which it is performed. In this case, the Versailles being in distress, and in a condition to have a salvage service rendered to her, and having been relieved by towage, that towage was, in its nature and circumstances, a salvage service, unless it appears that there was some relation existing, by contract, between the managers of the steamer and the ship, inconsistent with their sustaining the character of salvors. It is incumbent on those who assert that such a relation existed, and who call on the court to apply, to what is primâ facie a case of salvage, some other than the ordinary principles of adjudication which govern such cases, to plead the contract, and exhibit satisfactory proof in support of it. So that what I have to determine is, whether a contract is pleaded and proved, which establishes such a relation between the asserted salvors and the ship, as deprives them of the character of salvors, by showing that the service was rendered in some other capacity; or if rendered in the capacity of salvors, that the agreement displaces the ordinary principles of adjudication, and introduces a measure of compensation derived from compact.

I must first look to the pleadings; and I do not find it asserted in the answer of either the claimants of the ship or the cargo, that such a contract existed. The only allegations bearing on these questions, in the answer of claimants of the ship, are in the eighth article of their answer, which is as follows: "These respondents allege and propound, that the services rendered by said steamboat were not, as in the eighth article of the said libel is alleged and pleaded, salvage services, but were mere towing services." The eighth article of the libel, to which this is an answer, is merely the assertion of the title of the libellants to a salvage compensation, by reason of the nature of their services described in their previous articles; it is no more than a statement of a legal result or inference, from the facts previously pleaded; and the answer to that article can scarcely be carried further than a traverse of it, founded, as the article itself was, on a previous statement of facts concerning the nature of the services. Certainly it cannot be treated as pleading a contract, sufficient to deprive the libellants of the character of salvors, or to require the court to conform to an agreed measure of compensation different from that awarded by the law. To produce either of these effects, the particular contract should have been pleaded, to the end that the court might see whether the circumstances under which it was made, its consideration, and the services actually performed, compared with those stipulated for, were such as would induce the court to decree its execution. And, especially, if it was relied on as a bar to a salvage compensation, it should have been pleaded, distinctly, as such a bar. I should have regretted, however, to have had the case turn upon this state of the pleadings; and on examining the evidence, I do not find such proofs as would have supported the necessary allegations, in bar of a libel in a cause of salvage.

The evidence relied on by the claimants comes from the deposition of Mr. Caleb Curtis, the president of the Neptune Insurance Company, who, I infer, interposed in this matter, upon the reception in Boston of the news of the condition of the Versailles, in consequence of that company having an interest as insurers of the cargo to a small amount. It appears that about the same time the condition of the Versailles became known in Boston, it was also ascertained that two other vessels, bound to that port, were on shore a little to the eastward of the place where the Versailles was at anchor; and Mr. Curtis proves that Captain Hennessey, the master of the steamer Rescue, was sent for to come to the reading-room in State street, and was there told what was known of the condition of each of these vessels. Soon afterwards, Mr. Curtis and Captain Hennessey again met at the office of the Neptune Insurance Company, when Mr. Curtis told the captain they had not such news as to give any specific directions, but to go down, and if there was time before high-water, he might go to the assistance of the ships on shore, if the Versailles was not leaking too badly; but, at all events, to take the Versailles in tow, and bring her up before night. The Rescue was then lying at her wharf in East Boston, and soon after started, went directly to the Versailles, and took her in tow, as has been stated. It is manifest that here was no express contract, inconsistent with a technical salvage service. The steamer went on this expedition at the suggestion, and, though not stated, it is fairly to be inferred, upon the request of the witness. In some sense, this may be said to amount to an employment of the steamer; but so does any request for assistance. When the master of a vessel sets a signal of distress, it amounts to a request for assistance; and when it is tendered and accepted, there is an employment. But the question always remains, what service is rendered, and how is it to be compensated; and in the absence of a binding contract, the marine law settles that question, according to the nature of the service.

It is argued, however, that in this case, though there was no express contract to that effect, the court ought to infer there was a contract to pay a quantum meruit for work and labor at all events, though the Versailles had been totally lost. If there was such a contract, fairly made, I do not think

salvage could be claimed. But I do not find the grounds necessary for such an implication. In the absence of an express contract, the law implies that services are to be paid for, as such services are usually paid for. In the case of work and labor on land, only the fact of its performance, at the request of the defendant, is necessary to be shown, because such service is usually, reasonably paid for at all events. In the case of mariner's wages, the performance of some voyage, in which freight might have been earned, must appear, in addition to those other facts, because upon this event depends the title to wages; and so in the case of salvage, upon the ultimate safety of some of the property, as well as upon the other facts of service and request, depends the title to salvage; and consequently, the law will not imply that work and labor in salvage is to be paid for, except upon that contingency. Now, it does not appear, either that such services generally, or when performed by this particular steamer, were usually paid for, at all events, by a quantum meruit. As to the general practice, there is no evidence that the law is otherwise. And as to this particular steamer, though it appears her occupation is to tow vessels, it is not shown that it is part of her occupation to go to the relief of vessels situated as the Versailles was; and if I could infer this from the evidence, there is absolutely no evidence that her owners, officers, and crew, were usually or ever paid for such services at all events, and by a reasonable sum, for mere work and labor.

The case, therefore, stands upon a request to the master of the steamer to go to the assistance of the ship, a compliance with that request, and the performance of a service, in its nature and incidents, salvage; and such a service must be rewarded under the conditions, and according to the measure of the marine law. It has been suggested, that it is of great practical importance to the commerce of the port, that the court should not come to a conclusion which would prevent those interested in vessels of distress from sending steam-tugs to their assistance, without subjecting themselves to the payment of salvage. I do not conceive that the principles above laid down have any such tendency. It is competent for those parties to make any fair and reasonable contracts on these subjects, and this court will enforce them. But they must take care actually to make contracts, and not leave them to be inferred from facts, which in point of law, will not justify such inferences.

The remaining inquiry is, what compensation ought to be paid to the steamer. The principles upon which it is to be assessed are well settled, though their satisfactory application is often difficult. The value of the property saved, the degree of peril from which it was delivered, the risk of the property, and especially of the persons of the salvors; the severity and duration of their labor, the promptness of their interposition, and the skill exhibited by them, are all to be considered. In this case, the value of the property saved was large, about one hundred and twenty thousand dollars. The remuneration is of course to be greater on this account, not only because a greater benefit was received, but also because it enables the court to confer such a reward as to operate as an encouragement to salvors, without casting a heavy burden upon an amount of property too small to be adequate to bear it. In my opinion, the degree of peril, from which the ship and cargo were delivered, was very considerable. Without undertaking to say, that, with assistance from the shore, the ship could not have been worked by her sails clear of the rocks, and brought into the harbor, it is clear that the attempt would have been attended with much risk, even with the wind and the bearings of the rocks as the witnesses for the claimants give them. Nothing can show this more clearly, than the fact, that the master did not make the attempt, but continued to lie at anchor there five hours after the men from the shore came on board, although he must have known, that at that season of the year, the wind was liable to change at any moment, so as to render his unaided escape impossible. In point of fact, the wind did so change; the witnesses do not agree on the precise point of time when; but whether it was just before or just after the ship was taken in tow, does not seem to me very material, unless it appears, that the master would have made the attempt to get out before the wind changed, if the steamer had not arrived; and he does not so testify, nor had he then begun to make his preparations for the difficult evolution he describes, by which he says he should have tried to get under way, headed to the eastward, without coming in contact with the rocks on the larboard beam. On the other hand, I am not satisfied, by the evidence, that the peril to the steamer was materially greater than what is ordinarily incurred in navigating, for a short distance, in the neighborhood of ledges of rocks, in a narrow channel. If any accident should occur to the machinery, the danger would, no doubt, be great. But this steamer is said to have been built and employed as a tow-boat, and, it is reasonable to infer, had strength suitable to that business. There does not appear to have been any such unusual strain put upon her, as ordinarily would, or in fact did, injure her machinery. It is not proved that she was worked under an unusual head of steam. There was not, therefore, such a reasonable probability of injury to the machinery, as ought to form any considerable element in the computation of the reward. The labor of the men was no more than ordinary; and the length

of time employed was about half a day. The sea was certainly not smooth; but it was not so bad as to cause the ship and steamer to labor much, and thereby much increase the difficulty of towing. After getting out from among the rocks, the ship used her sails; and though the water in her must have rendered her somewhat crank, it does not appear that, viewed simply as a towage service, it was one of great effort. The fact that the vessel employed was a steamer, is undoubtedly to be taken into consideration; for sound policy requires, that they who are able to render the most efficient aid, by means of expensive boats, should be encouraged to do so. Speaking in general terms, it may be said, that an important benefit was conferred upon the claimants, by saving a large amount of their property, exposed to very considerable peril, through the prompt assistance of this steamer; rendered, however, with but small risk or labor, or loss of time. In such cases, the allowance of a specific proportion of the property saved has not been, of late years, much practiced in England, or, so far as cases are reported, in this country. A more exact appreciation of the merits of salvage services, and a nicer graduation of their rewards, have been attempted. This opens a large and difficult field of judgment and discretion, in which great caution is necessary; for it must not be forgotten, either that the security of life and property in navigation, and the general interests of commerce, require rewards for salvage beyond the usual rates of compensation for the exact work done, or that individuals must not be oppressively burdened for this public benefit.

After considering all the circumstances, I am of opinion that the sum of three thousand six hundred dollars is the proper sum to be allowed. If the claimants do not agree upon the apportionment of this sum upon the several interests at risk, I shall refer it to an assessor, to report thereon. The libellants may agree on the distribution of the salvage compensation; but I shall require the agreement to be reported to, and sanctioned by the court, for the protection of the crew.

HENNING (FARMERS' LOAN & TRUST CO. v.). See Case No. 4,666.

Case No. 6,366.

HENNING et al. v. UNITED STATES INS. CO.

[2 Dill. 26.] [1]

Circuit Court, E. D. Missouri. 1872.

MARINE POLICY — CONSTRUCTION — PAROL CONTRACTS OF INSURANCE—CHARTER OF DEFENDANT AND STATUTES OF MISSOURI CONSTRUED.

1. Declaration construed, and first count held to set forth a parol contract by an insurance company to insure the specific cotton sued for.

2. The parol contract of insurance set up in the declaration held to be valid, and not to be prohibited by the charter of the defendant, or by the statutes of Missouri, the provisions of which in this respect are considered.

3. The decision of the supreme court of the state to the contrary held not to be binding upon this court. Treat, J., dissenting on this point.

4. Where by the terms of a written policy of marine insurance the city of St. Louis was to be one of the termini of all risks it embraced, it cannot be extended to other and different risks by an averment that the policy was so "understood, construed, and intended by the parties;" but there may be a new parol contract to insure such different risks, and this new contract may refer for part of its terms to a pre-existing written contract of a similar character between the parties.

In this cause an amended declaration was filed to the October term, 1871. The defendant filed pleas of non-assumpsit, and the statute of limitations of five years. To this there was a replication, confessing and avoiding, and defendant demurred. The court, on argument, overruled the demurrer, and the defendant rejoined, tendering an issue. Plaintiff [Hening & Pearce, surviving partners] joined issue. Two additional counts were filed to the April term. To these defendant demurred generally. At the argument, it was suggested by the court that, in order to accomplish anything effectual by this preliminary discussion, it would be desirable that the policy declared on in the second and third counts, together with the charter of the defendant, should be before the court. Thereupon, it was agreed to withdraw the pleas to the first count, and to file a general demurrer to the whole declaration; the court, in considering the matters of law presented, to have before it the policy (including the books which make part of it) and the defendant's charter. The declaration as amended contains three counts; and the demurrer to each of which raises the questions to be decided. All of the counts refer to a written policy issued by the defendant to Hening & Woodruff, June 1, 1855.

The words of the policy, so far as the same (exclusive of the books annexed to it) are illustrative of the points under consideration, are as follows: "The United States Insurance Company, of St. Louis, Missouri, do make insurance, and cause to be insured, lost or not lost, Messrs. Hening & Woodruff, or whom it may concern, on all shipments made to them, including ten per cent. additional to invoice, at and from any ports and places, to and from St. Louis, said shipments to be covered by this policy, on good steamboats, canal boats, and steam and sail vessels, and also by railroad, and the same to be reported to the company for endorsement on the policy as soon as known, and each package subject to its average, this policy will also cover all shipments made

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

by said assured, or to their address at St. Louis, from the Upper Mississippi, Illinois, or Missouri rivers; said shipments from the Missouri river to be made on good steamboats, and from the Upper Mississippi and Illinois rivers, to be made on good steam or canal boats or barges (such as have the inspector's certificate) towed by a steam vessel. Goods and produce from the upper rivers to be entered, and in case of loss, to be paid for at the cash value, in St. Louis, at time of such loss. Such shipments to be entered in a book annexed to this policy, and hereby made a part of it. It is understood that goods and produce covered by this policy shall be for the one-half (½) of said shipments, the other half being insured elsewhere, and to be taken at the usual rates, premium to be settled for at the end of each and every month. Amounts under $50, in cash, when over $50, by a note at four months; in either case a discount of twenty-five per cent. to be made."

The defendant was chartered by the state of Missouri, February 24, 1855. The charter provides: "The company hereby established shall have power to make insurance on life or lives, and to grant annuities, and to make insurance for the benefit of survivors; but all the conditions of policies issued by said company shall be printed or written on the face thereof." Section 3. Section 4 declares: "The company hereby created shall have full power and authority to insure all kinds of property against loss or damage by fire, to make all kinds of insurance against loss on property of every kind, in course of transportation, whether happening on land or water, to make such other insurance as they may deem proper and expedient, and to re-insure themselves against loss or any risk which they may have taken, and generally to do and perform all necessary matters and things connected with these objects or either of them." Section 5 fixed the time and mode of election of thirteen directors. "Sec. 6. The directors regularly chosen by the stockholders of the company, shall, as soon as may be after every annual election, choose out of their body one person to act as president and one as vice-president. The first named shall preside at all meetings of the directors; in case of his absence or death, the vice-president shall perform his duties; either of whom with the secretary or actuary, shall sign the policies or contracts made by order of the board of directors; which contracts shall be binding with or without the seal of said corporation, and shall do and perform such other acts and things as may be prescribed in the company's by-laws." The General Statutes of Missouri upon the subject of corporations in force at the time of the charter of the defendant, declares that all charters thereafter granted shall, unless otherwise expressed, be subject to the provisions of the general law respecting corporations; and section 8, p. 232, Rev. Code 1845, declares that "parol contracts may be binding on aggregate corporations if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation; and contracts may be implied on the part of such corporations, from their corporate acts, or those of an agent whose powers are of a general character." The defendant was not released from, but, by implication, subjected to, this provision of the general law.

The first count in the declaration, after setting forth the original policy of June 1, 1855, and certain subsequent verbal modifications thereof, its continued existence in force, and the acts of the parties under it, alleges as follows: "And on the 25th day of March, in the year 1864, the said Hening & Woodruff proposed to the said defendant that all cotton on any boat, for or on account of William Butler & Co., from Red river or its tributaries, or the Yazoo river and its tributaries, or any tributary of the Mississippi, should be considered, treated, and regarded as insured in and by the said open policy, dated, as aforesaid, June 1, 1855, and modified, as hereinbefore stated, by verbal agreement, and the said defendant, on or about the first day of April, 1864, accepted the said proposal, and agreed verbally with the said Hening & Woodruff that all the cotton of William Butler & Co. on any boat from the Red river or its tributaries, or the Yazoo river or its tributaries, or from any tributary of the Mississippi, should be entered in the book annexed to the said open policy of the said Hening & Woodruff; that the said Hening & Woodruff should pay in respect thereof the usual rates of premium, and that the same should be taken, treated and regarded by the defendant as insured for the said Hening & Woodruff, on account of whom it might concern, according to the terms and conditions of the said open policy, and that the loss thereof, if any, should be paid by said defendant to the said Hening & Woodruff, for whom it might concern, and that the payment of the premiums thereon, and the settlement of the accounts in respect thereof, should be made monthly by said Hening & Woodruff, as provided in and by the terms of said open policy, and after the said agreement was so as aforesaid made, the said Hening & Woodruff, and the said defendant, carried the same into execution by causing all the cotton of the said William Butler & Co., on any boat from the Red river or its tributaries, or the Yazoo river, or its tributaries, or from any tributary of the Mississippi river, to be entered and endorsed upon and in the said book annexed to said open policy of the said Hening & Woodruff with the said defendant, and the said Hening & Woodruff did pay to the said defendant, in respect thereof, the usual and customary rates of premium, and the defendant, fully under-

standing the said agreement so verbally made, and intending to carry the same into effect, did receive the said premiums from said Hening & Woodruff down to the accruing of the loss and the doing of the wrong and injury herein presently stated. And on the ninth day of June, in the year 1864, the said William Butler & Co. did ship, on the good steamboat Progress, from the mouth of the Red river, in the state of Louisiana, then bound for the port of Cairo, in the state of Illinois, seven hundred (700) bales of cotton, of great value, to-wit: of the value of two hundred and eighty thousand dollars ($280,000), to be delivered at the port of Cairo aforesaid, to the said William Butler & Co., for the mere purpose of complying with the regulations of the treasury of the United States in that behalf, and immediately thereafter to be forwarded and consigned to the said Woodruff & Co., at the city of New York. That the said Hening & Woodruff were then and there interested in the said cotton, and were, in fact, the legal owners thereof, as having advanced thereon the sum of fifty thousand dollars to the said William Butler & Co. for the purchase thereof, to be repaid to them out of the first proceeds of the sale of the said cotton by the said Hening & Woodruff at New York City, the said William Butler & Co. agreeing at the time of said advance to forward and consign the said cotton to the said Woodruff & Co. at New York City, to be by them sold on commission on account of said Hening & Woodruff; and as soon as the said cotton was so placed on board the said steamboat Progress, a bill of lading was given therefor to the said William Butler & Co., on which bill of lading the said Hening & Woodruff immediately caused a memorandum in writing to be made, that the same was insured in and by the open policy of the said Hening & Woodruff, meaning the open policy aforesaid of the said Hening & Woodruff with the said defendant; and immediately after the said shipment and the making of the said bill of lading, and the making thereon of the said memorandum, the said defendant had due and immediate notice of the making of the said memorandum and the shipment, to-wit: at St. Louis aforesaid; and the said Hening & Woodruff caused the said shipment to be immediately noted and entered upon the said book annexed to the said open policy of the said Hening & Woodruff with the said defendant, to-wit: on the 9th of June, 1864; and the said Hening & Woodruff were at all times ready on said day, and thereafter, to pay to the said defendant the customary and usual rates of premium for insurance thereon, according to the terms of said verbal agreement with the said defendant by the said Hening & Woodruff made on or about the first day of April, 1864, and the conditions of said open policy. And afterwards, and while the said steamboat was ascending the river Mississippi, as aforesaid, on her way from the mouth of the Red river to the port of Cairo, in the state of Illinois, and while the said steamboat was in a part of the Mississippi called 'Dead Man's Bend,' said steamboat took fire and was destroyed, together with all of the said cotton so shipped on board of her by the said William Butler & Co., by means of the said fire and so the said cotton became burnt, and wholly, utterly, and totally lost by the said fire, which was one of the perils against which the said defendant promised to insure the said Hening & Woodruff in respect of said cotton, of all which the said defendant had due notice, to-wit: at St. Louis aforesaid, on the day of the happening of said fire, which was on the ninth (9th) day of June, 1864, and by reason thereof the said defendant became liable to pay to the said Hening & Woodruff the value of said cotton, to-wit: the sum of two hundred and eighty thousand dollars at the end of the month of June, 1864, less the usual rates of premium for insuring the same, which rates of premium were one per cent. of the value thereof. And being so liable the said defendant afterwards, to-wit: on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised to pay the said sum of money to said Hening & Woodruff, on the last day of June, 1864," etc.

The second count is like the first, except that it alleges that the subsequent modifications of the written policy of June 1, 1855, were made by memoranda in writing by the defendant, and annexed to the said open policy, and that the defendant, by such a memorandum, in writing, insured the said cotton shipped as aforesaid by Butler & Co. on the 9th day of June, 1864, on the steamer Progress, from the mouth of Red river to the port of Cairo.

The third count, after setting forth the policy of June 1, 1855, alleges, inter alia, as follows: "That after the making of said contract of insurance, to-wit: on the first day of September, A. D. 1862, by a memorandum in writing, indorsed and written in and upon said policy book, a part of said contract of insurance, as hereinbefore stated, and duly assented and agreed to by said Hening & Woodruff and said defendant, it was understood and agreed that the goods and produce covered by said policy should be for the full amount of said shipments, instead of the one-half thereof as theretofore; and from and after the date last aforesaid, defendant, by virtue and in pursuance of said contract or policy of insurance as understood and construed and intended to be understood and construed by and between said Hening & Woodruff and said defendant, did insure and cause to be insured all shipments made by said Hening & Woodruff, or by any other parties in which said Hening & Woodruff had an interest, at and from any and

all ports and places to and from any and all ports and places upon the Mississippi river and its tributaries and other navigable waters, irrespective of the place of shipment or the point of destination, which shipments were from time to time duly entered in said policy book, and settled for as afore-stated, for a long term of years." The said shipment of cotton by Butler & Co. on the 9th day of June, 1864, on the Progress, from Red river to Cairo, is then alleged, and also the value thereof and the plaintiff's ownership or interest therein as before; and it is also averred that "immediately upon the delivery of said cotton to said steamboat Progress, and upon the day and year last aforesaid, the master or agent thereof did execute and deliver to said Butler & Co. a bill of lading therefor in the usual form, and said Butler & Co. delivered the same to said Hening & Woodruff, who caused to be indorsed thereon, in the usual course and manner of business between said Hening & Woodruff and said defendant, the words, in effect, as follows, to-wit: 'Insured in Hening & Woodruff's open policy,' meaning the policy aforesaid, and in the usual time, to-wit: on the fifteenth day of June, eighteen hundred and sixty-four, the said shipment was duly indorsed upon said policy of insurance, and entered in said policy book, whereby the same became and was covered by said policy; of all which defendant was duly notified, and said Hening & Woodruff, at the end of said month of June, eighteen hundred and sixty-four, and at all times, were and have been ready and willing, and offered to pay the premium reserved and provided for in said policy, and afterwards, to-wit: on the ninth day of June, 1864, and while said steamboat Progress was duly prosecuting her voyage on the Mississippi river aforesaid, from the mouth of Red river to Cairo aforesaid, and at a point on said river called 'Dead Man's Bend;' the said steamboat took fire, and both the said boat and the said seven hundred bales of cotton were consumed and totally destroyed; and the said cotton became and was wholly and totally destroyed by the said fire, which was one of the perils against which defendant, by its said open policy, did assure the said Hening & Woodruff, of all which said defendant afterwards, to-wit: on said ninth day of June, A. D. 1864, had due notice, by reason whereof defendant became and was liable to pay to said Hening & Woodruff the value of said cotton," &c.

Thos. T. Gantt and George P. Strong, for plaintiff.

Glover & Shepley and Sharp & Broadhead, for defendant.

DILLON, Circuit Judge. Upon consideration, we decide:

1. That the first count of the declaration sets forth a verbal contract by the defendant to insure this specific cotton; that in the absence of any restraining provisions in the charter of the defendant, or in the laws of the state applicable to the defendant, a parol contract of insurance is valid; that the laws of the state respecting corporations, so far from prohibiting, allow parol contracts to be made, and recognize the validity of implied contracts by corporations (St. 1845, p. 232, § 8); that the charter of the defendant, construed in the light of the general law, does not disable it from making a binding contract of insurance without writing. The charter directs that "all the conditions of policies issued by the company shall be printed or written on the face thereof," and that certain named officers "shall sign the policies or contracts made by order of the board of directors;" but these provisions, especially when viewed in connection with the general law of the state, cannot be held to prevent the company from making oral contracts of insurance, nor from being held liable upon implied contracts of insurance in accordance with the general and established principles of law.

2. If the decision of the supreme court of Missouri, when this cause was before it (47 Mo. 425), is to be considered as holding an opposite view, it is not conclusive upon this court, although entitled to great respect and consideration. The contract alleged is one relating to general commercial law, and in such cases the federal courts, when their power is judicially invoked, must determine for themselves, both as to the power to make the contract and its true construction. Butz v. Muscatine, 8 Wall. [75 U. S.] 584; Bank v. Skelley, 1 Black [66 U. S.] 436, 443; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175, 205; Leffingwell v. Warren, 2 Black [67 U. S.] 599; King v. Wilson [Case No. 7,810].

In this view, as to the effect of the decision of the state court, KREKEL, J., concurs, but TREAT, J., differs, he holding that it is conclusive upon the federal court as to the power of the corporation to make the contract. The demurrer to the first count is therefore overruled.

3. The second count alleges the contract to insure this specific cotton to be in writing. And if (as the demurrer admits) the averments thereof are true, the plaintiffs have a cause of action. We do not now determine whether the entries appearing on the books annexed to the open policy establish the truth of the averment that there was such a contract in writing as this count sets forth. The statements in this count as to the legal effect of the written policy of June 1, 1855, as to termini of shipments, are, in our opinion, erroneous, for the reasons stated in the ruling upon the third count of the declaration.

4. In substance, the third count is one upon the original policy of June 1, 1855, which, it is alleged, covered by its own terms and

effect ("as understood, construed, and intended to be understood and construed," by the parties), this shipment of cotton in 1864 by Butler & Co. to themselves, from the mouth of Red river to Cairo. The allegation is that the original policy, when properly construed as intended, extends to and covers by its own force, effect, and operation, "all shipments made by said Hening & Woodruff, or by any other parties, in which said Hening & Woodruff had an interest, at and from all ports and places, and to and from all ports and places, upon the Mississippi river, irrespective of the place of shipment or the point of destination."

To this construction of the policy of June 1, 1855, we cannot give our sanction. It cannot mean one thing in 1864 and another in 1855. Where the terms of a policy are not clear, we may resort to usage, and the course of dealing under it the better to enable us to ascertain what the parties meant by the use of such terms, but no further. By its terms we think it plain that St. Louis was to be one of the termini of all risks which it was intended to embrace, and that it cannot be held of its own unaided force and effect to extend to a shipment of cotton in the name of other parties. from a place on the Mississippi river to the port of Cairo, although Hening & Woodruff may have been interested in such shipment.

In this view of the third count, the demurrer thereto is well taken, and must be sustained. Of course, it is not intended to deny that a written contract may be modified, and either enlarged or restricted by a subsequent valid parol agreement. But if any such parol agreement was subsequently made whereby a risk was insured which was not embraced in the original contract, the rights of the plaintiff arise under such subsequent parol contract, and must be determined by it. It is in this event a "new" contract, and it is a "parol" contract, although it may refer for part of its terms to another contract in writing of a similar character existing between the parties; but such reference does not make the new contract a written contract, nor does it alter the meaning, force, or operation of the written contract. Judgment accordingly.

NOTE. Subsequently, at the September term, 1872, the cause was tried before Mr. Justice Miller, and Treat, J. and a jury, which rendered a verdict for the plaintiff for $178,280. To a proposition to reopen the questions of law decided on demurrer in the foregoing opinion of the circuit judge, Mr. Justice Miller is reported as saying, that such a course is not only against the settled practice of the court,—Appleton v. Smith [Case No. 498],—but if the propositions ruled heretofore were now open, he sees no reason to doubt, after what has been said by counsel, that they were ruled correctly.

HENNING (UNITED STATES v.). See Cases Nos. 15,348 and 15,349.

Case No. 6,367.

In re HENNOCKSBURGH et al.

[6 Ben. 150;[1] 7 N. B. R. 37.]

District Court, N. D. New York. June 24, 1872.

BANKRUPTCY—TIME WHEN DEBT IS PROVABLE.

1. A debt, existing at the time of the adjudication in bankruptcy, but not existing at the time of the commencement of the bankruptcy proceedings, is provable in bankruptcy. The case of In re Crawford [Case No. 3,363], dissented from.

[Cited in Re Lachemeyer, Case No. 7,966; In re Boston & Fairhaven Iron Works, 23 Fed. 881, 29 Fed. 784.]

2. A suit for assault and battery, having been commenced against the bankrupts prior to the commencement of the proceedings in bankruptcy, was continued to judgment before the adjudication, no leave of the bankruptcy court having been obtained: *Held*, that, as the claim was not provable until the judgment was obtained, it was not necessary to obtain such leave.

[Cited in Re Broich, Case No. 1,921.]

[Cited in Howland v. Carson, 28 Ohio St. 628.]

[See In re Bailey, Case No. 729.]

[In bankruptcy. In the matter of William Hennocksburgh and Marx Block.]

HALL, District Judge. The assignee in this case having applied for an order expunging the proof of debt made therein by Mary C. Bainbridge, and she having appeared by attorney to oppose such application, it was stipulated that the matters in controversy should be submitted and decided upon the papers and written briefs left with the clerk, without other argument. The alleged indebtedness is a judgment rendered in the supreme court of this state upon a verdict taken against the bankrupts on the 20th September, 1870, in an action brought by the said Mary C. Bainbridge, against the bankrupts, for an assault and battery and false imprisonment. The suit in which the verdict was rendered was commenced in May, 1869; and the final judgment therein was perfected and docketed in Onondaga county, in which the bankrupts resided, October 6, 1870. The judgment was confessedly in tort, for a personal injury to the plaintiff; and it is clear that her claim was not a provable debt until the judgment was entered.

The petition in bankruptcy was filed against the bankrupts July 28, 1870; but it appears from the papers on file that no adjudication was made under the order to show cause granted on that day and made returnable on the 16th of August, 1870; and that on the 28th of September, 1870, an alias order to show cause was granted, upon the same petition, and was made returnable on the 25th of October of that year. On the

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last named day an order of adjudication was granted;—no one appearing to oppose.

The assignee insists that the debt proved was not provable, because there was no debt until the judgment was entered; and he insists, that the judgment was not entered until after the adjudication. As the date of the adjudication does not appear upon the papers submitted, it may be that he had overlooked the fact that the judgment was docketed nearly three weeks before the actual adjudication; or it may be that, under the decision to that effect hereinafter cited, he has regarded the time of the filing of the petition as the time of the adjudication, for the purposes of the present question.

The assignee also insists that even if the claimant had a valid debt at the time of the adjudication, it cannot be proved in these proceedings, because the suit was continued and a verdict and judgment taken, after the petition in bankruptcy was filed, without the leave of the bankruptcy court.

No doubt would have been entertained upon the question presented, if the judgment had been in fact entered after the actual adjudication in bankruptcy made on the 25th of October, 1870. Until the judgment, the plaintiff had no provable debt; for her claim, as before stated, was simply and purely a claim for damages for a personal injury, and such damages are not provable unless liquidated and transmuted into a legal debt by a judgment obtained before the filing of the petition in bankruptcy or before the adjudication, as the one or the other of these is to be considered as fixing the time when a debt must exist to be provable in bankruptcy.

In this case the actual adjudication was granted after judgment perfected, and if a debt, existing at the time of the actual adjudication, but which did not exist at the time of the filing of the first petition in bankruptcy, is not provable, the proof of debt must be expunged.

There is some want of clear and certain and consistent expression in the bankruptcy act [of 1867 (14 Stat. 517)] in respect to this question. The first clause of the 19th section of the act, if it stood alone, would seem to be decisive of the question; and it is entitled to much weight, as being the first and a most important general provision of the act in reference to the character and description of the debts which may be proved. By this clause it is provided "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." In the third clause of the same section it is provided, that "if the bankrupt shall be bound as drawer, indorser," &c., &c., * * * "and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed," &c. In another portion of the same section, provision is made for proving a claim for rent, &c., falling due at fixed and stated periods; and it is provided that "the creditor may prove for a proportionate part thereof up to the time of the bankruptcy."

By the terms of the 11th section it is provided, that the filing of a voluntary petition is an act of bankruptcy; and that the petitioner shall be adjudged a bankrupt;—which adjudication, under the 4th section of the act, may be made, if there is no opposing interest, by the register to whom the case is referred. In involuntary cases of bankruptcy, the adjudication cannot be made in less than five days from the filing of the petition, unless the debtor appears and consents, and it may not take place (as in this case) until months after the petition is filed, whether the case be one of voluntary or involuntary bankruptcy. I think the fair construction of the act is, that a petitioner or debtor is not to be deemed a bankrupt, within the contemplation of the provision for the proof for rent, &c., just alluded to, until the order of adjudication is made; and that the time of the actual adjudication of bankruptcy is the time referred to in this provision, in regard to the proof of rent, &c., unless, indeed, the other portions of the bankruptcy act require the court to say, that the time of the filing of the petition in bankruptcy, and not the time of the adjudication of bankruptcy, is the time intended, where the "adjudication of bankruptcy" is mentioned in section 19.

I confess that my own impressions are against such construction. The filing of the first petition (being a petition for an adjudication in bankruptcy, whether the case is one of voluntary or involuntary bankruptcy), is many times referred to in the act; and, by section 38, it is declared to be, not an adjudication, but the commencement of proceedings under the act. The time of filing of the petition, and the time of adjudication, are several times referred to, in other sections of the act, in such manner as to show that congress was, or should have been, fully aware that the adjudication of bankruptcy was, in all cases, to be made subsequent to the filing of the petition, and that, in many cases, it would necessarily be made several days, if not weeks or months, after the filing of the petition, as in most cases of involuntary bankruptcy. The registers are authorized to make adjudication of bankruptcy in voluntary cases; but the petition is to be filed with the clerk, and afterwards referred to the register for his action. The filing of the petition, and the adjudication of bankruptcy, are clearly and frequently recognized by the general bankruptcy act, as different in point of time. Section 14 makes the assignment relate back to the commence-

ment of the proceedings in bankruptcy (by the filing of a petition, see section 38); and the "time of the filing of the petition" is referred to in section 20. "The time of adjudication" is referred to, in section 21, as the important time to be regarded, in respect to the proof of certain debts or liabilities of the bankrupt; and, in section 27, it is provided that the wages due to operatives, clerks, or house servants, for which preference is given by the act, must be for labor performed "within six months next preceding the adjudication of bankruptcy," not the commencement of proceedings, unless the one means the other.

By the same section, the second meeting of creditors is to be called "at the expiration of three months from the date of the adjudication," &c.; and, by section 29, the application for a discharge, in certain cases, is to be made "at any time after the expiration of six months from the adjudication of bankruptcy," and "within one year from the adjudication of bankruptcy." In the same section it is provided that certain acts, if "done within four months before the commencement of such (bankrupt) proceedings," shall bar his discharge; and, in section 32, the form of a discharge is given, in which "the day the petition was filed by (or against) him," (the bankrupt) is referred to. In section 35, the time of "the filing of the petition by or against him" (the bankrupt) is twice referred to. The 39th section refers to "the order of adjudication," and shows that the order in involuntary cases cannot be made, except by consent, until at least five days after the service of the petition. Section 44 uses the terms, "after the commencement of proceedings in bankruptcy," and "before the commencement of proceedings in bankruptcy."

When we consider the fact, that the filing of the petition by which the proceedings in bankruptcy were commenced, and the adjudication under it, are entirely different acts, to be performed by different persons, and at different times, and, in some cases, at times widely different from each other, it is difficult to conclude that congress intended "the time of filing the petition," or the time of "the commencement of proceedings in bankruptcy," in the cases where they have omitted the use of either of such or like expressions so often found in the act, and have used instead, and over and over and over again, the expression "the time of the adjudication of bankruptcy." It is only by the exercise of a power of construction which may, perhaps, be properly termed judicial legislation, that it can be held that congress did not mean what they have expressed, in clear and unequivocal terms, but did mean what they did not say; although other parts of the act afford sufficient evidence that they could and did use proper and unequivocal language to express the intention in respect to time, imputed to them by the construction, which gives to the language used a meaning and effect entirely different from that expressed.

The language used in giving the form of a discharge (section 32) would seem to limit its effect to provable debts which existed on the day the petition was filed, by or against the bankrupt; but section 34, in declaring its effect, provides that, with the exceptions referred to, it shall "release the bankrupt from all debts, claims, liabilities and demands, which were or might have been proven against the estate in bankruptcy." So that the debt of the creditor, in this case, if provable, will be barred by the bankrupt's discharge.

It may be conceded that the bankruptcy act would have been more harmonious, in its language, and its expressed provisions, in relation to the proof of debts, more in accordance with what may properly be deemed the general policy and purpose of the act, if it had expressly provided that only debts existing at the time the petition was filed, by or against the bankrupt, could be proved; and it is not, perhaps, surprising that it has been held by the learned judge of the Eastern district of Michigan, to be the duty of the court to give to the provisions now in question a construction deemed more in accordance with such general policy and purpose, than the construction which would necessarily be given to the language upon which the question mainly depends, if the general purpose and policy of the act was not deemed to require a different construction. In the case referred to,—In re Crawford [Case No. 3,363],—it was held, that it was the intention of the act that such debts, and such only, as existed at the time of the filing of the petition for adjudication of bankruptcy, are provable against the bankrupt's estate. The original claim of the creditor, in that case, would have been provable, if no judgment had been obtained upon it after the filing of the petition in bankruptcy, and although the learned judge held that it was the judgment only which was provable, and that the debt, on which the judgment was rendered, was not provable, because it was merged in the judgment, he yet held, that the costs which might have accrued subsequent to the time of filing the petition, could not be said to constitute a claim or debt existing at that time, and should, therefore, be excluded in making up the amount upon which dividends were to be made in the bankruptcy proceedings.

After much hesitation, I have concluded to act upon my own judgment in the present case, notwithstanding the decision in the Case of Crawford [supra]. The learned judge who decided that case, felt at liberty to express his dissent from opinions delivered by other learned judges; and in the Case of Williams [Case No. 17,705], Judge Shipman appears to have considered that the question, whether a debt was provable depended upon the question, whether it existed at the time of the adjudication of bankruptcy. On the other hand, Judge Blatchford, in the Case of

Patterson [Id. 10,815], expressed an opinion, that debts, to be provable, must have existed at the time of the commencement of the proceedings in bankruptcy. The question did not, however, arise in that case, and in the subsequent case of the New York Mail Steamship Co. [Id. 10,211], I understand that the learned judge decided that the proper charges of the attorneys and counsel of the bankrupt, for their services in resisting the adjudication, were provable in such bankruptcy proceedings, because such services were rendered prior to the adjudication in bankruptcy, although after the petition for adjudication was filed.

There is certainly much reason for supposing that congress deliberately adopted the time of the actual adjudication of bankruptcy, as the time at which a debt must exist in order to be provable, in contradistinction to the time of the commencement of the proceedings in bankruptcy. It was apparent, upon the face of the act, that, in many cases, the adjudication would not be made until a considerable time after the proceedings were commenced, and that, in all, some time must elapse between the filing of the petition and the adjudication. It was also apparent that the act made no provision for giving any notice of the filing of the petition until after the actual adjudication, and that a warrant was then to issue to the marshal requiring him to publish forthwith in the designated newspapers, and to send to the creditors of the bankrupt, the required notices of such proceedings in bankruptcy. This warrant is required to be issued forthwith after the adjudication;—thus evidencing the intention of congress to give the public, especially those who had dealings with the bankrupt, immediate notice of the adjudication in bankruptcy, in order that persons might not longer trust him as worthy of credit, or otherwise deal with him in respect to his property; and the adoption of the language used, under these circumstances, affords strong evidence that congress intended what is repeatedly expressed in the act. It may well have been considered, that no one was likely to trust the bankrupt, with knowledge that proceedings in bankruptcy had been commenced against him, and that it was just and equitable that those who had trusted the bankrupt, in ignorance of the proceedings against him, on the evidence of his solvency, afforded by his possession and apparent ownership of property, should be entitled to prove their debts, and receive dividends from such property, instead of looking solely to a declared bankrupt, just stripped of his property for the benefit of other creditors having no stronger equities. Other reasons of a similar character might be stated, but, as this case is likely to be presented to the circuit, for review, it will be disposed of without further discussion of this question.

The objection that the claimant proceeded in her suit, and that the verdict and judgment were taken after the petition in bankruptcy was filed, without the leave of the bankruptcy court, cannot be maintained. The language of the act is, "that no creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit, at law or in equity, therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall be stayed, &c.;" but it does not apply to this case, for the reason that the debt of the claimant was not provable until final judgment was obtained.

HENOP (DAVIDSON v.). See Case No. 3,605.

Case No. 6,368.

HENOP v. TUCKER.

[2 Paine, 151.] [1]

Circuit Court, S. D. New York.[2]

WAGES OF SEAMEN — SALE OF VESSEL — DETERMINATION OF CONTRACT—DAMAGE TO VESSEL.

1. The general principle of the marine law is, that freight is the mother of wages, and if no freight be earned, no wages are due. The reason of this rule is, that if mariners were to have their wages in all cases, they would not use their endeavors nor hazard their lives for the safety of the ship. But it does not apply where the freight is lost by the fraud, or wrongful act of the master.

2. Without any express stipulation to that effect, the seamen's contract is contingent, and in cases of wreck and capture their wages are lost on the happening of the peril; and this does not depend on the physical destruction or absolute loss of the vessel, for she may afterwards be got off, or be recaptured or restored.

3. And in respect of the right to wages, there is no distinction between a vessel's becoming innavigable from wreck, and being rendered incapable of proceeding on her voyage from any other peril of the sea.

4. And where in the course of a voyage a vessel receives damage by the perils of the sea, to an extent that it will cost more than one-half her value to repair her, and upon a regular survey and proceedings she is sold and abandoned to the underwriters, the contract with the seamen for wages is determined.

5. Where an American seaman shipped at New York, on a voyage to Liverpool, and back to the United States, and on her return voyage the vessel, in consequence of a leak, put into Cork to repair, where upon a regular survey it was found that it would cost five-sixths of her value to repair her, and the surveyors advised a sale, and she was accordingly sold and abandoned to the underwriters; it was *held*, that the seaman was not entitled to recover the two months' wages allowed by the act of congress to American seamen discharged abroad. Aliter, had she been unseaworthy at the commencement of the voyage.

[Cited in Kelly v. Otis, 23 Fed. 905.]

[See note at end of case.]

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[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

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

In admiralty.

E. Hine, for appellant.

E. Burr and Mr. Benedict, for respondent.

THOMPSON, Circuit Justice. In this case, Tucker and Carver, seamen on board the brig Caroline, filed a libel against Henop, as owner of the brig, for the recovery of two months' wages claimed to be due on their discharge from the brig at Cork, under the act of congress of 1803, § 3,—3 Laws [Bior. & D.] 527 [2 Stat. 203]. The two months' wages were allowed by the district court, to wit: sixty dollars to Tucker, and forty dollars to Carver, from which decree there is an appeal. The appeal, however, is only prosecuted against Tucker; as to Carver the decree has been satisfied.[3] From the libel and proof in the case, it appears that Tucker was duly shipped as mate or mariner on board the brig, on a voyage from New York to Liverpool, and back to some port in the United States. That the brig sailed on the voyage with a cargo for Liverpool, and having landed the same, took in a return cargo of salt; and soon after having sailed on her return voyage, the brig was found to leak so much, that it was deemed necessary to put into some port to repair, and she accordingly bore away for the harbor of Cork; and upon her arrival there, a survey was held, and the surveyors upon examination reported her damages to an extent that would cost about five thousand dollars to repair her. The brig being valued at about six thousand dollars, the surveyors advised a sale of the brig, which was accordingly made, and the vessel was abandoned to the underwriters. A protest was duly made, and signed by the master (Jenkins) and by both the libellants, fully stating the vessel to have been seaworthy at the commencement of the voyage, and that the damage sustained was by perils of the sea. The proceedings on the survey and sale were regular, and no complaint on the appeal has been made on that ground. Upon the hearing in the court below, some testimony was introduced touching the seaworthiness of the brig, but utterly failed in showing that she was unseaworthy; and the only point that has been made on the appeal is, whether, under these circumstances, Tucker was entitled to his two months' wages under the act of congress.

The question in this case resolves itself into the single inquiry, whether when in the course of a voyage a vessel receives damages by perils of the sea, to an extent that it will cost more than one-half her value to repair her, and upon a regular survey and proceedings she is sold and abandoned to the underwriters, the contract with the seamen for wages is determined. There is no question in this case with respect to any wages except the two months' claimed under the act of congress. That act—Act 1803, § 3; 3 Laws [Bior. & D.] 527 [2 Stat. 203]—provides that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged, it shall be the duty of the master or commander to furnish the consul, vice-consul, commercial agent, or vice-commercial agent, a list of the ship's company, and to pay to such public agent, for every American seaman or mariner designated upon such list, three months' pay over and above the wages that may be then due to such seaman or mariner, two-thirds of which is to be paid by such public agent to each seaman or mariner, and the other third to be applied in the manner directed by the act, in the maintenance of destitute seamen, and to aid them in their return to the United States.

It has been argued at the bar, on the part of the appellants, that this law applies only to cases where there has been a voluntary sale of the vessel in a foreign country, and not where the sale has become necessary by reason of sea damage. I am not aware of any direct decision upon this point, either in the English or American courts. No case has been referred to on the argument where it has been expressly adjudged. The question must, therefore, be decided upon general principles, growing out of the contract of seamen for wages. It is admitted to be the settled rule, that in case of shipwreck, when there is a total physical destruction of the vessel, this will dissolve the contract for wages; but it is said, that when there is only a technical total loss, the contract is not ipso facto dissolved. I am not aware of any case where such a distinction has been intimated; and I cannot discover any solid grounds upon which it can be maintained. It is true, the ship-owner is not obliged to abandon, he may repair the vessel and prosecute the voyage. But it may not be in his power to make such repairs in a foreign country; or the damage may have occurred in a place where repairs were impracticable; or the extent of the injury so great as to render the vessel not worth repairing. And the loss of wages grows out of the loss of freight, and the breaking up of the voyage, so that no further beneficial services can be rendered by the seamen; and in case of shipwreck or capture, the assured is not bound to abandon, any more than in any other case of loss which entitles him to abandon.

This case is not free from difficulty, and I cannot say that I have arrived at a perfectly satisfactory conclusion upon it. The first impression would be that it was unjust to visit the misfortune of the ship-owner upon the seamen, when they have discharged their duty faithfully. The law is very benign in its provisions respecting this improvident class of men, and goes very far in throwing around them guards to protect

[3] [See note at end of case.]

and secure their rights, and to prevent their being deprived of their wages by any circumstances growing out of the misconduct of the master or owners. The master is not, therefore, permitted voluntarily to discharge the seamen in a foreign country; and their wages continue until the end of the voyage, where they are wrongfully discharged by the master; and courts will look with a vigilant eye to see that no trivial or slight circumstance shall excuse the master for such discharge. But where the voyage is broken up without any fault of the master or owners, by perils of the sea or a vis major, against which they could not guard, and by reason whereof no further beneficial service could be rendered by the seamen in navigating the vessel, no injustice is done the seamen in such case, if, according to the principles of the marine law, this is understood to be a contingency upon the happening of which the contract for wages is dissolved, according to the true intent and understanding of the parties. It certainly cannot be maintained that a seaman is, in all cases, entitled to receive his full wages, when the voyage is broken up without any fault or misconduct chargeable upon him. Where there is no special contract, the seamen must be understood to be on board on the common terms of the marine law. It is admitted, that in case of wreck, the seamen lose their wages; and where is the sound and sensible distinction between such a case and when there is a total loss by any other peril of the sea? There is not, in every case of wreck, a total physical destruction of the vessel; and if there is an insurance covering the loss, the remedy of the ship owner against the underwriters is the same in both cases. The case of shipwreck which draws after it the loss of seamen's wages, is not limited in any of the cases to a physical destruction of the vessel. If a ship takes ground by accident or by force of the wind or sea, out of the ordinary course of navigation, and remains so long as to become innavigable, it is a wreck, and constitutes a total loss; and what can make the difference, whether the vessel becomes innavigable by reason of grounding or any other peril of the sea, if she is thereby rendered incapable of prosecuting the voyage? If there must be an absolute physical destruction of the vessel, in order to deprive the seamen of their wages, they must wait until it is known whether the vessel goes to pieces or is got off. It is also well settled, that in case of capture, the seamen lose their wages; and this must depend on some other principle than the physical destruction or absolute loss of the vessel. That remains in perfect safety, and may be recaptured or restored; or indemnity for the loss may be obtained from the underwriters, if any insurance has been effected. The ground upon which these cases rest, must grow out of the nature of the seamen's contract, and depending on some principles of public policy, from the nature of the service. In the cases of wreck and capture, the seamen's contract, without any express stipulation to that effect, is considered contingent, and their wages lost on the happening of the peril. The law annexes or implies a condition that where the voyage is broken up by some peril or vis major, without the fault of the master, or ship-owner, or any of the parties concerned in the navigation of the vessel, the seamen's wages are gone. This doctrine grows out of principles of public policy, to stimulate seamen to every possible exertion to save the vessel, knowing that their wages were dependent upon that; and it is upon this same principle that seamen are not allowed to insure their wages, which is a rule so firmly fixed and incorporated in the law, that, according to the language of some of the cases, it cannot be done directly nor indirectly. But if the seamen have a right to recover their wages, at all events, of the ship-owner, it is difficult to see why they may not insure their wages; but if they can recover their wages of the ship-owner, they are not all put at hazard, and the recourse over against the ship-owners, in all cases, is virtually an indirect insurance of their wages, and is directly at war with the grounds and reasons upon which that rule has been established. The general principle of the marine law is, that freight is the mother of wages; and if no freight be earned, no wages are due. There may be some exceptions to this rule, depending on special circumstances, but not applicable to the present case. This principle protects the ship-owner, by making the right of the mariner to his wages commensurate with the right of the owner to his freight; but that the rule may duly apply, the freight must not be lost by the fraud or wrongful act of the master. The policy of the rule applies to cases of loss of freight by perils of the sea; and the reason assigned for the rule is, that if the mariners were to have their wages in all cases, they would not use their endeavors, nor hazard their lives for the safety of the ship. 1 Sid. 179; 3 Kent, Comm. 187. In the case of Wiggins v. Engleton, 3 Burrows, 1844, it was held, that the wages of a sailor are not payable if the ship be lost or taken before the end of the voyage; and no distinction is intimated between an absolute and a technical total loss. In the case of Icard v. Goold, 11 Johns. 279, it was held, by the supreme court of this state, that insurance of freight is for the indemnity of the ship-owner only, and does not enure to the benefit of seamen's wages, which cannot be insured directly or indirectly; and the same principle is recognized in the case of Riley v. Delafield, 7 Johns. 522, where it is held, that no interest is covered by an insurance on freight other than freight strictly so

called; that is, an interest accruing to the insured for the use of the vessel of which he is owner. And in the case of Shepherd v. Taylor, 5 Pet. [30 U. S.] 711, it is said by the court, that there is an intimate connection between the freight and the wages; the right to the one is generally, though not universally, dependent on the other. It would certainly operate oppressively upon the ship-owner, if he should be held liable to pay the seamen's wages, and yet could not indemnify himself by insurance. The marine law very equitably distinguishes between the cases in which seamen's services are not rendered in consequence of a peril of the sea, and where they are not rendered by reason of some illegal act or misconduct of the master or owner interrupting and destroying the voyage. In the latter case, they are entitled to their wages. 3 Kent, Comm. 187. In the case of The Saratoga [Case No. 12,355], Mr. Justice Story fully recognizes the rule, that where freight is lost by inevitable accident, the seamen cannot recover wages as such from the ship-owner; but in some cases, under special circumstances, may be entitled to recover compensation in the nature of salvage. If the doctrine in these cases is well founded, it must rest upon the principle that under the marine law the contract for seamen's wages is, from the nature of the case, in some measure contingent, depending on the earning of freight where no fault is chargeable upon the master or owner. Under these views of the case, I think that no wages were recoverable, and the decree of the district court must accordingly be reversed.

NOTE. A seaman charged with mutinous conduct, was voluntarily discharged from the ship by the captain, who expressed regret for the difficulties that had occurred, and promised to pay the seaman his wages. Held, that the captain's promise operated as a waiver of any forfeiture of wages by the seaman, for disobedience of orders during the voyage. Austin v. Dewey, 1 Hall, 238. The master and seamen, after becoming separated from vessel by shipwreck, are entitled to compensation as laborers or salvers, for their services in transporting and saving the property, to be allowed according to the nature of the services. Bridge v. Niagara Ins. Co., Id. 423. Wages cannot, in general, be recovered by a seaman, where no freight has been earned, and there is no fault of the master or owners occasioning the failure. Van Beuren v. Wilson, 9 Cow. 158. It is not sufficient to entitle seamen to wages, that the freight be lost without their fault. It must be owing to the fraud or other wrongful act, or some fault of the master or owner; or at least some act or omission on the part of the master or owner, over which the seamen can have no possible control. Id. The defendants shipped the plaintiff, a seaman, on a voyage from New York to Newry, in Ireland, and thence back to a port in the United States; and the vessel was libelled in the Irish admiralty by one pretending to be owner, and the crew turned ashore and discharged by the captain. The vessel was detained more than a year, and was finally restored; but, in the meantime, had become so much deteriorated as to be unworthy of repair, and was abandoned in Ireland to the underwriters, and never returned to the United States. Held, that this was not the exercise of that superior force over the vessel, which should exempt the owners from liability to pay the plaintiff his wages, or damages for discharging him from the return voyage; and held, also, that the master and owners were not entirely free from fault; and they were bound to understand and risk their title; or, if it was contested in a mere civil proceeding, to take effectual means for liberating it, if possible, on security, pendente lite; so as to prosecute the voyage, and enable the vessel to earn freight. Id. An action will not lie at a suit of a seaman against the owners under the act of congress [2 Stat. 203]. And see Ogden v. Orr, 12 Johns. 143. Id. If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment by the master, or through his agency, and for fear of his personal safety, it is not a case of a voluntary desertion, and he is entitled to recover his full wages for the whole voyage. Ward v. Ames, 9 Johns. 138. Where a crew has been shipped for a voyage, and articles have been regularly entered into, fixing the rate of wages, if the crew, at an intermediate port of the voyage, compel the master by threats of desertion, to enter into new articles for a higher rate of wages, such articles are void, and not binding on the master, being contrary to the policy of the act of congress; and if established, would be holding out an inducement to a violation of duty and of contract. Bartlett v. Wyman, 14 Johns. 260. Nor are such new articles binding on the owners of the vessels, the master having no authority to make them, the owner being bound by the first articles. Id. And any such promise is void for want of consideration, the seamen having no right to abandon the voyage. Id. The written agreement or shipping articles, made at the port of departure, are the only legal evidence of the contract, and the mariner can recover no more than what is stipulated in such articles. Id. Johnson v. Dalton, 1 Cow. 543. Where a seaman who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave until the voyage was ended, and the vessel discharged of her cargo, on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain on board and assist in discharging the cargo, but absented himself, without leave; held, that by such desertion, he had forfeited his wages. Webb v. Duckingfield, 13 Johns. 390. Though the master has no right to insert in the shipping articles any stipulation or agreement repugnant to the laws of the United States, yet he may add any provisions consistent with the laws relative to seamen. Id. The contract with a seaman continues in force until the cargo is finally discharged, and if he leaves the ship before that is done, he forfeits his wages. Id.

Where a ship, captured during the voyage, and her crew taken out and detained as prisoners of war, was afterwards recaptured, and the master having hired a new crew, proceeded on her voyage, and arrived at the last port of delivery, and carried freight; held, that the seamen who were taken out, though never restored to the ship, were entitled to wages for the whole voyage, deducting only their proportion of the salvage paid to the recaptors. Wetmore v. Henshaw, 12 Johns. 324. Where a vessel is captured and condemned, though the owner afterward recovers the freight from the insurers, the seamen are not, therefore, entitled to their wages. Percival v. Hickey, 18 Johns. 257. So, where a neutral vessel is run foul of and sunk by a belligerent cruiser, through negligence, and the owner, in an action of trespass against the commander of the vessel, recovers the full value of the vessel and cargo so sunk and lost, the seamen are not entitled to the wages. Id. Insurance of freight is for the indemnification of the owner only, and does not enure to the benefit of the seamen's wages,

which cannot be insured directly or indirectly. Icard v. Goold, 11 Johns. 279. The master is chargeable for wages only on his special contract, in hiring the seamen; and the owners from the implied contract which they are supposed to make through their agent and master. Wysham v. Rossen, Id. 72. Where seamen are shipped for a voyage, and during the outward passage the vessel is captured and carried into a port of the captor, where the master leaves her, and she is afterward released, and instead of prosecuting the original voyage, returns home with the same crew, under the command of A., who had been subsequently appointed by the owner to take charge of the vessel, this is a new and distinct voyage, and A. is liable only for the wages arising while he was master, and not for wages which had accrued while the vessel was under the former commander. Id. Whether, if A. had prosecuted the original voyage, he would be deemed to have assumed the contract of the seamen with the former master. Id. A seaman signed articles without reading them, for a voyage from New York to Archangel, and back to New York, which was represented to him as different from that expressed in the articles. The vessel went to Sicily, Sardinia and Messina, at which places she disposed of her outward cargo, and at the latter place, where she lay seven months, took in a return cargo. She left Messina for Gottenburgh, and on her voyage thither was captured, carried in and condemned; held, that the seaman was entitled to wages unto and during his stay at Messina; but not from Messina, that being a new intermediate voyage, and the capture put an end to the freight, as well as wages, for that voyage. Murray v. Kellogg, 9 Johns. 227. The seaman, in this case, brought his action in an inferior court, which allowed him wages up to the capture; and, on certiorari, the supreme court refused to reverse the judgment on that account, the excess being trifling, and there was no evidence as to the time between the departure from Messina and the capture, but some evidence of collusion between the master and captors. Id.

Where a vessel was compelled, in consequence of springing a leak, to put back for repairs, and the seamen made no application for repairs under the law of the United States, but the owners voluntarily caused repairs to be made; and the vessel, after the repairs, was, in the opinion of the master carpenter, and three shipbuilders, perfectly seaworthy; though seven journeymen carpenters were of opinion that she was not seaworthy; and on that ground, the crew refused to proceed on the voyage; held, that no freight having been earned, and the loss of the voyage not being imputable to the master or owners, the seamen were not entitled to wages; and that they could not set up the opinion of the journeymen workmen to excuse their breach of contract, and justify their demand of wages. Porter v. Andrews, 9 Johns. 350. Where the voyage is lost by the act of the master or owner, and whether, as it seems, that act be wrongful or fraudulent or not, the seamen are entitled to their wages. Hoyt v. Wildfire, 3 Johns. 518; Sullivan v. Morgan, 11 Johns. 66. So, where a seaman was hired for a voyage from New York to Bombay and back, and the vessel was loaded with naval stores; and the master, on his route to Bombay, under a false pretense of want of water, deviated, in order to put into the Isle of France, and was captured by a British vessel on her way thither, and the ship condemned; held, that a seaman might, on his return, recover his wages, according to the contract, from the time he shipped on board until his arrival in New York, deducting such wages as he had received in his absence. Id. Where freight has not been earned, wages are not due. Dunnett v. Tomhagen, 3 Johns. 154; Icard v. Goold, 11 Johns. 279. And it makes no difference that there has been a salvage of part of the cargo; for, as it was not delivered by the ship, no freight was earned. Id. Where the crew, on abandoning a vessel from necessity, took some boxes of merchandise, part of the cargo, in the long boat with them, and which were, in this manner, preserved; held, that though the seamen might have had a valid lien on the goods saved, for an equitable compensation, in the light of salvage, yet it gave them no right of action on their contract for wages. Id. Where the wages of a seaman appear, by the shipping articles, evidence of a further compensation by way of customary privilege, cannot be received. Bogert v. Cauman, Anth. N. P. 97, note a. The master is not bound to pay the seamen until the cargo is discharged. Schieffelin v. Harvey, Id. 76, note a. Upon a breach of contract, seamen are entitled to wages until their return home. Patten's Adm'rs v. Park, Id. 46. Where a vessel on a voyage merely earns passage money, and no regular freight, how far seamen are entitled to their wages. Id. 43.

Case No. 6,369.

In re HENRICH.

[5 Blatchf. 414;[1] 10 Cox, Cr. Cas. 626.]

Circuit Court, S. D. New York. June 12, 1867.

EXTRADITION — FORGERY — JURISDICTION OF COMMISSIONER — DOCUMENTARY EVIDENCE — PROCEEDINGS BEFORE COMMISSIONER—APPEAL.

1. This court has power, on a writ of habeas corpus, in conjunction with a writ of certiorari, to revise the action of a commissioner of this court, committing a fugitive from justice for surrender under an extradition treaty between the United States and a foreign country.

[Cited in Re Macdonnell, Case No. 8,772; Re Stupp, Id. 13,563; Re Kelley, Id. 7,655; Ex parte Perkins, 29 Fed. 908; Re Fergus, 30 Fed. 607; Ex parte McCabe, 46 Fed. 369.]

2. This court will look into the evidence on which the judgment of the commissioner rested, and will pass upon its weight, as well as upon its competency.

[Cited in Re Roth, 15 Fed. 507.]

3. Under a warrant issued by a justice of the supreme court, directed to the marshals of the United States for any district respectively, and to their deputies, or the deputies of any of them, or to any of said deputies, commanding them, and each of them, to arrest such alleged fugitive for such surrender, and bring him before the said justice, or a commissioner named therein, or some other magistrate, at New York, a deputy of the marshal of the United States for the Southern district of New York has the right to arrest such person in Wisconsin, and bring him before such commissioner, and such commissioner has jurisdiction of the case, under such an arrest.

4. Where the crime is forgery, the complaint on which such warrant is founded may charge more than one forgery.

5. The act of June 22, 1860 (12 Stat. 84), enlarges the class of documentary evidence which may be adduced in support of the charge of criminality, beyond that authorized by the act of August 12, 1848 (9 Stat. 302), so as to admit any depositions, warrants, or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offence was committed would receive them for the same purpose.

[Cited in Re Farez, Case No. 4,645; Re Macdonnell, Id. 8,771; Re Stupp, Id. 13,563; Re Fowler, 4 Fed. 308; Kurtz v. Moffitt, 115

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

U. S. 497, 6 Sup. Ct. 151; Re McPhun, 30 Fed. 59; Re Charleston, 34 Fed. 534; Re Manning, 44 Fed. 276; Oteiza v. Jacobus, 136 U. S. 338, 10 Sup. Ct. 1034; Re Adutt, 55 Fed. 378.]

6. The proper form of such authentication considered.

[Cited in Re Wadge, 15 Fed. 865, 16 Fed. 333.]

7. The decision of the commissioner sustained.

8. Rules prescribed for the conduct of proceedings under extradition treaties: (1) Demand for surrender and mandate of the president; (2) previous designation of the commissioner before whom the warrant of arrest is returnable; (3) certificates to documentary evidence; (4) record, by the commissioner, of the proceedings before him; (5) verified translations of documents in foreign languages; (6) contents of complaint.

[Cited in Re Thomas, Case No. 13,887; Ex parte Van Hoven, Id. 16,858.]

9. Where the commissioner acts, in such a case, on legal evidence, this court will not reverse his judgment, except for substantial error in law, or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence.

[Cited in Re Stupp, Case No. 13,563; U. S. v. Brawner, 7 Fed. 87.]

10. No appeal lies from the decision of this court, on a habeas corpus, in an extradition case.

On the 4th of December, 1866, the president of the United States, upon the application of the Baron Von Gerolt, accredited to the government of the United States as envoy extraordinary and minister plenipotentiary of Prussia, issued his mandate to the proper magistrates of the United States, requesting them to cause the arrest of Phillip Henrich, an alleged fugitive from Prussia, charged with the crime of forgery, that the evidence of his criminality might be heard and considered, and, if deemed sufficient to sustain the charge, that the same might be certified, together with a copy of all the proceedings, to the secretary of state, in order that a warrant might issue for the surrender of the fugitive, under the stipulations of the convention between the United States and Prussia and other states of the Germanic Confederation, entered into June 16, 1852 (10 Stat. 964). On the 12th of December, 1866, the Honorable Guido Von Grabow, acting consul general of the kingdom of Prussia, for the United States, duly made complaint before Kenneth G. White, Esquire, a commissioner of the circuit court for the Southern district of New York, one of the magistrates properly designated by the president's mandate, setting forth the crimes alleged to have been committed by the fugitive, and praying for a warrant of arrest, that he might be surrendered to the authorities of Prussia, pursuant to the treaty stipulations between the two countries. This application to the commissioner was accompanied by a copy of the warrant of arrest issued by the authorities of Prussia, duly authenticated, and certified at Berlin by the minister of the United States to that country. On the same day (December 12th, 1866,) the Honorable Samuel Nelson, one of the justices of the supreme court of the United States, and the presiding judge of the circuit court for the Southern district of New York, on proper application being made to him, issued his warrant, directed to the marshals of the United States in any district, or to any of their deputies, commanding them, and each of them, to arrest Henrich forthwith and bring him before said justice, or Commissioner White, at the city of New York, or some other magistrate, that the evidence of the criminality of said Henrich might be heard and considered, pursuant to the treaty stipulations referred to, and the acts of congress in such case made and provided. This warrant was placed in the hands of Robert Murray, Esquire, marshal of the United States for the Southern district of New York, who, on the 14th of December, 1866, duly deputed a person to execute the same. Under and by virtue of this warrant, Henrich was arrested, and, on the 30th of March, 1867, he was brought before Commissioner White, at the city of New York, for examination. This examination took place from time to time, under regular continuances, and terminated on the 29th of April, 1867, when, after hearing the evidence, and the counsel for the Prussian government, and the counsel for the prisoner, the commissioner adjudged the evidence produced sufficient to sustain the charge, and committed Henrich to the custody of the marshal, to be kept in custody till he should be surrendered by the executive authority of the United States, under the provisions of the treaty. At this stage of the case an application was made to this court for a writ of habeas corpus, to produce Henrich in court. The object of this writ was stated to be, to procure a revision by this court of the whole proceedings in the case, including the final judgment of the commissioner. By an arrangement between the counsel for Prussia and the prisoner, the question whether this court had the power to revise the judgment of a commissioner in a case of extradition, was fully argued. It was held, by Judge Shipman, after consultation with Mr. Justice Nelson, that it had such power, and, on the 23d of May, 1867, a writ of habeas corpus was issued to the marshal, to bring the body of Henrich before this court, and a writ of certiorari was directed to the commissioner, to send up all the papers and proofs upon which he had acted in the premises. Both of these writs were promptly obeyed, and the whole subject came before the court, and was argued by counsel on both sides.

Henry D. Lapaugh, for the United States.
Charles Wehle, for the prisoner.

SHIPMAN, District Judge. I now proceed to dispose of the material questions which have been raised in this case. But, before

enumerating and disposing of the precise points raised by the prisoner's counsel against the proceedings and the judgment of the commissioner thereon, it is proper that I should make some observations on the power of the courts of the United States and the justices and judges thereof, through the medium of the writs of habeas corpus and certiorari, to revise the action of commissioners, when they commit persons for surrender under extradition treaties. A correct understanding of this subject is important, in view of the fact that this power is so often and so persistently contested. The decisions on this subject have not always been uniform. In the Case of Veremaitre and others, fugitives from the French republic [Case No. 16,915], Judge Judson, sitting in the district court of the United States for the Southern district of New York, held, that he had no power to revise the judgment of the commissioner on the question of fact; and, on inspecting the papers and finding them sufficient on their face, he declined to review the proofs, and remanded the prisoners, to be held subject to the warrant of the commissioner, and the action of the executive authorities of the United States. In the Case of Kaine [Id. 7,598], Judge Betts, in the circuit court for this district, delivered an elaborate opinion covering various questions, and substantially affirming the rule laid down by Judge Judson. The same doctrine was laid down by Judge Ingersoll, in the district court for this district, in the case of Heilbronn [Id. 6,323]. In the case last cited the judge remarks: "Where there is any legal evidence before the commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it, or to render it ineffectual, at least not till the expiration of two calendar months after it shall have been issued. In such a case, no one can revise the opinion of the commissioner but the president. The president has that power. If he should be of opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If it should be his opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the commissioner." At a still later date, in the case of Ex parte Van Aernam [Id. 16,824], Judge Betts said: "In my view of the subject, this court, on return before it of a writ of habeas corpus, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offence subjecting him to imprisonment, and whether the commissioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively, in this case, on both those inquiries, and, therefore, decide, that I have no authority, under this writ, to review the justness of the decision of the commissioner."

The Case of Kaine, which I have already cited, deserves a further notice. The controversy touching his extradition went through various phases, with different results, in different courts. He was first arrested and brought before a commissioner, upon the complaint and requisition of the British consul for the port of New York, and, after a hearing, the commissioner adjudged the evidence produced sufficient to justify his commitment for surrender, under the charge made against him. He was subsequently brought before the circuit court, on a writ of habeas corpus, and remanded, upon grounds fully set forth in the opinion of Judge Betts, above cited. After this, and after the acting secretary of state had issued a warrant, directing the marshal to deliver up Kaine to the British consul, the matter was brought before the supreme court of the United States. That tribunal was divided in opinion upon several questions involved in the case, and authoritatively decided only one point, and that was, that it had no jurisdiction of the controversy. 14 How. [55 U. S.] 103; 6 Op. Atty. Gen. p. 93. Subsequently, Mr. Justice Nelson, sitting at chambers, issued a writ of habeas corpus, and brought the prisoner before him. Upon the return to the writ, it was objected, that the decision of Judge Betts, sitting in the circuit court, upon the return to the writ of habeas corpus before that court, it being a court of competent jurisdiction to hear and determine the question whether the commitment under the commissioner's order or warrant was legal or not, was conclusive, and a bar to any subsequent inquiry into the same matters by virtue of that writ. But Mr. Justice Nelson overruled this objection, for reasons stated in his opinion. Ex parte Kaine [Case No. 7,597]. He then proceeded to examine the case on the evidence which the commissioner had received in support of the charge, and decided that the same was not competent, and, therefore, did not justify the conclusion of guilt at which the commissioner had arrived. There were other points decided and enforced in the same opinion, which it is unnecessary to mention in this place, as they have no bearing on the case now before the court. It is true, that Mr. Justice Nelson, in the Case of Kaine, decided that the commissioner had no competent evidence before him. He, therefore, did not directly determine the precise question whether, if the commissioner had had competent evidence presented to him, tending to prove the charge of criminality, it would have been within the rightful power of the court, or of the judge at chambers, to review that evidence, and, if he thought it failed to support the charge against the prisoner, to discharge

him from custody, under the commissioner's warrant. But the whole spirit and scope of his reasoning, in the opinion delivered by him in the supreme court, as well as in the one delivered by him at chambers, tend toward the assertion and vindication of this power. To set the matter at rest, however, I am authorized by him, after full consultation on the point, to state that such is his judgment of the law. It is, then, the law of this court, and it is, therefore, the duty of the court, in the present case, to look into the evidence upon which the judgment of the commissioner rested, and which he has certified up to this tribunal, in compliance with the writ directed to him, and to pass upon its weight as well as upon its competency. Some practical considerations touching the course which should be pursued in the performance of this duty, in this case and similar cases, will be referred to in another part of this opinion. I have dwelt at length on this branch of the case, in order, if possible, to prevent misconstruction hereafter, in controversies of this character. I now proceed to the examination of this case on its merits, and to apply the legal rules which must govern it.

The first two objections to the action of the commissioner, raised by the prisoner's counsel, rest upon the fact that he was arrested in Wisconsin, by a special deputy of the marshal of the Southern district of New York. It is insisted that this deputy had no legal authority to execute the warrant of Mr. Justice Nelson out of the limits of this district, and the 27th section of the judiciary act of September 24, 1789 (1 Stat. 87), is referred to as conclusive on this point. This section gives the marshal no authority to execute precepts beyond the limits of his district, and it is, therefore, argued, that the deputy in this case could not lawfully execute this warrant in another district. The warrant in question was issued by Mr. Justice Nelson and addressed to the marshals of the United States for any district respectively, and to their deputies, or the deputies of any of them, or to any of said deputies. The precept is to each and every of them, in the name of the president of the United States, to apprehend the said Phillip Henrich, and forthwith bring him before the said justice, or before the commissioner named, or some other magistrate, at New York, &c. The operation of the warrant is not limited in terms to any judicial district. The fugitive was not to be apprehended for any crime committed against the United States, for which he was amenable to trial in any particular district. His extradition was not sought from any district as such, but from the United States. He was to be arrested in order that he might be delivered, on good cause being shown, to the agents of the government from which he had fled. The section of the judiciary act referred to has no application to an arrest under an extradition treaty. No such treaty was in existence when the act was passed, and no proceedings under such a treaty could have been contemplated by its framers. Indeed, an application of the implied restrictions of that act relating to marshals, to warrants for the arrest of fugitives from foreign states, would make the execution of these treaties depend wholly upon the magistrates of the district in which such fugitives might be arrested. Under such a construction, the hearing and delivery must be in the district where the arrest is made, as no judge or marshal could remove him to another district.

The 33d section of the judiciary act, authorizing and regulating the removal of parties arrested in one district, to be held for trial in another, clearly has no application to such a case as the present. It is claimed that the marshal of Wisconsin should have arrested Henrich under this warrant. But he could not have performed the duty required by the warrant, under the construction of the law urged; for, if his powers under it are to be confined to his own district, then he could not have executed that part of the precept which required him to bring the accused before Mr. Justice Nelson, or Commissioner White, at New York. Considering the object of the treaty, the provisions of the statute for carrying it into effect, by authorizing the arrest of the fugitive in any state or territory of the United States, and the scope of Mr. Justice Nelson's warrant, I am satisfied that the arrest was legal, and that the commissioner had jurisdiction.

The third objection to the proceedings is, that the complaint upon which the warrant is founded contains charges of a large number of offences. The claim is, that only one crime should be charged in the same complaint. No argument is necessary to refute such an objection. If a fugitive can be surrendered for the commission of one forgery, he certainly can for the commission of fourteen, the number charged in this complaint. These offences are distinctly alleged in the complaint, and their joinder in the same instrument is no more objectionable than it would be in an indictment. This not only might be, but it is required to be, done by the laws of the United States. The complaint is specific and full, and the crimes charged are set forth with all the particularity necessary in a proceeding of this character.

The fourth objection is founded upon the admission by the commissioner of certain declarations of the prisoner after his arrest, sworn to by the special deputy who had him in custody. They were of so trifling and unimportant a character that I should not be justified in dwelling upon them. I think they were admissible, but they are of little weight on a question of guilt.

The fifth objection is, that the documentary evidence received by the commissioner in support of the charge of criminality, was

inadmissible, because not authenticated according to law. This objection must be tested by a reference to the acts of congress regulating the admission of evidence in extradition cases. The 2d section of the act of August 12, 1848 (9 Stat. 302), provides, that, at the hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested, upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the persons so apprehended. This provision was altered and enlarged by the act of June 22, 1860 (12 Stat. 84), which provides, that, in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence, under the above section of the act of August 12, 1848, such depositions, warrants, and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in said section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and that the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by such act of 1860. It will be seen, by comparing the acts above cited, that the one of June 22, 1860, enlarges the class of documentary evidence which may be adduced in support of the charge of criminality. In addition to the depositions upon which the foreign warrant of arrest may have issued, embraced in the 2d section of the act of August, 1848, it provides for the admission of any depositions, warrants or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offence was committed, would receive them for the same purpose. Whether they are so authenticated, is to be determined by the certificate of our own principal diplomatic or consular officer resident in the foreign country.

The papers offered in evidence are numerous, but I shall notice only a few of them. The first to which I will refer is a complaint or information of the directors of the Rhenish Railroad Company, dated at Cologne, January 13, 1866, addressed to the royal chief procurator. This is not a merely formal accusation, containing only technical allegations of the forgeries in question, but an elaborate statement of facts and circumstances in support of the charge. A further complaint and statement of the same character is appended to this, dated five days later. The two form one document. This paper is properly attested as a true copy, by the secretary of the county court, under seal. The secretary's signature is attested by the president of the court, under seal, and the latter adds a certificate that the document is a valid piece of evidence by the laws of Prussia. The signature of the president is then attested, and the same certificate, as to the validity of the document as evidence, is given, under seal, by the first president of the royal Rhenish court of appeals. The signature of the latter is then attested by the minister for foreign affairs. The document is then authenticated by our late minister at Berlin, Mr. Wright, with his certificate that the paper is legally authenticated, so as to be entitled to be received for similar purposes by the tribunals of the kingdom of Prussia. This certificate is under the seal of the United States legation.

Some criticism has been made upon the certificate of Mr. Wright, on the ground that it does not state explicitly that this paper is admissible by the tribunals of Prussia in support of the charge of criminality. It is urged that the words "similar purposes," in the certificate, are not definite enough. By reference to the 2d section of the act of August 12th, 1848, it will be seen, that the purposes for which certain documentary evidence was made admissible, were, to support the charge of criminality. The documentary evidence made admissible by the act of June 22, 1860, is declared to be for the same purposes mentioned in the 2d section of the act of 1848, and includes all papers which are received by the foreign tribunals for "similar purposes." The meaning of the certificate is perfectly obvious, when considered in reference to its object, and in connection with the certificates of the Prussian officials. The latter declare it to be a valid piece of evidence touching the charge of criminality, which it embraces and sets forth with particularity. This paper is authenticated by our minister, is made admissible by our statute, and was, therefore, properly received by the commissioner. The same remarks apply to the depositions, twelve in number, which are also fully attested by various Prussian officials, and to which a similar certificate of our minister is attached.

By these documents, to say nothing of others in the case, it appears, that the prisoner was the secretary of the Rhenish Railroad Company at Cologne; that that company purchased lands of various parties; and that he obtained and applied to his own use the purchase money in a number of instances, by forging the names of the vendors to receipts, or by the use of such receipts knowing them to be forged. The evidence of forgery is very strong, and, so far as its weight is concerned, is, in the language of the treaty, "such evidence of criminality, as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." There is other evi-

dence in the case, which I have not deemed it necessary to comment upon. I am satisfied that the commissioner came to a correct conclusion, and shall, therefore, dismiss the writ, and remand the prisoner to the custody of the marshal, to be held by him under the commissioner's warrant, to await the final action of the executive authorities at Washington.

Before finally dismissing this case, I will endeavor to make some suggestions which may tend to prevent some of that uncertainty, confusion and prolixity which have so often characterized these proceedings under our extradition treaties.

1. It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the president be obtained, before the judiciary is called upon to act. See Mr. Justice Nelson's opinion in Re Kaine [Case No. 7,597]. At all events, this would be the better practice, and one in keeping with the dignity to be observed between nations, in such delicate and important transactions.

2. Where the warrant of arrest is returnable before a commissioner for hearing, it should be one who has been previously designated by the circuit court under which he holds his office, as a commissioner for that purpose. In re Kaine, 14 How. [55 U. S.] 142, 143.

3. Each piece of the documentary evidence offered by the agents of the foreign government, in support of the charge of criminality, should be accompanied by a certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country.

4. The commissioner before whom an alleged fugitive is brought for hearing, should keep a record of all the oral evidence taken before him, taken in narrative form and not by question and answer, together with the objections made to the admissibility of any portion of it, or to any part of the documentary evidence, briefly stating the grounds of such objections, but he should exclude from the record the arguments and disputes of counsel.

5. The parties seeking the extradition of the fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before him or some other United States commissioner, or a judge of the United States, that the same is correct.

6. The complaint upon which a warrant of arrest is asked should set forth clearly, but briefly, the substance of the offence charged, so that the court can see that one or more of the particular crimes enumerated in the treaty, is alleged to have been committed. This complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offence.

It should be understood that, in the exercise of this power of revising, on habeas corpus, the judgment of the commissioner, this court will not reverse his action upon trifling grounds, or for mere errors in form. When designated by the court, he is fully empowered to hear and decide the questions of criminality, and, where he has legal evidence before him, this court will not reverse his judgment except for substantial error in law, or for such manifest error in fact, as would warrant a court in granting a new trial for a verdict against evidence.

I have had a full consultation with my brethren, Mr. Justice Nelson and Judge Blatchford, in reference to this case, and I am authorized to state that they concur with me in the views expressed in this opinion. Let an order be entered dismissing the writ of habeas corpus in this case, and remanding the prisoner to the custody of the marshal, under the commissioner's warrant.

NOTE. After the foregoing decision was rendered, the counsel for Henrich applied to Mr. Justice Nelson, and also to Judge Shipman, to allow an appeal in the case, to the supreme court. The application was refused by each of them, on the ground that the habeas corpus in this case was issued under the authority conferred by the 14th section of the judiciary act of September 24, 1789 (1 Stat. 81); that no appeal was provided for by law, in the case of a habeas corpus issued under that act; and that the appeal provided for, in cases of habeas corpus, by the 1st section of the act of February 5, 1867 (14 Stat. 385), was confined to cases where the habeas corpus was issued under the authority conferred by the last named act, which was an authority in addition to the authority theretofore conferred by law, and extended to cases not covered by the act of 1789, where a person was "restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States."

HENRICI (SHOUP v.). See Case No. 12,814.

HENRIETTA, The (HARRIS v.). See Case No. 6,121.

Case No. 6,370.

In re HENRY et al.

[9 Ben. 449;[1] 17 N. B. R. 463.]

District Court, S. D. New York. April 24, 1878.

BANKRUPTCY—COMPOSITION — SECOND MEETING—REGULARITY—FAILURE OF PARTNER TO SIGN PETITION—EFFECT OF MISTAKE.

1. Where objection was made to the regularity of composition proceedings in the case of a bankrupt firm, because by mistake the mem-

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

ber who was considered to be a special partner took no part in the proceedings, nor even signed the petition for composition, because liabilities alleged to be fictitious were included in the schedules—one being the amount put in by said special partner, and others notes of the firm held by parties who on other accounts were indebted to the firm—and because the composition did not provide how and when the bankrupts should be re-invested with their property when the composition was fulfilled: *Held*, that none of these irregularities, being the effects of mistake and not of fraud, would be considered fatal to the validity of the proceedings; but that, the special partner being in fact a general partner, and not entitled to vote as a creditor, it must appear that the requisite number had signed the composition without counting him.

[Cited in Re Griffith, Case No. 5,820.]

2. Refusal or neglect to sign a petition for a composition by one of the partners, unless fraudulent, will not render the proceeding invalid as against the other partners, though it may well deprive the one who fails to sign of all benefit of it.

In bankruptcy.

T. Saunders, for bankrupts.

Amos G. Hull, for opposing creditors.

CHOATE, District Judge. This is a motion for an order calling the second meeting in composition. Several objections are made by opposing creditors. Henry, Curran, and Bowen filed their petition as partners under the firm-name of John F. Henry, Curran & Co., and were adjudicated bankrupts February 12th, 1878. Charles A. Gillis, then supposed to be a special partner in the firm, was in fact a general partner, not having complied with the statute requiring the special partner's capital to be paid in, in cash. Proceedings for composition were commenced February 18th, 1878, and the notice for the first meeting of creditors to consider the composition was made returnable March 25th, 1878. That meeting was held, and the composition was proposed to the creditors by the original petitioners, Henry, Curran, and Bowen, and signed by them. They attended and were examined, and the composition was approved by a large majority of the creditors. The objections now made to the regularity of the proceedings are as follows:

1. It is objected that the proceedings are void and without jurisdiction, because Gillis, a member of the firm, did not join therein, and did not attend the meeting, nor sign the proposition of composition. It seems clear, however, that composition proceedings may take place in any pending case of bankruptcy. Rev. St. § 5103. It is also clear that in case of a partnership the petition may be filed by one or more of a firm. Section 5121. There can be no doubt that upon the filing of such a petition there is a "pending case" in bankruptcy. The fact, therefore, that Gillis did not join in the original petition or in the composition proceedings, does not prevent the court from getting jurisdiction as to the other partners. If by mistake one of the partners fails to join in the petition, or those who do join in the petition make a mistake in describing the partnership as composed of three partners instead of four, as is the fact in this case, there seems no good reason why this mistake should not be remedied by amendment. An amendment has been allowed to bring in as petitioner a copartner, although the original petition was filed by a single petitioner and was not based upon any allegations of partnership at all. In re Little [Case No. 8,390]. Whether there is an amendment or not, it is not perceived why the proceeding cannot go on for the benefit of those partners who do join in the petition, nor why the creditors should not have the benefit of a composition offered by those partners, especially where, as in this case, the partner left out is not vested with any control or possession of the partnership, he being a general partner so far as liabilities are concerned (1 Rev. St. N. Y. 764), but still, by the terms of the copartnership, having no interest in the assets except to be repaid his special capital on the liquidation. The right of the creditors as against him, if he is not brought in, seems not to be impaired. If the ground taken by the opposing creditors in this case is sound, one partner, by refusing to join in the proceeding or to sign the composition or to attend and be examined, can entirely prevent his copartners and the creditors of the firm from receiving the relief which the composition proceedings are designed to give in all cases. This cannot be the intent of the law. A refusal to join, to attend, to sign, or to be examined, may well deprive the one refusing of all benefit of the composition, but unless the refusal or neglect to join is the result of some fraud on the part of those partners who do carry on the proceedings, it is no reason for avoiding those proceedings as to them, and their signing the composition and attending the meeting and submitting to the examination is a substantial compliance with the requirement of the statute that the debtor must sign, must attend, etc. For the purpose of those proceedings they are the debtors. The concealment of the fact that there was another partner, not made a party to the composition, might be a good ground for setting aside a composition or opening the proceedings and allowing creditors to change their votes, but here there was no concealment. It was originally a case of ignorance, not of concealment—a case of mistake and not of fraud—and at the first meeting, and before the creditors voted, all the facts relative to Gillis' connection with the firm were disclosed.

In the present case, however, an amendment has been allowed, making Gillis a party to those proceedings. On the 4th of April a new petition was filed by all the partners, including Gillis, reciting the former mistake and proceeding, and on that pe-

tition they have all been adjudicated bankrupt. What the effect of this amendment is on Gillis's rights under the composition is not in question now. The question is, are these proceedings fatally irregular and void as to any of the partners. It is obvious that they are not. The case of In re Plumb [Case No. 11,231], has no application, because in that case there was no adjudication or intent to adjudicate the bankruptcy of the firm in question, but there was an adjudication of one member of a firm individually, and an adjudication of the other members of the firm as copartners composing a distinct firm of which the person adjudicated individually was not a member. It was held that these two adjudications did not in effect constitute the adjudication of the other firm of which all the parties were members, and gave the court no jurisdiction over the estate of such other firm. In the present case the firm of J. F. Henry, Curran & Co. was the same firm whose adjudication was sought in the original petition. In re Plumb [supra] was not a case of a defective petition and an amendment of it.

2. It is also objected that the proceedings are void for fraud in including fictitious liabilities in the schedules. This is a question that will be more properly disposed of after the second meeting. Most of the alleged frauds, however, are obviously not frauds at all. Thus, the stating of the amount of the special capital of Gillis as a liability was not a fraudulent statement on the evidence. The other partners then supposed him to be a special partner, and though his claim against the assets as such special partner would be postponed to those of other creditors, still it was properly described as a liability as they then understood it. So the inserting in the schedules of various notes of the firm, held by parties who on other accounts were indebted to the firm, was not apparently a fraud. Debtors preparing their schedules are not presumed to know where their paper is, or what rights holders thereof may have acquired, although the circumstances under which it was first issued may be known to them to be such as not to make it a valid claim in the hands of the first takers. And the only safe way for debtors is to set down in the schedules all the paper that they may be liable on in the schedule of liabilities, with proper explanations in regard to them; and it is not shown in this case that the statements in the schedules were such as to mislead, or did mislead, any creditor.

3. There is no invalidity in the proposed composition in not providing how and when the bankrupts shall be reinvested with their property, nor any uncertainty in the terms of the trust provided for by way of security for its performance.

4. There being, then, no irregularity fatal to the validity of the proceedings, the only question is whether the resolutions were passed by the requisite majority. The register reports that they were, but it also appears by his report that the co-partner, Gillis, voted as a creditor in the affirmative. It is obvious, that being a partner he had no right to vote at all. If the firm is indebted to him, his claim, whatever is its nature, is necessarily postponed till all the creditors are paid. It is not certain on the report that his vote was not necessary to make up the majority that is reported. The register will, therefore, be directed to make a supplemental report of the proceedings at the first meeting, showing the number of creditors whose debts exceed $50 who voted in the affirmative, exclusive of Charles A. Gillis, and also the aggregate amount of the debts proved by those creditors exclusive of said Gillis who voted in the affirmative, also the number of creditors whose debts exceeded $50 who appeared at said meeting in person or by proxy, and the aggregate amount of the debts proved by the creditors who so appeared at said meeting, exclusive of said Gillis.

Other affirmative votes are challenged on the ground that the testimony taken discloses that the creditors casting them either had no right to vote at all, or only for an amount much smaller than the amounts set against their names in the list showing the votes as given by the register. The register does not certify that their votes were given for these amounts, and the presumption is that they voted only on the amounts for which they proved their debts. The register will, however, in his supplemental report, show whether any of the following creditors whose votes are objected to, voted in the affirmative, and if so, on what amount: A. L. Scovill & Co., Hegeman & Co., Henry Johnson & Lord, F. Brown, P. W. Hoagland, and E. J. Dunning, Jr. Order to be entered accordingly, and case stand for further argument on such supplemental report for Saturday, April 27th.

Case No. 6,371.

In re HENRY.

[1 MacA. Pat. Cas. 467.]

Circuit Court, District of Columbia. Nov., 1856.

PATENT PRACTICE—INTERFERENCE APPEALS — ATTESTATION OF DRAWINGS—PROCESS CLAIMS —PATENTABILITY OF PRINCIPLE.

[1. By section 11 of the act of March 3, 1839 (5 Stat. 354) the commissioner is bound to answer the reasons of appeal in cases of single applications as well as in cases of interference.]

[2. The specifications of a claim for a combination of machinery must be accompanied by drawings signed by the inventor, and attested by two witnesses; and, on an appeal from the commissioner's decision, the court cannot consider loose drawings sent up with the papers, but not so attested, or even identified by references in the specifications.]

[3. Where the claim is clearly for a process, it is unnecessary to inquire into the novelty or utility of an arrangement of machinery described in the specification; for, if such combination is not the ground of the claim, no patent can be issued therefor.]

[4. While a well-known principle or truth of natural science, as well as a newly-discovered one, is patentable to him who first applies it to the useful arts, yet, where once applied, any subsequent application must, to be patentable, rest upon the new machinery or combination by which such application is made.]

[5. The principle that cotton taken directly from the gin, in the fleecy state, and immediately corded and spun, while the fibre is yet undisturbed by baling, or any of the other processes thereby made necessary, produces a better and stronger yarn than when it has been baled, is not patentable, having been previously applied in Bryant's Columbian spinner.]

[This was an appeal by George G. Henry from the refusal of the commissioner of patents to grant him a patent.]

Reverdy Johnson, for appellant.

MERRICK, Circuit Judge. The interpretation which I have put upon the eleventh section of the act of congress of March 3d, 1839, makes it necessary to refer to the office letter of the acting commissioner addressed to me on the 7th of October, 1856, in which he states "that it is not the practice of the office for the commissioner to give answer to the reasons of appeal in cases of a single application. Only in appeals from the commissioner's decision, in cases of two or more interfering applications, a written statement or answer is submitted where the nature of the case seems to require it." It would appear that in cases of appeal in single applications rather than in cases of interfering claims it is expedient that the judge who tries the appeal should be furnished with a response from the commissioner to the reasons of appeal filed by the applicant, and for the obvious reason that in cases of conflicting claims the respective parties in agitating their several rights must incidentally guard the rights of the public; whereas, in an appeal from the rejection of a single application, there is no one to represent the United States before the appellate judge, unless we construe the law to mean that the commissioner shall, on behalf of the United States, lend his aid to the judge in appeal, in reaching a correct conclusion in the premises, by filing a response to the appellant's exceptions. I find this to have been the construction placed on the law by other judges, and also to have been the construction placed on the act by the patent office, as appears by the fifth and sixth rules of practice in appeals contained in the letter of Acting Commissioner Weightman to Hon. James S. Morsell of the date of September 7th, 1852. The question is not of much practical importance upon the present appeal, but I feel it my duty to advert to it thus particularly to exclude the inference of acquiescence on my part in the announcement by the office in this case of its present construction of that part of the eleventh section of the act of 1839 which directs the mode in which cases shall be prepared and submitted for revision. The present appeal was set for hearing on the 15th of October, and the party was fully heard by his counsel, Hon. Reverdy Johnson, within a day or two thereafter. The case has since been carefully considered. A principal difficulty has been to determine from the specifications, the reasons of appeal, or the arguments filed by the party with the commissioner what it is that the party really claims as the subject-matter of his invention. In his original specification, filed August 26th, he calls it "a new and improved mode of manufacturing yarns," and describes the nature of his invention and improvement as consisting "in an improved process of manufacturing cotton yarns by placing in the gin-house, in contact with the gin, the second machine of the series, called the spreader, followed by such others as are now used in mills employing the most approved machinery for the manufacture of cotton yarns;" and states that he constructs an endless apron in front of his gin, from which he feeds in about one-third the quantity in a given time now or heretofore fed in the old process; and in the rear of the gin he attaches a spreader and lap machine without an apron, through which the cotton leaving the gin, freed from its seed, in a soft and fleecy state, passes to the lap, thence to the carders, thence to the drawing, thence to the rovings, thence to the bobbin, thence to the spinning-frames, &c. After enumerating in vague detail many supposed advantages of his invention, he sums up the claim thus: "What I claim as my invention, and desire to secure by letters patent, is the improvement in the manufacture of cotton yarns effected by my combination and arrangement of machinery in the manner described, dispensing with much now in use, securing the cotton fibre from great injury and waste, and the general advantages before presented and derived from taking the cotton directly from the seed by the gin and carrying it at once to the spreader, in the manner substantially as and for the purposes described." On the 4th of September he filed an amended specification, stating that the object of his discovery is "to manufacture the cotton lint as it leaves the gin without further handling, but by automatic mechanism, into any and every number of cotton yarn, so that I shall make more yarn, and of fibres nearly in their natural condition and strength, from any given quantity of cotton in the seed, than is now obtained. This object can alone be effected by making the gin the first of the manufacturers' series of machines, instead of isolating it to the planter's use, which is simply to separate by it the lint from the seed." And this amended specification he sums up, after disclaiming the Columbian spinner and

its improvements, in these words: "But what I do claim as new, and desire to secure by letters-patent, is my automatic process, especially involving cotton in the fleecy lint or lap, so that my yarns shall consist of fibres of cotton in their normal condition, and uninjured by, because not subjected to, the usual machines now operated; and this I claim, substantially as described and for the purpose set forth."

Were the inquiry confined to the first specification, (and that was alone relied upon in the argument of the applicant's counsel,) it might with some force, but by no means conclusively, be argued that the subject-matter of his claim was for a new combination of machinery; for that specification is itself framed with a double aspect; and in its titling, as well as other portions, seems to contemplate a process, and not a combination of machinery, as the subject of discovery. But the second or amended specification, which must be taken to include the true demand of the party, abandons all claim to machinery as the matter of the invention, and relies finally upon what he calls his "automatic process, involving cotton in the fleecy lint or lap, so that my yarns shall consist of fibres of cotton in their normal condition, and uninjured by, because not subjected to, the usual machines now operated." If the applicant designed to claim a combination of machinery, he has been singularly infelicitous in the language of his specifications. Neither, as the commissioner in his opinion very justly remarks, has he prepared his case aright, if such were his object. The patent law requires every specification of a claim for machinery to be accompanied by drawings signed by the inventor and attested by two witnesses. It is by some held that the attestation to the specification is sufficient where the specification identifies and embodies by express reference accompanying drawings. See Curt. Pat. § 165. However that may be, there are no drawings in the present case attested in either mode. The loose drawings which have been sent up with the other papers in the case are not such as deserve any consideration on this appeal. But more than this, in the reasons of appeal filed and to the errors assigned therein, must the revision of the decision of the commissioner be confined. The applicant, on page 4, states explicitly that "he does not ask the patent on the machinery; he asks it on his process of manufacturing yarns." And again, on page 7, he says: "I insist that I state, by annexing the spinning machinery to the gin in the ginhouse, and letting the ginning and the spinning manufacture go on continuously in one process, I achieve extraordinary results." It is manifest, therefore, from the whole scope of the case that in the mind of the applicant his invention is a new and useful improvement of the art of manufacturing cotton yarns, and that the important part of his invention is the application of a supposed new principle, and that the machinery or apparatus by which the principle is applied is not of the essence of the invention, but only incidental to it. He therefore defines it to be a process, and not a machine or combination of machinery. A claim to a new process, then, being all that is now made, we must dismiss from the inquiry all consideration either of the novelty or utility of the arrangement of machinery described in the specification; for however novel or useful the arrangement or combination of machinery may be, if it be not the ground of claim of patent, and relied upon as such, no patent will be issued for it, but the party must present that demand in its proper form and as distinct matter of patentable invention, in which event it will be passed upon by the proper authorities.

What, then, is the principle claimed? In one aspect of the case, the applicant seems to insist that he has discovered an automatic function or power of the gin and spreader when in juxtaposition to dispense, through the agency of the draft created by the rotary movement of the gin, with the intermediate process of gathering the ginned cotton and feeding from the one to the other; but the discovery of the propulsive force, and its adaptation to a spreader in juxtaposition with the gin, are not relied upon, nor do they seem to have been considered by the commissioner, nor are they urged directly in the assignment of errors to his judgment. This needs, therefore, no further comment. The only intelligible demand which can be extracted from the case is that which the commissioner has considered to be the real subject-matter of the applicant's claim, to wit, the principle that cotton taken directly from the gin in the fleecy state, and immediately carded and spun while the fibre is yet undisturbed by the processes of baling and the other stages of manufacture now used to restore it after baling to the condition necessary for carding and spinning, makes a better and stronger yarn than when subjected to those operations; and that he has embodied that principle in an application of existing machinery to attain this result. There is certainly no novelty in this principle as an abstract principle or truth of natural science, nor is there any novelty in the application of the principle thus broadly stated to the manufacture of cotton yarns. A well-known principle or truth of natural science, as well as a newly-discovered one, is patentable to the first applicant of it in the useful arts, as in the case of Watts' contrivance for lessening the consumption of fuel and steam in fire-engines, and as in the case of Minters' self-adjusting leverage to the back and seat of a chair; but having once been made known and applied, any subsequent application must, to insure a patent, rest upon the new machinery or combination of machinery, and not upon the principle

the novelty of which has been exhausted. But in the present case it has not been, nor can be, successfully maintained that the abstract principle is new, neither is the primary application of it with this claimant, but is due to the invention of the Columbian spinner, Bryant's patented improvement, and other instances of its application cited in the opinion of the commissioner. And although it may be conceded that the application in those instances was not so perfectly made as it might have been, or as it would be made by using the forms of machinery suggested in this claimant's specifications, yet that does not give him any right to demand a patent for the principle. There is no novelty in his invention. And although in the reasons of appeal the claimant insists that the immediate spinning from the gin, and with the power used to gin, is new, and that Bryant's improvement on the Columbian spinner did not produce similar results, he fails to show any distinction in the cases other than his mere suggestion of an undefined difference. This, standing by itself, cannot be sufficient to overthrow the objections of the commissioner. There being no other power in the case as presented to me which can supply the fundamental defects of the claim which I have already noticed, it is unnecessary to extract and classify the supposed objections which the claimant may have included in his reasons of appeal; nor is it necessary to advert to that portion of the opinion of the commissioner in which he argues the economical question, which in another aspect it might be incumbent upon me to analyze. I cannot escape the conclusion that the judgment of the commissioner in the premises was correct, and his decision refusing a patent will be affirmed.

Case No. 6,372.

The HENRY.

[Blatchf. & H. 465.] [1]

District Court, S. D. New York. Dec. 31, 1834.[2]

SALE OF STRANDED VESSEL—AUTHORITY OF MASTER—SURVEY—EVIDENCE OF NECESSITY—FREIGHT—REPAIRS BY PURCHASER.

1. A sale of a vessel by a master, virtute officii, for the benefit of all concerned, is not conclusive, but may be reviewed in admiralty, and the burden of proof will be on the purchaser to show, as against the former owner, that the sale was both bona fide and necessary. The meaning of the term "necessary," examined.

[Cited in Fitz v. The Amelie, Case No. 4,838; The Raleigh, 37 Fed. 126.]

2. It seems that, in respect to the validity of such a sale by the master, the rule is the same, whether the question arises between the owner and the purchaser, or between the insured and the underwriter.

3. A survey of the vessel, under oath, prior to the sale, if not indispensable, is highly important as evidence to show the necessity and good faith of the sale.

4. A paper purporting to be a survey, but not drawn up, subscribed or sworn to prior to the sale, will not be received as evidence of a survey.

5. The facility with which a stranded vessel was reclaimed by the purchaser, after the sale of her by her master, is evidence in regard to the good faith of the master and the necessity of the sale.

6. A special agent must act in the name of his principal, and according to the terms of the authority conferred upon him.

7. The mere presence of an agent of the owner of the vessel, at the sale of her by her master, does not constitute the sale any the less a sale by the master.

8. Evidence of the receipt, by a special agent of the owner of a vessel, or the proceeds of an unauthorized sale of the vessel by her master, does not afford a presumption that the sale was ratified by the owner.

9. Where, in the case of an unauthorized sale of a vessel by her master, in a foreign port, restitution of the vessel, or the amount of her value on her arrival home, is decreed to her former owner, the purchaser at such sale will be allowed the amount of the necessary repairs put upon the vessel to fit her for sea, and the expenses of navigating her home, and the price paid for her, on such sale, to the agent of the owner.

10. The right to the freight earned upon the homeward voyage follows the ownership of the vessel.

11. The bills of lading are only prima facie evidence of the amount of cargo upon which freight is to be estimated.

[See Backus v. The Marengo, Case No. 712.]

12. Repairs and betterments put upon the vessel in her home port by the purchaser, before notice of the former owner's claim, will be allowed to the purchaser out of the proceeds of the vessel, if any remain after the other accounts are adjusted.

This was a possessory action. The libellants were owners of the brig Henry, and, in April, 1832, despatched her to Matamoros, in Mexico, with Daniel Moss as master, and Jason St. John as supercargo and agent, giving a power of attorney to St. John "to employ the vessel, or to make sale of her, in the name, place and stead of the libellants, in case a fair price could be obtained." Moss was unable, from sickness, to return with the vessel, and one Titterton was substituted as master in his place. In getting out of the harbor of Matamoros the vessel ran ashore and was stranded upon a sand-bank. There was a great deal of evidence on both sides as to the degree of danger to which she was exposed, similar cases of vessels grounding in that vicinity were adduced, and it was proved that Titterton himself had before been wrecked on that coast. The master abandoned the vessel the same day she ran aground, and ordered her to be sold in three days. A paper was put in evidence in the case, signed by three ship-masters at Rio Grande, and verified before the United States consul at Matamoros, in these words: "At

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

[2] [Reversed by circuit court; case unreported.]

the instance of William Titterton, master, we went on board the hermaphrodite brig Henry, of New-York, to examine the said vessel, and, having carefully and particularly inspected, examined and surveyed the said brig, report her to be stranded and bilged, with a great quantity of water, and unfit to be got off, and, therefore, we recommend the said brig to be sold for the benefit of the concerned." This paper was dated the 5th of July, and sworn to on the 7th, which was the day of the sale; and there was evidence that it was not subscribed or sworn to until after the sale. The brig was sold at auction. The master superintended the sale. St. John was present, and made no objection to it. One Irwin bought the vessel for $80, and sold her again, for the same sum, to the vendor of the claimants. The purchase-money for the brig was received by St. John, but it did not appear whether he had ever paid it over to the libellants. Eleven days after the sale, the vessel was got off, and was discovered to be not materially damaged. Such repairs as were necessary for her preservation were put upon her at Matamoros, and she arrived at New-York in October, 1832, with the same cargo which she had on board when she ran aground. She was sold to the claimants at New-York, and was by them put upon the railway to be repaired. The libel was filed in January, 1833, and prayed that the vessel, or her value, and the freight earned, might be decreed to the libellants. The claimants excepted to the jurisdiction of the court, and prayed restitution of the vessel and freight. She was afterwards bonded by the claimants, on an agreed valuation of $3,500. It was contended by the libellants that the sale was invalid, and that no title passed by it. The claimants urged, that the master had, under the circumstances, competent authority to sell the vessel, and that the sale was valid; that, as St. John, the agent of the libellants to sell the vessel, had concurred with the master in the sale, it had the same effect as if he himself had made the sale; and that the receipt of the purchase-money by the agent of the libellants amounted to a ratification of the sale. The authorities and the arguments are fully considered in the opinion of the court.

John Duer and William Kent, for libellants.

George Griffin, James W. Gerard, and Benjamin Haight, for claimants.

BETTS, District Judge. The libellants in this case produce a complete documentary title in themselves to the brig Henry, which entitles them to prevail, unless the claimants can show a paramount title out of them, or derive one through them. The title of the claimants rests upon a sale of the vessel, by the master, in the port of Matamoros, and it devolves on them to establish the validity of the sale, and the sufficiency of their title under it. The master of a vessel has complete authority in every thing relating to the management and conduct of his vessel; but it is apparent that no general authority from his owners to sell her can be implied. When, therefore, a master first assumed the power to sell his ship, virtute officii, under any exigency whatever, the English courts denied his authority, and refused to recognise the validity of the title thus acquired. Tremenhere v. Tressillian, 1 Sid. 452; Johnson v. Shippen, 2 Ld. Raym. 982. And these views received the approbation of the court at a much later period (Reid v. Darby, 10 East, 143; Hunter v. Prinsep, Id. 378) although some nisi prius cases before Lord Ellenborough seem to import a yielding of the general principle (Hayman v. Molton, 5 Esp. 65; Underwood v. Robertson, 4 Camp. 138). The rule has now been relaxed, or has assumed a new form, so that it is admitted in England that the master may, by the maritime law, sell his vessel in case of wreck or irreparable disaster. The Fanny and Elmira, Edw. Adm. 117; Maeburn v. Leckie, cited in Abb. Shipp. (Ed. 1829) p. 6; Cannan v. Meaburn, 1 Bing. 243; Idle v. Royal Exchange Assur. Co., 8 Taunt. 755; Read v. Bonham, 3 Brod. & B. 147; Freeman v. East India Co., 5 Barn. & Ald. 617. And the law of England conforms, in this respect, to that of other maritime countries. Pardessus, Cours de Droit Comm. pt. 4, tit. 1, c. 3, § 2; 1 Emerig. Ins. tit. "Innavigability"; Valin, Comm. sur l'Ordonnance, liv. 2, tit. 1, art. 19; Id. liv. 3, tit. 6, art. 46; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604; 3 Kent, Comm. 173, note. But the qualifications attached to the power manifest the caution and distrust with which its admission was ultimately yielded by the courts. The cases demand the existence of an extraordinary and paramount necessity to justify a sale, and refuse to uphold it unless it is resorted to only in the last extremity. The American and English cases coincide in one rule, as applicable to this subject. The master's agency to sell, arising by operation of law and being exercised by him virtute officii, both necessity and good faith must concur, to render the sale by him valid. Abb. Shipp. (Ed. 1829) 10, 244, note; Reid v. Darby, 10 East, 143; Hayman v. Molton, 5 Esp. 65; Underwood v. Robertson, 4 Camp. 138; The Fanny and Elmira, Edw. Adm. 117; 3 Kent, Comm. 173, note; The Tilton [Case No. 14,054]; Hall v. Franklin Ins. Co., 9 Pick. 466; American Ins. Co. v. Center, 4 Wend. 45; Center v. American Ins. Co., 7 Cow. 564, 582; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604, 621. Neither necessity nor good faith is alone sufficient to make valid a sale by the master which is offered as a bar to the title of the previous owner. Both must concur, and must be affirmatively shown by the party setting up the sale; and the courts will not infer the existence of either of these requisites from the most ample proof of the other. Chancellor Kent expresses the rule deducible from the authorities to be, that if the voyage be broken up in the course of it

by ungovernable circumstances, the master may sell the ship, provided he do so in good faith, for the good of all concerned, and in a case of supreme necessity which sweeps all ordinary rules before it (3 Kent, Comm. 173); and the spirit of this statement of the master's authority is supported by the supreme court of the United States (Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 621).

This term "necessity," which at the same time creates the power and marks its limitation, is not itself of any very distinct or definite signification. The epithets annexed to it as qualifications, in most of the cases, indicate the anxiety of the courts to restrain the power within severe limits, but do not assist in removing the vagueness and uncertainty of the term itself. What test is the court to employ in determining when, in point of law, this necessity becomes absolute, paramount or extreme? Practically, these epithets serve only to administer an impressive caution to courts and jurors, to demand clear proof that the necessity is actual and not merely apprehended or one which, upon a balancing of chances, may turn out to be absolute and real, or only threatening and imaginary. The tribunal which passes upon the facts must determine, upon its own best judgment, in view of all the evidence, whether the necessity was actual and justified the sale, because the principles applicable to the subject do not, from their nature, admit of any more precise standard. The qualifying phrases which the books annex to the rule can only avail as appeals to the sound discretion of the court or of jurors, in a given case, and not as of themselves presenting any distinct particular to be ascertained, or as affording any definite or practical limitation to the power. Wherever an actual necessity exists, the power is conferred, equally when that necessity presents itself in its simplest form, and when it is most imminent. Some cases seem to incline towards taking a distinction between sales which are to be deemed operative between insurer and insured, and those which are to conclude the owner as against the purchaser. The Tilton [Case No. 14,054]; Center v. American Ins. Co., 7 Cow. 577, 582; Idle v. Royal Exchange Assur. Co., 8 Taunt. 755; Holt, Shipp. (2d Ed.) 250. It is not necessary to the decision of this case, that I should pass upon the solidity of this distinction; but I am persuaded that principle and authority are opposed to any further relaxation of the rule, and that the same necessity and good faith which are required when the question arises between the owner and the master or purchaser, must exist to give validity to the sale as between the underwriter and the insured. So far as the case of Center v. American Ins. Co., 7 Cow. 582, 4 Wend. 45, indicates a different principle, it may be considered as controlled by the decision in Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 621.

The law has not settled what precise mode or degree of evidence is sufficient to prove the existence of the necessity which is thus made the first requisite to the validity of all sales of a vessel by her master. The judgment and determination of the master himself, no matter how careful his consideration of the circumstances of the case may have been, is manifestly not conclusive upon the subject. His decision is subject to review in the home tribunals, and he or the party who claims under his acts must sustain that decision. Nor is the opinion of bystanders, however intelligent, disinterested and unanimous they may be, adequate proof of the accuracy of the decision. The law adheres to the ordinary rules of evidence in this matter; and requires proof of the facts and circumstances themselves in view of which the master decided, in order to a determination whether his decision was correct. The wise precaution of the maritime law has, however, pointed to one item of proof, which, if not necessary, will, nevertheless, be demanded, unless its absence be satisfactorily accounted for; and that is, a precedent examination of the vessel by competent surveyors, and their report, stating her condition, and advising a sale. Gordon v. Massachusets Ins. Co., 2 Pick. 249; The Tilton [supra]; Cort v. Delaware Ins. Co. [Case No. 3,257]; Fontaine v. Phoenix Ins. Co., 11 Johns. 293; Idle v. Royal Ins. Co., 8 Taunt. 755. Such a survey answers the salutary purpose of checking precipitation on the part of the master under circumstances well calculated to disturb his judgment, and gives him authentic evidence to guide him in determining whether the condition of his vessel be desperate or not. He is by no means bound to adopt the opinion of the surveyors advising a sale, nor, if he does follow it, will it, of itself, justify his proceeding to a sale. Hayman v. Molton, 5 Esp. 65; Abb. Shipp. (Ed. 1829) 8–11. Still, a survey by competent surveyors, containing a clear statement of the injury, and a strong recommendation to sell, will be an important element in the proofs, in determining the character of the emergency and especially the good faith of the master. The Fanny and Elmira, Edw. Adm. 117; The Tilton [supra]; Gordon v. Massachusetts Ins. Co., 2 Pick. 264. Independently of all authority on the point, the use the survey is to subserve plainly indicates, that it should be deliberately made and should precede the action of the master. It is not intended to be laid down as a fixed rule, that the surveyors must be sworn before they proceed to act. Still, it will add greater weight and credibility to their decision, if all their examinations and consultations are under the solemnity of an oath. At all events, when their report is submitted to the master and he proceeds to act upon its testimony, it should have the sanction of the oaths of the surveyors, if they can be legally administered at the place of the survey.

In view of these principles, the survey offered in evidence in this case is substantially defective in every particular necessary to constitute it a safe or proper guide to the decision of the master. It would have been easy for him to have called together persons competent and properly qualified to make a survey, and to have had their proceedings duly authenticated. But the evidence shows, that the paper offered here as a survey was not subscribed or sworn to until after the master had concluded to sell, and probably not until after the sale had actually taken place. Moreover, it appears upon the evidence, that the persons who signed the paper were not called to the vessel to act as surveyors; nor did they make any joint examination of her, nor did they ever consult together with a view to a report, nor did they all individually inspect her in a way to enable them to form a sound opinion as to her condition. If, then, in circumstances like the present, where there is no impediment in the way of a competent survey of the vessel, either from the want of surveyors or from the imminency of the peril, a master cannot legally proceed to sell his vessel without instituting such a survey, it follows that Titterton exceeded the bounds of his authority, and the claimants, who make title under this sale, must fail in consequence. But even if a master may, on his own judgment of the exigency of the case, sell a vessel, without regard to a survey, it cannot be denied that this power is not absolute, but is subject to review, when those whose interests have been affected by his acts sue before the proper tribunal to reclaim their rights. It will then devolve upon the party who upholds the proceedings of the master, to prove the circumstances necessary to confer the power, and the faithful execution of the power so created. Without recapitulating the evidence in this case, it is enough to say, that the master did not attempt those exertions to save the vessel which he was bound to make. He gave her up as hopeless as soon as she stranded, before the injuries sustained could have been understood, and without making reasonable efforts to ascertain them. He presumed she had bilged, but had no adequate reasons for that conclusion. The average experience in respect to vessels grounding in that vicinity may have been, that they could not be got off, and this the master may have been aware of, from having been familiar with the coast, and from having been once previously wrecked there himself. But he cannot be excused because the circumstances were discouraging, for not having made earnest efforts to save his vessel. Besides, two cases could hardly occur of vessels grounding under precisely similar circumstances. The wind, the currents and tides, the force of striking, the weight of the vessels and other circumstances, would always present distinctions which would prevent one case from offering a rule of conduct applicable in all respects to another.

The evidence does not mark this as a case of extreme necessity. The vessel was very strong, and lay upon a sandy bottom, so soft that the chief danger apprehended seemed to be, that she would gradually become imbedded in the sand. The state of the wind was not such as to expose her to instant peril; and there were several American merchant vessels in the vicinity, and an American armed ship anchored a few miles off. She struck, moreover, at the edge of the harbor, from which she had just cleared. Her lading was got off in a few hours, and then, without an endeavor to procure relief or assistance from the shore or from neighboring vessels, the master gave her up as desperate, and ordered her sale in three days. Eleven days after the sale, the purchaser, with the application of ordinary means, raised the vessel, and she was then found not to have received any fatal injury. It is true, that this result is not to be considered conclusive as to the propriety of the conduct of the master. Idle v. Royal Exchange Assur. Co., 8 Taunt. 755; Fontaine v. Phoenix Ins. Co., 11 Johns. 295. A sale is not to be invalidated merely because the vessel is afterwards rescued. The case is to be judged of by the circumstances as they must have appeared at the time, and not by the subsequent event. Still, the result is an element in the evidence, to assist in determining whether the condition of the vessel ought reasonably, at the time, to have been deemed hopeless, and may, in this manner, become a circumstance of weight in deciding whether the master acted in good faith to his employers. So far, then, as the validity of the sale under which the claimants make title rests upon the authority of the master to sell, I must, under the facts in proof, hold that they have failed to show that junction of necessity and good faith, by which alone such authority can be established.

It is next contended by the claimants, that since the supercargo, with a power of attorney from the owners to sell the vessel, was present and assented to the sale in question, his acts in relation to the sale constitute it, in point of law, a sale under the power, and that, accordingly, the claimants derive a complete title in that manner, without regard to the authority or acts of the master. If the supercargo had sold, he would have done so under no authority arising by operation of law. The master sold virtute officii, in his own name, as clothed with the possession of the article, and with the power to sell pro hac vice, and not by the direct act or assent of the owner, but by authorization of law. The supercargo, however, would have acted as a mere agent for his prin-

cipal and in his principal's name. Passing by the question, whether a vessel can be sold by an agent, so as to pass a title good against her former owner, without the ordinary evidence of a bill of sale for and in the name of the principal, or, whether a sale and delivery of a vessel, without a bill of sale, are good only between the owner and the purchaser personally,—3 Kent, Comm. 130, note; Abb. Shipp. (Ed. 1829) 1; The Tilton [Case No. 14,054]; Ohl v. Eagle Ins. Co. [Id. 10,473]; The Sisters, 5 C. Rob. Adm. 155; Holt, Shipp. 183; Jac. Sea Laws, 17, 57,—I am satisfied, upon the proofs, that the master himself assumed the power to sell, and proceeded to carry it into execution, without referring to any authority of the agent of the owners. It is not claimed that the sale was made directly by the agent, but only that the master and auctioneer sold with his implied sanction, he being present and acquiescing in the act. Upon this question, the case of Idle v. Royal Exchange Assur. Co., 8 Taunt. 755, is in point. In that case, one of the owners of a ship was present at its sale by the master, and assented to the sale. Dallas, C. J., says, it was no less a sale by the master because one of the owners was present on the spot and concurred in it. Moreover, the power of attorney, in the present case, gave authority to sell "in case a fair price could be obtained," evidently with a view solely to the exercise of the power in a market or under circumstances where the price might be the subject of negotiation and election. The supercargo was manifestly a special agent, with a limited trust, and could dispose of the property only while acting strictly within the limits of the authority conferred. His presence, therefore, at the sale by the master, or even his assent or advice to that sale, does not constitute it a sale by him under his power of attorney from the owners. The claimants contend, however, that as the proceeds of the sale were paid to the supercargo, the court will intend that he paid them over to the libellants, and that the receipt of the money by the libellants implies a ratification of the sale on their part. A ratification by a principal of an act of an agent, after that act is performed, is, in its legal effect, the same as a precedent authorization to the agent; and the ratification may be either in the form of an express assent, or be implied by law from the absence of any dissent. The rule is, that where the act is done by one party, in the name of and affecting another, without his direct authority, there, if the latter does not, within a reasonable time after notice of the act, dissent therefrom, his assent and ratification will be presumed. 2 Kent, Comm. 616, and cases cited; Richmond Manuf'g Co. v. Starks [Case No. 11,802]. To constitute a ratification, however, it is obviously necessary that the act supposed to be ratified by the principal should itself be the act of the agent. It has been already seen, that a master who assumes to sell a ship, does so virtute officii, by authorization of law, and not as agent of the owner; or that, if, in this instance, the master assumed to act as agent of the owners, the circumstances, as they appear in evidence, did not confer upon him authority to sell, and that the sale was actually made by him without the participation of the supercargo. Admitting, therefore, that the libellants received the money from the supercargo, the claimants should, in order to establish a ratification of the sale, and bind the owners to its confirmation, have shown that the supercargo had directed the sale, or had at least received the purchase money as the vendor of the ship, knowing all the circumstances of her sale, and intending to confirm that disposition of her, in so far as he was capable of doing it, and that the libellants also knew of the facts, and received the money with similar intentions, expressed or implied. Those facts being established, ground would be laid for the inquiry, whether a disposal of property by an agent, without following the directions of his principal, and the receipt of the consideration money by the principal, without objection, do not conclude the principal from denying the validity of the act of the agent. Paley, Prin. & Ag. 145, 249. As the evidence stands, however, there seems to have been no affirmative act on the part of the agent, promoting or confirming the sale. He is to be regarded as having been a mere involuntary depositary of the money for the benefit of the lawful owner, rather than as having acquired it in the character of vendor of the vessel. The sale, therefore, which the principals are supposed to have ratified, cannot be deemed the act of the agent.

A further and controlling objection to applying the principle of subsequent ratification to this case is, that no proof is given that the libellants ever actually received the consideration money. This must be brought directly home to them, and no inference, controlling their interests, can be deduced from the circumstance of the payment to St. John of the price of the sale. It may yet remain in the hands of St. John, or, if passed over to the libellants, it may have been received by them under circumstances which leave their rights unimpaired by its receipt. The court will not intend, from the fact that it went into St. John's hands, that the libellants received it without reservation or qualification, or, indeed, that they received it at all. The prior title of the libellants must, therefore, prevail in this action, and they are entitled, upon the strength of it, to a restoration of the vessel or to her proceeds. The point then arises, whether they can recover her in the condition in which she was found when arrested in this action, or whether she is equitably chargeable with disbursements made in raising and repairing her abroad, and with

the expenses she has incurred in the hands of the claimants since her arrival in this port.

The title of the claimants in the present case is invalid, upon legal objections. There is, in my judgment, no evidence establishing any fraudulent or improper participation, on the part of the purchaser, in procuring the sale or in buying at it. It is true, that he who takes an illegal title takes it at his peril; but, it has been held in the English court of admiralty, that where such title is not notoriously bad, the purchaser need not, in favor of the legal owner, be deprived of all remuneration for actual betterments put upon the property purchased. The Perseverance, 2 C. Rob. Adm. 239. The decree of restitution, in this case, proceeds upon the ground that the right of the original owner has not been divested, and not on the imputation of any improper act of the purchaser. However fair his conduct may have been, and notwithstanding he may have bought in entire ignorance of any defect in the proceedings or want of authority for the sale, the legal title remains in the libellants, and, upon that, restoration is awarded. There is, however, a manifest equity in requiring the owners to reimburse the expenses which were necessary to enable them to recover or enjoy their property. The purchaser was under no obligation to reclaim their vessel. He might have abandoned it, without incurring any responsibility to them; and, in that case, their property would have been an utter loss. Their master and supercargo assumed no further interest in the matter, but relinquished the vessel to the purchaser, as upon a valid sale. The libellants are, therefore, bound to remunerate those who rescued the wreck, for all indispensable expenditures bestowed upon the vessel in getting her off, and in so repairing her as to make her seaworthy. The English admiralty has relieved the purchaser in regard to betterments put by him on the vessel, under circumstances of less urgent equity. The Perseverance, 2 C. Rob. Adm. 239; The Kierlighett, 3 C. Rob. Adm. 96; The Nostra de Conceicas, 5 C. Rob. Adm. 294. The relief should be confined, however, to repairs to the hull of the vessel, and to the purchase of such tackle and apparel as did not before belong to her and were indispensable to her safe navigation. All the old equipments remained the property of the libellants, and, although the purchaser of the vessel may have purchased them of others who had bought them at the sale, his right so acquired must yield to the elder and paramount title of the owners.

The next consideration is the one respecting the repairs made in this port. These cannot be considered as indispensable to the preservation of the vessel, and were, it would seem, of a much more expensive character than was necessary for her safe and profitable employment. If they were put on by the claimants after notice of the libellants' claim of property, and without their assent, they would, in strictness of law, be at the hazard of the claimants. The testimony is singularly deficient on this point. If the libellants, knowing of the arrival of the vessel at this port, and of her refitment, kept back their claim until the expenditures were completed, they committed a fraud on the claimants, and this court would compel the satisfaction of all disbursements chargeable to the claimants for such repairs. In the absence of evidence on either side, the inference on this point must be, that the vessel lay in port without the knowledge of the libellants, and that the claimants made the repairs in good faith, and under the persuasion that they were the legal owners. As any allowance in the case is made upon considerations of equity, the court is bound not to suffer the equities of the innocent purchaser to merge and annihilate the equities of the real owner. The possessor of the vessel, by whatever good faith he was actuated, ought not to be allowed to burden the owner with bills for repairs which were in no way necessary to enable him to acquire the possession and use of his vessel, and to an amount which would absorb and extinguish his actual interest in her. The claimants allege that the vessel was worth, on her arrival here, but $700, and that they expended $2,260 65 in her refitment, and they also offer proof that she sold, after being so repaired, for $2,500. To charge all these disbursements upon the vessel, would extinguish nearly the entire interest of the real owners. On the other hand, if the repairs augmented the available value of the vessel, the owners ought not to reap that advantage at the expense of the innocent purchasers.

The rule which the court adopts is, to allow the libellants the full value of the vessel on her arrival in this port, deducting, as before stated, the amount of expenditure reasonably necessary to raise her, repair her bottom and fit her for sea, and deducting also the amount of disbursements, at their fair value at the port of refitment, for the tackle and apparel she had on board when she was seized by the libellants, which did not belong to her when she stranded; and to allow to the claimants all that it may be proved their repairs increased her value between what she was worth when she arrived and her fair value at the time she was restored to them on their bond, subject to such determination as to costs as may be made on the final disposal of the whole case. As the vessel was bonded by the claimants after her arrest in this cause, and was delivered up to them on an agreed valuation of $3,500, the amount to be recovered by the libellants cannot exceed that sum, whatever may have been the value of the vessel on her arrival. The prayer of the libel also asks, that the earnings of the vessel on her return voyage may be decreed to the libellants. It is not stated in any of the pleadings, nor is it shown by the proofs, what freight was

earned, and the court would not be able to make any specific decree on that subject. Nor has the point been discussed by the counsel on either side. The general right to freight, as a consequence from the decree adjudging the ownership to be in the libellants, would probably not be controverted; and the case, as it has been presented to me, does not require me to decide whether freight can be recovered in this form of action, as an incident to the main subject matter of the decree. I shall, therefore, make no order in reference to the freight, though I would, on the application of the libellants, have referred it to the clerk to ascertain the amount of the freight, leaving the general question of the remedy open to be discussed on the coming in of the report.[3]

Afterwards, on the application of the libellants to have the decree of reference enlarged, so as to embrace the freight earned by the brig on her homeward passage, an order was made referring it to the clerk to ascertain, also, the amount of freight earned or justly chargeable upon the homeward voyage, and the amount of charges and expenditures incurred in the navigation, lading and unlading of the vessel. Upon the coming in of the clerk's report, exceptions were taken because the cargo upon which freight was estimated was less than that specified in the bill of lading. The amount of the items as reported by the clerk, and the evidence upon which they rested, (being a copy of the claimants' account with the master, upon the settlement of the voyage from Matamoros to New-York,) were also objected to.

BETTS, District Judge. A bill of lading is never considered conclusive as to the quantity of the cargo shipped, and is, at most, but prima facie evidence to charge the master or owner. 2 Phil. Ins. 490. The consignee or owner here would be bound to pay freight only for the goods delivered; and, as the accounting ordered demands no more than the freight earned, the amount chargeable on delivery of the goods is all for which the claimants are bound to account. The original account upon which the settlement of the voyage was made with the master has not been produced; and there is a technical objection to the evidence by which the charges are supported. But, inasmuch as the objection, if allowed to prevail, would go to exclude all the proofs offered by both parties, and, as the merits of the case are fully brought out, I prefer, rather than expose the parties to the expense of a new reference merely to verify a document necessary to both, to proceed to consider the case as if the copy were properly received in place of the original account. As to the $80 received by St. John at Matamoros, for the price of the vessel on her sale, it is not directly proved that it was paid over by him to the libellants. If he retains the money, he has it as a stakeholder for the libellants. But, as he was examined by the libellants in court in relation to the proceedings at Matamoros, and this charge stood on the account against them, and there was proof of the payment of the money to him as their agent or supercargo, I think it belonged to them, and not to the claimants, to examine him upon the subject. The presumption is strong, that in accounting to them for the voyage, he also accounted with them for that money, as all he had to show for the vessel. I shall, therefore, allow that amount.

Various items in the clerk's report were re-adjusted, and the final decree, as entered, allowed to the libellants—

For the value of the vessel at the time of her arrival in New-York		$2,000 00
And for the freight earned		429 76
		$2,429 76
Allowing first to the claimants the charges of the navigation of the vessel to New-York	$227 00	
Expenses of repairs, &c., at Matamoros	733 50	
Purchase money paid at Matamoros	80 00	1,040 50
		$1,389 26

It was thereupon decreed, that the libellants recover $1,389 26 and costs, and that the residue of the proceeds, if any, be paid to the claimants, in part payment of $1,500 allowed to them as the fair and reasonable value of the repairs and betterments put upon the vessel before her arrest by the libellants.

NOTE. This case was taken to the circuit court by appeal, and additional proofs were given in that court. The decree of this court was reversed, upon the ground that the claimants proved, by new evidence, a regular survey of the vessel before her sale, and her desperate condition when the master ordered her sale. [Case unreported.]

[3] The main provisions of the decree were as follows: "That it be referred to the clerk to compute and ascertain, upon the proofs in court, and such further evidence as either party may produce before him, the amount of such expenditures made at the port of Matamoros, in raising, repairing and refitting the said vessel after her abandonment by her former master, Titterton, and the fair reasonable value of the labor, repairs and refitments bestowed upon the vessel, at the time the same were made and supplied, and that the clerk distinguish in his report, in so far as may be practicable on the proofs, the new materials and equipments, if any were furnished, from those belonging to the vessel, at the time she stranded, and the value thereof respectively; and that the clerk also compute and ascertain, upon competent proofs, the fair value of the said brig Henry, on her arrival at this port, and before repairs were put upon her by the claimants in October last past, and also the fair value of the said vessel after the repairs and refitments put upon her by the claimants, and at the time of her attachment in this suit, and also the value of any of the tackle, apparel and furniture or materials of the vessel, disposed of or retained by the claimants in making the repairs aforesaid, if any such were disposed of or retained, and that the clerk report upon the premises with all convenient speed."

Case No. 6,373.

The HENRY.

[1 Hask. 100.] [1]

District Court, D. Maine. Dec., 1867.

FORFEITURE OF VESSELS—RESIDENCE OF OWNER —ENROLLMENT.

An enrolled vessel, sailing under a fishing license, is not liable to forfeiture because a part-owner, a citizen of the United States, resides in a foreign country, even though he is not a United States consul, or agent for and partner in a firm composed of citizens of the United States, here carrying on trade.

In admiralty. Libel in rem by the United States claiming a forfeiture of the schooner Henry, because she was owned in part by a citizen of the United States resident in a foreign country. The owners made claim to the vessel, and demurred to the libel as insufficient in law.

George F. Talbot, Dist. Atty., for the United States.

Albert W. Bradbury and Bion Bradbury, for claimants.

FOX, District Judge. This is a proceeding against this schooner for an alleged violation of the navigation laws. The count in the libel is for fraudulently and knowingly using a certain certificate of record, to wit; an enrolment to which she was not entitled, inasmuch as the "schooner was then and there owned as to one fourth part by one Geo. E. Myrick, a citizen of the United States, who then usually resided in a foreign country." This is the only count, and it is founded on, and is in the words of the act of December 31, 1792 [1 Stat. 287], relating to registry of ships and vessels. Jabez Myrick and George E. Myrick appeared as claimants, and for the purpose of presenting the question, a demurrer is filed by them, and the case submitted on the demurrer and the further agreement of the parties, "that the schooner was formerly the property of one of the claimants, he then being a citizen resident in this state; that she was by him duly enrolled and licensed for fishing, and that subsequently this owner being resident in New Brunswick, conveyed a share of the vessel to the other claimant, a resident citizen of Maine, and that the vessel was enrolled in this manner in Frenchman's Bay collection district, and a new fishing license taken out, under which document she was sailing at the time of her seizure.

Under these circumstances was the vessel liable to forfeiture? An examination of the act of December 31, 1792, entitled "An act concerning the registering and recording of ships and vessels," demonstrates that it was designed to be confined entirely to those two classes of vessels. It provides for the registry of ships and vessels owned by citizens, and for record of the same when owned by the subjects of foreign powers. The first nineteen sections are confined to registered vessels entirely, whilst from the 19th to the 25th, it relates wholly to the record of title of ships owned by foreigners. In the one case, a certificate is issued to the citizen, which in terms recites that the ship or vessel is registered. In the other, a certificate is issued to the alien similar to the former, with the exception that it recites the record of the title. One is spoken of throughout the act as "a certificate of registry," and the other as "a certificate of record."

By the second section of this act, vessels entitled to registry must be wholly owned by a citizen or citizens of the United States; and it is further provided that "no such ship or vessel shall be entitled to be registered, or if registered to the benefits thereof, if owned in whole or in part by any citizen of the United States, who usually resides in a foreign country, during the continuance of such residence, excepting he be a consul of the United States, or an agent for and a partner in some house of trade or partnership consisting of citizens of the United States actually carrying on trade within the said States." It is not claimed that the non-resident owner in the present case was within the exception.

By the 27th section, the vessel is forfeited if any certificate of registry or record shall be fraudulently or knowingly used for her, she not then being actually entitled to the benefit thereof.

Under these provisions of the act of 1792, I do not see that any forfeiture has been incurred in the present case; and for the reason, that there is nothing in the act itself which extends any of its provisions to enrolled vessels. It was designed to apply to registered and recorded vessels, and to those two classes only; and the phrase "certificate of record" must be confined to the class and description of vessels contemplated by the act, and expressly included within it by this precise description. An enrolled vessel was of an entirely different description; and although an enrolment is a record, and the certificate of a vessel's enrolment is a certificate of record, yet, it was not the kind of certificate then contemplated in this section of this act. This will be made quite apparent on reference to the act of 1789 [1 Stat. 55], which provided for the three classes of vessels, viz: registered, owned by our own citizens; recorded, when owned by foreigners; and enrolled, when employed in the coasting trade or fisheries, and owned by citizens of the United States. By the 35th section of this act (chapter 12), it was enacted, "that if any certificate of registry, record, or enrolment, shall be fraudulently used for any ship or vessel not entitled to the same by this act, such ship or vessel shall be forfeited." This provision is the same as that now under consideration from the act of

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

1792, excepting that it was found necessary to specify an enrolment specifically, in order to include it within the provision. The fact that it is omitted in the act of 1792, which is confined to ships registered and recorded, is certainly conclusive that it was not intended by any of the provisions of the act, to subject enrolled vessels to forfeiture for a violation of them as prohibited in the 27th section.

The provisions of the 2d section of the act of 1792, requiring owners not only to be citizens, but residents, in order to allow these ships and vessels the benefit of registry, were taken literally from the act of 1789. The same clause is then found in the 5th section, and is confined to the case of registered vessels, although the act subsequently provides for vessels being recorded, and also for their being enrolled, showing most clearly, that it was not the design of the act of 1789, to extend these provisions to but a single class, the registered ships.

The provisions of the act of 1789, which applied to the three different classes of ships and vessels, registered, recorded, and enrolled, were in 1792 and 1793 divided, and are to be found in two acts, one passed December 31, 1792 [1 Stat. 287], and the other February 18, 1793 [1 Stat. 305]. The first is confined to registered and recorded vessels, being chapter 1 of the session, and the other being chapter 8 of the same session, as its title imports, being "an act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries and for regulating the same." The forfeiture of an enrolled vessel, I apprehend therefore, if any, must be found in this last act, either directly, or by an adoption of the forfeiture created and provided for in some other act. An examination of the act will show that it deals forth with a liberal hand its own penalties and forfeitures for violation of its provisions, without any occasion to grasp at others from any other act. In fact, in some instances, the same offense is punished differently by the two acts; for instance, both acts require the name of the vessel and the home port to be painted on the stern; by act of 1792, a penalty of fifty dollars is imposed if a registered or recorded vessel is found violating this provision, whilst by act of 1793, if a licensed vessel is thus found, the penalty is only twenty dollars.

An examination of the various provisions of the act of 1793 will satisfy any one, that the framers of the act were not sparing of forfeiture, but were ready and willing to inflict this extreme penalty in all cases deemed advisable.

By the 5th section, the vessel and cargo are forfeited if she is found with a forged or altered license, or making use of a license granted for any other ship or vessel.

By the 6th section, any ship or vessel other than registered, if over twenty tons, found trading between district or districts, &c., or fishing, without being enrolled and licensed, and if between five and twenty tons, without a license and having on board any articles of foreign growth or manufacture, or distilled spirits other than sea stores, shall with her lading be forfeited.

By the 8th section, if any enrolled vessel proceeds on a foreign voyage without first giving up her enrolment and being duly registered, such vessel with goods imported in her shall be liable to seizure and forfeiture.

Under the 17th section, an enrolled vessel is liable to forfeiture if goods and merchandise of foreign growth and manufacture, or distilled spirits, are found on board, or landed from her without a manifest or a certificate from the collector of the port from whence she sailed, if the same are of the value of $800.

By the 21st section, if any ship or vessel licensed for the fisheries shall be found within three leagues of the coast with goods, wares and merchandise of foreign growth or manufacture, on board, exceeding the value of $500, without a permit on board from the collector of the district where she was previous to her departure for her to touch and trade at a foreign port or place, such ship or vessel with such goods is made liable to seizure and forfeiture.

By the 32d section, it is enacted, "that if any licensed ship or vessel shall be transferred in whole or in part to any person who is not at the time of such transfer a citizen of, and a resident within the United States, or if any such ship or vessel should be employed in any other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel * * * and the cargo found on board her shall be forfeited."

These are all the provisions found in the act which in terms inflict a forfeiture of the vessel, and it is very clear that the facts of the present case do not bring the Henry within any one of them. The one most applicable is that found in section 32, prohibiting the sale of a licensed vessel, or any part thereof, to any person who is not a resident citizen. It is claimed that this must clearly manifest the design and purpose of congress, that resident citizens alone should enjoy the privileges granted to licensed ships and vessels, as they have prohibited the sale of such vessels to any one not a resident within the United States. Such may have been the purpose of congress; but to effectuate that, they have only prohibited the sale, and have nowhere declared in regard to enrolled vessels, as they have by the act of 1792 in respect to registered vessels, "that no such ship or vessel shall be entitled to be so registered, or if registered to the benefits thereof, if owned in whole or in part by any citizen of the United States, who usually resides in a foreign country during the continuance of such residence."

It is claimed by the government, that a proper construction of the 2d section of the act of 1793 will subject this vessel to forfeiture, as it either expressly or impliedly adopts the registry act, and subjects an enrolled vessel to its penalties and forfeitures. If such had been the intention of congress, it would have hardly been thought necessary to have in terms introduced into the act the various grounds of forfeiture just mentioned, and especially subjecting an enrolled vessel to forfeiture when sold to a non-resident citizen. No such consequences result from such sale of a registered vessel, provided the transfer is made however, in the manner prescribed in the 7th section of the registry act.

The true rule of construction in such cases is laid down in Hubbard v. Johnstone, 3 Taunt. 220. It was there decided that the ship registry acts of Great Britain, so far as they apply to defeat titles and create forfeitures, are to be construed strictly as penal, not liberally as remedial laws. Heath, J., said, "I think the same rule ought to obtain here, as in the construction of clauses inflicting pains and penalties in the revenue laws, if they be ambiguous and obscurely worded, the interpretation is ever in favor of the subject."

A careful examination of the 2d section of the act of 1793 will demonstrate, that it was not the intention of congress to adopt the penalties found in the registry act. This section of the enrolment and licensing act provides, "that from and after the last day of May" then "next, in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with as are made necessary for registering ships or vessels by the" registry act, "and the same duties and authorities are hereby given and imposed on all officers respectively in relation to such enrolment, and the same proceedings shall be had in similar cases touching such enrolments, and the ships or vessels so enrolled, with the master or owner, or owners thereof, shall be subject to the same requisites as are in those respects provided for vessels registered, by virtue of the aforesaid act." Vessels so enrolled are by the first section deemed to be vessels of the United States, entitled to the privileges of ships and vessels, employed in the coasting trade or fisheries. The same qualifications and requisites for enrolment as for registry are requisite, but it nowhere declares that if the ship or vessel is destitute of them, she or her owners shall be subject to the same penalties as registered ships and vessels. The vessel not being legally enrolled is not entitled to the privileges of a coasting or fishing vessel, and the same act apportions its punishments according to the nature and degree of the violation of its provisions. It enacts its own prohibitions, and avoids and prescribes its own punishment for these infractions.

Mr. Justice Story in the case of The Two Friends [Case No. 14,289], a libel against a licensed vessel claiming her forfeiture for a false oath of the owner as to his citizenship, says, "It is true, that the act for registering vessels, sec. 4, declares that a false oath by the owner, in any matter of fact required to be sworn in that section previous to the grant of a registry, shall work a forfeiture of the vessel. And the act for enrolling and licensing vessels in the coasting trade and fisheries, in section 2, c. 8, Act 1793, provides that in order to obtain an enrolment, vessels shall possess the same qualifications, and the same requisites in all respects shall be complied with as are made necessary to the registry of vessels, and the same duties and authorities are given and imposed on officers, and the same proceedings are to be had in similar cases touching such enrolment, and the ships and vessels so enrolled, with the masters and owners thereof, are to be subject to the same requisites as are prescribed for the registry of vessels. But it is nowhere declared that a violation of these provisions shall be followed with like penalties and forfeitures. * * Now, it is certainly not the duty of the court to seek out new modes of punishment when the legislature has prescribed them in its own direct terms. Nor can it be proper to pronounce that to be a qualification, requisite, duty or proceeding, within the act, which is a forfeiture for a wilful violation of the same act."

Judge Ware, in U. S. v. Bartlett [Case No. 14,532], says, "That while the license act requires the same qualifications of the vessel, and makes the same requisites necessary for the enrolment as for the registry of a vessel, it nowhere denounces the same penalties and forfeitures."

Upon a careful examination of the acts in question, I can find no provision subjecting the vessel in this case to forfeiture for the alleged cause that she was employed under an enrolment and license, whilst one of her owners was a citizen of the United States usually resident in a foreign country, and not within the class excepted in the provisions of the 2d section of the registry act, although she might have been subject to forfeiture under like circumstances if she had been a registered ship or vessel. Libel dismissed. Certificate of probable cause to issue.

HENRY BUCK, The (LARRA v.). See Case No. 8,094.

Case No. 6,374.

The HENRY C. BROOKS.

[Blatchf. Pr. Cas. 99.] [1]

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

PRIZE—CONDEMNATION—CARGO—COSTS.

1. Vessel having been used by the enemy without the knowledge of her owners, and recaptured from the enemy, restored, by consent, with costs to the libellants.

2. Cargo condemned as enemy property, employed in aiding the insurrection on foot at the place of its capture, and as shipped with intent to run the blockade.

3. The subject of the rate of costs in prize cases deferred, to await the action of congress.

In admiralty.

BETTS, District Judge. This cause being regularly ordered on the calendar and called, and not being answered to by any claimant, the district attorney moved for judgment, and submitted the pleadings and proofs to the court. The vessel and cargo were arrested and taken as prize by the United States vessel-of-war Harriet Lane, on the 29th of August, 1861, within the outlet of the port of Washington, in North Carolina, and near Hatteras Inlet. She was sent to this port, and an information was filed against her by the United States and captors on the 16th of September thereafter, under process upon which she and her cargo were brought before the court. The libel charges that the vessel and cargo were owned, when arrested, by citizens or residents of that portion of the United States which is in insurrection against the laws and government of the United States, and that the vessel was then lying in a blockaded port, with the design to violate the blockade, and carry the cargo on a foreign voyage. A general answer and claim, in behalf of the Columbian Marine Insurance Company of the city of New York, and of several individuals, owners of the vessel, were put in the 15th of October thereafter, alleging ownership in themselves of the brig. No test oath was filed by the claimants, and no appearance was made in court to support the claim and answer on the hearing, but the parties libellants, with those who had intervened and answered, carried on subsequent proceedings essentially by mutual consents and stipulations in writing filed in court. Under these stipulations orders of various kinds were taken and entered in the suit, admitting and consenting that the vessel was "the property of loyal owners, citizens of the United States, and had been and was recaptured from the unlawful possession of the enemy, by whom she was illegally employed without the knowledge, privity, or consent of the owners thereof, and is, therefore, to be proceeded against in all respects as though the naval captors herein had filed a separate libel against the vessel for the military salvage of said vessel allowed by law"; and also admitted "that an order had been duly entered for the appraisement of the said vessel, in compliance with the consent of said parties, and that the report of such appraisement had been duly filed; that it was thereupon ordered by the court, on such consent and stipulation of the parties, that the vessel be restored to the aforesaid claimants thereof, upon their payment to the libellants, or to their proctors therein, of one-eighth part of such appraised value of the vessel, her tackle, &c., together with the costs of the proctors for the libellants, and such portion of the costs of the clerk and marshal as are exclusively applicable to the vessel, as the same may be assessed or entered by consent." By virtue of such arrangement and stipulations between the parties interested therein, all matters respecting the vessel and her equipments were disposed of by the parties concerned, without other than the passive action of the court thereon. No claim was interposed to the cargo or any part thereof. It consisted of cotton and naval stores, and was apparently in transit from the port of Washington, in North Carolina, for some foreign port, when the vessel was seized, after being deserted by the crew, and after all papers and evidences of the destination of the property or its ownership had been withdrawn or destroyed. The evidence found the cargo to be enemy property, the products of the country from which the attempt was making to transport it, which had been intercepted in Pamlico Sound, in or near Hatteras Inlet, by capture by the land and naval forces of the United States of the forts and places there, together with the vessel and her cargo aforesaid, there so found deserted. The vessel and cargo, according to the proof, were manifestly endeavoring to get out from an enemy port, then under blockade. Upon the evidence thus before the court, and in default of all appearance and defence to the suit, the libellants are entitled to a decree of condemnation and forfeiture on the libel against the cargo aforesaid.

No doubt, an essential object aimed at, among the questions brought into view in the papers presented in this and other prize suits, is to obtain a rule or order from the court fixing the rate or amount of fees or compensation to be allowed the officers concerned in conducting prize or seizure cases, or the principle upon which the same are to be computed or ascertained. The question has been repeatedly pressed upon the attention of the court since the commencement of this order of business during the present war. The difficulty manifested itself in the late war with Mexico, but to so small a degree as not to lead, at that time, to any definitive action on the subject by congress or the courts; and the opening of the existing hostilities threw the question upon the courts without any certain or satisfactory guide to the determination they are asked to make

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

This has produced delay in the final disposition of the point, in order to obtain from the concurrent action of the United States courts, or an appropriate legislative declaration, a uniform regulation, which shall meet and govern the entire subject. I am given to understand that a law is now under consideration before congress, which will probably obviate all existing difficulties in this respect. The court will, accordingly, still longer defer acting separately by itself on the matter of fees and costs in prize suits, trusting that the subject will be authoritatively settled by legislation within a brief period.

Judgment for condemnation and forfeiture of the cargo captured in this case is, therefore, ordered, in the usual form, both because the same was used and employed in aiding and promoting the insurrection on foot in the place of its capture, and because it was shipped and on transportation with the intent and endeavor to run the blockade of that port. The question of the rate and amount of costs is deferred until the further application of the libellants and the order of the court in respect to costs and expenses.

HENRY C. HOMEYER, The (UNITED STATES v.). See Case No. 15,353.

Case No. 6,375.

The HENRY CLAY.

[N. Y. Times, Sept. 9, 1852.]

District Court, S. D. New York. 1852.

MANSLAUGHTER—ACT 1838, § 12 — STEAMBOATS — NEGLIGENCE OF OFFICERS—PROPER PRECAUTIONS.

[Under Act Cong. 1838, § 12 (5 Stat. 306), providing that misconduct, negligence, or inattention by the officers, etc., of a steamboat, resulting in loss of life, shall be punished as manslaughter, such officers, etc., are liable for any act or omission in not properly regulating the fires or amount of steam, or any neglect of duty likely to create danger, or in not taking proper precaution, where loss of life is caused thereby.]

In admiralty.

[The following charge to the grand jury in relation to the law of the United States for the punishment of offenders who might cause the loss of life by negligence or inattention to their duties on board of steamboats, was delivered by]

BETTS, District Judge. Your services are required on this occasion in the aid of the criminal jurisprudence of the laws of the United States. It will devolve upon you to inquire into the criminal acts of individuals who are charged with offences against the laws of the United States, which although cognizable by you are triable in this court, or the circuit court of the United States. The docket shows a large number of cases, but the larger number possesses but little interest. The first charge however, relates to the destruction of the steamboat Henry Clay, and I find that several persons, officers, owners and others, connected with that boat, are charged under the act of congress of 1838, which provides as follows:

"Sec. 12. And be it further enacted, that any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person on board of such vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement, at hard labor, for a period of not more than ten years."

I shall not enter into any labored exposition of this law. It is not the practice of the United States courts to prepare elaborate charges for the edification of grand jurors. We would rather reserve our remarks until the whole case has been brought before us by counsel, as it then will become our duty to make a proper exposition of the law, and to say how far, by the conduct of parties, they had rendered themselves amenable to its provisions. I shall, therefore, limit my remarks to what I conceive to be a proper exposition of the law, and it will remain for you to ascertain if these parties have been brought within it. You are doubtless aware, generally, that the utmost endeavors have been made within these few years to gain an extraordinary velocity in the speed of steamboats. On one hand, there has been the spirit of rivalry and the spirit of gain to stimulate the owners and officers to attain the highest speed of velocity known to be attainable. Under these circumstances—as is natural—the utmost extent of speed has been required by owners and the public. The first essay in steam navigation was very slow,—probably not more than four or five miles an hour was attained. Next, we find they had reached ten or twelve miles; and in 1823, it was thought the acme of steam navigation to carry a boat from here to Albany between sun and sun, or within the same day. Now the steamboats on the same river have attained a velocity of twenty or twenty-five miles an hour. At first this rivalry for speed was only between boats running on the same river with equal advantages, but latterly a railroad with steam-cars has been laid alongside the river, and the contest has been between the boats on the river and the train on the railroad, until the former have been propelled through the water with almost the same velocity as the latter on the railroad. The same velocity of steam appears to produce different effects when brought to bear in different ways, producing danger in one case, yet harmless in another. Thus one object appears to have been to employ the least possible weight of

machinery consistent with safety in the construction of the boat, and light boilers, which require extreme care on the part of the engineer and others engaged in navigating the boat. Now there is always a hazard to some extent in navigating vessels with steam, as in the force of steam employed in the diminution of water, and in the force of heat in the boiler. Then there is the hazard which arises from the hurry of the traveller, and from the desire of the captain to force up the amount of steam so as to make his boat excel others on the river.

The congress of the United States has enacted a law which requires these boats to be navigated on certain rules, and there is a state law which requires them not to go beyond a certain amount of speed, and not to pass each other; and requires them to blow off steam at landings, and imposes a heavy penalty for violations of the law. The act of congress for such negligence and inattention to duty as should occasion the loss of life, imposes the penalty—if proved guilty—of manslaughter, and punishes the offence with ten years hard labor in the state prison. The law is exceedingly stringent; for you perceive it goes beyond the motives of the parties. Their motives may indeed be praiseworthy. Yet if they have gone beyond the line of their duty and have been negligent or inattentive, then they are as amenable as if they intended to endanger human life, or do the act which resulted so deplorably. You will therefore go beyond the mere design, for it is not to be presumed that any one entertained any harm to any passenger on board that vessel. It must be presumed that the owners and officers would have the strongest desire to carry that boat with prudence and safety; but if you should find they have omitted to do what they ought to have done, or have done what they ought not to have done, they come within the terms of this act. If such is the case, they have been guilty of negligence, and it will be your duty to bring in a bill against them for a violation of the law. There can be no doubt but these gentlemen have already suffered greatly, not only in a pecuniary, but in a personal point of view. That you must disregard, and not permit your personal feelings to be excited, for the law does not look for victims, although you are to look for facts; and if the facts show that any persons have done what they ought not to have done, by making too large fires or raising too much steam, then it becomes your duty to find a bill against them. You are not to take hearsay evidence in relation to this matter, and you must have the evidence of witnesses to show what was done on board that boat to occasion the loss of life. As citizens we may be inclined to hear or know what is said of it, but when we come to proof we must take care to make a distinction between what has been said in a general point of view, and what can be proved in evidence. You will inquire if any officer of the boat has been guilty of "misconduct" on board. The court will not lay down any specific definition of that term, as that will more properly come before the judges of the court when they are called upon in relation to the interpretation of the facts for a final and judicial settlement of the case. In relation to the term "misconduct," the court would say it was any act which would result in the loss of life on the part of the captain and the engineer, in not properly regulating the fires or the amount of steam, or in any other act which might come within the term "misconduct," as employed by congress; in any neglect of duty like to create danger,—for congress has imposed upon these officers the necessity of doing everything necessary to be done, as well as to avoid all negligence. You may find they have been guilty of negligence in not taking proper precautions, just as much as if they purposely exposed the lives of the passengers to the dangers of fire and explosion. If you find the officers of the boat did not do all they ought to have done, it was negligence; nay congress has gone further, and call inattention to duty an act of negligence; in this respect it would be negligence on the part of the captain, not to see that the fires were so regulated that the draft was not excessive, and the risk of fire increased; and you must inquire if the loss by fire on board this boat was occasioned by any act of the captain or the engineer, or by any neglect on their part, or that of any other officer. If you do so find you will bring in a bill, and you will have discharged your duty firmly, however painful it may have been to you individually. If, however, you can satisfy yourselves that any of the conclusions are not reliable, and without imputing wrong to any body, the cause of this disaster was accident, you will not find any bill against these parties. You will be careful not to be induced by public opinion to say that the provisions of this act have been violated on the part of these parties. You will pursue the rule of strict justice to the people, and also to the parties, and not subject the latter to the imputations brought against them unless on good and sufficient evidence. Your inquiries and decision will doubtless tend to appease the public mind, already excited, in relation to this calamity, and if the charges should prove groundless, you will release the owners and officers of the steamboat from the charges of neglect and inattention in the management of their vessel, and not convict them of negligence for merely doing or omitting to do those things which they are not amenable for under the act.

His honor then briefly alluded to the other cases on the calendar, and dismissed the grand jury to their duties. The court then adjourned.

Case No. 6,376.

The HENRY EWBANK.

[1 Sumn. 400.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

UNDERWRITERS—CLAIM FOR SALVAGE — DERELICT —SECOND SALVORS—MARINE INSURANCE—STOPPAGE TO SAVE LIFE — APPORTIONMENT OF SALVAGE—SALVORS AS WITNESSES—APPORTIONMENT OF COSTS.

1. Underwriters cannot make any claim for salvage property in the admiralty, unless there has been an abandonment of the property to them, and it has been accepted by them.[2]

[Cited in The Bee, Case No. 1,219; The Narragansett. Id. 10,020; The Williams, Id. 17,710; The Tolomeo, 7 Fed. 500.]

2. In salvage cases, the proper course is to make all the co-salvors parties to the original libel. And if any are omitted, they need not file a new libel, where the property has been already taken possession of, and is in the custody of the court under process. But they may bring forward their claims by a suitable allegation; and thus make themselves parties to the cause, without the formality of notice or process to the other parties. Where different libels are filed by co-salvors unnecessarily, it is at the peril of paying costs.

[Cited in The Merrimac, Case No. 4,927; The Blackwell v. Sancelito Water & Steam-Tug Co., 10 Wall. (77 U. S.) 12.]

3. In cases of derelict, the habit of courts of admiralty is to allow one moiety as salvage. That proportion is not departed from, unless under extraordinary circumstances.

[Cited in The John Wurts, Case No. 7,434; McGinnis v. The Pontiac, Id. 8,801; The Charles, Id. 4,556; The Sandringham, 10 Fed. 571.]

4. If salvors, in effecting a salvage service, themselves fall into distress, and are relieved by other salvors, they do not lose their original right to salvage; but the second salvors only partake in the salvage according to their merit. Second salvors cannot lawfully make it a condition of giving assistance, that the original salvors shall abandon all claims to salvage.

[Cited in The Mayflower v. The Sabine, 101 U. S. 387.]

5. An appeal by any parties interested in the distribution of salvage, as to their shares, brings up incidentally a review of the whole decree, so far as the distribution is concerned.

6. Stoppage on the high seas, to save the lives of a distressed crew in another ship, is not a deviation from the voyage, which discharges a policy of insurance. But a stoppage merely to save property is a deviation.

[Cited in The Rising Sun, Case No. 11,858; The Charles, Id. 4,556; The Joseph C. Griggs, Id. 6,640; Peterson v. The Chandos, 4 Fed. 653; Markham v. Simpson, 22 Fed. 745.]

7. In the distribution of salvage, the owner of the salvor ship ought under ordinary circumstances to be allowed one third of the salvage. In cases of extraordinary merit, or extraordinary peril to the ship, he may found a claim to higher salvage.

[Cited in The Waterloo, Case No. 17,257; The Charles, Id. 4,556; The Charles Henry, Id. 2,617; The Saragossa, Id. 12,335; The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 473; The Pomona, 37 Fed. 816.]

8. Rule of apportionment between the master, officers, and crew; and between co-salvors.

9. Salvors are ex necessitate admitted as witnesses to all facts, which are deemed peculiarly or exclusively within their knowledge. To other facts they are incompetent witnesses.

10. What constitutes a case of derelict.

11. Apportionment of costs among co-salvors and claimants.

[Cited in The Liverpool Packet, Case No. 8,407.]

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a libel for salvage against the ship Henry Ewbank, the Charleston Fire and Marine Insurance Company and others, claimants.]

Blair & Aylwin for Manners and others.

C. G. Loring and William H. Gardiner, for Wheelwright and others.

Mr. Fletcher and E. Hasket Derby, for Blaise Isserverdens and others, and for George Brewster, and for George Weissell.

Mr. Sewall, for George Turner.

Dunlap & Bulfinch, for the Henry Ewbank and cargo.

STORY, Circuit Justice. This is a libel of salvage in the case of an asserted derelict. The ship Henry Ewbank, Jeremiah N. Jaques, master, owned in Charleston, (S. C.) sailed in February last from that port with a cargo of cotton and rice, bound to London. In the course of the voyage, having met with severe disaster and lost her rudder, she was on the 12th of March, in latitude 42° 5′ and longitude 53° 50′ W. abandoned by the master and crew, who on the same day were taken up by the ship Marmora, of Boston, and afterwards safely arrived at that port. At the time of the abandonment, the ship (as described by Captain Jaques) was completely unmanageable; her cargo (the rice being stored in bulk) was shifting, so as to throw her gunwale into the water in every gale; and she was waterlogged, and in imminent peril of foundering from the nature of her cargo, and her forlorn situation. On Monday, the 1st of April, the British barque Hope, Lister master, bound on a voyage from Liverpool (England) to New York, with a large number of passengers on board, and a cargo consisting of salt, coals, and iron, fell in with the Ewbank in latitude 40°, longitude 54° W. The Hope was at this time, from the length of the passage, and the deficiency of provisions, in a disturbed and suffering state, from which she was greatly relieved by obtaining a supply from the Ewbank. The master of the Hope, with the consent of the owner of the latter, who was then on board, concluded to undertake the enterprise of getting the Ewbank into port; and accordingly his mate, Mr. Metcalf, and a suitable crew, consisting of four seamen and six passengers, were finally selected for the purpose. When the Ewbank was boarded she was found stanch and strong, but

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

[2] For later cases on the subject of salvage, see The Emulous [Case No. 4,480].

without any rudder, and with nine feet of water in her hold. The Hope remained by her from Monday, the 1st, until Friday, the 5th of April; and during that period the crew were employed in making a new rudder and other arrangements preparatory for their separation, which took place on the same day. After parting company, the Ewbank encountered severe weather, and the new rudder, which was a sweep, was found, after a few days' trial, altogether inadequate for the purpose, and was taken on deck. A new rudder was then constructed; but it was found impracticable to attach it in the proper position, from the prevailing heavy seas and violent winds. It was, therefore, fastened astern by a rope, which parted in the night, and thus it was lost. From that period the ship was steered wholly by her sails; continual pumping was required; little effort was made towards constructing a new rudder; and the ship was left in a good measure to drift about at the mercy of the winds and waves. This state of things remained until the 1st of May, when they fell in with the brig Padang, of Boston, Brewster master, bound to New York with a valuable cargo on board. At this time they were in latitude 40° 16' and in longitude 48° 30'; and of course they had within the last twenty-seven days lost several degrees of west longitude. The crew of the Ewbank were in a state of great discouragement and exhaustion, and in want of provisions; and were (as, I think, it cannot well be denied) entirely willing to give up the whole enterprise. After some negotiations with Captain Brewster, who was unwilling to take all the crew on board his own vessel for want of suitable accommodations, it was concluded to make an attempt to fix a new rudder, and to get the Ewbank into port. Accordingly, with the consent of the original salvors, Mr. Wheelwright, (the chief mate of the Padang,) with the assistance of some of the Ewbank's crew, constructed a new rudder, and hung it in a very ingenious and skilful manner; and, a new crew (in number seven) having been formed, consisting partly of four of the original salvors, and partly of three seamen from the Padang, the Ewbank, under the command and direction of Wheelwright and Metcalf, proceeded on the voyage, and safely arrived at Boston on the third day of June last. The Padang remained by the Ewbank until the new rudder was constructed and hung, and other suitable arrangements were made for the voyage, having had her in tow a part of the time. She then proceeded on her own voyage, and arrived safely at New York on the 14th of May last.

Such is a very brief outline of the more general facts, which are given with great particularity and clearness in the opinion of the learned judge of the district court, to which I may thus generally refer for more minute facts. I may, by and by, have occasion to glance at some facts of a controversial nature, upon which there is a great contrariety of declaration by the witnesses.

The cause came before the district court upon proceedings instituted, in the first place, on the 3d of June last by a libel by Mr. Manners, his Britannic majesty's consul, for and in behalf of the owner, master, officers, and crew of the Hope, for salvage. Upon this libel a warrant of arrest issued, upon which the Ewbank and her cargo were taken into custody by the marshal. In this libel no mention whatever is made of any other persons as co-salvors. On the sixth of July, another libel was filed by Wheelwright and others, (including all the crew, who navigated the Ewbank into port, except Metcalf,) stating the general facts, and averring, that there was an entire abandonment of the Ewbank by the original salvors; and a new enterprise undertaken by themselves; and excluding Metcalf from any share in the salvage, on account of his asserted neglect of duty and desertion; and concluding with the declaration, "that the said vessel and cargo were saved by the labors and service of your libellants, without the assistance of any other person or persons whatsoever." In this libel, also, there is a total omission to state any claim in behalf of the owner, master, and other part of the crew of the Padang; and, indeed, upon the structure of the libel there would seem to be a studied disinclination to admit any such claim. Afterwards, on the same day, another libel was filed by Blaise Isserverdens and others, owners of the Padang, in behalf of themselves, and the officers and crew of the Padang, for salvage, repelling the libel and claim of the Hope, and praying, "that no award of salvage be made to the libellants named therein." On the seventh day of June, another libel was filed by George Brewster, denying the claim of the Hope to any salvage, and praying salvage to be awarded to the owners, officers, and crew of the Padang. On the eighth day of June, a libel was filed by George Weissell, the second mate, and others, the seamen of the Padang, denying the claim of the Hope to any salvage, and praying salvage for the benefit of the owners, officers, and crew of the Padang. And lastly, on the second of July, a libel was filed by James Turner, one of the passengers, and an original salvor from the Hope, stating, that he was by artifice induced to go on board of the Padang, and could not return to the Ewbank, and praying salvage. Upon all these libels, except that of Turner, process issued in the common form, which was also served by the marshal. A claim was interposed by the Charleston Fire and Marine Insurance Company, to which the Ewbank had been duly abandoned, and the abandonment accepted, praying for restitution after an allowance for salvage. A claim was afterwards interposed by William S. Skinner, agent for the underwriters at Lloyd's, and

also for the association of underwriters at Liverpool and Glasgow, stating his belief, that they have an interest in the property, of which he would thereafter produce proofs. Upon this claim I need scarcely say, that underwriters, as such, have no right to intervene in this court, unless the property is abandoned to them, and is accepted by them, so that they have an interest in the thing, and not a mere interest in the cause. A claim, so generally framed as that of Mr. Skinner's, and so naked of all apparent interest, can have no other influence upon any court, than as furnishing some ground for delay, until proper inquiries can be made to ascertain the actual absent interests. But this, in salvage cases, would hardly be granted, unless upon circumstances of great stringency and force. I dismiss from my mind, therefore, all future consideration of this claim, which, indeed, in a technical sense, is not before the court.

Upon the final hearing of the cause, the district court decreed a salvage of one moiety of the net proceeds of the Ewbank and cargo (the same having been sold under an interlocutory order of sale), amounting to $31,488.37, and the decree distributed this salvage as follows: Three fifths of the salvage to be given to the owners, officers, and crew of the Padang, namely, one half to the owners, and the remaining one half to be divided into twenty-one shares, of which Capt. Brewster was to receive six, Wheelwright three, Weissell two, Eldridge and Betts, (salvors on board of the Ewbank,) two, and the residue of the crew (four) one share each. The remaining two fifths of the salvage were decreed to the owner, officers, and crew of the Hope; namely, to the owner one half; the other half to be divided into twenty-five shares, of which were decreed to Captain Lister six shares, to Metcalf three shares, to Watkins, Green, James, Marshall, Duggin, Turner, and Leman, (original salvors belonging to the Hope, and, except Turner, remaining during the whole voyage on board of the Ewbank,) two shares, and to the residue of the crew of the Hope (nine) one share each. The court also decreed the libel of Wheelwright and others, of Brewster, and of Weissell, to be dismissed without costs to either party, a compensation to them being decreed under the other libels, and the expenses to be paid out of the gross proceeds. [Case unreported.]

From this decree there were divers appeals interposed. The first was by the owner, officers, and crew of the Hope, to so much of the decree as awarded three fifths of the salvage to the Padang, and limited that of the Hope to two fifths. The next was by Grace, Watkins, Marshall, and Duggin, from the decree, so far as regarded the amount awarded to them; and the appeal asserted, that Metcalf was entitled to nothing, and that Hough ought not to have a double share. Wheelwright also claimed an appeal with Grace, Watkins, Marshall, and Duggin, upon their joint libel, on account of the dismissal thereof. Wheelwright also claimed an appeal on account of the insufficiency of the salvage decreed to himself, as well as for other special causes. And lastly, the owners of the Padang claimed an appeal from the decree, so far as regarded the amount of salvage, and the portion thereby decreed to the Hope, and for other causes. No appeal was interposed by the Charleston Insurance Company, or by any other of the parties. But the actual appeals necessarily bring before the court all the substantial merits of the case, as to the amount of salvage, the persons entitled to salvage, and the proper distribution thereof.

Before I proceed to the principal matters, the state of the pleadings requires me to make a few preliminary remarks, especially as in the present case they involve some questions of costs. There is certainly a very unnecessary multiplication of libels in this case; and it is matter of regret, as well as of surprise, that a different course was not pursued in instituting the original proceedings. It would have been far more for the credit of all the parties concerned in all these libels to have admitted with frankness and distinctness all the claims of all the other salvors. There was, however, a studied desire on the part of all the libellants to bring forward in bold relief their own merits, with a studied suppression, or a very feeble acknowledgment of the claims of other salvors. The libel of the Hope has wholly forgotten the existence of the Padang. That of Wheelwright and others makes no mention of the owners of the Padang; and sets up an exclusive claim to salvage for themselves, as being the only salvors in the new enterprise, without the assistance of any other person whatsoever. The libel of the owners of the Padang repudiates the claim of the Hope, in which respect it is closely followed by the libel of Captain Brewster. So that it is impossible, in the actual posture of the facts, not to perceive, that there has been as little ingenuousness, liberality, and fulness of statement on any side, as could well be presented to the attention of the court. One cannot wink so hard as not to see, that, trusting to the libels alone, as a suitable guide to inform the court of the facts, it would have been impossible for the court not to have been led astray, and to have made shipwreck of the cause. If the demerit in these particulars had rested solely on Wheelwright and his co-libellants, I should have entirely concurred in the judgment of the district court in dismissing the libels, if not in form, at least in fact, by a denial of all costs. But it seems difficult to distinguish his case successfully from that of the libel of the Hope, and even from that of the owners of the Padang, who, while setting up their own claims, have not only denied those of the

Hope, but have also forgotten those of the co-salvors of the Hope, who actually assisted in navigating the Ewbank into port. All the libels, then, have the same common defect, that no one of them states all the facts, and all the claims of all parties; but all intentionally set up a special and exclusive merit and service. Justice then, I think, does not require the court to single out the libel of Wheelwright and others for its peculiar displeasure, or to make the parties to that libel the victims of a dismissal, which shall put upon them the burden of their own costs. I observe, too, that all these libels were served by the marshal, a proceeding by no means necessary, when the property is already in the custody of the court, upon any libel executed in rem; for then all other parties, whether they stand in the character of libellants or of respondents, may assert their respective claims by allegations filed in the court, which, being admitted by the court, are necessarily brought to the notice of all the other parties, who may contest them without the formality of a notice by process. In all cases, where unnecessary libels or claims are filed, it is at the peril of paying costs. In truth, there ought not to have been in the present case more than two libels; one on behalf of the owner, officers, and crew of the Hope, and the other on behalf of the owners, officers, and crew of the Padang, standing, as they do, upon adverse rights. See The Baltimore, 2 Dod. 132, where the owner libelled separately. Upon these libels the amount of the whole salvage might have been properly ascertained, and the relative claims of the Hope and Padang to share in it disposed of. If afterwards there had remained any conflicting interests or rights of the different salvors relative to their shares in the distribution of the salvage, they might properly at that stage of the proceedings have been brought forward by separate allegations, each party intervening pro interesse suo, as to the matters in conflict. In this way much of the complexity of the cause would have been avoided; and the litigation would, in every stage of it, have assumed the distinct character properly belonging to it; and the court would have been enabled to fix upon the proper parties, engaged in these collateral controversies, the just and exclusive responsibility for the costs occasioned thereby. Sitting in the district court, I should not have had the least hesitation in staying proceedings upon all the collateral libels, until the principal question of salvage had been disposed of; and then to have required these libels to be reformed, so as to bring forward only the peculiar claims of the parties respectively. One cannot but perceive, how large a mass of the voluminous testimony in this case is taken up in these collateral controversies, with the merits or demerits of which other parties have nothing to do. What, for example, have the Charleston Fire and Marine Insurance Company to do with the distribution of the salvage, or the relative merits of the different co-salvors? It is not of the slightest importance to them, in what manner that distribution takes place, or who are the parties to it. The only important consideration to them is the amount of the salvage. And there is not the slightest pretext for burdening them either with the delays or the expenses incident to the distribution among the salvors. There is, fortunately, little of the whole mass of evidence, which bears upon this point of salvage; and that little is scarcely a matter of controversy between the parties. If, indeed, it were now practicable to separate the portion of the evidence bearing on the merits of the salvage from that bearing on the merits of the different salvors, I should be much disposed to apportion the costs accordingly. That is not now practicable; but the court will have some regard to it, when it comes to the apportionment of the costs.

Passing by, for the present, any further consideration of these matters, which are preliminary in their nature, I come, then, in the first place, to the question, what amount of salvage ought to be decreed? The district court allowed (as we have seen) one moiety; the insurance company have acquiesced in this allowance; and so have the owners, officers, and crew of the Hope. The amount is contested by the other parties appellant, who ask for an increase of salvage, asserting, that it is not sufficient to compensate them for their labors, or in proportion to the merits of the salvage service. At the argument I intimated a strong disinclination to change the amount of salvage; and upon the most mature reflection I adhere to that opinion. This is a clear case of derelict, for there was an abandonment of the property, animo non revertendi. In such cases the habit of courts of admiralty has been to decree one moiety to the salvors; and by the old law no more than that was ever decreed. That rule, however, has been somewhat relaxed in modern times; but still a moiety continues to be the favored, if not favorite, proportion allowed by courts of admiralty in ordinary cases. See The Fortuna, 4 C. Rob. Adm. 193; L'Esperance, 1 Dod. 46; Rowe v. The Brig [Case No. 12,093]; The Blenden-Hall, 1 Dod. 414, 421; Elliotta, 2 Dod. 75. It is not, however, an inflexible rule; but it yields to extraordinary circumstances, greatly diminishing or enhancing the perils, and gallantry, and personal sacrifices of the salvage service. But the court on all occasions has great reluctance in deviating from a moiety, and expects a very strong case to be made out; in which, upon other principles, there would be a very great disproportion between the services and the compensation; so great, indeed, as in a moral and legal view to constrain the court to deviate from it. And there is great wisdom in thus adhering to the rule; for nothing can be more

inconvenient in the administration of justice, and especially of international justice, ex aequo et bono, than to leave every case open to the mere exercise of an unlimited discretion. Certainty in this case, as in many other cases, is far more important than mere theoretical propriety. In salvage cases it is not ordinarily in the power of a court of admiralty to fix any exact rules, which will suit many classes of cases. But whenever they can be fixed, the tendency of fixed rules to suppress litigation, and to produce uniformity of decision, is so apparent, that a judge must have more than ordinary boldness, or confidence, or presumption, who will venture to cut himself adrift from all rules, and launch upon the broad ocean of discretion, without taking counsel of the wisdom of his predecessors. For myself, I have not the slightest inclination to adventure upon such a course. I have hitherto adhered with an unshrinking confidence to the general rule of a moiety in cases of derelict. It has the support of the authority of the ablest judges for many ages (see The Fortuna, 4 C. Rob. Adm. 193; L'Esperance, 1 Dod., 46; The Blenden-Hall, Id. 414, 421; The Elliotta, 2 Dod. 75); and in an especial manner of that court, whose judgments I am bound to hold in the highest respect. On this subject I have the less need now to speak, as in the case of Rowe v. The Brig [supra], I had occasion to give my opinion at large upon this subject. To that opinion I still attach myself with unabated satisfaction. I am aware, that, by the ordinance of Louis the 14th, one-third is the rule of salvage fixed in all cases of derelict. 2 Valin, Comm. lib. 4, tit. 9, art. 27, p. 635, etc. It is, however, one third clear of all expenses, or one third of the gross value, an amount in many cases not materially different from a moiety of the net proceeds, given by the common rule of the admiralty courts. Even this positive regulation of the French Code would, if adopted generally, be far more convenient than to leave the proportion utterly unsettled; though I deem the rule of a moiety better adapted to the ordinary cases of derelict. Now, unless I were prepared to shake the common rule to its very foundation, there are no circumstances in the present case calling upon the court for the slightest deviation from it. It is an ordinary case of derelict in all its features, without any uncommon perils or difficulties, or any distinguished gallantry. The property saved is large enough to give a reasonable salvage at that rate; it is not so large as to make it an extravagant compensation. And I agree, that the value of the property saved constitutes a material ingredient in decreeing salvage. See The Blenden-Hall, 1 Dod. 414, 421; The Waterloo, 2 Dod. 433, 442. If there were any uncommon perils, sacrifices, or sufferings, they were borne by the original salvors from the Hope, before the Padang was fallen in with. But I am by no means prepared to admit, that there were any not fairly to be expected under like circumstances, or not easily to be borne by men of common skill, constancy, and firmness. If the salvors of the Hope had succeeded in getting the Ewbank into port without assistance, they could hardly have made out a higher claim. That they have accomplished it with the assistance of others does not enhance their own merits, but rather lets in the latter to share in the appropriate salvage. Indeed, no demand of a higher salvage is now made in behalf of the Hope, though some of her crew, connecting themselves with Wheelwright's libel, do assert such a claim. It is not by glowing sketches of common services, or by strong and vivid coloring impressed upon common incidents, that salvage is to be inflamed to an undue amount. Salvage, it is true, is not a question of compensation pro operâ et labore. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium, by way of honorary reward, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life. Treated as a mere question of compensation for labor and services, measured by any common standard on land or at sea, the salvage of one moiety is far too high. But treated, as it should be, as a mixed question of public policy and private right, equally important to all commercial nations, and equally encouraged by all, a moiety is no more than may justly be awarded. In this respect I entirely approve of the decree of the district court.

The next question is, who are entitled to be deemed salvors? The owners, officers, and crew of the Padang contend, that they, and those, who actually navigated the Ewbank into port, are exclusively to be deemed the salvors; and that the owners, officers, and crew of the Hope, as such, are not entitled to share in the salvage. For this purpose they assume two grounds of argument; first, that the Hope rendered no effectual service to the Ewbank; and, secondly, that there was a total abandonment of the original enterprise by her crew, and an entirely new enterprise undertaken by a new crew on meeting with the Padang. It appears to me, that neither ground is maintainable, either in law or in fact. That the Hope was the first and original salvor does not, upon the evidence, admit of the slightest doubt. She found the Ewbank in a state of derelict, and put a salvage crew on board; thus taking possession, and entitling them and herself to be deemed the exclusive salvors, unless the possession should be afterwards totally abandoned, and the enterprise surrendered.

No other persons, without their consent, could intrude themselves upon that possession, or gain a title to be deemed co-salvors; and whoever, during that possession, should come in, with their consent, must be deemed to come in under that title, and not in exclusion of it. The crew of the Hope navigated the Ewbank for thirty days, exposing themselves to every peril, encountering every hardship, and struggling against adverse circumstances with all the skill, and ability, and vigor, which they possessed. During this whole period, then, they actually preserved the Ewbank; and, from the very nature of the case, there is not only no evidence, that she could have been preserved without their superintendence during this period, but there is the highest probability, that she would otherwise have foundered. We are not to indulge mere possible conjectures on such subjects. The fact, that she was thus saved, is clear; the presumption, that she might have been otherwise saved during this long period, is mere matter of conjecture, in nubibus. It is not the habit of any courts of justice to yield themselves up in matters of right to mere conjectures and possibilities; and least of all do courts of admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of court upon the suggestion, that if they had not touched a derelict ship and cargo, the latter might in some possible way have been saved from all calamity, and therefore that the salvors have little or no merit. Such a suggestion has not, in this case, been put forth by those, who alone would seem to be entitled to propound it; I mean the owners of the Ewbank and cargo. And least of all can it be maintained in behalf of the Padang; for, whatever may be the demerits or deficiencies of the salvage service rendered by the crew of the Hope, they were the direct means, by which the Padang has been enabled to earn any salvage. If the crew of the Hope had had more skill, and more energy, and more success in their perilous adventure, there would have been no need of calling for the assistance of the Padang. And, in every possible view of the case, the boldest imagination would not venture to declare, that if the Ewbank had not been taken possession of and navigated by the crew of the Hope, she would ever have fallen in with the Padang. The fact is, that the former brought her into contact with the Padang, and were the immediate instruments of enabling the latter to continue a possession, thus far safely maintained. It would be (I confess) a new doctrine to me, that, if salvors themselves fall into a state of distress, they can obtain effectual relief only by a surrender of all their own title to salvage; that, if they were to navigate a salvage ship across the Atlantic or Pacific, and they should afterwards be incapable of proceeding farther without some substantial assistance, that assistance can be purchased only at the peril of a loss of all their antecedent services. That doctrine is not, I am aware, contended for in the present case; but I do not well see, how the reasoning can stop short of it, if followed out to its natural consequences. It is said, that the Ewbank had made no advances in her intended voyage while in possession of the crew of the Hope, and, indeed, that she had actually lost six or seven degrees of longitude, and was thus receding from her intended port. But this is no answer to the claim of salvage. If the salvors had accomplished the enterprise by getting safely into any other port, their title to salvage would have been equally indisputable; and so long as they held to their possession, or, if we may so say, so long as they clung to the wreck, it was not for others, whatever might be the want of skill or want of success of their efforts, to insist, that they were entitled to supersede the first claimants. They might refuse to lend assistance, however reprehensible such conduct might be; but they could not make it a condition of such assistance, that the original salvage service should be abandoned, or be treated as extinguished. Even if there had been an express contract to such an effect, it would have been deemed by any court in Christendom a fraudulent advantage taken of the necessities of the first salvors, and utterly void, upon the eternal principles of justice, humanity, and good faith. It would be like bargaining with a man for the purchase of his estate, while he is on a plank to save himself from shipwreck. In every view of the case, there is no possible ground, upon which the original merit of the salvage service of the Hope can be taken away or contested by those, who are merely called in to aid in, and insure, its ultimate acomplishment. The question in such cases is not, whether the original salvors shall share, but in what proportions they shall share.

Then let us turn to the other point. Has there in the present case been any absolute, voluntary abandonment of the Ewbank and cargo by the crew of the Hope? I agree, that, if there has been, then the Hope cannot now entitle herself to share in the salvage. The doctrine stated at the bar, is perfectly correct, that salvage must be earned, not by attempting merely to rescue, but by the actual rescue of the property from its perils. The property must be effectually saved. It must be brought into some port of safety; and it must be there in a state capable of being restored to the owner, before the service can be deemed completed. All the service done before that time is merely in fieri. Whatever of personal gallantry, or of laborious exertion, or of severe sacrifices, may have been already borne, it comes to nothing, unless the property is actually saved by the asserted salvors. But if saved, it is wholly immaterial, whether the salvage is by the original salvors alone, or by them with the aid of others; for the

original salvors in such cases are treated as the principals; and the whole salvage service takes effect as their act, according to the maxim, "Qui facit per alium, facit per se." Was there, then, in the present case a voluntary abandonment of the Ewbank and cargo by the crew of the Hope? In point of fact there never was. There might have been intention, design, and wishes. The discouragements brought upon the crew by past events and past ill success may have rendered all of them entirely ready and willing to be rid of the burden of all future possession, and thus to bury all their hopes of profit, as well as fears of disaster. But I cannot say, that I clearly see that such intention, design, or wishes did exist to the extent, to which the argument has been pressed. On the contrary, I am not satisfied, that there ever was a single moment when, if effectual aid and assistance should be promised, and given by the Padang, and a new rudder could be hung, the mate and crew of the Hope, or at least a great part of them, were not willing to continue the original enterprise. The whole negotiation seems to me to have been exactly what, under existing circumstances, would naturally occur; a negotiation to obtain effectual aid and assistance to navigate the Ewbank into port; and if that could not be obtained, an intent to abandon the Ewbank ex necessitate. And here let me add, that if Captain Brewster had refused to afford such aid and assistance, unless the crew of the Hope should abandon the salvage ship, and had made this the sure mode of operating upon their hopes and fears, until they had yielded her up, I should not have had the slightest doubt, that it would have been the duty of this court to have declared such an abandonment, so procured, to be utterly void, as unconscionable and inhuman. And I should have felt myself called upon to visit Captain Brewster with the punishment due to such misconduct, by a forfeiture of his own share in the salvage. But here no such negotiation is pretended, or proved. Whatever may have been the intermediate designs or wishes of the parties, there never was any actual abandonment de facto and de jure by the crew of the Hope. They never wholly abandoned the Ewbank, animo non revertendi. The exclusive possession was never surrendered in fact, or in law, by any final acts, to the Padang; and all the intermediate proceedings are to be deemed but preliminary negotiations or propositions. "Finis coronat opus." The case must take its true complexion and character from the final event. The navigation of the Ewbank into Boston was accomplished without any open visible dispossession of the original command of the crew of the Hope. The mate, Metcalf, remained on board with a part of the original crew; and an exchange was made of others for a more efficient number of the Padang's crew. Under such circumstances it is impossible, in contemplation of law, or of the true posture of the facts, to treat the case, as a case of an entire abandonment of the original enterprise, and the commencement of an entirely new one. It was nothing more than taking a new point of departure in furtherance of the old enterprise. Nor was it, in point of law, competent for Metcalf and his crew to abandon the old enterprise in behalf of the Hope, and to engage in a new enterprise of salvage exclusively for themselves. And it was equally incompetent for the officers and crew of the Padang to enter into such an engagement with a knowledge of the facts. It would have been a meditated fraud upon the rights of the other parties. A salvage crew cannot, by any shuffling or management, deprive the owners of their right to share in the salvage. They must take or lose in common with the latter. The original character adheres to them through every change; and, having assumed the character of agents, they cannot make use of their agency powers to become exclusive principals. The trust travels with them on the voyage; and is severed only by that common necessity, which overwhelms and buries the entire enterprise. But here, in point of fact, no such abandonment, legal or illegal, intentional or formal, is made out. And nothing but the strongest evidence could establish it; evidence beyond the reach of all suspicion from interest, from management, from imposition, and from private and irresponsible conduct. I follow the admitted facts; and they speak a language as unequivocal, as could be desired. The case of The Jonge Bastiaan, 5 C. Rob. Adm. 322, before Lord Stowell (a name always to be mentioned with reverence) was a much stronger case to justify the defence of an abandonment. There, a ship had struck on a rock near Harwich, had lost her rudder, and beat in her bottom; had been deserted by her crew, and was warped off by a smack with great danger and peril. Afterwards the ship sunk from the damage received; but was weighed up and brought into Harwich by six other smacks by great exertions, continued through five weeks, the original salvors not assisting at all. The objection was taken, that their conduct amounted to an abandonment of all claim to salvage. Lord Stowell, in answer to the objection, said: "She sunk afterwards, it is true; but it is not on that account to be said, that the first salvors had lost her again, or that they had abandoned their interest in her. They did not stay by the vessel; but it cannot be supposed, that, having risked so much for her recovery, they meant to desert her, whilst others were employed in their sight in weighing her up, and in saving the cargo. If they took no part in those exertions, it could only be, because they perceived, that the persons employed in the service would perform it as well without them. They had been the immediate instruments of saving her from her original danger,

and of bringing her to the place, where these other parties were enabled to complete her recovery." Language more exact or expressive could not well be found; and it applies with tenfold more force to the circumstances of the present case, than to those of the case before him.

Much stress has been laid on the ascertainment of the point, whether Wheelwright or Metcalf was in the command after the Ewbank parted from the Padang, on the voyage to Boston. I do not attach any considerable importance to this fact, let it be decided whichever way it may be. Metcalf, being originally placed in the command by the master and owner of the Hope, must, in contemplation of law, be deemed to be the commander de jure during the whole voyage. No person had any legal right to displace him, while he remained on board. And if he consented to act under another person, it must be deemed to be a mere voluntary obedience, binding on him personally, but not necessarily on the owners of the Hope. The evidence in the case, however, leaves the point quite equivocal. And I rather incline to the belief, that in fact both Wheelwright and Metcalf exercised command on board in the character of equals, without either of them yielding any acknowledged superiority to the other. But this, in my view, is quite immaterial; for no one can doubt, that Wheelwright was the real dux facti, the strong, prevailing, skilful mind, that led throughout the voyage. Metcalf appears from the evidence to have been a man not of very high character, occasionally at least given to intemperance, and somewhat deficient in energy and skill. On the other hand, it is but a moderate tribute to Wheelwright to say, that every line of the testimony proves him to be an accomplished seaman, of uncommon skill, and energy, and spirit. I have no private doubt, that he conducted in fact, whatever he might in form, the great operations of the voyage. It was the common case of the dominion of the strong over the weak or inefficient. The grounds, then, upon which an attempt is made to exclude the Hope from any share in the salvage, wholly fail, treated as matter of law, or as matter of fact. And the remaining question on this head is, in what proportion the Hope is entitled to share in the salvage. The district court gave two fifths to the Hope, and three fifths to the Padang. Both parties are dissatisfied with this allowance. It is insisted, on behalf of the Hope, that she is entitled to one half, bringing the whole into what is called, in the homely language of the common law, "hotchpot," and what is called, in the more refined language of Rome, with more classical propriety, "collation." Lord Stowell, in the case already cited of The Jonge Bastiaan, 5 C. Rob. Adm. 322, brought the whole property into hotchpot, and gave an equal share to each of the salvor-smacks. It appears to me, that his judgment in that particular case was perfectly correct and unexceptionable. But he did not affect to lay down a rule to govern all cases. Cases may easily be suggested, in which, from the inequality of the labors, and perils, and nature and extent of the services of the co-salvors, equality would not be equity; though I think, that, as a general rule for ordinary cases, the rule of equality has much to commend it by its simplicity and convenience of application. It has a strong tendency to diminish the causes of litigation, and to suppress that spirit among the parties, so notably and pertinaciously displayed in the evidence in the present case; I mean, the desire to found a claim of exclusive merit upon the studied disparagement of all other persons. If the district judge had followed the rule in the present instance, I should have felt great repugnance in altering it. But I confess myself better satisfied with the actual proportions selected by him. The apportionment is more exactly in regard to relative merit, and relative perils, and relative risk of property, than a division into moieties would have been. On the side of the Hope, it may be truly said, that there was more of peril, and hardship, and suffering, with little skill and energy, and an entire want of success. On the part of the Padang, there was great skill, energy, and success, prompt assistance, and ready co-operation, but little peril or suffering. The relative services of the vessels, the Padang and the Hope, are very nearly in the proportions of the salvage.

It has been argued, that there was positive misconduct on the part of the salvors of the Hope, by withdrawing some part of the equipments and sails of the Ewbank, and by doing great injury to some of her cabin-work and decorations. We must not always scan things of this sort with nice and curious eyes. Much must be allowed to the nature of the marine service, and much to the infirmities of human nature, resulting from ignorance, and carelessness, and the spirit, not of wanton, but of unsparing abuse. This objection does not properly lie in the mouth of the co-salvors, but in that only of the owners of the property. It may justly diminish the aggregate amount of the whole salvage; but it can furnish no peculiar ground of merit in those, who become co-salvors in the actual state of things, and take it for better or for worse. Now, it is not a little remarkable, that the owners of the saved property take no such objection. They are content with the actual state of things, imputing no blame, and seeking no redress. The case is wholly distinguishable from that of wanton plunderage and gross mischief, which might go to the forfeiture of the claim of salvage, or at least of a part thereof. But, even in such a case, it would only go to diminish the common stock of salvage in favor of the injured owner, and not transfer it to the co-salvors. Nor do I think the distressed state of the Hope at the time, when she fell

in with the Ewbank, can make any substantial difference in her merit; at least, not in respect to her co-salvors. She might have supplied her necessities, and been excused, and perhaps justified in so doing, from the abundance of the floating derelict ship; and then have left the latter to her fate. She did not stop there; but having supplied herself, undertook the not less grateful, though perilous task, of saving the residue for others. It would not, I imagine, much lessen the merit of saving a drowning man, that the salvor was an interested creditor.

Upon the whole, without entering more at large into this part of the case, I am well satisfied with the decision of the district court in apportioning the salvage between the Hope and the Padang, according to the proportions of two fifths, and three fifths. But this apportionment only applies to the proportions, in which the owners, officers, and crews of the respective vessels, which were ultimately engaged in the salvage service, should share, relatively to each other; and cannot be permitted to affect the rights of the actual salvors belonging to either vessel. The claims of the latter not only admit, but absolutely require an independent consideration.

We are next led to the consideration of the question, what proportion of the salvage ought to be decreed to the owners of the Hope and Padang, as contradistinguished from the officers and crews of those vessels? The district court decreed a moiety; and the appeals actually interposed, though not professedly dealing with the distribution of the Hope's share, do (as I think) necessarily bring the whole subject before this court for review and reconsideration. And here it seems important, if practicable, to search for some general rule; and, if none can be found, to establish one for ordinary cases, as the point must constantly present itself in almost every case of salvage. There have been no peculiar services, no uncommon sacrifices, and no extraordinary perils encountered by the salvor ships, while engaged in the salvage service in this case, and no very large amount of property was put at risk. Neither of the salvor ships broke up or discontinued her voyage; neither of them has suffered any loss or injury in tackle, apparel, keel, or cargo; neither of them was exposed thereby to extraordinary difficulties, or has had any hair-breadth escapes from imminent dangers. The owners of the Padang knew nothing, and said nothing. The owner of the Hope was present; but did no more than yield a ready assent to what was done, having no personal hazard, and assuming no extraordinary responsibility. The case, therefore, stands upon merits common to all cases of this sort, and must be decided upon general principles. The owners, then, have a just claim to share in the salvage in all cases, where their property is put at risk, in effecting the salvage service. I entirely agree with my lamented brother, the late Mr. Justice Washington, in declaring, that no stoppage on the high seas for the purpose of saving life is, or can be, deemed a deviation from the voyage, so as to discharge the insurance on ship or cargo. Bond v. The Cora [Case No. 1,621]. The duties of humanity call upon every human being to do such acts of mercy and charity; and that duty is enforced by all the authoritative precepts of Christianity, which no one is at liberty to disregard. But I farther agree with him—Bond v. The Cora [supra]—in holding, that any farther stoppage for the purpose of saving property, is a deviation from the voyage, and discharges the underwriters. And in all cases of this sort, it is wholly immaterial, whether the owner stands his own underwriter, or the risk is borne by others at his expense. In either case his property encounters risks beyond those belonging to the ordinary prosecution of the voyage, and he is entitled to an indemnity. But the law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged policy, and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature; and it bestows upon the owner a liberal bounty and reward, to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. If a bare compensation for loss and risk were allowed, what motive could any owner have to suffer his voyage to be retarded; his just expectations of profit to be frustrated; his whole commercial arrangements to be suspended upon risks, which he could neither foresee, nor guard against by any common prudence? The law has a wise regard to considerations of this nature; and it offers, not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast. While I agree with Lord Stowell, that the master and crew are, in strict language, the only salvors; I cannot agree to the justice of his remark, "that the owners in general have no great claim; as to labor and danger, none;" and "that they come in only upon the equitable consideration of the court for damage or risk, which their property might have incurred." The San Bernardo, 1 C. Rob. Adm. 178. This latter remark is not borne out by the subsequent practice of that eminent judge; for he has been liberal in awarding salvage to the owners. I can, with far more satisfaction, unite in the opinion of Mr. Chief Justice Marshall, in speaking on this subject in the great case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 269, where he says, "The proportion allowed to the owners of the Firm," (the saving ship,) "and her cargo, is not equal to the risk incurred; nor does it furnish an inducement to the owners of vessels to permit their cap-

tains to save those found in distress at sea, in any degree proportioned to the inducements offered to the captains and crews. The same policy ought to extend to all owners the same rewards for a service, which deserves to be encouraged; and it is surely no reward to a man, made his own insurer without his own consent, to return him very little more than the premium he had advanced." To this it may be added, that it furnishes a strong inducement to officers and seamen not to desert their own proper duty to their owner, and his interests for selfish purposes, by making them share only in subordination to, and in connexion with, those interests. If I had been called upon for the first time, to say, what, under ordinary circumstances, should constitute the proportion of the owner, I might have hesitated; but I incline to think, that it would have occurred to me, that one third would be a suitable proportion. But, if I had found that proportion to have been adopted in other cases, and to have become, in some sort, a habit in our courts of admiralty, my own judgment would have reposed upon it with an undoubting confidence. Now, upon looking into the cases, decided in the superior courts, exercising admiralty jurisdiction, it appears to me, that it will be found to have been, if not throughout, at least to some extent, a habit of these courts to award to the owner one third of the salvage. That amount has certainly been not unusual in our most commercial districts, and especially in New York and Pennsylvania. See The Harmony [Case No. 3,089]; Bond v. The Cora [Id. 1,620]. My Brother, Mr. Justice Washington, adopted it after grave examination in the case of Bond v. The Cora [supra], and I find, that it has prevailed more than any other rule in contested cases brought before the courts of the districts, in which he presided. But, what is of most powerful influence in this case, it was adopted by the supreme court in the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 269, 271, after the fullest deliberation, and upon solemn argument. It seems to me, that that case ought to furnish a guide for all subordinate courts under common circumstances. I do not say, that the rule should be absolutely inflexible, and not yield to any extraordinary merits, or perils, or losses on the part of the owners. Cases may exist, in which it may be quite fit to allow the owner one half, as was done in several of the cases stated at the bar. See Taylor v. The Cato [Case No. 13,786]; The San Bernardo, 1 C. Rob. Adm. 178; The Waterloo, 2 Dod. 442. But all such cases must stand upon very peculiar and pressing circumstances. Such circumstances certainly did exist in the case of The Cumberland [Case No. 3,470] decided by the district court of Massachusetts in 1815. The salvage ship in that case actually broke up her voyage, and returned back to port, keeping company with the Cumberland through the whole period. And it was beyond doubt a perilous enterprise to all concerned. As to the case of M'Donough v. The Mary Ford, 3 Dall. [3 U. S.] 188, it furnishes no authority for a different course. In that case, the distribution was made in the district court by the award of three persons, named by the parties, and appointed by the court. See the opinion of Judge Lowell [M'Donough v. The Mary Ford] 3 Dall. [3 U. S.] 191. So that the distribution was made with the consent of the parties in interest, by way of amicable award, and can in no just respect be held to be the legal adjudication of the court, acting upon its own judgment. And the case, as to this point, never came before the supreme court, the appeal being limited to the mere question, who was entitled to the residuum after the salvage was deducted. In The Haase, 1 C. Rob. Adm. 286, Lord Stowell adopted the proportion of one third, in a case calling strongly for a high remuneration; for it appeared, that the salvor ship (which was a whaler) had lost the chief object of her voyage by this service.

Upon the whole, with the greatest deference to the opinion of the learned judge of the district court, I have come to the conclusion, that the owners of the Hope and the Padang are not, under the circumstances of this case, entitled to more than one third of the salvage. In so deciding, I have the satisfaction to know, that I am supported by his own judgment in three late cases; I mean those of The Boston [Case No. 1,668], The Hudson [Id. 6,828], and The Friendship [Id. 10,783], in which he adopted the same proportion. In apportioning the remaining two thirds of the salvage, I have not the least hesitation in expressing my sense of the merit of Wheelwright's services, as being in the very first rank. The only drawback, which there seems to be to his full measure of praise, is found in his conduct after his arrival in port, in setting up an exclusive claim for himself and his co-libellants, as the sole salvors; and in excluding their fellow-laborer, Metcalf, from all share in the salvage. There is manifest error in this; which I am not disposed to impute to any wanton disregard of the claims of others, but to a precipitate and rash judgment, acting at the moment upon warm feelings, and the belief of imaginary wrongs, and the natural delusions of self-interest. In making the apportionment between the master and the other officers, I find the usual course has been to allow the master a larger proportion than the mate, even when the latter has been put in command of the salved ship, as she is sometimes denominated by Lord Stowell. The common proportion has been, as I gather, under ordinary circumstances, double that of the mate. And it should be so; for the master, by his conduct in permitting the salvage enterprise, takes upon himself a great responsibility to his owners; and no common share

of responsibility also to the shippers of the cargo. The same enlightened policy governs here, as in other cases. The reward is liberal, to stimulate the master to assume the responsibility, as the common guardian of the interests of all concerned. But here, again, the rule is not inflexible. It yields to circumstances of a peculiar nature; and in a case of great perils, sacrifices, and hardships on the part of the commander of the actual salvors, his proportion is permitted to approach nearer to that of the master. In the present case, I feel myself compelled to make a slight deviation from the rule, though I do it with extreme reluctance, on account of the singular conflict of claims between the two classes of salvors, and the relative merits of Wheelwright and Metcalf, standing, as they do, in the same official character, and yet somewhat distinguishable in the order and value of their services.

After bestowing upon the subject considerable reflection, I have come to the conclusion, satisfactory at least to my own mind, that the distribution should be according to the following scheme. In the first place, I shall decree one third of the moiety of the net proceeds, decreed as salvage, to the owners of the Hope and Padang, in the proportions already intimated, of two fifth parts to the owners of the Hope, and three fifth parts to the owners of the Padang. In the next place, I propose to divide the remaining two thirds of the moiety into fifty-seven shares, to be distributed among the several officers and crews of the salvor ships according to the following classification.

1. The first class includes the master and officers of the Hope and Padang.

Capt. Brewster is to take		nine	shares,	9
Capt. Lister	"	six	"	6
Mr. Wheelwright	"	five	"	5
Mr. Metcalf	"	four	"	4
Mr. Weissell	"	three	"	3

2. The second class includes all those persons belonging to the Hope, who were placed on board the Ewbank, and composed a part of her crew during the whole voyage. To each of these there are to be assigned two shares, namely:

To Watkins,	2	
Grace,	2	
Marshall,	2	
Duggin,	2	
		8

3. In the third class I place Turner, who was excluded from serving on board of the Ewbank contrary to his wishes, and to whom there are to be assigned two shares. 2 2

4. The fourth class includes the seamen of the Padang, who navigated the Ewbank into port, and to each of these I assign one share and a half, namely:

To Eldridge,	1½	
Hilyer,	1½	
Betts,	1½	
		4½

And I assign a like proportion to Hough, the carpenter, for his meritorious services, and the peculiar circumstances under which he went on board of the Padang; having been very efficient, as one of the original salving crew, namely: 1½ 1½

5. The next class includes those of the crew of the Padang, who remained on board of her. To each of these there is assigned one share, namely:

To Miller,	1	
Hatch,	1	
Dale.	1	
Barrett,	1	
		4

6. The next class includes those of the original salving crew of the Hope, who left the Ewbank, and went on board the Padang. To each of these there is assigned one share, namely:

To James,	1	
Lyman,	1	
Cornish,	1	
Smith,	1	
		4

7. The next and last class includes the crew of the Hope who remained on board of her. To each of them (in all nine in number) there are assigned two thirds of one share, namely:

To Walker,	⅔	
Oliphant,	⅔	
Addison,	⅔	
Graves,	⅔	
Jones,	⅔	
Lord,	⅔	
Mitburn,	⅔	
Love,	⅔	
Skinner,	⅔	
	$^{18}/_{3}$ = 6 shares	6
	shares	57

It will be perceived, from the manner in which I have viewed the general merits of the cause, that it has been wholly unnecessary for me to enter upon a minute examination of the great mass of conflicting testimony, as to the comparative merits or demerits of individual salvors. That there is much in this testimony, which is utterly irreconcilable, must be admitted; and on that account I rejoice, that it has not become my duty on this occasion to weigh in minute scales the credibility of those portions of it, which present the most distressing conflicts. All the testimony comes from parties in interest; and therefore partakes of the common infirmities of prejudice, suspicion, and feeling, which belong to evidence originating in such sources. Salvage cases constitute one of the class of excepted cases from the ordinary rule of evidence, by which a party is not permitted to testify in his own cause. But the exception arises from the very necessity of trusting to that, or of being left without proof; for in many cases no other persons exist, who can testify to the facts. A mere formal release

would not in substance vary the legal credibility of such testimony, whatever it might do as to its competency. Salvors, then, are ex necessitate admitted as witnesses to all facts, which are deemed peculiarly or exclusively within their knowledge. To other facts they are incompetent. But the very necessity of such a resort creates in many cases, from rival interests, and jealousies, and passions, a sad discoloration of the facts. In the struggle for victory, amidst the dust and eagerness of the race, each becomes intent for himself, and indifferent to others. So that the unwelcome duty is often imposed upon the court, to trust little to individual statements of minute facts, and much to the general aspect of the facts, as gathered from the res gestae. In salvage cases, above all others, it becomes the duty of the court to place its decrees far more upon the general merits of all, than upon the professed merits of a few. There is also sound policy in it; inasmuch as it has some tendency to mitigate the unavoidable virulence of personal comparisons; and to bring into common bonds of peace and union those, who would otherwise join in the common adventure with a warm and generous gallantry, and then quarrel ad internecionem about the division of the booty. But, although I have not found myself called upon to comment at large upon the conflict in the evidence, I can bear the most ready testimony, that it has been examined by the counsel on all sides with a diligence and ability worthy of the highest praise.

It remains for me only to say a few words upon the subject of costs. And, I think, taking into consideration, how much of the evidence bears solely upon the merits of the particular salvors, without any reference to the general amount of salvage, that it would not be correct to make the costs and expenses in the district court an equal charge upon the whole proceeds of the Ewbank and cargo, the effect of which would be to make the owners of them pay a full moiety. It appears to me, that it will be more just to charge the moiety given to the salvors with three fifths of those costs and expenses, and to charge the remaining two fifths on the other moiety. The costs of all the parties salvors in this court are to be deemed exclusively a charge upon the moiety awarded to the salvors. The claimants, (the Charleston Fire and Marine Insurance Company,) are entitled to their costs in this court, the decree of the district court not having been varied as to them. These costs are of course to be a charge upon the moiety awarded to the salvors.

I have thus gone over all the grounds of this cause, and I conclude by remarking, that I shall refer it to the clerk to ascertain and report the amount of salvage due to each party, according to the principles of this decree, after deducting all the costs, charges, and expenses.

HENRY KNEELAND, The (CHAMBERS v.). See Case No. 2,581a.

HENRY KNEELAND, The (STALKER v.). See Case No. 13,282.

Case No. 6,377.

The HENRY LEWIS.

[Blatchf. Pr. Cas. 131.] [1]

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

PRIZE—VIOLATION OF BLOCKADE—CONDEMNATION.

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

In admiralty.

BETTS, District Judge. The steamboat and her cargo proceeded against in this suit were captured as prize in the Mississippi Sound, off the Alabama coast, southwest of Pascagoula, November 28, 1861, by the United States steamship New London, and first taken to Ship island, in said sound. The steamer Henry Lewis and a part of her cargo were there appraised by the naval surveyors, by order of the United States flag-officer at that port, and the same were, by his direction, appropriated to the use of the United States as necessary to the public service. The residue of the cargo was transmitted, by command of said flag-officer, to this port in the United States storeship Supply. The Henry Lewis was employed, at the time of her capture, in coasting voyages between Mobile and New Orleans, and was on a voyage from New Orleans to Mobile when arrested in this action, and had been in that employ ever since the war commenced. The cargo was laden in her at New Orleans, November 26, 1861. One of the private owners of the vessel resides in Indiana; the others in Mobile and New Orleans. She belongs to a company or association in New Orleans. The master and crew of the Henry Lewis knew, at the time, that those ports were under blockade. The vessel was enemy property; and it appears, by the bills of lading found on board the prize vessel, that all the cargo was shipped by resident dealers at New Orleans to assignees or consignees in other blockaded and enemy ports. No person has intervened in the suit to claim the vessel or cargo or made defence to the allegations of the libel. Upon the state of the proofs it is manifest that full cause for condemnation of the vessel and cargo has been established, either because both were enemy property at the time, or because they were employed in a voyage intended to violate the blockade of the port of Mobile. Judgment to be entered accordingly.

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

Case No. 6,378.

The HENRY MIDDLETON.

[Blatchf. Pr. Cas. 121.] [1]

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

PRIZE—VIOLATION OF BLOCKADE—CONDEMNATION.

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

2. None of the officers or crew of the vessel were sent into this port with her, or produced with her to be examined as witnesses, but the master subsequently appeared and was examined in preparatorio.

In admiralty.

BETTS, District Judge. The prize in this instance was captured off the coast of South Carolina, August 21, 1861, by the United States ship Vandalia, and sent into this port, and here libelled September 5, 1861. No answer or claim has been interposed or prosecuted by any person. The vessel and cargo were owned in Charleston, and sailed thence for Liverpool between the 6th and 21st of August, 1861. The master of the vessel knew that the port was blockaded, and the fact was also published in the Charleston papers. The ship's documents were furnished her by the rebel government at Charleston, and she sailed under the rebel flag. When she was chased by the Vandalia, the master of the prize threw overboard the private letters of the shippers of the cargo he was carrying, and also his deck load, to avoid capture. Judgment of condemnation of the vessel and cargo is rendered, because the prize was at the time of capture enemy property (Jecker v. Montgomery, 18 How. [59 U. S.] 110), and also because she designedly evaded the blockade of Charleston harbor. In this case none of the officers or crew of the captured vessel were sent into this port with the prize, nor were they produced with her to be examined as witnesses. This irregularity is substantially cured by the subsequent appearance and examination in preparatorio of the master of the vessel; and, moreover, no one appears to contest the validity and regularity of the capture.

HENRY MORRISON, The (VAN WINKLE v.). See Case No. 16,882.

HENRY PRATT, The (BROWN v.). See Case No. 2,010.

Case No. 6,379.

The HENRY TROWBRIDGE.

[10 Ben. 415.] [2]

District Court, E. D. New York. April, 1879.

SUPPLIES TO A WHALER—LIEN—SPECIFICATION.

1. Casks, furnished to a whaler, to be stowed on board to receive the oil, are necessary for the vessel, and, by the law of the state of New York, a lien attaches to the vessel for the amount of the debt incurred therefor.

2. It is not necessary to file a specification of such lien, where the vessel has not left the state before her seizure under process issued to enforce such lien [The John Farron, Case No. 7,341, followed].

In admiralty.

C. N. Judson, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. The evidence shows a delivery to the bark Henry Trowbridge of certain casks and hoops intended for use on board the vessel during a whaling voyage for which she was then fitting.

Under the circumstances attending the transaction the libellant was entitled to payment upon delivery of the articles in accordance with the order. It cannot be held that the sale was upon the personal credit of the owners, nor was there any delay of payment agreed on such as would affect the libellant's lien or show an intention to waive the lien.

Upon the evidence, the articles furnished formed a necessary part of the equipment of the vessel. Casks stowed in a whaler to receive the oil obtained from whales captured are a necessity, and no whaler is sent to sea without them. Such articles are part of the equipment of such a vessel. The vessel was a domestic vessel of the state of New York, and by the law of that state a lien attached to her in favor of the libellant for the amount of his debt. This lien was subsisting at the time of the filing of the libel, inasmuch as the vessel did not depart from the state between the time of the delivery of the casks and her seizure under the process herein. Under such circumstances it was not necessary to file a specification of the lien.

The question in respect to the effect of the statute of the state and the necessity for filing specifications in such a case were passed on by the circuit court for the Southern district of New York in the case of The John Farron [Case No. 7,341]. The law of that case I have no desire to question or doubt, even if it were proper for me to do so. It furnishes the authority by which this case must be decided, and accordingly the libellant must have a decree for the amount of his bill, with interest and costs.

HENRY WOOD, The (HOWLAND v.). See Case No. 6,795.

Case No. 6,380.

HENRY v. CORNELIUS et ux.

[1 Cranch, C. C. 37.] [1]

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

BAIL—FEME COVERT.

Bail cannot be required of a feme covert in a civil action.

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

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

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

Actions on the case.

THE COURT decided that a feme covert could not be held to bail in a civil action.

Case No. 6,381.

HENRY v. CURRY.

[Abb. Adm. 433.] [1]

District Court, S. D. New York. Jan., 1849.

ADMIRALTY—LIBEL FOR WAGES—MISNOMER—CERTIFIED COPY OF SHIPPING ARTICLES.

1. In defence to a libel for wages as cook and steward by one William Henry, respondent put in shipping articles executed by William Henderson as cook and steward. *Held*, that the presumption was that the libellant was the person who had entered into the articles.

2. Maritime courts will not lay much stress on an objection of misnomer, unsupported by evidence that the party was in fact not known by the name ascribed to him.

3. It seems, that where original shipping articles are proved before a commissioner, and redelivered to the vessel, who thereupon pursues her voyage, a copy certified by the commissioner is competent evidence upon the hearing.

This was a libel in personam by William Henry against Frederick Curry, sued as Johnson, master of the bark Alpine, for wages.

Alanson Nash, for libellant.

Griffin & Laroque, for respondent.

BETTS, District Judge. The libellant alleges that he shipped on October 24, 1848, in the bark Alpine, as cook and steward, at $16 wages per month, to perform a voyage from Halifax, Nova Scotia, to Sydney and New York, where the voyage was to terminate; and that he performed his duty on board up to November 12th, when the vessel arrived at this port and the voyage ended. He claims $9 balance of wages due him. The answer asserts that the bark is a British vessel, and the libellant a British seaman; and that the voyage for which he engaged was from Halifax to various ports including New York, and to Europe, and back to British North America, for a period not exceeding one year. The original articles were produced on the preliminary hearing before the commissioner, and identified by the testimony of the chief mate. "William Henderson" is entered therein as cook and steward. The name is signed with a cross or mark. The handwriting of the witness to the execution of the articles by Henderson is proved, and that he resides in Nova Scotia. This action is in the name of "William Henry."

The sufficiency of this evidence is controverted by the libellant, on the ground that, as he is not proved to have been known on board by the name of Henderson, the presumption is that he came out as a substitute for Henderson, but never bound himself to the engagement of Henderson by subscribing to the articles. The objection is also extended to the further suggestion, that even if proof of the handwriting of subscribing witness is ever adequate evidence of the execution of articles, it can be so only on the exhibit of the original articles to the court, in order to show that the whole transaction wears the appearance of genuineness and correctness. The libellant having brought suit for wages in the capacity of cook and steward, and having adopted the name of "William Henry," it is incumbent on him to prove that to be his true name; otherwise the inference will be, that he is the person who shipped and subscribed the articles in that capacity. The difference in surnames is not so great, but that a misconception in pronunciation might easily occur; and maritime courts are too familiar with the habit of sailors to assume a variety of names, to lay special stress on an objection of misnomer, unaccompanied with evidence on the part of the seaman that he did not use the name attached to the articles, and that he was known in the ship by a different one. No evidence is offered by the libellant that he is "William Henry" and not "William Henderson"; and since he assumes to himself the description of cook and steward, applied in the articles to "William Henderson," it must be presumed by the court that he is the person who entered into the contract. It is moreover to be observed, that the libellant is not very exact in his recollection and statement of names. He sues the master by the name of "Johnson," but gives no evidence that anybody on board did not perfectly well know that his name was "Curry." It so appeared upon the articles, and was proved to be his true name by the testimony of the chief mate.

The original articles, after having been examined and proved in presence of a commissioner, upon the hearing on return of the summons, were restored to the vessel, and had gone with her on her voyage. A copy certified by the commissioner is attached to the depositions. For the libellant, it is objected that such copy is incompetent evidence. The cause not depending upon the evidence furnished by the articles, I do not think it necessary to go into the discussion of that point; but my impression is, that the evidence should be regarded competent and sufficient, the authentication of the articles having been made in a judicial proceeding in the cause under the act of congress of July 20, 1790 [1 Stat. 131], before a magistrate authorized to conduct it. The chief mate testifies that the voyage was not to end at New York, but was to be continued from here to Ireland, and back to Halifax, and that the libellant shipped for the voyage. No evidence is furnished by the libellant showing the termination of the voyage at this port, or his discharge by the master. Upon the well-settled doctrine of admiralty

[1] [Reported by Abbott Brothers.]

courts, he therefore cannot sustain this action, irrespective of the nationality of the vessel. But suing as a British seaman, for services on board a British vessel, his claim to relief in this court is wholly destitute of merits. Libel dismissed with costs.

Case No. 6,382.

HENRY v. FRANCESTOWN SOAP-STONE STOVE CO.

[2 Ban. & A. 221;[1] 9 O. G. 408.]

Circuit Court, D. New Hampshire. Jan. 28, 1876.

PATENTS—IMPROPER REJECTION OF APPLICATION—NEW PETITION—ISSUANCE OF PATENT—OF WHAT DATE—PUBLIC USE—ASSIGNMENT—ASSIGNOR AS PARTY TO SUIT—CLAIM FOR DAMAGES.

1. An application for a patent was improperly rejected. A new petition was filed renewing the first petition, whereupon the patent issued: *Held*, that the date of the application for the patent is the date of the first application which was rejected.

2. The date, from which the time of prior use or sale is to be reckoned, is the date of the earliest application.

3. Public use in good faith for experimental purposes, while the inventor is perfecting his invention, and for a reasonable period even before the beginning of the two years of limitation, cannot affect the rights of the inventor.

[Cited in Graham v. Geneva Lake Crawford Manuf'g Co., 11 Fed. 142; Andrews v. Hovey, 124 U. S. 712, 8 Sup. Ct. 682.]

[See note at end of case.]

4. Where a patent is assigned, and in connection therewith and incidental thereto, a claim for past damages and profits for the infringement of the patent is also assigned, it is not necessary, in a suit by the assignee to recover such damages and profits together with those accruing since the assignment, to make the assignor a party to the bill.

[Cited in Consolidated Oil-Well Packer Co. v. Eaton, 12 Fed. 870; Nellis v. Pennock Manuf'g Co., 38 Fed. 380.]

In equity.

Bainbridge, Wadleigh and Thomas L. Livermore, for complainant.

Sawyer & Sawyer, Jr., and William L. Putnam, for defendant.

SHEPLEY, Circuit Judge. This is a suit in equity by Hyren Henry against the Francestown Soap-Stone Stove Company, for an alleged infringement of letters patent [No. 22,787], granted to Porter Dodge, February 1, 1859, for a new and useful "improvement in stoves." Defendant answers to part and demurs to part of the bill. The answer sets up prior use and knowledge in William Eayrs and O. W. Wade, and also a public use and sale more than two years prior to the application by Dodge for a patent. There is nothing in the patent of O. W. Wade resembling the invention of Dodge, except that both patents were for stoves, and the material described in both was soap-stone. Here the similarity ends. Eayrs' stove was never patented. No practical working stove appears to have been made by him. He had not perfected and was not using any diligence to perfect his invention before Dodge obtained his patent. Neither is there anything in his model to anticipate Dodge's invention.

I have carefully analyzed and examined the evidence, introduced to sustain the allegation in the amended answer of the defendant, that Dodge "consented and allowed his said patented improvement to be in public use and on sale for more than two years prior to his application for said letters patent—to wit, from about the year 1854 to the year 1858." Before commenting on this testimony it becomes necessary to fix the date of Porter Dodge's application. His application was subscribed, and the specification sworn to, and the power of attorney to his solicitor drawn and acknowledged December 26, 1856. His model was filed in the patent office the next day. His formal petition, specification, drawings, affidavit, and power of attorney were filed and the fee paid at the patent office, February 14, 1857, and correspondence ensued. His specifications and one of his drawings were returned for unimportant corrections, and after corrected specifications had been returned, his application was rejected, April 15, 1857, by reason of an entire misapprehension by the examiners of his claims upon a reference of the patent to O. W. Wade and the application of William Eayrs before mentioned. January 13, 1859, he filed a new petition renewing the first petition, whereupon his patent issued, February 1, 1859. Under such circumstances the date of his application for a patent is to be considered to be the date of his first application, which was rejected, and not the date of his renewed application, which was granted, and on which the letters issued. Godfrey v. Eames, 1 Wall. [68 U. S.] 317. To the same effect is a decision of Mr. Justice Clifford in this circuit,—Jones v. Sewall [Case No. 7,495],—and it has frequently been held that the date of filing the application on which the patent was granted is not the date from which the time of use or sales is to be reckoned, but that the time is to relate back to the date of any application. Delays in the patent office, which an inventor cannot prevent, will not impair his title to his invention, nor can any use of his invention during such delays, if without his consent and allowance, afford any evidence to support the idea that the inventor abandoned his invention to the public. Jones v. Sewall, above cited; Stimpson v. Railroad, 4 How. [45 U. S.] 402.

Mere forbearance to apply for a patent during the process of experiments, and until the party has perfected his invention and tested its value by actual practice, affords

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

no just grounds for any presumption of abandonment or dedication to the public. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 607. To defeat the patent on the ground of a public use and sale more than two years prior to the application of Dodge for a patent, such public use and sale must be proved more than two years prior to his first and rejected application. That application was formally filed February 14, 1857, and for the purposes of this case that may be taken as the date from which the time of the two years' prior use and sale is to be reckoned; although to save a forfeiture it might, if necessary, be just to give him the benefit of the informal application made to the commissioner when he transmitted his model, December 27, 1856, the day after the date of his oath to the application, signed and sworn to on the 26th.

In Birdsall v. McDonald [Case No. 1,434], the court were of the opinion that the placing, by an inventor, of his model and application and fee in the hands of a solicitor within two years after public use, was sufficient to prevent forfeiture, although the solicitor negligently omitted to file it until after the two years.

The fact of a public use or sale more than two years prior to the application, when clearly proved, is fatal to the patent. But the objection rests upon the principle of forfeiture, and is not to be so favorably regarded as to dispense with the necessity of strict proof. Public use in good faith for experimental purposes, while the inventor is perfecting his invention, and for a reasonable period even before the beginning of the two years of limitation, cannot affect the rights of the inventor. Birdsall v. McDonald [supra]; Mellus v. Silsbee [Case No. 9,404].

Applying these principles of law to the facts found in this case, the evidence does not show any such public use or sale, with the consent of Dodge, for two years prior to his application, as would work a forfeiture of his patent. There is one case only of a sale clearly proved before February 14, 1855, and no evidence tending to show more than two or three sales before that time, and all of them accompanied with a notice of an intention to apply for a patent, and all of these during the time when he was experimenting upon and before he had perfected his invention and attained sufficient perfection in the castings to satisfy him that his invention was practically successful. As in most, if not in all of these instances, the stoves were delivered on trial, to be returned if the invention did not work satisfactorily, they are to be regarded rather in the light of such practical tests as the law permits an inventor to make, than as such public sales as would tend to show abandonment, or mislead the public into a belief that the inventor had made a dedication to the public.

The ground of the demurrer is that Roundy and Darling are not joined as parties to the bill. Porter Dodge died August 13, 1865, and Roundy was duly appointed executor of his will and trustee of the letters patent under a clause of the will, by which the testator had provided that all his letters patent should be held in trust for the benefit of his widow and son. The property in the letters patent in question, and in and to all claims for profits and damages for infringement, passed by valid conveyances from the executor and trustee Roundy to Darling, and from Darling to the complainant, the contention is that, inasmuch as profits and damages are claimed for a period which includes the time in which the legal title to the letters patent was held by Roundy and by Darling, they are necessary parties to the bill. In this case, the assignments were not merely of a chose in action. Assignment of the claim for past damages and profits was in connection with, and an incident to, the transfer of the title to the letters patent. Such an assignment of past profits and damages for the infringement of a patent, when made in connection with the transfer of the title of the patent itself, courts of equity will uphold, and the modern doctrine in courts of equity is that if the assignment be absolute and unconditional, and there is no remaining title or interest in the assignor to be affected by the decree, the assignor is not a necessary party. Trecothick v. Austin [Id. 14,164]; Hill v. Adams, 2 Atk. 39; Story, Eq. Pl. 153, 154, 197; Haskell v. Hilton, 30 Me. 419; Moor v. Veazie, 32 Me. 355; Whitney v. McKinney, 7 Johns. Ch. 144; Montague v. Lobdell, 11 Cush. 114, 115; Currier v. Howard, 14 Gray, 513.

The infringement in this case is clearly proved, and there must be a decree for the complainant for an account, and for profits and damages, according to the prayer of the bill.

[NOTE. In February, 1879, a rehearing was granted upon affidavits tending to show that Dodge had sold two of his stoves to two different persons more than two years before his application. Evidence having been taken, the rehearing took place before Lowell, Circuit Judge, who held that a single sale of an invention, more than two years before the application, works a forfeiture of the patent. This having been shown in the present case, the patent is thereby avoided. 2 Fed. 78.]

HENRY (GAGER v.). See Case No. 5,172.

Case No. 6,383.

HENRY v. HENRY.

[4 Biss. 354.] [1]

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

CONDITIONAL DELIVERY OF DEED—SUBSTITUTED GRANTEE.

1. If a conveyance is delivered on condition that a life lease of the same estate be executed and delivered to the grantor, the grantee cannot

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

recover in ejectment against the grantor, when the condition has not been fulfilled.

2. Subsequent negotiations, not consummated, do not affect the rights of the parties; and one party in accepting a proposition, which the other afterwards refused to carry out, does not waive his rights.

3. A person substituted for the originally intended grantee, but having knowledge of the condition, does not stand in any stronger or better position.

Ejectment for eleven hundred acres of land, situate in Livingston and Will counties, Illinois. Plaintiff [John Snowden Henry] claims under a warranty deed from defendant [James Henry]. Defendant being, in May, 1858, embarrassed, and having for the purpose of improving the property in controversy theretofore borrowed largely from his brother, Alexander, of Manchester, England, applied to him (Alex.) for a loan of twenty-five thousand dollars upon the property, in order to remove the incumbrances outstanding, agreeing, subsequently, to convey the land in consideration of the further advance, he to receive a life lease at an annual rental of two thousand dollars. The deed was executed to plaintiff, a son of Alexander, but the life lease was not.

Thomas Hoyne, for plaintiff, moved to exclude the testimony relating to the conditions on which the deed was executed.

Bailey & Magruder, for defendant.

DAVIS, Circuit Justice. The life lease was sent to England with the deed, but for some reason was not executed. The question is, Was the delivery of the deed intended to be absolute or on condition? If on the condition that a life lease should be returned, manifestly the defendant is not wrongfully withholding possession, as it is conceded this has not been done; nor can he be ousted of his possession until this lease has been tendered and its covenants broken. The intention of the parties to the transaction is a question of fact for the jury. If the lease and deed were intended to be simultaneous acts, the plaintiff cannot recover. On the contrary, if the giving of the lease was a subsequent agreement, and not a part of the original transaction, or if the execution of the lease was waived, the case is different. There is no question about the legal title, but only a question of possession. That there can be a right of property separate from the right of possession, is too plain for dispute. The motion is denied, and the plaintiff is at liberty to go to the jury on the question of fact whether the delivery of the deed was dependent on the execution of the lease.

The parties went to the jury on this issue, and DAVIS, Circuit Justice, charged as follows:

Gentlemen: If the jury believe, from the evidence, that James Henry proposed to Alexander Henry if he would loan him twenty-five thousand dollars to remove the incumbrances on his real estate in Livingston county that he would convey to him by absolute deed the legal right to the property on condition that Alexander Henry should execute to him, James, a lease for life at the yearly rent of two thousand dollars, and that Alexander Henry accepted the proposition, and if the jury further believe from the evidence that in transmitting the deeds and lease to Mr. Ewing, the agent, James Henry acted on the belief that Alexander Henry, on the receipt of the deed would execute the lease, and that the deed was transmitted on that conditional; and if the jury further believe that after the deed was received, Alexander Henry refused to execute the lease, and that James Henry has not waived his right to the lease, then the defendant has not wrongfully withheld the possession of the property from the plaintiff.

There were various subsequent propositions made, and some of them partially accepted, but the minds of the parties do not seem to have united distinctly on any, and therefore it may not be material to consider them. Of course the defendant in accepting propositions made subsequently by his brother, which the latter refused to carry out, did not waive his right to insist upon the lease, if that was a condition on which the deed was transmitted.

Under the conceded facts of the case, it would seem that the plaintiff, to whom the deed was made, instead of the brother, cannot be in any stronger or better position than if the deed had been made, as originally intended, to Alexander.

Verdict for defendant, and new trial taken under statute.

Consult U. S. v. Hammond [Case No. 15,292]; U. S. v. Dair [Id. 14,913], and cases there cited.

HENRY (HOVEY v.). See Case No. 6,742.

HENRY (MULLER v.). See Case No. 9,916.

HENRY v. The PARKERSBURGH. See Case No. 10,753.

Case No. 6,384.

HENRY v. PROVIDENCE TOOL CO.

[3 Ban. & A. 501;[1] 14 O. G. 855.]

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

FOREIGN PATENT—DOMESTIC PATENT—WHEN LATTER EXPIRES—"PUBLIC USE."

1. The 25th section of the patent act of 1870 [16 Stat. 201] construed to mean that a patent granted in the United States will expire at the same time as the original term of a foreign patent for the same invention; or, if there be more than one, at the same time as the one having the shortest term, without regard to any prolongation of such foreign patent which the patentee might procure from the foreign government.

[Applied in Reissner v. Sharp, Case No. 11,689. Cited in Bate Refrigerating Co. v.

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

Gillett, 13 Fed. 557; Holmes Elec. Prot. Co. v. Metropolitan Burglar Alarm Co., 21 Fed. 459; Canan v. Pound Manuf'g Co., 23 Fed. 187; Paillard v. Bruno, 29 Fed. 865; Bate Refrigerating Co. v. Hammond Co., 129 U. S. 167, 9 Sup. Ct. 228.]

2. Under the act of 1870, a party who has taken out a patent in a foreign country may, at any time during the life of the foreign patent, apply for and receive a patent in this country, provided the invention shall not have been introduced into public use in this country for more than two years prior to the application. The authorities upon the question of what constitutes public use, examined.

[Cited in Perkins v. Nashua Card & Glazed Paper Co., 2 Fed. 453; Driven-Well Cases, 16 Fed. 411; Huber v. Myer's Sanitary Depot, 33 Fed. 49; Andrews v. Hovey, 124 U. S. 712, 8 Sup. Ct. 682; Huber v. N. O. Nelson Manuf'g Co., 38 Fed. 831; Pohl v. Anchor Brewing Co., 39 Fed. 784.]

3. Letters patent No. 119,846, granted to Alexander Henry, October 10th, 1871, for improvements in firearms, *held* void.

[This was a bill in equity by Alexander Henry against the Providence Tool Company, for the alleged infringement of letters patent No. 119,846, granted to plaintiff October 10, 1871.]

Chauncey Smith and Charles S. Bradley, for complainant.

Benjamin F. Thurston and J. C. B. Woods, for defendants.

CLIFFORD, Circuit Justice. Vigilance is necessary to entitle an individual to the privileges which the act of congress grants to an inventor. It is not enough that he should show his right by invention, but he must in due time secure it in the mode required by law. Shaw v. Cooper, 7 Pet. [32 U. S.] 319. Meritorious inventors cannot be debarred from receiving a patent for their inventions, by reason of the same having been first patented in a foreign country; nor can the patent be held invalid on that account; or be held void because the invention had been known or used in a foreign country before it was made here, if it had not been patented or described in some printed publication. Provision is also made that an invention first patented in a foreign country may be subsequently patented here, if the invention shall not have been introduced into public use here for more than two years prior to the application; but the express enactment is that the domestic patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term. 16 Stat. 201, 208, §§ 25–62. Such was the language of the act under which the patent in controversy was issued, and the present act also provides, in the same words, that the domestic patent shall be so limited as to expire at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term. Rev. St. § 4887.

Improvements in rifled fire-arms constitute the subject-matter of the patent described in the bill of complaint; and the patentee states that the invention relates to the arrangement and construction of such firearms, and that the essential peculiarity of the improvement consists in the form of the rifled bore, which, as he states, includes a series of planes, angles and grooves, adding that these surfaces may be formed or arranged in various ways; that, instead of relying wholly upon acute angles, semicircular or curvilinear projections or indentations, they may be produced upon the interior of the bore, and he gives examples illustrating some of the modes of construction. In one example of the improved bore, consisting of such a combination of planes and narrow curvilinear or angular surfaces or portions, he states that the surface of the bore, as made up of wide planes and narrow grooves, admits of a plug or missile of larger size than usual, and, of course, requires less expansion to fill the planes than one which touches the centres of the planes only; and he adds, in this connection, what it is important to notice, that while it requires less expansion to fill the planes, there is less windage, and that the planes with the grooves have more power to insure the proper rotation of the missile or ball. Besides that, he also gives another example of the invention in which the planes and internal projections, either round, square or acute, are combined, so as to afford double the number of points of bearing for the missile when in the barrel, and less windage before starting it, and requiring less expansion of the same to fill up the planes, while there is an equal amount or more power to cause the missile to rotate.

[Drawings of patent No. 119,846, granted October 10, 1871, to Alexander Henry, published from the records of the United States patent office.]

Fig. 1.

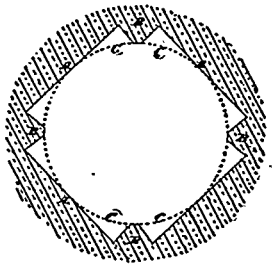
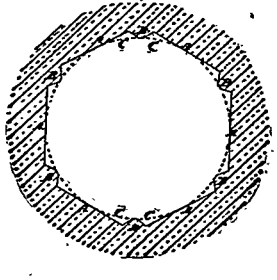


Fig. 2.



Transverse sections of portions of the barrel of the fire-arm are given in the drawings, showing several modifications of the invention. In the modification shown in figure 1, the barrel is rifled so that in its end view or transverse section it presents a quadrilateral figure with angular projections or bands extending inward from the angles of the planes, or, in other words, the rifling of the barrel forms four plane surfaces, and the periphery of the projectile, which is indicated by a dotted circle, touches the planes at the centres; and, in addition to the bearing-surfaces thus obtained, there are angular projections which extend inward from the planes, so that the apex of each of the projections is concentric with the centre of the surfaces of its contiguous planes. These four ridges thus afford a further bearing or support to the projectile, and by these means double the number of points of bearing are obtained. These angular ridges also fill up to a great extent the spaces between the angles of the planes and the periphery of the projectile, thus reducing the windage by lessening the amount of the expansion necessary to cause the projectile to fit the grooves of the barrel, so that the rotary or spiral motion of the projectile is obtained with greater certainty, and consequently its flight is rendered more accurate. Equally minute and satisfactory explanations of the other figures of the drawings are also given in the specification, which are omitted in the opinion for the sake of brevity. Appended to the specification is a single claim as follows: "What I claim is the system of rifling or grooving fire-arms in which a series of planes or flat surfaces are combined with angular, curved, or rectangular ridges or bands, either intervening between the planes or intersecting the same, as hereinbefore described and shown in the drawings."

These explanations are sufficient to show the nature of the invention which it is alleged the respondents have infringed. Service was made, and the corporation respondents appeared and filed an answer, setting up, among others, the following defences:

1. That the patentee is not the original and first inventor of the improvement.

2. That the patent is invalid, because it is not alleged therein that the invention had not been in public use or on sale in this country for more than two years prior to the application, the supposed invention having been first patented in a foreign country.

3. That the patent in suit, granted on the 10th of October, 1871, expired by operation of law on the 15th of November, 1874, when the foreign patent first obtained by the patentee expired by limitation of law.

4. That the alleged invention, or a substantial and material part thereof claimed as new, was, before the invention of the patentee, described in each of the several patents set forth in the answer.

5. That the alleged invention, or a substantial and material part thereof claimed as new, was, before the invention of the patentee, known to and used by the persons named in the answer and amended answer, and whose residences and the places where such prior knowledge and use were had are also specified and alleged in the answer and amended answer.

6. That the patentee first obtained a patent for the supposed invention in a foreign country, and that the invention had been introduced into public use in this country for more than two years prior to his application for the patent described in the bill of complaint.

Defences not urged at the argument will be omitted in this investigation.

7. They deny that they have made, used or vended the supposed invention of the complainant, or that they have rifled fire-arms, or that they have sold such as were rifled upon the system described in his patent, or that they have in any manner infringed upon his exclusive rights secured in the said patent.

Two of the defences, to wit, the third and sixth, will be first considered, for the reason that they were more discussed at the hearing than the others, and for the further reason that if one or both are sustained it will save the necessity of examining the others.

First. Of these, the first is that the patent, though not granted here until the 10th of October, 1871, expired on the 15th of November, 1874, when the foreign patent expired, which was previously granted to the same party for the same invention. Letters patent were granted to the complainant for the same invention by Great Britain, on the 15th of November, 1860, nearly eleven years before the patent granted to him here bears date. Complainant's patent in suit, which was issued here, was granted under the act of the 8th of July, 1870, the twenty-fifth section of which provides that such a patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term. British patents at that period were granted for the term of fourteen years, and of course the foreign patent granted to the complainant expired at the time alleged in the answer. Grant that, and it follows that the patent here expired at the same time, unless the proposition of the complainant can be sustained that the language of the act of congress, as copied from the twenty-fifth section of the act, includes not only the term of the foreign patent then in force, but also the term of any prolongation which the patentee might procure from the foreign government. 16 Stat. 201. Acts of parliament at different periods have been passed empowering the crown, by order in council, to prolong the term of a patent under certain restrictions, qualifications and conditions. By the act in force at the time in question, section 69 provides to the

effect that if a patentee shall, before the expiration of his patent, petition her majesty, in council, setting forth that he has been unable to obtain a due remuneration for the expenses and labor in perfecting his invention, and that an exclusive right for the period of seven years will not suffice for that purpose, her majesty is authorized to refer the matter to the judicial committee of the privy council, and if the report of the committee is favorable "it shall be lawful for her majesty, if she shall so think fit, to grant an extension thereof for any term not exceeding fourteen years." Agnew, Treatise, c. 8, p. 179. Henry, the patentee, made seasonable application to the crown for the prolongation of his patent, stating, among other things, that recently a contract had been made by an American firm with the Turkish government to supply six hundred thousand arms, to be made with the barrels rifled on his system, and that he would be unable to derive any benefit from the contract in the shape of royalties, unless the term of his patent was extended. Due report was made by the privy council November 11th, 1874, in favor of prolonging the patent for four years, upon certain restrictions and conditions, but the case shows that the report was not read at the board until thirteen days after the foreign patent expired, reckoning from its date. On that date it was read, and her majesty, in council, ordered "that the lord chancellor, upon the receipt thereof, do cause new letters patent, according to the tenor and effect of the order," to be made and sealed, and that a new patent be granted to the petitioner upon the conditions therein specified. New letters patent, it is provided by a later act of parliament, shall be sealed and bear date as of the day after the expiration of the term of the original patent which may first expire. Agnew, Treatise, p. 179. Viewed in the light of these provisions, the complainant contends that, by the true construction of the act of parliament, the prolongation of a patent is the same in effect as the extension of the original term, and that the extension, by relation, begins to operate at the moment when the original term expired, and the court is inclined to adopt that view as the correct exposition of the act of parliament. Saxby v. Hennett, L. R. 8 Exch. 210.

Suppose that is so, still it does not touch the question in this case, the question here being—What is the true construction of the act of congress under which the patent in suit was granted? When granted, the foreign patent was still in full force, and would not expire for the period of three years; nor could any one foreknow whether a petition for prolongation would ever be seasonably presented; or, if presented, whether any prolongation would ever be granted. Congress employs the words "the foreign" patent, evidently referring to the term of the foreign patent, to define the term of the domestic patent. Had congress intended to grant a patent for an indefinite term, or for an uncertain and undefined duration, they would have employed suitable words to express such an intent. Our patent act requires every patentee, before he shall receive a patent, to file in the patent office a written description of his invention, and of the manner and process of making and using it, in such full, clear and exact terms as to enable any person skilled in the art to make and use the same.

Requirements of the kind are enacted for several important purposes: I. That the government may know what they have granted, and what will become public property when the term of the monopoly expires.

II. That licensed persons, desiring to practise the invention, may know during the term how to make, construct, and use the invention.

III. That other inventors may know what part of the field of invention is unoccupied. Gill v. Wells, 22 Wall. [89 U. S.] 27.

Adopt the theory of the complainant and none of these requirements would be of any avail, as none could foreknow whether the term of the patent was for three or for seven years, or for some intermediate term of duration, the effect of which would be to make the rights of property in this country depend upon the discretion exercised by a foreign sovereign. Support to that view is derived from the words of the section, which refer not only to the foreign patent, but, if there be more than one, to the one having the shortest term, which, in effect, excludes the theory that the provision in any view can be held to include any subsequent prolongation or extension of the monopoly beyond what was then vested in the foreign patentee. If congress had intended otherwise the language would have been different, and words would have been employed to signify that the domestic patent should continue as long as the same invention was protected by the foreign government.

Under the system prevailing here of extending patents for seven years, while the original term was for fourteen years only; the extended term would, in fact, have been a new grant, had not the eighteenth section of the same act provided that the extended patent should have the same effect, in law, as though it had been originally granted for the term of twenty-one years. 5 Stat. 125. Even admit that the prolongation of the term is, under the foreign system, a continuation of the original patent, and that it takes effect from the day the original patent expires, without any lapse whatever, still it is clear that the admission is of no weight in the present case, as the question to be decided here, is: What right does our patent act confer upon a patentee who first patented his invention in a foreign country? Her majesty, as all must admit, had the power to refuse the petition for prolongation altogether, or to grant it, as she did in this case, upon terms and conditions not found in the original patent. Beyond all doubt she may grant the prolongation for the whole period

recommended by the judicial committee, or for a less period of time, and no one in the case before the court could tell what her action in the premises would be until it took place, which was thirteen days after the term of the original patent expired. In fine, the crown in such matters is supreme under the law of England, and is free to grant the royal favor in whole or in part, or to withhold it altogether. Extensions, when they were authorized here, were inchoate rights under the law, and were so far property that such a right could be sold and conveyed by an instrument of sufficient scope to show clearly that the grantor intended to convey the estate absolutely or upon condition. Assignments of the original patent might or might not convey the right to the extension, dependent upon the language of the instrument, and the intent, expressed or implied, of the parties.

Enough appears in these suggestions to show that there is a wide difference between the legal discretion which the commissioner of patents exercised under the act of congress granting extensions, and the prerogative power exercised by the crown in granting what is called prolongations of original patents. Applications of the kind here, if the statutory conditions were fulfilled, the commissioner of patents had no right to refuse; but a patentee in the foreign country petitioning for a prolongation of the term, if he obtains his request at all, obtains it not as a legal right but as a royal favor, which of itself goes far to support the proposition of the respondents, that congress never intended to extend the term of the domestic patent beyond the legal term secured to the foreign patentee when the domestic patent was granted. Great inconvenience would result from the opposite rule, as neither the authorities of the United States, nor inventors, nor the public would ever, in such a case, be able to know what the patentee acquired under a patent granted here, in a case where the invention had previously been patented in a foreign country. Neither the act of a foreign sovereign, nor the act of a foreign legislature, can have the effect to prolong the term of a patent granted here beyond the term which the act of congress prescribes. Nothing short of a special act of congress can breathe new life into such a patent, after the term prescribed by law has expired. Tested by these several considerations, the court is of the opinion that the patent in suit ceased to be operative when the original foreign patent expired. Repugnant propositions are earnestly, and, no doubt, sincerely urged by the eminent counsel for the complainant, and, in view of the circumstances, the court deems it proper to say that there is another view of the case equally decisive against the right of the complainant to maintain the present suit.

Second. That the supposed invention was first patented in a foreign country, and that the same had been introduced into public use in this country for more than two years prior to his application for the patent described in the bill of complaint. Inventions first patented in a foreign country may be patented here, "provided the same shall not have been introduced into public use in the United States for more than two years prior to the application." 16 Stat. 201. Evidence was given by the respondents showing that the invention was known and used in this country to a considerable extent for more than two years prior to the time when the complainant applied for a patent. Proofs to that effect come from several witnesses, of whom John Boyden was first examined. He testified to the effect that he made the acquaintance of the complainant while on a visit to Edinburgh, in Scotland, in the year 1853, and that he subsequently, at various times during several years, purchased of him shot-guns of his manufacture, which were sold by the witness in this country as he found customers; that in the year 1863 the complainant sent to the witness a sporting rifle containing the patented system of rifling the bore, which, as the witness states, he sold to Nathan Washburn during that year. Three more rifles, containing the same improvement, were sent by the complainant during the succeeding year to the witness, two of which were kept until "some two or three years since," the other one having been returned the year following after it was received. Speaking of the rifle first received, which was sold to Washburn, the witness states that it "created something of a sensation," and that it was accompanied by a certificate of its performance. Newspaper descriptions of the same, it appears, had also been sent to the witness, giving accounts of the "performances of the rifles and their capacity." Washburn paid one hundred and seventy-five dollars for the rifle, which sum was transmitted to the complainant. He, the witness, also states that the first rifle was exhibited to a few persons before it was sold, and that the three rifles received the next year were sent to be sold if customers could be found; that two of the number were used and exhibited at target practice, one of which was purchased by the owner of the one first sent, but was subsequently returned on account of a defect, and that the other was used by the witness. Both Washburn and the witness used these two rifles on different occasions in practising and at turkey-shoots, and the witness states that he used his rifle at the Adirondacks, shooting deer. Sufficient appears to show that the complainant desired the witness to act as his agent and make sales of the rifles sent, and the witness states that he paid over to the complainant the money received for the second rifle, and that he made efforts without success to sell the other two; that he sent one to a firm of gun-dealers in New York for sale, but, being a muzzle-loader, it was not easy to sell that kind in competition

with breech-loaders. He also states that three more military rifles were sent to him during those years as samples, with the purpose of obtaining an order for arms to supply a military organization, but that no order was received. Statements of a similar character are found in the deposition of Nathan Washburn, who was also called by the respondents. Among other things, he states that he first saw a rifle having its barrel rifled as described in the patent in 1863, at the office of the preceding witness, and that he became interested in the rifle from the targets exhibited, which it was said were made with it; that he purchased the rifle in 1863, as represented by the witness, to whom it had been sent for sale. Inquiries were then made of the witness as to the manner and extent the rifle had been used by him subsequent to that time. His answers were to the effect following: That he first went out with the rifle and tried it with a target, and that he found the shooting very satisfactory; that he then attended turkey-shoots, which he followed until they "barred him out" from shooting if he used the rifle with the rifle bore in question; that he made use of the first rifle for some two or three years at shooting-matches, and occasionally permitted others to use it; that he purchased a year later a more nicely finished rifle of the same construction, which proved defective, and he exchanged it for another with the preceding witness. Superadded to that, the witness states that he visited Edinburgh in 1865, and that while there he ordered of the complainant a rifle of the kind, without limit as to price; that in the course of six months a magnificently finished rifle came to hand, the cost of which in currency, at the then premium on gold, amounted to one thousand dollars; that he purchased the rifle for exhibition, but that he had tried its shooting capacity and pronounces it a "splendid shooting gun;" that he thinks he had fired the first rifle purchased fifteen hundred times; that Colonel Berdan called at his house several times to see the rifle, and spent most of two days in examining the rifle and its ammunition, and afterward constructed one and exhibited it at Long Island to a large number of persons; that he, the witness, fired the second one two or three times before "the accident" happened, and that he fired the substitute a great many times, but cannot tell how many. Two of the rifles which the witness purchased were exhibited in court for inspection, and the court is of the opinion that they contain the exact system of rifling described in the patent. Two or more witnesses were examined by the respondents to show that the patented system of rifling the bore of rifles was copied by the company which manufactured Sharp's rifle more than two years before the application for a patent here was filed in the patent office.

Suffice it to say, without reproducing the evidence, that it tends strongly to support the views of the respondents. Waiving that, the testimony of the other two witnesses, whose credit is above suspicion, is amply sufficient to show that the invention was very extensively known among our citizens; that it had been sold or offered for sale in repeated instances, and that it had been used in public many times and almost without number. Of these facts there is no doubt, and the only remaining question is as to their effect. Foreigners have never been permitted to take out a patent in this country, when their invention had first been patented abroad, without some restrictions beyond what was attached to our own inventors. No patent under the act of July 4th, 1836, for an invention previously patented in a foreign country was valid unless the patent granted here was applied for within six months after the publication of the foreign patent. 5 Stat. 121. Six months was the limitation in that act, but the subsequent act provided that a delay for that period should not debar the party from securing a patent here, provided the invention shall not have been introduced into public and common use in the United States prior to the application for such a patent. 5 Stat. 354. Nothing is contained in the succeeding act touching the present question, except that the term of a patent is extended from fourteen to seventeen years. 12 Stat. 246. Quite different regulations, and such as are more liberal to the foreign patentee, were enacted in the act under which the patent in controversy was granted. 16 Stat. 201. Delay to apply for a patent here, however long, within the life-time of the foreign patent, will not debar the applicant in this country from receiving a patent, provided the invention shall not have been introduced into public use in the United States for more than two years prior to the application. Examined in the light of that provision, the only remaining question is whether the evidence exhibited by the respondents proves that the invention had been introduced into public use for more than two years prior to the time when the application for the patent in this case was filed.

Even meritorious inventions first patented in a foreign country could not be patented here under the act of July 4th, 1836, unless the application for the patent here was filed within six months after the publication of the foreign patent, and they were exposed to the danger of having their patents defeated under the act of March 3d, 1839, in case it could be shown that the invention had been introduced into public and common use for any time, however short, prior to the filing of the application. Defendants in a suit upon a patent granted here might, under the act of July 4th, 1836, plead the general issue, and give in evidence that the invention had been in public use or on sale, with the

consent and allowance of the patentee, before his application for a patent, and, if they proved the allegation, they were entitled to judgment. 5 Stat. 123. Cases arose under that provision in which it was held that proof of public use with the consent and allowance of the patentee, even for a day, was sufficient to sustain the defence. Pennock v. Dialogue, 2 Pet. [27 U. S.] 13; Shaw v. Cooper, 7 Pet. [32 U. S.] 318; Mellus v. Silsbee [Case No. 9,404]. Hardships grew out of the stringency of that rule, and congress enacted in the act of March 3d, 1839, that no such forfeiture should occur by reason of such purchase, sale or use, except on proof of abandonment, or that such purchase, sale or prior use had been for more than two years prior to such application for a patent. Expounding that provision, Justice Nelson said: "The patentee may forfeit his right to the invention if he constructs it and vends it to others to use, or if he uses it publicly himself in the ordinary way of a public use of a machine at any time prior to the period of two years before he makes his application for a patent." Pitts v. Hall [Id. 11,192]. Other cases of repute decide in the same way, nor is the court aware that there is any conflicting decision. McClurg v. Kingsland, 1 How. [42 U. S.] 207; M'Millan v. Barclay [Case No. 8,902]; Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 607; Fruit Jar Co. v. Wright, 94 U. S. 94. Justice Swayne says, in the latter case, that a single instance of sale or of use by the patentee may, under the circumstances, be fatal to the patent, and that such is the construction of the clause as given by authoritative adjudications. Roemer v. Simon, 95 U. S. 219. Judicial decisions in England also decide that the phrase, public use, employed in patents granted there, means use in public or in a public manner, in opposition to a secret use, and that it does not mean use by the public generally. Carpenter v. Smith, 1 Webster, Pat. Cas. 534; Hind. Pat. pp. 108, 112; Stead v. Williams, 2 Webster, Pat. Cas. 126. By public use, says Curtis, is meant use in public; that is to say, if the inventor himself makes and sells the thing to be used by others, or it is made by one other person only, with his knowledge and without objection, before his application for a patent, a fortiori, if he suffers it to get into general use, it will have been in public use. Curtis, Pat. § 382. Adjudications to that effect might be multiplied almost without number, but those already referred to are quite sufficient to show that by public use is meant use in public, as stated by all the well-considered authorities upon the subject. Coffin v. Ogden, 18 Wall. [85 U. S.] 124; Reed v. Cutter [Case No. 11,645]; Bedford v. Hunt [Id. 1,217]. Apply those rules to the case before the court, and it is clear that the sixth defence is well sustained, and that the respondents are entitled to a decree upon both grounds, which renders it unnecessary to examine the other questions raised by the pleadings.

Decree in favor of the respondent that the bill of complaint be dismissed with costs.

Case No. 6,385.

HENRY v. RICKETTS et al.

[1 Cranch, C. C. 545.] [1]

Circuit Court, District of Columbia. July Term, 1809.

NEW TRIAL—MISBEHAVIOR OF JUROR—DEPOSITION OF INTERESTED WITNESS—EVIDENCE—DIVIDED COURT.

1. Misbehavior of jurors is not a ground for a new trial, if it has not affected the verdict.

2. The refusal of a new trial is not error.

3. If the defendant take and return the deposition of an interested witness, he cannot object to its being read on the trial, because the witness was interested. Quaere.

4. If the court is divided upon an objection to evidence, the objection does not prevail.

[Cited in Welch v. County Court (W. Va.) 1 S. E. 340.]

In an action upon the acceptance of a bill of exchange drawn by W. Hartshorne upon the defendants [Ricketts, Newton & Co.] in favor of Ashley, and by him indorsed to Henry; the defence was that the ship Rose was transferred to Hartshorne in payment of the bill, under a contract signed by Ashley. Ashley, the indorser of the bill, and who had signed the contract, had been produced and examined by the defendants, and his deposition taken de bene esse, under the thirtieth section of the judiciary act [of 1789 (1 Stat. 80)] and the plaintiff [Henry's executor] had cross-examined him. The deposition was returned and filed, and at the trial the plaintiff offered to read the deposition. The defendants' counsel objected that it appeared from the papers that the witness was interested, both as indorser and as a guarantor of the contract. To which the plaintiff's counsel answered, that the defendant, by producing and examining the witness, had waived the objection of interest; and of that opinion was CRANCH, Chief Judge. Fitzhugh, Circuit Judge, contra. Duckett, Circuit Judge, absent. The judges being divided in opinion, it was still a question, what was the consequence of such disagreement. But THE COURT agreed that the objection did not prevail.

Verdict for defendants.

Mr. Taylor, for plaintiff, moved for a new trial upon two grounds. 1. Newly-discovered evidence. 2. Misbehavior of some of the jurors. James Harris, the bailiff who attended the jury, testified that two of the jurors, without his leave, left the room about 11 o'clock at night, and were intoxicated, (the jury

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

being in their chamber all night.) That spiritous liquors were sent to them in their blankets. That the jury did not inform him that they had agreed upon their verdict till after the court had opened on the next morning. THE COURT refused to hear any explanation from the jurors implicated, and refused to suffer any of them to testify in regard to the misbehavior.

CRANCH, Chief Judge, said that if the jurors implicated could be heard, it must be as witnesses; and then the other jurors must be examined, which would produce mutual recriminations; and that the general rule in this court, and in other courts, is, not to hear the testimony of jurors upon an allegation of misbehavior. THE COURT refused to grant a new trial.

Mr. Taylor, for plaintiff, wished to except to the decision of the court. THE COURT said they should not sign a bill of exceptions, as the supreme court of the United States had decided that a writ of error would not lie to the refusal of a new trial.

Case No. 6,386.

HENRY v. RICKETTS et al.

[1 Cranch, C. C. 580.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

WITNESS—ATTENDANCE — SUBPOENA—MORE THAN ONE HUNDRED MILES.

The court will not, in a civil suit, attach a witness who resides more than one hundred miles from the place of trial, nor issue a subpoena commanding him to go and testify before a magistrate.

[Action at law by Henry's executors against Ricketts, Newton & Co.]

R. J. Taylor, for defendants, moved for a rule on James Taylor to show cause why an attachment should not issue against him for a contempt in not obeying a summons to appear and testify as a witness, and to bring with him certain papers. The witness resided in Norfolk, Virginia, more than one hundred miles from the place of trial.

THE COURT told Mr. Taylor they would hear him further in support of the motion. THE COURT, on hearing, refused to lay a rule, being of opinion that a witness, residing more than one hundred miles from the place of trial, could not be compelled to attend; and refused to issue a subpoena commanding the witness to appear before the mayor of Norfolk to testify. See Acts Cong. Sept. 24, 1789, § 30 (1 Stat. 88), and March 2, 1793, § 6 (1 Stat. 333).

HENRY (UNITED STATES v.). See Cases Nos. 15,350 and 15,351.

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

HENRY, The CHARLES. See Case No. 2,617.

HENRY, The JOHN. See Case No. 7,350.

HENRY, The PATRICK. See Case No. 10,805.

HENRY, The (UNITED STATES v.). See Case No. 15,352.

HENSHAW (BISSELL v.). See Case No. 1,447.

Case No. 6,387.

HENSHAW et al. v. MUTUAL SAFETY INS. CO.

[2 Blatchf. 99.] [1]

Circuit Court, S. D. New York. Nov., 1848.

MARINE INSURANCE—INTERPRETATION OF POLICIES—INTEREST OF INSURED—TIME OF INSURANCE AND TIME OF LOSS.

1. These points are settled in the construction of policies of insurance: First, they are to have a liberal and benign interpretation in behalf of the insured; second, they are to be construed and enforced according to the plain intent of the parties, if no settled rule of law interposes to prevent; third, whether or not, by the general rules of insurance law, the fact that the insured party had no insurable interest in the subject insured at the time it was intended the contract should commence its operation, although he possessed such interest at the time of the loss, would render the policy invalid, yet it is competent for the parties to contract with a view to such a condition of things.

[Cited in The Sidney, 23 Fed. 93, 27 Fed. 125.]

[Cited in Duncan v. China Mut. Ins. Co., 129 N. Y. 244, 29 N. E. 76.]

[See Bank of South Carolina v. Bicknell, Case No. 898.]

2. There is strong color, however, for the doctrine, that the party intended to be insured will be protected, if he had an interest at the time of the loss, without any express stipulation to that effect, although he had no interest at the commencement of the risk.

3. A time policy, against marine risk, on a steam-vessel, for a succession of voyages, each voyage to bear its own average, made at the instance of N., on account of whom it may concern, the loss payable to H., for the sum of $15,000, is an agreement by the underwriters to insure all the interest to that amount which shall be owned in the vessel at the time of her loss within the policy, and to pay the loss to H., for the benefit of the actual owners. Such a contract is legal, and H., in his own right, or as trustee, is competent to enforce it.

4. The policy might, also, be construed as intending each separate trip of the vessel to be a distinct voyage, the risk on which would commence at its inception, and thus the party interested at the time of the loss would also be interested at the commencement of the risk.

5. Where the declaration on such a policy averred that, at the time of the loss of the vessel, H., the plaintiff, was interested in her to the amount of the said insurance: *Held*, that it need not aver that H. was interested in her at the time of the insurance, or at the time of the commencement of the risk.

6. Where it averred that the insurance was for the use and benefit of H., as trustee for N., and that, as such trustee, H. was interested in

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

the vessel at the time of her loss: *Held*, that it need not set forth the nature or extent of the trust, they being matters of evidence.

Assumpsit on a policy of marine insurance. The declaration averred, in some of its counts, that on the 15th of July, 1846, at New York, the Norwich and Worcester Railroad Company, according to the usage and custom of merchants, caused a policy of insurance to be issued by the defendants, purporting and containing that the said railroad company, on account of whom it might concern, loss payable to the plaintiffs [David Henshaw and others], insured, from the 15th of August, 1846, until the 15th of August, 1847, the steamer Atlantic, each passage subject to its own average, against marine risk only, for the sum of $15,000; that the plaintiffs were, at the time of the loss of the steamer, interested in her to the amount of the said insurance; and that she was totally lost on the 26th of November, 1846, on her passage from Allyn's Point, in Connecticut, to the city of New York. To these counts the defendants demurred specially, assigning for cause, that it did not appear that at the time of the insurance, or at the time of the commencement of the risk under the policy, the plaintiffs were interested in the vessel. Other counts averred that the insurance was for the use and benefit of the plaintiffs, as trustees for the railroad company, and that, as such trustees, they were interested in the vessel at the time of her loss. To these counts the defendants demurred specially, assigning for cause, that they contained no sufficient, distinct or intelligible description of the trust referred to, or of the title of the plaintiffs as such trustees.

Benjamin F. Butler and Daniel Lord, for plaintiffs.

John Duer and Theodore Sedgwick, for defendants.

BETTS, District Judge. The essential point upon which it is claimed by the defendants that the decision of the court should be in their favor is, that the policy is not obligatory on them, because the plaintiffs had no interest in the subject-matter of the insurance at the time the policy was executed, nor when it was to take effect. The policy contains no statement touching the interest of the plaintiffs in the subject of the insurance. The character of that interest must accordingly be indicated by averments in the declaration, and each count must contain such as are essential to the maintenance of the action. The declaration here must, therefore, be held to be defective in some of its counts, if, to uphold the policy, it be necessary for the plaintiffs to show an interest in themselves in the subject insured, either at the date of the contract or at the commencement of the risk.

We do not propose to review the various cases cited on the argument, which declare the necessity of a subsisting interest on the part of the insured at the inception of the contract, because, in our opinion, this case does not fall within the principle involved in those decisions.

We consider these points in the construction of policies of insurance to be incontestably setttled: First, they are to have a liberal and benign interpretation in behalf of the insured; second, they are to be construed and enforced according to the plain intent of the parties, if no settled rule of law interposes to prevent; third, whether or not, by the general rules of insurance law, the fact that the insured party had no insurable interest in the subject insured at the time it was intended the contract should commence its operation, although he possessed such interest at the time of the loss, would render the policy invalid, yet clearly it is competent for the parties to contract with a view to such a condition of things. 3 Kent, Comm. (6th Ed.) 258; 1 Duer, Ins. 159, 160, note 1; Rogers v. Traders' Ins. Co., 6 Paige, 583, 596. There is, however, strong color at least for the doctrine, that the party intended to be insured will be protected if he had an interest at the time of the loss, without any express stipulation to that effect, although he had no interest at the commencement of the risk. Hughes, Ins. 42; 2 Duer, Ins. 49, § 31; Sutherland v. Pratt, 11 Mees. & W. 296; Hancox v. Fishing Ins. Co. [Case No. 6,013].

But we place our decision in this case upon the manifest purpose of the parties, as expressed in the policy. It was a time policy on a steam-vessel, for a succession of voyages, each voyage to bear its own average. It was made at the instance of the Norwich and Worcester Railroad Company, on account of whom it might concern, the loss payable to the plaintiffs, and the interest was vested in them when the loss occurred. Aldrich v. Equitable Ins. Co. [Case No. 155]; 1 Duer, Ins. 159, 160, note 1. Upon the statements of the contract, set forth in the declaration, we think that no stronger form of stipulation can be necessary, to render it palpable that the underwriters intended, by their agreement, to insure all the interest, to the extent of $15,000, which should be owned in the vessel at the time of her loss within the policy, and to pay the loss to the plaintiffs for the benefit of the actual owners. The authorities are abundant to show that such a contract is legal, and that the plaintiffs, in their own right, or as trustees, are competent parties to enforce it. Cox v. Parry, 1 Term R. 464; 2 Duer, Ins. 10, § 9; Id. 17, § 15; 1 Phil. Ins. c. 4, note a; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Buck v. Chesapeake Ins. Co., 1 Pet. [26 U. S.] 151; Sutherland v. Pratt, 11 Mees. & W. 296. If the suit is avowedly in the name of an agent, it is only necessary for the declaration to disclose who the real parties in interest are. Rider v. Ocean Ins. Co., 20 Pick. 259; 2 Duer, Ins. 48, § 30. In this case, however, there is a positive averment that, at the time of the loss, the interest was in the plaintiffs, and that fact stands admitted by the demurrer.

It was conceded, on the argument, that a policy upon an interest to be acquired after the execution of the contract is valid. This is the ordinary, and, perhaps, the most serviceable class of insurances. Cargoes can be purchased and laden from port to port, on trading voyages, under the protection of policies already in existence, without waiting for the means of obtaining satisfactory insurance after the interest is acquired. The same principle applies to the changeable proprietorship of vessels; and we have no difficulty in expounding the present policy as contemplating a succession of ownerships in the steamer, and as intended by the underwriters to cover the interest in the vessel, in whomsoever it might be vested when a loss should occur. Such a contract, explicitly entered into, is, as we have already shown, recognized as valid both by the English and American law. Rogers v. Traders' Ins. Co., 6 Paige, 583, 596; 2 Duer, Ins. 29, §§ 21, 22, 24; Id. 41, § 28; Id. 49, § 31; Hughes, Ins. (Am. Ed. 42) 54.

There would be no incongruity in this case in construing the policy as intending each separate trip of the vessel to be a distinct voyage, the risk on which would commence at its inception, because it is a time policy, in reference to a succession of voyages or passages, each of which is subject to its separate average. That interpretation of the contract would satisfy the formal rule indicated in some of the cases, that the insured must be interested at the commencement of the risk and at the time of the loss. Seamans v. Loring [Case No. 12,583]; Hancox v. Fishing Ins. Co. [Id. 6,013]; Rider v. Ocean Ins. Co., 20 Pick. 259. We are not, however, prepared to say that the propositions of law laid down in the cases just cited, necessarily flowed from the points involved in those cases. But, in our view of the present case, it is not important to scan the force of those decisions, as the defendants here are responsible upon their express undertaking, and not upon any liability implied from the relation of the parties or the subject-matter of the contract.

We think that the plaintiffs are not bound to set forth with more particularity the nature and extent of their trust. They aver that they are trustees, that the insurance was for them, and that they were interested in the vessel at the time of her loss. Granger v. Howard Ins. Co., 5 Wend. 200, 202. The amount of the interest and the value of the trust are matters of evidence only, when it becomes important to inquire into either of those facts. Judgment for plaintiffs.

Case No. 6,388.

HENTZ et al. v. The IDAHO.

[The case reported under above title in 14 Int. Rev. Rec. 134, is the same as Case No. 6,997.]

HENTZ (McGEHEE v.). See Case No. 8,794.

HENZIER (BUFORD v.). See Case No. 2,114.

HEPBURN (AULD v.). See Cases Nos. 650 and 651.

Case No. 6,389.

HEPBURN et al. v. AULD.

DUNLOP et al. v. HEPBURN et al.

[2 Cranch, C. C. 86.] [1]

Circuit Court, District of Columbia. Nov. Term, 1813.[2]

EQUITY — REAL ESTATE — BILL TO VACATE CONTRACT—ABILITY TO CONVEY GOOD TITLE AS A DEFENSE.

If the vendee of land bring a bill to vacate the contract because the title has been adjudged defective, the defendant may resist a decree by showing himself to be now ready to make a good title, if time be not of the essence of the contract, although a former bill by the vendor for a specific performance had been dismissed on account of the defect of title.

[See note at end of case.]

Dunlop & Co. brought their bill in equity against Hepburn & Dundas, to annul the agreement of the 27th September, 1799, and to compel an account, and to pay the balance. Hepburn & Dundas brought their bill against Colin Auld, agent of Dunlop & Co., for a specific performance of that agreement. A former bill in equity, brought by Hepburn & Dundas against Auld, to compel a specific performance of the same agreement, had been dismissed by the supreme court of the United States, for want of a good title in Hepburn & Dundas, to the land mentioned in Graham's contract. 5 Cranch [9 U. S.] 262. After the dismissal of that bill at February term, 1809, Auld, in the name of his constituents, Dunlop & Co., brought the present bill in equity to vacate the agreement of the 27th September, 1799. On the same day on which the subpoena issued in this case, H. & D. informed Auld that they had perfected their title, and were ready to execute a deed to him for the Ohio lands, upon his paying the balance; that is, the difference between the award and the stipulated value of Graham's contract. To which offer Auld replied that Dunlop & Co. had issued process against them to compel them to pay their debt and interest, in money; and that he did not believe that a court of equity would, under all the circumstances, compel them to take the land in satisfaction of the debt. After this, Hepburn & Dundas brought their second bill in equity against Auld for a specific execution of the agreement, and to compel him to take the land, and pay the difference between the award

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

[2] [Reversed in 1 Wheat. (14 U. S.) 179.]

and the stipulated value of Graham's contract.

In answer to the bill of Dunlop & Co., which seeks to vacate the contract, and to open the account, and to compel payment of the whole debt in money, H. & D. say: (1) That the accounts are all closed by the award, and cannot now be opened. (2) That it was decided by the supreme court of the United States, in the suit at law brought by Auld for the penalty of the articles of agreement, that the tender of the assignment of Graham's contract, as pleaded, was a good tender; and that Auld ought to have accepted it; and that if he had accepted it, it would have discharged the debt due upon the award. And although this did not relieve them from the duty of executing a proper deed, when required, yet they are in no default, inasmuch as no conveyance has been required; and they are now able, and have offered, to make a good conveyance of the land to him, upon his paying the difference. In answer to the bill of H. & D. against Mr. Auld, he resists a specific performance, at this late period, on various grounds: and among others, because the tender of the assignment of Graham's contract was upon condition that he should first execute and deliver to them a release of all demands, &c.; and because their title was defective until March, 1809, after their bill for a specific execution had been finally dismissed by the supreme court; and because the object of Auld was to receive payment of a debt, and not to purchase land; and therefore time was very material; especially as it was well known to both parties that the rents and profits were by no means equal to the interest of the debt, and that the land has depreciated very much during this delay of the title.

CRANCH, Chief Judge. These causes are set for hearing on the bills, answers, exhibits, and sundry depositions respecting the value of the land and its depreciation. There seems to be a considerable difference of opinion as to the value of the land, but the balance of evidence inclines to the fact that the land never was worth more than $18,000 in cash, and that it has greatly depreciated. This is not a common case of vendor and vendee, where the object is the purchase of an estate, the rents and profits of which may be an equivalent for the interest of the purchase-money, whereby delay is rendered immaterial. But it is the case of a creditor seeking payment of his debt, and of a debtor seeking to pay off his debt in lands. It is well known that in this country, the price of lands, especially of new lands, fluctuates very much; and therefore where the object is to raise money by the sale of lands, to pay off a debt, time is very material. I should therefore doubt of the propriety, in this country, of applying to such cases the rule of equity which has prevailed in England, between vendor and vendee, that if the vendor's title is perfected before a decree upon his bill for a specific performance is rendered against him, a specific performance shall be decreed. But if it be proper to apply that rule to such a case as this, yet the inference from the same rule is, that if the vendor's title be not perfected before decree on his bill, the decree shall be against him; and I do not remember a case in which a vendor has obtained a decree for a specific performance upon a second bill, brought after a dismissal of the first for want of title. If his right to a specific performance be not barred by the dismissal of his first bill on the merits of his case, will it be barred by the dismissal of his second, or third bill? If not, where shall he be stopped—or what end can there be to the controversy?

This view of the subject would be conclusive in my mind, if Mr. Auld had not brought a bill to vacate the contract, thereby impliedly admitting it to be in force until declared void by a decree of this court. When a court is called upon to vacate a contract by reason of the non-execution thereof by the other party, the defendant has a right in equity to offer himself able, ready, and willing to perform it; and if he do so offer, the court ought to suffer him to perform, if time be not of the essence of the contract. In this case, the supreme court has declared, in effect, that time is not material, if the party can make a good title before the decree. Mr. Auld having instituted a suit, praying for a decree to vacate the contract, it would seem, by analogy to cases of foreclosure, that H. & D. would have a right to perform before the passing of that decree, if they can.

The judgment of the supreme court in the suit at law, brought by Auld against H. & D. was in their favor only upon the tender of the assignment as pleaded in one of the pleas, in which the title was not brought in question. On the other two demurrers, if they gave judgment at all, it must have been in favor of Auld, because those demurrers brought into view the same defects of title which the supreme court decided to be sufficient to dismiss the bill for a specific execution of the contract. The effect, therefore, of the opinion of that court upon the two cases, was, that although the tender, as pleaded, was good, yet upon all the facts of the case it was not such a tender as Auld was obliged to accept. The tender of the assignment has been considered by the counsel of H. & D. like a tender of so much money, which stops interest from the time of tender until a new demand be made. But the tender which will stop interest, must be a tender of that which the creditor is bound to accept. Here the supreme court has decided that Mr. Auld was not bound to

accept the assignment tendered, and therefore such a tender does not stop interest. Mr. Auld was bound to receive only such an assignment, of such a contract, with such powers as would enable him to maintain an ejectment against Graham's heirs, or would enable him to compel a specific performance by payment of the purchase-money. It is immaterial what were Mr. Auld's motives at the time, for refusing to accept the assignment. H. & D. must show that he was bound to accept what they tendered; and as they could not tender what he was bound to accept until the 20th of March, 1809, and did not give him notice of their ability to perform until the 27th of March, 1809, they ought to make compensation for the delay by payment of interest upon the amount of the award from its date to the 27th of March, 1809. Such a decree is conformable to the precedent in the case of Clute v. Robison, 2 Johns. 595, in the court of errors at New York, a precedent entitled to much respect, not only for its equity, but on account of its being the unanimous decision of a most respectable court. That case, indeed, seems to justify the calculation of interest to the time of this decree; and we have considerable doubt whether it ought not to be so calculated, because H. & D. did not make a regular tender of a conveyance, and had been in the receipt of the rents and profits ever since that time; but as they declared their readiness to convey a good title on the 27th of March, 1809, and as Mr. Auld in his answer intimated that he was not then bound to accept such a conveyance, we think he waived the necessity of a tender, and therefore the interest ought to stop at that time. As the interest on the debt is to stop on the 27th of March, 1809, and as Dunlop & Co. were bound on that day to receive the title offered, they are entitled to the rents and profits which may have accrued since that date, and an account of them ought to be taken, if required. (To avoid an account, however, the court gave interest to the present time, December 23, 1813.)

These suits having been heard at the same time,

THE COURT, in the suit of Dunlop & Co. v. Hepburn & Dundas, decreed that H. & D. should pay to Dunlop & Co. or their agent, Colin Auld, the sum of $33,060.37, being the sum awarded, at the par of exchange, with interest thereon, at 5 per cent. from the 1st of January, 1800, till the time of rendering the decree; but that the sum of $21,112, part thereof might be discharged by a conveyance, within a certain time of the land mentioned in Graham's contract to Colin Auld in trust for Dunlop & Co.

And in the suit of Hepburn & Dundas v. Auld, that upon H. & D.'s making the payment in that manner, Auld, as agent of Dunlop & Co. should execute and deliver to H. & D. such a receipt and discharge of all the claims of Dunlop & Co. against them, as the court might approve.

Reversed by the supreme court (1 Wheat. [14 U. S.] 179), who ordered the bill of Dunlop & Co. v. Hepburn & Dundas to be dismissed; and in the case of Hepburn & Dundas v. Auld, decreed a sale of the land mentioned in Graham's contract, and the proceeds to be paid to Dunlop & Co. or their agent, and that H. & D. should convey the lands to the purchasers; and that H. & D. should pay to Dunlop & Co. or their agent, on or before the 1st day of April then next, $9,143.72, being the difference between the sum awarded with interest thereon at 6 per cent. per annum from the 1st of January, 1800, to the 27th of March, 1809, and the sum due upon Graham's contract on the 1st of January, 1800, and that an account should be taken of the rents and profits since the 27th of March, 1809, and that H. & D. pay over the same to Dunlop & Co. or their agent. The only substantial difference between this decree and that of the circuit court is, that it gives interest upon the award at 6 per cent. from 1st January, 1800, to 27th March, 1809, and the rents and profits afterwards; whereas the decree of the circuit court gave interest upon the award at 5 per cent. from the 1st of January, 1800, to the time of the decree, in lieu of the rents and profits.

[NOTE. An appeal was then taken by both parties to the supreme court, where the judgment was reversed in an opinion by Mr. Justice Washington, who said that a court of equity will decree specific performance of a contract for the sale of land if the vendor is able to make a good title at any time before the decree is pronounced. The dismissal, however, of a previous bill for specific performance is a bar to a new bill for the same object. 1 Wheat. (14 U. S.) 179.]

HEPBURN (QUEEN v.). See Case No. 11,503.

Case No. 6,390.

HEPPARD v. The GENERAL CADWALADER and The MAJOR RINGGOLD.

[6 Pa. Law J. 473; 4 Pa. Law J. Rep. 472.]

District Court, E. D. Pennsylvania. March 26, 1847.

MARITIME LIENS—LIEN FOR WORK DONE—LOCAL LAW—PERSONAL LIABILITY OF OWNER.

1. The only lien which the admiralty will enforce against a vessel for work done in its construction, is that which obtains under the local law; and as by the Pennsylvania act of assembly of 13th June, 1836, § 2 [Laws Pa. p. 617], the lien ceases under such circumstances, when the vessel proceeds on her first voyage, no admiralty process will be extended to enforce it.

2. A shipowner is not liable personally for work upon the ship, unless done by his order or on his credit.

3. A. agrees with B. that a vessel building by A. shall become B.'s property, on the payment

of a certain sum. B. takes charge of the vessel for the purpose of fitting her up, and in so doing, but before a legal transfer is made, makes a contract for painting the cabins: *Held*, that A. is not liable personally for the work thus done.

[Libels in admiralty by John Heppard against the barges General Cadwalader and Major Ringgold, and William L. Ashmead and Theodore Birely, owners.] The libels in these cases were in rem et personam; and a decree pro confesso having passed against William L. Ashmead, a decree was asked, upon hearing, against the barges and against Theodore Birely. The barges were built at Philadelphia by Birely, and the legal title remained in his name; but by agreement between him and Ashmead, they were to become the property of the latter, on payment of a certain sum. They were fitting up, under Ashmead's direction, to carry passengers, and the libellant was engaged by him to paint the cabins. Birely was occasionally on board while the work was in progress, but gave no orders respecting it. After the barges had made repeated voyages in the service of Ashmead, he found himself unable to complete his bargain, and the barges were sold to a third person.

Mr. Vandyke, for libellant.
Mr. Ashmead, for respondents.

KANE, District Judge (after stating the facts as above). It is plain on these facts that this libel cannot be sustained against the vessel. The only lien which this court could enforce against it is that which obtains under the local law, and that expired when the vessel proceeded on her first voyage, after the work was done. Act Assem. Pa. June 13, 1836, § 2. The argument by which recourse is sought against Birely supposes a liability on the part of shipowners which the law does not warrant. They are not liable personally for work upon the ship, unless done by their order or on their credit. See the cases collected in the new edition of Abb. Shipp. p. 31 et seq. The case of Leonard v. Huntington, decided by Chief Justice Thompson (15 Johns. 302), is closely parallel to the present. There the defendant had contracted to sell, but retained the bill of sale until the purchase-money was paid; and he was held not liable for repairs done in the meantime by the orders of his equitable vendee. The court asserted substantially the same principle which the English courts have in later years decided to be the true one, that the question of liability refers itself directly and exclusively to the question, upon whose credit was the work done? 1 Russ. & M. 42.

I therefore dismiss the libels against the vessels and against Theodore Birely. Regarding all the circumstances, however, the case seems to be one in which the court may properly exercise a discretion as to the costs to be paid by the parties respectively, and I therefore order that the full costs being first taxed, the one-half thereof be paid by the libellant, and the other by the respondents.

Vide People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393; Roach v. Chapman, 22 How. [63 U. S.] 129; The St. Lawrence, 1 Black [66 U. S.] 522; The Coernine [Case No. 2,944]; The Revenue Cutter [Id. 11,713].

HEQUEMBOURG (LAKE v.). See Case No. 7,994.

Case No. 6,391.

The HERALD.[1]

District Court, E. D. Pennsylvania. Feb. 8, 1862.[2]

PRIZE — FALSIFICATION OF DESTINATION — FALSE STATEMENTS OF MASTER — TIME ALLOWED FOR APPEARANCE OF CLAIMANTS.

[1. A vessel condemned because her destination was falsified at the port of departure, and because the master, in the preparatory examination, made false statements as to the ownership of the cargo.]

[2. Cargo shipped under bills of lading showing apparent ownership in an absent party capable of claiming, whose ownership is also affirmed by the master in his preparatory examination, will not be finally condemned until such party has had the benefit of the rule allowing a year for the assertion of claims, although this evidence of his ownership is subsequently contradicted by the master, and by other evidence asserting ownership in a third person, who is held incapable of claiming.]

In admiralty.

CADWALADER, District Judge. The case of this vessel and that of her cargo are somewhat complicated with each other. As to the vessel—of which fifty-nine sixty-fourths are of alleged British ownership—the principal questions are:—(1) Should the case be ruled by the law of war? (2) Was Beaufort harbor effectively blockaded? (3) Was there a breach of blockade? (4) Did the notification of the intended blockade of the ports of North Carolina render a vessel sailing afterwards, as this vessel did, for a port of that state from a port of the United States, liable to capture and condemnation, independently of any question of actual blockade of the port of destination? (5) Independently of any question of blockade, ought she to be condemned either for the sole reason that her clearance at Boston, when she was bound for Beaufort, was falsified so as to represent a fictitious destination for a friendly foreign port, or on account of this and other facts considered in combination with one another, and also in connection with negative circumstances of the case?

I think that the law of maritime war should rule the case. Beaufort harbor was not blockaded when this vessel entered it,

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[1] [Not previously reported.]

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 3 Wall. (70 U. S.) 768.]

on the 10th of June, 1861. Whether it was effectively blockaded on the 14th of July, 1861, when she left it, is an unimportant inquiry; because, if there was then a blockade, there was, according to the rules prescribed in the president's previous proclamations, afterwards confirmed by congress, no breach of blockade. So far as the vessel is concerned, the voyage was, under the charter party, from Boston, by way of Beaufort, to Liverpool; so that the primary destination to Beaufort, not less than the ulterior destination to Liverpool, must be considered. There had been a complete notification of the intended blockade; and the parties had actual knowledge of it before she left Boston. Whether, under the fourth question, the rule of decision should be the same as if the port of departure had been within a foreign jurisdiction, involves a point of great importance, which it is not necessary to decide, because the destination was falsified.

The master's conduct is, in some respects, inexplicable, if the whole truth as to interests in the profits of the voyage has, at this time, even after the latitude of proof which has been allowed, been fairly disclosed. But, if these obscurities are disregarded, the case of the vessel may be decided on either of two simple grounds, upon either of which further proof should, from the first, have been disallowed. She should be condemned, both because her destination was falsified at the port of departure, and because the master, in the preparatory examination, made false statements for the purpose of deception as to the ownership of the cargo. The indulgence which, in matters of practice, has, in the earlier stages of the present hostilities, been extended in all cases of maritime capture, has, in this case, perhaps, been extended rather too far in disregarding the defects in the test oath of the alleged owners of this vessel. The entry of the decree condemning her will be postponed for a few days, if they desire to file a suppletory test oath to go up in case of an appeal.

As to the cargo, the transactions in which Messrs. Williams and Parmelee were concerned require more satisfactory explanations than have been offered or sustained. The claim of Mr. Williams for the tar and rosin and a portion of the spirits of turpentine cannot be allowed. But, in rejecting it, I ought not, at once, to condemn the subjects of it. The bills of lading for this part of the cargo describe the shipper as agent of the Liverpool consignees. This indicates an ownership in parties who, according to the rule of proceeding, are allowed a year to prosecute their claim. Their ownership was moreover affirmed by the master in the preparatory examination. However this may have been contradicted by his own subsequent affidavit, and by the further proof which has been adduced on behalf of Mr. Williams, the contradiction does not affect these absent parties, or shorten the time of a year, which is allowed to parties not incapable of claiming.

The shipments of tobacco are, according to the respective bills of lading, for the account of other parties in England, to whom the like delay should be extended. The particular distinctions in the facts are attended with no such difference as excludes the application of the rule of practice. The claim interposed by the captain on behalf of other parties who are probably the true owners of the tobacco is rejected. They are parties incapable of any standing in this court as claimants. But its rejection, as in the other case, does not affect other parties who are, as yet, unrepresented, however improbable it may seem that they will ever appear as claimants.

The several shipments of spirits of turpentine, which are not included in the claim of Mr. Williams, have been claimed by the master, on behalf of the respective owners. They are parties who can have no standing in court as claimants. These claims are rejected, and the subjects of them condemned. But, as the vessel is of alleged foreign ownership, and the cargo has not been unladen, the decree of condemnation will not be entered as to any part of it until the formal condemnation of the vessel. On all the questions of the case I have prepared a fuller opinion, which may, perhaps, be filed hereafter.

[NOTE. An appeal was then taken by the claimants to the circuit court, where the decree was affirmed. From this decree they appealed to the supreme court, where the decree was duly affirmed in an opinion by Mr. Chief Justice Chase, who said that under all the circumstances of the case a knowledge of the blockade must be inferred against the master of the vessel. 3 Wall. (70 U. S.) 768.]

Case No. 6,392.

The HERALD, Etc.

[8 Ben. 263.] [1]

District Court, S. D. New York. Dec., 1875.

COLLISION IN THE HUDSON RIVER—TUG-BOAT AND TOW.

1. The barge A. was towed by the steamboat H. astern at the end of two hawsers, being steered by her own helm. In passing the steamer C. and a fleet of twenty-five canal-boats, which she was towing up the river astern of her, the barge took a sheer towards the canal-boats and came in collision with one of them, while the H. and two boats which she had alongside, passed clear of all. In a suit brought against the H., the C. and the A., to recover for the damages sustained by the canal-boat: *Held*, that, under the circumstances, it was for the A. to establish that this sheer was caused by some fault on the part of the H.

[Cited in The Ciampa Emilia, 46 Fed. 867.]

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

2. No fault was shown to have been committed by either the H. or the C., and the A. must be held solely responsible for the damages.

This was a libel by Louis Mayer, owner of the canal-boat Late and Early, to recover for the damages sustained by her being sunk on the night of the 1st of August, 1874, in the Hudson river, just below Hudson. The Late and Early was one of twenty-five boats which were being towed up the river by the steamer Connecticut, arranged in five or six tiers, the Late and Early being the outside boat on the port side of the second tier. The steamboat Herald was coming down the river, having two canal-boats on each side, and towing astern an ice-barge called the Arctic, at the end of two hawsers of about forty fathoms in length, and this ice-barge was brought in contact with the Late and Early, causing her to sink. Mayer filed his libel against the two steamboats and the ice-barge, charging that they were all guilty of negligence which caused the collision—the Connecticut, in that she was too close to the west side of the channel and should have stopped sooner to allow the Herald and her tow to pass; the Herald, in running at too great a rate of speed and in towing the barge on so long a hawser; and the Arctic in being so towed, and in not being properly steered, so that she sheered to the eastward against the Late and Early. Separate answers were put in on behalf of each of the vessels, denying the faults charged upon them respectively.

Beebe, Wilcox & Hobbs, for libellant.
Benedict, Taft & Benedict, for the Herald.
C. Van Santvoord, for the Connecticut.
H. N. Beach, for the Arctic.

BLATCHFORD, District Judge. Although the motive power which gave the barge her forward movement was in the Herald, and she was being towed at some distance astern of the Herald, by lines from the stern of the Herald, yet she was being guided by the movement of her own rudder, controlled by the will and discretion of her own captain, who was at the wheel in her pilot house. The barge struck the boat that was in front of the libellant's boat, and drove the former against the latter, and thus caused the injury complained of. It is plain that the barge took a sheer and went out of her proper course. Under the circumstances, it is for her to establish that the sheer was caused by some fault on the part of the Herald. This is not done; nor is any fault shown on the part of the Connecticut. The libel is dismissed as to the Herald and the Connecticut, and a decree will be entered in favor of the libellant against the barge, with a reference to ascertain the damages sustained by the libellant.

Case No. 6,393.

The HERALD.

[8 Ben. 409.] [1]

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

POSSESSION—SALE OF VESSEL BY MASTER.

Where a vessel, in a foreign port, was in such a condition that nothing better could be done for her owner than to sell her, and her master could not within a reasonable time have consulted with the owner, and he called to his aid disinterested persons of skill and experience, who, after survey, advised her sale, the master having no means and no credit and it not being possible to make the necessary repairs at that port, and the master thereupon, acting in honesty and good faith, sold the vessel: *Held*, that the sale must be sustained and that a libel for possession in behalf of her former owner must be dismissed.

This was a libel for possession. The libel alleged, that, in July, 1874, the libellant bought the bark Herald for £1550 in England, overhauled her and fitted her up at an additional expense of £1800, and sent her on a voyage to Colon, Central America, under the command of one Rasmussen, as captain; that she was then chartered by the captain to go to the Musquito coast and load mahogany for England; that, on that voyage, she received certain injuries and returned to Colon on January 14th, 1875; that on the next day a survey was held when the surveyors reported that she was unseaworthy and could not be repaired at Colon, and that, if she could, it would cost more than two-thirds of her value, and advised her condemnation and sale; that she was thereupon sold, on January 28th, for $850; that the survey was false and was procured by Rasmussen; that Rasmussen did not communicate with the owner, although there was telegraphic communication between Colon and London, via New York; that the respondent, Gerhard Wessels, who lived in New York, afterwards bought the vessel for $1,500, though having reason to know that the condemnation and sale had been fraudulently procured, and brought her to New York without making any substantial repairs on her; and that, as soon as the libellant learned of her arrival in New York, he left London and came to New York and filed this libel at once, against the bark and Gerhard Wessels, to recover possession. The respondent denied the allegations of the libel. The son of the respondent, Henry B. Wessels, claimed the vessel as owner, and also denied all allegations of any improper dealing in relation to said vessel, alleging that he first heard of the vessel after the sale at Colon, and bought her from the purchaser at such sale, she being then in an unseaworthy condition and fifty-seven years old; that he put some repairs on her and

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

sent her to Jamaica in ballast and thence with a little cargo to New York, where he had commenced thorough repairs on her when the libel was filed; and that the sale was valid and passed a good title to the purchaser.

Porter, Lowrey & Soren, for libellant.

R. D. Benedict and Henry T. Wing, for claimant and respondent.

BLATCHFORD, District Judge. Within the principles laid down by the supreme court in the cases of Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 620; The Sarah Ann, 13 Pet. [38 U. S.] 400; Post v. Jones, 19 How. [60 U. S.] 157; and The Amelie, 6 Wall. [73 U. S.] 18,—I think the libel in this case must be dismissed. The vessel was in such a condition, and the necessity was so urgent, as to justify the sale. There was a necessity for the sale, within the meaning of the commercial law, because nothing better could be done for the owner. The honesty and good faith of the master in making the sale are satisfactorily shown. The master could not, within a reasonable time, have consulted the owner, and he called to his aid disinterested persons of skill and experience, competent to advise him, and who, after a survey of the vessel, advised her sale. He was at a great distance from the owner and had no direct means of communication with him. He had no money and no credit, and the repairs that were necessary could not be made at the place where he was. I see nothing to impeach the good faith of the claimant, or of the respondent who has answered. The libel is dismissed, with costs.

HERAN (BRADSTREET v.). See Case No. 1,792.

END OF CASES IN BOOK 11.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ABATEMENT AND REVIVAL.

Page

An action of ejectment is one in which the cause of action survives in Vermont.. 814

Where plaintiff dies before judgment, his personal representative may become a party to the suit, and prosecute it to final judgment (Act 1789, § 31), where the cause of action survives by the local law..... 814

The fact that the administrator of the deceased plaintiff is a citizen of the same state with defendant will not oust the court of jurisdiction 814

Accord and Satisfaction.

See "Payment."

ADMIRALTY.

See, also, "Affreightment"; "Average"; "Bills of Lading"; "Charter Parties"; "Collision"; "Demurrage"; "Marine Insurance"; "Maritime Liens"; "Pilots"; "Pleading in Admiralty"; "Practice in Admiralty"; "Salvage"; "Seamen"; "Shipping"; "Towage"; "Wharves."

Jurisdiction—In general.

Admiralty jurisdiction attaches where there is no other question than that of title to a ship, and no pretense of a maritime contract or a marine tort..... 47

Admiralty has no jurisdiction, under a state statute or otherwise, to enforce a lien against a vessel for a demand which is not distinctively for maritime supplies..... 4

A claim for half pilotage, given by a state law for services offered and refused, cannot be enforced in admiralty..... 646

—— Waters and places.

A contract for pilotage, to be performed wholly within a state, cannot be enforced in admiralty 646

The maritime law does not apply to a steam ferryboat running between Washington and Alexandria, D. C..... 642

Services by seaman upon a vessel sailing between Philadelphia and ports on the Chesapeake Bay, employed as laborers to obtain a cargo of oysters for purposes of transplanting, *held* maritime..... 685

—— Persons and property.

The district court in admiralty may exercise jurisdiction against a British vessel, in favor of a British subject residing in the British dominions, but is not bound to do so 844

The court will not ordinarily interfere in a dispute between the master and seaman of a foreign vessel, before the voyage is ended, without the concurrence of the consul 909

The admiralty court will not proceed against a foreign vessel without the consent of the commercial representative of the foreign government, in the absence of strong circumstances 893

A steamboat, dismantled and stripped of her motive power, and fitted and used as a saloon and hotel, *held* not liable in rem for services to her in the nature of salvage, where she went ashore while being towed to another place.....1085

A barge without any propelling power or rudder, used as a transport in New York harbor, is a vessel engaged in maritime service upon navigable waters..... 783

——. Rights and controversies.

Admiralty has jurisdiction over policies of marine insurance..... 189

Admiralty has jurisdiction of an action by a passenger against a steamship for breach of a contract of passage as to the accommodations afforded 398

Admiralty has jurisdiction of a contract by a steamboat, made in connection with the contract to transport goods, to collect the price, freight, etc., from the consignee, and return the balance to the consignor... 503

A person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps, and the like, cannot maintain a suit in admiralty to recover his compensation for such services 123

Admiralty has no jurisdiction of a suit by equity co-owners of a vessel against the other co-owners for supplies furnished... 227

A libel by the master and co-owner of a whaling vessel, to recover his lay disbursements and commissions on sales, will be sustained only so far as the lay is concerned 928

Procedure.

The admiralty court is not bound by the local statute of limitations, but is inclined to follow its analogies..... 227

A libel for compensation for services in the nature of salvage rendered a hulk which was not at the time engaged in commerce and navigation must be dismissed without costs.....1085

ADVERSE POSSESSION.

See, also, "Ejectment"; "Limitation of Actions."

The possession of the disseisor and of his grantee, who immediately succeeds thereto in pursuance of the conveyance, constitutes one entire and continuous possession..... 640

AFFREIGHTMENT.

See, also, "Admiralty"; "Bills of Lading"; "Charter Parties"; "Demurrage"; "Shipping."

Shipowners are bound to send the goods by the vessel on which they are laden, and which has an advertised time of leaving when the bill of lading is delivered..... 671

The opportunity of shipping by another vessel without additional cost or risk cannot be used as a bar or in mitigation of damages for breach of the contract..... 671

The damage is the difference in value between the goods at the port of shipment

Page

and their selling price at the port of destination, if the contract had been performed.. 671
The ship must put casks containing cement in proper landing order before discharging them, and recooper them in the hold, if necessary to save their contents.. 570
The master has no authority to sell the cargo in order to make repairs, unless he be clearly unable to procure funds on the credit of the ship, or to hypothecate the cargo 584
Where a vessel has been captured and condemned at an intermediate port, and part of the cargo has been restored and sold there, no freight is due therefor..... 584
The vessel is liable for the loss of goods seized by customs officers, and forfeited for the neglect of the master to enter them on the manifest..... 6
The measure of damages, where cargo has been unlawfully disposed of at an intermediate port, is its first cost, with interest and charges of shipment and transportation 584
Construction of Act March 3, 1851, § 2, requiring a note in writing of the true character and value of precious metals on their delivery for shipment..... 2

Agency.

See "Principal and Agent."

ALIENS.

By the Mexican law in force in Texas from March 17, 1836, to January 20, 1840, aliens were prohibited from holding lands except by titles issuing directly from the government 375
But a title under a deed not emanating from the government is good against all persons until declared void in some proceeding analogous to office found..... 375
A deed upon a secret trust for an alien, of which the grantee has no knowledge, is not invalid where the alien is incapaciated from acquiring or holding realty, the trust, only, being void 375

APPEAL AND ERROR.

No appeal lies from the decision of the circuit court on a habeas corpus in an extradition case.....1143
An appeal to the circuit court in admiralty is not regular unless appellant gives security for costs..... 909
An appeal to the circuit court in admiralty carries with it all the funds belonging to the case, which funds still remain in the circuit court on a further appeal to the supreme court..... 909
A writ of error to a decree dissolving an injunction restraining enforcement of a judgment at law *held* not a supersedeas... 95
The 10 days within which a writ of error must be sued out to operate as a supersedeas, where a motion for a new trial is denied, commences to run from the entry of the rule for judgment in the clerk's office.. 805
Where the judgment is for a large amount, the court may approve an appeal bond whose penalty is not double such amount 805
The usual affidavit of the ability of the sureties accompanying the bond when approved, *held* sufficient justification..... 805
Where the amount due for supplies to a vessel is determined by report of commissioner before libelant's right to recover is established, no objection to allowances can be made on appeal which were not raised in the court below..... 643
The effect of a remitter of the cause on reversal by the supreme court..... 740
On affirmance by the circuit court of a decree for libelant in admiralty, no execution can issue until the entry of a formal decree awarding a recovery to libelant.... 644

Appearance.

See "Courts"; "Removal of Causes."

APPRENTICE.

An infant cannot bind himself as an apprentice, nor can a master assign the indenture of his apprentice..... 422
An apprentice bound in Maryland, and brought into the District of Columbia, may be discharged by the court, who will order him to be bound again, by two justices of the peace, to a new master..... 128
A stranger to the indenture of apprenticeship cannot take advantage of the omission to insert the age of the apprentice....1037

ARMY AND NAVY.

The enlistment, in the naval service, of a minor, without consent of his parents, is invalid, and he will be discharged on habeas corpus..... 908
A mere contractor to furnish supplies to the government for the use of the military service cannot be punished by court-martial under Act March 2, 1863.....1067
Act July 17, 1862, § 16, is unconstitutional in so far as it operates to subject a contractor to trial by court-martial.....1067
If not unconstitutional, such act only makes contractors subject to trial by court-martial for fraud or willful neglect of duty in connection with their contracts, and not for offenses unconnected therewith.....1067
A charge that defendant was engaged in furnishing supplies "for the military service" is indefinite, in failing to show that the supplies were furnished for the regular army and navy.....1067
In a trial by court-martial the charges cannot be so amended after arraingment as to entirely obliterate the original specifications, and insert new ones, describing wholly different offenses.....1067

ARREST.

See, also, "Bail"; "Escape"; "Execution"; "Extradition."

An agent is not liable to arrest in New York in an action for money collected by him under an agreement to account for and pay over the proceeds monthly to his principal 79

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy"; "Garnishment."

On the general validity of assignments made by a failing debtor for the benefit of creditors, with various stipulations and conditions. (Per Story, J.)..... 295
A general assignment is valid for future liabilities, as well as for debts due, if the parties so intend..... 295
One partner may sign and seal such an assignment for the firm, and it will bind the partnership, as a release of the debt... 295
Quaere, whether an assignment stipulating for a release of the debtor is fraudulent 295
An assignment for the benefit of all creditors is good against subsequent attachments, although all the creditors are not parties to the deed before the attachments. 295
It is not a fraud upon any attaching creditor to provide for the payment of all the

Page

creditors in preference to one who means to attach by process the property conveyed.. 295
If the terms of a covenant by creditors to indemnify the debtor against claims under them are general, it will be construed a several covenant by each creditor, and not a joint one by all..... 295
The assent of creditors to an assignment, not stipulating for a release, may be presumed; aliter if release stipulated for..... 295
If the terms of release are general, the operation will be restrained to a release of debts 295
The assignee who is put upon inquiry as to facts rendering the assignment voidable by creditors has no lien, as against attaching creditors, upon the proceeds of the property for services or counsel fees..... 793

ASSUMPSIT.

See, also, "Contracts."

Assumpsit lies for work done under a sealed contract, without previous demand for stock agreed to be received in payment. 292

ATTACHMENT.

See, also, "Bankruptcy"; "Execution"; "Garnishment."

A chancery attachment will not lie against the effects of a deceased person....1084
In attachments in chancery in Virginia, the attaching creditors have priority according to the time of service of their respective attachments 48
Sufficiency of instrument and affidavit produced to the magistrate to warrant attachment under Act Md. 1795, c. 56..... 479
An attachment against partners, where the writ failed to show their given names, but was amended in this particular before the return day, *held* valid..... 605

ATTORNEY AND CLIENT.

Name of proctor stricken from the rolls for contempt in filing a notice of motion to set aside a decree on the ground that the same was rendered without any consideration or deliberation, and was the result "of either prejudice or corruption," and in "willful violation of a known duty."..... 791

AVERAGE.

Where the voyage has been abandoned from necessity, the expenses and charges of going to a port of necessity are not the subject of general average..... 584

BAIL.

See, also, "Arrest"; "Execution"; "Principal and Surety."

Bail cannot be required of a feme covert in a civil action.....1178
The writ in the original suit cannot be set aside after judgment on motion in an action on the bail bond..... 255

Bailment.

See "Carriers"; "Pledge"; "Warehousemen."

BANKRUPTCY.

See, also, "Assignment for Benefit of Creditors"; "Compositions"; "Insolvency."

Operation and effect of bankruptcy laws, and of proceedings thereunder.
A suit by a partner, in the state court, against his copartners, for an accounting, in which he was appointed receiver, will not prevent jurisdiction in bankruptcy, on petition of defendant partners..... 822
The bankrupt court may enjoin such receiver from disposing of partnership assets, or from any interference with them, until the question whether or not the firm is bankrupt can be tried..... 822
The freedom from arrest granted to bankrupts "during the pendency of the proceedings" does not relieve them from arrests existing at their commencement..... 942
A charging in execution *held* to relate back to a prior surrender in exoneration of bail on arrest on mesne process..... 942
It is not necessary to obtain leave of the bankruptcy court to continue to judgment a suit for assault and battery commenced before the petition in bankruptcy was filed 1136

Jurisdiction of courts.
Proceedings under the act of 1841 may be instituted in the district either of the debtor's residence or place of business.... 196
In case of partnerships, either partner may be declared a bankrupt in the district where he resides, or where the partnership is established. But the court first acquiring jurisdiction has exclusive jurisdiction over all the partners and all their property, joint and several..... 196
Where an adjudication is had, and an assignee regularly appointed, the proceedings will not be set aside on the application of a creditor showing a prior filing of the petition against the bankrupt in another district 610

Commencement of proceedings—Voluntary bankruptcy.
Parties cannot apply jointly for a decree in bankruptcy after a dissolution of their partnership. (Act 1841.)..... 722
A decree cannot be rendered against a firm on a voluntary application therefor, unless the whole of the partners unite therein. (Act 1841.)..... 722
After a sale by a partner of all his interests as copartner to a third person, who is taken into the firm, neither the old firm nor the retiring partner can be adjudged bankrupts on the petition of the continuing partner 707
The fraud of a member of a firm, in effecting a composition with creditors, cannot be alleged by him as ground of proceedings in bankruptcy after the firm is dissolved 369
The court will dismiss proceedings on petition filed by one member of a firm solely for the purpose of vexing and harassing the other partner..... 369
A creditor cannot compel partners, willing or unwilling, to petition for the adjudication of other persons, who are alleged to be their fellow-partners..... 476
A petitioner cannot be decreed a bankrupt when, in his petition and schedule, he does not include all his creditors, and the debts due to them..... 498
The petitioner cannot be decreed a bankrupt while he owes debts which were created while he was acting in a fiduciary character 498
The arrest of a bankrupt in a voluntary proceeding is not authorized by the act of 1867 180
The petitioner cannot withdraw his petition before adjudication, without showing good cause, if opposed by any creditor.... 607

—— Involuntary bankruptcy.
Livery stable keepers are not merchants or traders, under the act of 1841..... 217
The owner of timber lands, who manufactures lumber therefrom as a means of deriving profit from the real estate, is not a merchant or trader (Act 1841), unless he carries on such business on a large scale.. 217

Page

A creditor fully secured by attachment cannot, while holding on to his attachment, sustain, on the same debt, a petition in bankruptcy 941

In computing the number of creditors who must join in the petition, creditors whose debts do not exceed $250 are not to be reckoned, but, in computing the amount or value, all should be included..... 148

The aggregate of petitioners' debts must be equal to one-third of all the debts, irrespective of the amount, provable against the estate..... 148

In making up the requisite number, petitioners may compute those simply whose debts exceed $250, or proceed upon the hypothesis that they represent one-quarter of of the entire number of creditors, in which case those of less amount than $250 may be reckoned..... 202

The nature of petitioners' debts should be so far stated in the petition that the court may see they are provable against the estate 148

Costs of attachment proceedings are not included, in estimating the amount of provable debts..... 823

A claim for money loaned to a debtor to aid him in the commission of an act of bankruptcy cannot be included among his provable debts..... 823

Letters written by the debtor to third persons, admitting payment of a claim, are admissible in determining the amount of provable claims..... 823

An attaching creditor, though not a party, may contest adjudication on the ground that the requisite number and amount of creditors have not joined..... 823

Creditors who, since the amendment of June 22, 1874, have joined in the petition, cannot afterwards be allowed to withdraw..1020

A charge in the alternative that the debtor was insolvent, or in contemplation of bankruptcy, at the time of the act in question, is insufficient..... 431

The allegations in proof of the act of bankruptcy should be made by separate deposition, and upon personal knowledge, and should make out a prima facie case... 148

Facts relied upon to justify a warrant of arrest and seizure should not be set forth in the creditors' petition..... 148

Where a preference is alleged, it is not necessary to state that such preference was in fraud of the act, but the name of the person preferred should be set forth..... 148

Suspension of payment of commercial paper held by another than the petitioning creditor may be alleged as an act of bankruptcy 199

The depositions in support of the petition must definitely describe the debts, and show that they were unsecured..... 555

The petition need not allege that petitioners' debts are unsecured, when it is alleged that they are provable debts..... 555

Where the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are insufficient, the court may allow supplemental affidavits or proofs to be filed..... 431

Where a petition averred that acts were committed by bankrupt in contemplation of bankruptcy and insolvency, and evidence of insolvency only was given, the petition should be amended accordingly..... 840

Where a petition is verified by an attorney, the nonresidence of his principal should be alleged directly, and not by way of recital..... 148

The authority of the agent who verifies a petition for a corporation petitioner must be set forth in the body of the affidavit, or otherwise established..... 431

The petition cannot be verified before a notary public.....1052

Page

Receipt of money by the bankrupt from his debtor after filing of petition and service of injunction is a contempt, but such contempt is purged where the bankrupt afterwards turns over to the assignee all his assets 897

Acts of bankruptcy.

An assignment by an insolvent of all his property for the benefit of preferred creditors is an act of bankruptcy..... 88

The fraudulent stoppage of payment of debts is ground of petition under the amendment of June 22, 1874..... 148

A payment by an insolvent debtor of a percentage on claims of a part of his creditors which does not lessen the percentage which his other creditors will receive, is not a preference..... 473

An insolvent who makes no defense to an action by a creditor, and does nothing to prevent his obtaining a preference, suffers his property to be taken under section 39, Act 1867, and the law presumes that he intended to give a preference.....1051

Schedule.

A register may allow amendments to the schedules on the ex parte application of the bankrupts, at any time while the cause is pending before him.....1052

Adjudication.

If the bankrupt neglects to move for a decree of bankruptcy, so that an assignee may be appointed, the creditors may move the court for that purpose..... 607

On a voluntary petition by a member of a firm, the court has power to determine the question what persons constituted the firm. 38

The adjudication will not be set aside after six years, on petition filed four years after a different decision in the state court.. 38

Warrant: Notice: Meeting of creditors.

A warrant is beyond the power of the court, in so far as it commands the marshal to take possession of property which has been conveyed by the bankrupt before the filing of the petition..... 704

Provisional warrant granted where the bankrupt remained in possession of his assets, and disposed of a portion of them, and expressed an intention of going abroad to adjust his foreign accounts..... 180

The proceedings will be set aside for the omission to publish notice of the first meeting of creditors in one of the papers designated, and for irregularities in, and false return to, the warrant of the register.... 201

If the petitioner does not appear at the time fixed in the order of reference, or within a reasonable time thereafter, excusing his delay, the petition may be dismissed.... 814

Assignee—Appointment and removal.

The choice of an assignee who resides out of the district will not be confirmed.... 849

Where a single creditor appears at the first meeting of creditors, and proves his debt, he may choose the assignee..... 914

The election of an assignee will be disregarded where it was secured by his agreeing to pay certain creditors their claims in full 138

A creditor holding a mortgage as security *held* not entitled to vote on the difference between its value, as stated by him, and the amount of the debt..... 436

An assignee under the bankrupt law of 1800 cannot deny the authority of the commissioners under whom he received the property of the bankrupt..... 110

Certifying questions to court.

Abstract question certified to the court in behalf of a person who is not a party will be returned without decision..... 770

Property of bankrupt—What constitutes.

A check deposited with a bank for collection, against which the depositor is not al-

Page

lowed to draw until payment, does not become the property of the bank, where it suspended before payment..... 847
An agreement that the seller shall have possession of the property, so that he may apply its rent to the reduction of the purchase money, does not prevent full title vesting in the purchaser's assignee..... 253

— **Custody and control.**
On the adjudication, the register must receive the surrender of the bankrupt's estate, and keep the property safely until it can be turned over to the assignee..... 767
One to whom stock is pledged to secure call loans need not obtain leave of court to sell the same, but he acts at his own risk 50, 51

— **Exemptions.**
The members of a bankrupt firm in Pennsylvania have no right to any of the partnership assets as exempt property..... 152
The same rule obtains in Arkansas..... 421
The assignee may designate a sum of money as "necessaries," under section 14, Act 1867 887
Property exempt, both by state and bankrupt law, from levy and sale, cannot be sold after the owner has filed his petition in bankruptcy, although then levied on by a United States marshal..... 5
The fact that the debtor is insolvent will not prevent a declaration of homestead under the California homestead act. (Reversing 1123.) 1124
The homestead in California is exempt from forced sale, though the insolvent owner has devoted money which equitably belonged to all his creditors to the payment of a debt which was a lien thereon. (Reversing 1123.).....1124
The bankrupt court will not order a reassessment for mere excess of value, where a homestead has duly been laid off and allotted under the local law, and no fraud or irregularity is shown..... 199

— **Liens.**
An attachment on mesne process, where judgment was recovered and execution issued after petition filed, but before the decree in bankruptcy, *held* a valid lien. (Act 1841.) 841
Execution creditor delayed by an injunction *held* entitled to a summary hearing after execution of the assignment..... 153
Rights of lien creditors to proceeds of sale *held* superior to the lien for costs, fees, and general expenses in bankruptcy..... 314

— **Sale.**
Application to sell real estate incumbered to its full value refused, with liberty to renew it if a sale was not effected, in a reasonable time, in a suit pending in the state court on a prior lien..... 156
A bankrupt in possession of realty at the time of its sale by the assignee, who thereafter agreed with the purchaser to vacate on a certain day, holds as tenant under the purchaser, and a petition will not lie by the assignee for delivery of possession..... 181
The purchaser of property on a sale by the assignee without order of court is entitled to rents and profits from the day of sale, and not from the date of its confirmation .....: 253
On petition by mortgagees in a foreclosure proceeding to set aside an injunction issued by the bankruptcy court, *held* that the register should be authorized to sell the property free of incumbrances, and receive the proceeds subject to order of court..... 436

Proof of debts.
A debt accruing after the commencement of the proceedings, but before the adjudication, is provable.....1136

Page

Interest accruing after the adjudication is not provable..... 134
But a secured creditor may apply the proceeds of his security to the principal and interest of the debt until paid, when so stipulated in his contract..... 134
Solicitors of a voluntary bankrupt, who advance expenses to enable him to obtain his discharge, are not entitled to relief, for such expenses or their services, against his assets 178
A debt, barred by the statute of limitations in the state where the bankrupt resides, is not provable in bankruptcy against his estate by a creditor resident in another state, even though not barred by the statutes of that state..... 488
Nor is such debt revived by the entering of it on the schedule of the bankrupt's liabilities 488
The holder of a note, who receives payment from the maker before submitting proof against the estate of the indorser, can only prove for the balance; otherwise where he receives payment after the affidavit is filed..... 606
Debts due to creditors residing within the district where the proceedings are pending must be proved before a register of the district. A commissioner of the circuit court cannot take such proof..... 194
A deposition in support of a claim is not properly a proof of a debt..... 194
A secured creditor allowed to withdraw his proof of debt on petition setting forth his prior ignorance of its effect..... 762
After leave granted to amend proofs of debt, *held* that they could not be withdrawn 290

Payment of debts: Priority: Dividends.
Interest on claims proved allowed from the filing of the petition to the date of payment, where the estate was sufficient..... 154
A single creditor proving his debt is entitled to be paid in full; the surplus, if any, being distributed among creditors admitted by the bankrupt, but who have failed to prove their debts..... 914
Rights of holders of bills drawn against factor on consignment of goods, where both principal and factor became bankrupt. 606
The United States have priority over all other claimants..... 669
An agent of the United States in England cannot, by conforming to the bankrupt laws there, lessen the priority established in favor of the United States here..... 669
The claim of a father for the services of his minor son, *held* entitled to a preference under § 28, Act 1867..... 705
Attorney's claim for services in defending a suit prior to the bankruptcy is not entitled to priority..... 420
Attorney's claim for services in preparing the petition and schedules, and filing the same, is not entitled to priority..... 420
Security for the payment of a note, by way of a deed of trust, given on the property of the wife, by the husband and wife jointly, *held* security, within the meaning of the act..... 697
Attaching creditors *held* entitled to only a ratable part of their debt with the other creditors, under Act 1800, § 31..... 555

Examination of bankrupt, etc.
The granting of a discharge is not a good objection against an examination under § 26, Act 1867.:..... 975
The wife of a bankrupt, attending under an order, and being examined as a witness, is entitled to witness and travel fees, calculated according to Act Feb. 26, 1853, § 3. 4
Witnesses are entitled to attendance fees for adjourned days, or to travel fees for going to and from home during adjournments 4

Costs: Fees: Disbursements. Page

Costs are not allowed to either party where, on new evidence, on appeal to the circuit court on a trial of objections to a discharge, the verdict is changed in favor of the bankrupt..... 106

Register entitled, under general order No. 30, to $5 for each day's service under order of court..... 311

The bankrupt is liable for the costs of the register on an examination by contesting creditors on his proposal of a composition.. 5

The fee and mileage for serving the order to show cause, and the copy of the petition in involuntary bankruptcy, cannot be charged for each.....1057

Proper charges for caring for and inventorying the bankrupt's property.....1057

Register's decision disallowing a charge for a watchman, on the ground that no watchman was necessary, reversed..... 520

Additional allowances should not be made to the marshal, under § 47, Act 1867, unless it appear that he performed something beyond his ordinary duties..... 520

Assignee *held* not entitled to allowance for fees of counsel employed by the bankrupt for services, beneficial to the estate, rendered before his appointment..... 317

The landlord is entitled to reasonable compensation for the time leased premises are occupied by the officers of the court..... 317

Discharge—Proceedings to obtain.

A discharge cannot be granted on the death of the bankrupt pending the proceedings, where he has not taken the oath required by § 29, Act 1867..... 115

Section 9 of Act June 22, 1874, dispensing with consent of creditors, applies to pending cases..... 40

—— Opposition: Acts barring.

Discharge refused on specification of objections showing a transfer made in contemplation of bankruptcy more than 16 months before petition filed..... 445

An allegation of a consignment to one out of the district, in contemplation of bankruptcy, and with intent to keep the property from the assignee, *held* a sufficient charge of a removal of the goods from the district with intent to defraud creditors..... 380

Vague and general specifications reciting fraud, etc., will not be allowed..... 463

When the specifications are not sustained by the proofs, a discharge will be granted whenever the register shall certify that the bankrupt has conformed to the requirements of the bankrupt law..... 611

The fraudulent preference or transfer which will bar a discharge must be such as is denominated a fraud by the terms of the law, and particularly described in section 35, Act 1867..... 572

It is a concealment, within section 29, Act 1867, for the bankrupt, having knowledge of the existence of his books, and of their place of deposit, to refuse to give them to his assignee, and to deny their existence.. 380

Failure of the bankrupts to enter on their books several transfers of property, made about the time their affairs became embarrassed, will, in the absence of a sufficient excuse, prevent a discharge..... 3

The absence of a cash book, is no ground of refusing a discharge where the cash receipts and payments may be shown from other books..... 445

An omission to write up books for a reasonable time while they are wanted in court, the accounts being kept on slips of paper ready to be inserted in their proper places, is not a failure to keep the books..... 380

Otherwise, of an omission without excuse, or for an unreasonable time, or a failure to procure new books if the old books are lost.. 380

Page

It is no excuse for failure to keep proper books of account that the fault was wholly with the debtor's bookkeeper..... 380

—— Scope and effect.

Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a "fiduciary character."..... 79

Prohibited or fraudulent transfers.

If an insolvent give a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the bankrupt act is complete as to both..... 271

Insolvency which renders the transfer void under section 35 is a condition of fact, not of belief..... 271

The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent, not what he did believe.. 271

The word "knowledge" in section 35, as amended June 24, 1874, means actual knowledge, as contradistinguished from constructive knowledge..... 831

A person having notice of such a state of facts in regard to the financial affairs of the bankrupt as in law constitute insolvency must be presumed to have actual knowledge that a transfer, etc., is a fraud upon the bankrupt act..... 831

A person, being a merchant or trader, is insolvent when unable to pay his debts as they mature in the ordinary course of business..... 831

A person will be *held* insolvent only when he fails to meet his debts according to the general custom of the place of his business.. 271

Question of insolvency of a Virginia society which was a bank of discount, deposit, and circulation, and had suspended during the Civil War, and thereafter undertook no other business than the liquidation of its affairs, should not be considered as if the society had been a trader, merchant, or bank..... 531

Papers in the form of checks on such bank, bought and sold in the public market, and used for the purpose of set-off, *held* not checks in the commercial sense..... 531

Persons who sell such papers are not responsible to the assignee of the society for the amounts stated in dollars on their face 531

The fact that the debtor had sold his stock of goods, had been refused extensions of credit, and was being pressed by his creditors, *held* to constitute reasonable cause of belief of insolvency..... 271

Transfers of property are not void under Rev. St. § 5128, where it is proved affirmatively that the persons who effected them with the debtor had no intention of obtaining a preference, or the debtor of giving it. 531

When a secured creditor takes goods in fair exchange for the security, the transaction is not in fraud of the act..... 286

Shipments of cotton, after the insolvency of the shipper, to commission merchants who made advances thereon, *held* not a preference..... 654

A mortgage executed more than four months before the filing of the petition cannot be set aside as a preference..... 226

A judgment taken with an intention to receive the entire estate for an equal distribution among the creditors, by a creditor who held overdue paper of the debtor, and was informed that they were hard pressed, *held* a fraudulent preference..... 654

A bill of sale with a lease back to the seller, containing an agreement by him to buy back the property at a fixed price, being unrecorded, *held* fraudulent as to creditors..... 121

The sale by the bankrupt of 6 out of 20 specific bonds, of like character and value, in the hands of a bailee, *held* valid as against his assignee..... 362

Page

The giving of a note payable one day after date, with cognovit to confess judgment, to a creditor, with knowledge of insolvency, *held* a fraudulent preference, and the judgment and all proceedings thereunder were nullities..... 837

A chattel mortgage invalid as against creditors, under the state law, under which the mortgagee took possession at a time when he had reasonable cause to believe the debtor insolvent, *held* invalid as against the assignee..... 734

A seizure of an insolvent debtor's property on execution within four months of his bankruptcy proceedings, by a creditor having reasonable cause to believe the debtor insolvent, *held* a fraudulent preference.... 772

Suits and proceedings in relation to the estate.

The circuit courts have concurrent jurisdiction with the district courts of all actions by an assignee against persons claiming an adverse interest in the estate of a bankrupt..... 286

No suit by an assignee for a sum exceeding $500 can be prosecuted in a state court. (Act June 22, 1874, § 2.)..... 286

The objection that there was no direction from the bankrupt court to bring the suit cannot be first raised in the appellate court 286

The assignee represents both the bankrupt and his creditors, and he can contest claims and rights of property which the bankrupt cannot contest..... 121

Where the petition in bankruptcy was filed before the amendment of June 22, 1874, a bill to set aside a fraudulent transfer must allege that the transfer was made with knowledge of defendant that it was fraudulent..... 1

The amendment of June 22, 1874, does not affect cases commenced before December 1, 1873, nor does the repealing clause affect suits by assignees then pending..... 373

Congress did not intend to validate contracts void under the original act, or to affect contracts theretofore made, or the substantial rights of parties acquired under the original law..... 373

A preference to a creditor cannot be set aside unless an adjudication in bankruptcy is had within the time limited by the act.. 369

The rule of the local statute that the limitation does not begin to run till the fraud is discovered has no application to such case 369

The four-months limitation, in the case of a secret deed of trust intended as a preference, does not begin to run until the deed is recorded..... 624

In the case of a transfer of property to hold in trust for certain uses, and to become absolute under certain conditions, *held*, that limitation did not commence to run until the title became absolute..... 777

The assignee in bankruptcy may maintain a suit to set aside a general assignment by the bankrupt for his creditors, made within three months of the filing of the petition in bankruptcy..... 490

The bankrupt is not a necessary party to such suit..... 490

On a bill to impeach a transaction as void under Rev. St. § 5128, the court is not concluded by the order of adjudication declaring the transaction to have been an act of bankruptcy..... 531

A creditor who has proved his claim in bankruptcy may withdraw the same, and plead it as an offset, in a suit brought by the assignee against him. (Rev. St. §§ 5073, 5105.)..... 539

Certificates of indebtedness held against the bankrupt payee of a note *held* subject to offset at their market value at the maturity of the note..... 539

Page

The declaration in an action by the assignee to set aside a transfer as in violation of the act must set out the facts to show its illegality..... 286

In an action by the assignee to recover property fraudulently transferred, the value of such portion as is exempt from execution must be deducted before judgment..... 88

Review.

Appeals from the district to the circuit court are regulated by § 8, Act 1867, and general order 26..... 880

An order vacating an adjudication of bankruptcy made at the former term cannot be revised on appeal..... 199

Arrangement with creditors.

Act June 22, 1874, does not require a written proposition from the bankrupt preceding the notice to creditors, to lay the foundation for their acceptance or rejection of a composition..... 771

A debtor can make a composition under Act June 22, 1874, § 17, though, by reason of preference or otherwise, he would not be able to obtain his discharge..... 771

Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares..... 367

Refusal or neglect to sign a petition for a composition by one of the partners, unless fraudulent, will not render the proceeding invalid as against the other partners..1148

Resolution of composition passed by the requisite number of creditors, but opposed by two creditors who, prior thereto, successfully opposed a discharge, *held*, should not be confirmed..... 446

When an application is made to set aside a composition once recorded, and to proceed in bankruptcy, notice should be given to all the creditors, as well as to the debtor..... 367

Irregularities which are the effects of mistake, and not of fraud, are not fatal to the validity of the proceedings.....1148

When a composition, partly carried out, is set aside, all acts which have been regularly done in pursuance of the resolutions are valid, and the assignment to an assignee should contain a proviso to that effect.... 367

BANKS AND BANKING.

An attachment of funds of a national bank on deposit in another bank, after one of its circulating notes has been duly protested for nonpayment, will not create a lien, as against a receiver subsequently appointed..... 727

Stockholders *held* liable, as principals, to redeem dishonored bank bills, under the charter provision that their persons and property shall be at all times bound for such redemption..... 795

BILLS, NOTES, AND CHECKS.

See, also, "Guaranty."

Validity.

No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a bona fide holder for value, unless made absolutely void by statute..... 795

Notes, bills, or other securities issued in aid of the war of the Rebellion are valid in the hands of a bona fide holder for value.. 795

Any instrument issued in violation of an act prohibiting a bank from issuing any bill or note not payable on demand, and without interest, under a penalty, is void..... 898

An acceptance of such a draft, or an agreement to indemnify the person who signed it, is void..... 898

An action will not lie on a note given for the purchase of a ticket in a lottery prohibited by law..... 878

Negotiability. Page
To be negotiable, a note must be for the payment of money, in a sum certain, subject to no conditions. A note payable in "New York funds, or their equivalent," is not negotiable 766
On a promissory note given in New York, payable at Detroit, with the current rate of exchange on New York, the rate of exchange may be recovered..... 98
Indorsement and transfer.
A duebill payable to order or bearer is assignable, and may be assigned by an agent.. 32
A note assigned after its maturity leaves all equities opened between the original parties 133
Possession of a note payable to bearer is prima facie evidence of right, and the holder may sue in his own name..... 308
Payment.
The possession by the payee of a time draft, unaccepted and uncanceled, is not prima facie evidence that he has paid it.... 434
The circumstance that a draft does not bear the customary "Paid" stamp of the bank, nor appear on its books to have been paid, may be considered by the jury in determining the question or payment..... 434
Release or discharge of indorser.
A release of a remote indorser by the holder of a note is a discharge of the subsequent indorsers..... 881
Actions on.
A plea setting up fraudulent representations in defense to a note should allege all necessary incidents of time and circumstance, and that the note was given in reliance thereon..... 96
A plea of failure of consideration, in defense to a note, should distinctly allege the actual consideration, and that there was never any other..... 96
The words "without offset," in common use on the face of negotiable paper, will not prevent an offset, as between the maker and payee..... 539
An order written by the agent of the drawee, on the back of a bill, to another person, to pay it, *held* evidence of the drawee's acceptance of the original bill... 584
The rate of interest and damages which the drawee of a bill is to pay ex mora is governed by the law of the place where the bill is drawn.....1021

Bills of Lading.

See "Admiralty"; "Affreightment"; "Carriers"; "Demurrage"; "Shipping."

Bonds.

See "Municipal Corporations"; "Principal and Surety"; "Railroad Companies."

BOUNDARIES.

See, also, "Grants."

A map which has governed in the sale of lots, and has been treated for many years by the proprietors and purchasers as the original map, is admissible to prove boundaries 553
The remarks, however, made on the map by the proprietor, are not evidence..... 553

Bounties.

See, "Fisheries."

CARRIERS.

See, also, "Affreightment"; "Average"; "Charter Parties"; "Demurrage"; "Shipping."

A railroad company is bound to construct platforms for the safety, rather than the convenience, of its passengers, and is bound to the highest degree of care and skill in such construction..... 522
A passenger not rightfully in a certain position cannot complain of the absence of the proper safeguards..... 921
A passenger cannot recover for injuries in an accident caused by the negligence of the carrier's servants, if he was in a position where a prudent man would not have been.. 921
A railroad company carrying passengers on freight trains is under the same obligation to carry them safely as if they were on regular passenger trains..... 921
A passenger who, by concealment, attempts to get valuable articles carried without paying the extra rates charged therefor, cannot recover in case of loss.....1055
If the carrier, with knowledge of the fact, carries such article as extra baggage, on paying the usual charges therefor, it is liable for a loss.....1055
A carrier, in the absence of special contract, may demand and recover a reasonable sum as freight for the transportation of merchandise, and no more..... 736
Evidence of charges for freight two years previous to the charges in controversy, for like freight, *held* competent upon the question of their reasonableness..... 736
Delivery is completed when there is nothing left to be done to finish the transportation 240
Each member of a connecting line of carriers who receives goods for shipment under a through bill of lading is liable for damage, on whatever part of the line received 571
Both the carrier and the insurance company are responsible to the owner or consignee, and in case of loss the owner or consignee may elect against which he will proceed 240
An insurance company which has paid the loss may recover against the carrier, on showing negligence..... 240
The measure of damages for the refusal to transport goods at an agreed price is the difference in value of the same at the ports of shipment and delivery, less the agreed freight, and other necessary charges of transportation 736
The measure of damages for not transporting unmanufactured lumber intended for specific manufacture by the owner is the price that the same would bring at the place of delivery when so manufactured, less its cost, including transportation, with interest from the time of the refusal to so transport the lumber..... 738

CHARTER PARTIES.

See, also, "Admiralty"; "Affreightment"; "Average"; "Demurrage"; "Shipping."

Where the charter contains no stipulation as to time of arrival at port of loading, the shipper takes the risk of detention by any superior force which the vessel could not overcome..... 228
Arrival at the port of loading after the season of shipping had gone by, caused by unusual delay, will not release the charterer, in the absence of fault of the master or owner..... 228
The omission to remain at the port of loading the number of lay days stipulated, where the master was informed that the cargo would not be furnished, will not bar a claim under the charter..... 228
In computing the damages for refusal to furnish a cargo, the court took into consideration the failure of the master to inform the charterer of a delay en route for repairs..... 228

Page

A guaranty of eight feet of water "at the place of loading" *held* to mean eight feet, or at least a sufficient depth to enable the vessel to perform her voyage, at the place of loading, and thence to the open sea..... 691

An error in judgment on the part of a master not shown to be incompetent in respect to the navigation of the vessel, will not render the owners liable for its consequences..... 155

A deduction from the monthly hire will be made, where the voyage has been protracted by reason of the insufficiency of the sails, etc..... 155

The departure of the consignee named in a charter-party from the port of destination constitutes no waiver of the contract..... 599

The master of a vessel chartered to proceed with a cargo to a certain port, and discharge the same as directed by the commander of a fleet of war vessels, learned en route that the fleet had left the port badly shattered. *Held*, that freight was not recoverable as for a partial performance.... 599

The risk and danger of losing the cargo in attempting to perform the voyage may be shown, in answer to a claim of damages for breach of the contract..... 599

There is no lien upon the vessel for the performance of a contract of affreightment until a lawful contract of affreightment is made, and the property shipped in pursuance thereof..... 437

CHATTEL MORTGAGES.

See, also, "Bankruptcy"; "Pledge."

A bill of sale, with a lease back, containing an agreement of the seller to buy back the property at a fixed price, will be construed as a mortgage..... 121

In Illinois, recording a chattel mortgage in which material changes have been made since its acknowledgment gives it no additional validity..... 734

A clause constituting the mortgagor agent of the mortgagee to sell the goods and account for their proceeds does not render the mortgage fraudulent on its face..... 879

The retention of possession of the property by the mortgagor after condition broken will not affect the validity of the mortgage as between the parties..... 286

The title of the mortgagee becomes absolute after condition broken, and where he takes possession the debt is satisfied to the extent of the value of the property at the time he took possession..... 134

A subsequent agreement to deliver the mortgaged property to the mortgagor on his giving security to sell the same and account for and pay over the proceeds, *held* a substitute for the mortgage..... 576

Cloud on Title.

See "Quieting Title."

COLLISION.

See, also, "Admiralty"; "Pleading in Admiralty"; "Practice in Admiralty."

Rules of navigation.

The local rules of navigation established by general usage must be observed..... 172

A Louisiana law adopting regulations as to the navigation of the Mississippi river cannot affect vessels engaged in carrying on commerce between that and other states.. 172

A steamboat carrying the mail is bound by the same laws and rules of navigation that govern other steamers..... 425

Between sail vessels. Page

The vessel on the privileged tack will not be *held* in fault for keeping her course, unless it appear that there was time, after the risk was apparent, to avoid the collision, by changing her course; and a failure in extremis will not be *held* a fault. (Reversing 849.) 854

Between steam and sail.

The sail vessel must keep her course, and the steamer must keep out of her way... 214

It is the duty of a steamer to avoid getting into such close proximity to a tacking vessel that a change of her tack might cause a possibility of danger..... 834

A steamer will be *held* in fault for approaching so near a sail vessel as to create a reasonable apprehension of danger of collision by the latter, and involve an erroneous maneuver in the moment of peril..... 425

Between steam vessels.

Where two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of her way..... 462

The not slackening of speed by the vessel bound to observe such rule, condemned; and the keeping of her course by the other vessel, approved 462

Embarrassment by proximity to vessels at anchor is no excuse for not observing the rule requiring the vessel on the port hand, on a crossing course, to keep out of the way, where there is no justification for being in such proximity.....449, 462

Vessels moored, etc.

Injury to a vessel properly moored at the side of a wharf, by collision with another, is prima facie evidence of fault in the latter 1047

The burden of proof is on the moving vessel to show that the collision was caused without its fault..... 236

Tugs and tows.

A boat towed astern, steered with her own helm, who sheers and comes into collision with a passing tow, has the burden of showing that the sheer was caused by some fault of the part of her tug.....1195

The owners of a tow which is under the exclusive direction of the master of the tug are not liable for damages caused by collision occurring through negligence in the navigation of the tug.....1018

Both tug and tow are liable where the injury would not have occurred had a second tug been employed.....1045, 1047

An agreement by the tow to assume all risk will not relieve the tug from liability to a third party for injury caused by a collision with the tow caused by inability of the tug alone to control the tow.....1045

River and harbor navigation.

A descending boat on the Mississippi river, when apprehensive of a collision, should stop her engine and float, leaving the ascending boat to choose the best mode of avoiding her 172

Speed: Fogs.

In a fog a steamer should be under such control that, when apprised by the regular signal of the neighborhood of a sail vessel, she can slow or stop in season to ascertain the position and course of the latter, and take suitable measures to avoid her..... 400

The presumption of fault is conclusive against vessels sailing with too much canvas in a fog in fishing waters, and colliding with vessels at anchor, where there is no vis major 100

A steamer meeting a sail vessel in a fog will be *held* in fault in changing her course in ignorance of the latter's position, instead of stopping and reversing..... 395

Page

Steamer *held* in fault in maintaining a speed of eight miles an hour on the river St. Clair, on a very dark night..... 214

Lights, signals, etc.

A vessel under way, with wind abaft the beam, must show a white light, under the act of 1849, as a vessel "going off large." 214

Signal lights hung on either side of the boat, on nails driven into the nosing of the hurricane roof, *held* not proper lights..... 944

Lookouts, officers, etc.

The master who went below after hearing the whistle of an approaching steamer *held* in fault 944

The fact that a bark has but one man at her wheel in a fog is no proof of negligence or want of seamanship..... 451

A steamboat, in the nighttime, navigating the waters of a bay or river, must always have a lookout who, for the time, has no other duty or occupation..... 423

The master is not a proper lookout..... 944

The man blowing the fog horn on a sail vessel is a proper lookout..... 451

The pilot house of a steamer, in the nighttime, is not a proper place for a lookout 944

The failure of the lookout of a steamer to report a vessel, when discovered, *held* negligence, though the master and pilot were on the bridge..... 449

The lookout of a vessel will be *held* in fault in leaving his post after reporting the light of another vessel..... 849

Particular instances of collision.

Between two steamers on the Ohio river, involving mutual fault as to lights, lookouts, etc. 944

Between steamer coming into New York harbor and steam elevator on her starboad hand, where the former's claim that the presence of vessels at anchor prevented her porting was not sustained.....449, 462

Between bark closehauled and steamer at sea in a fog, where the bark's horn was not heard, and the steamer was *held* liable for excessive speed 451

Between schooner closehauled and schooner sailing free in Chesapeake Bay, where the latter was *held* in fault for not keeping away 1039

Procedure.

Proof of title to the injured vessel may be given after trial..... 849

The testimony of those on board a moving vessel, as to her maneuvers, is more reliable than that of persons aboard the approaching vessel..... 214

The testimony of the witnesses on board a sail vessel, as to the direction of the wind, *held* more reliable than that of witnesses on board the steamer with which she came in collision 395, 451

Rule of damages.

Damages for the loss of a cargo are limited to its prime cost, together with all charges, premiums for insurance, etc., without any allowance for expected profits.... 598

The rule of damages for delay while undergoing repairs is the amount the vessel would have produced for chartering in the business in which she has usually been employed 643

There can be no recovery for delays caused by storms, or by ice or obstructions in the harbor or river where a vessel may be, after necessary repairs are made..... 643

Where a decree against two vessels does not apportion the damages, and it appears that one stands in the relation of surety to the other, libelant will be required to first issue execution against the latter.....1050

Division of damages.

In case of mutual fault, the loss must be divided 423

COMPOSITIONS.

Page

See, also, "Bankruptcy."

A composition with creditors, fair upon its face, but in fact fraudulent as to part of them, can be set aside only by the creditors who are wronged..... 369

Compromise.

See "Bankruptcy"; "Composition"; "Payment."

CONSTITUTIONAL LAW.

See, also, "Statutes."

The fifth amendment to the constitution is not applicable to state legislation..... 33

A state has no power to regulate commerce extending beyond its jurisdiction; otherwise as to commerce beginning and ending within the state 172

Interest is not a subject of common-law right, and a state statute allowing an abatement of interest which accrued during the Civil War does not impair the obligations of contracts..... 541

Persons in office, by lawful appointment or election, before the promulgation of the fourteenth amendment, were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in section 3, and they could continue to perform their official functions until congress should act..... 7

CONTINUANCE.

Want of preparation of the attorney, from attention to other necessary matters, is no ground for continuance..... 390

Failure to give security for costs is no ground for continuance, where it has not been demanded within a reasonable time.. 881

CONTRACTS.

See, also, "Assumpsit"; "Sale"; "Vendor and Purchaser."

All wagers are not void, but all gaming contracts are..... 491

Instruments executed abroad, as the foundation of sealed instruments in this country, must be under seal..... 530

There is no breach of a contract to build a boat with plank to be delivered by the other party at either of two places, until the plank is delivered..... 690

The omission to designate the place of delivery between the points stipulated will not prevent the other party from making delivery at any convenient point he may select between the points stipulated, in discharge of his contract to deliver..... 698

A party does not waive his rights, in accepting a proposition which the other party afterwards refuses to carry out.....1181

Delay incident to the badness of the roads is within the agreement to transmit money through express..... 306

Conversion.

See "Trover and Conversion."

COPYRIGHT.

A person who accompanied a government expedition, upon the understanding that all sketches and drawings he might make were to be the exclusive property of the government, where the same, upon his return, were incorporated in his report, and published for distribution, *held* not entitled to a copyright therein.....1031

CORPORATIONS.

Page

See, also, "Banks and Banking"; "Insurance"; "Marine Insurance"; "Municipal Corporations"; "Railroad Companies"; "Receivers."

There can be no corporate existence by prescription 27
In Ohio, a corporation cannot be created or authorized except in pursuance of a general statute..... 27
In Ohio there can be a corporation de facto, only when a corporation de jure continues in the exercise of its functions after a forfeiture or other extinguishment of its franchises 27
A certificate of incorporation, in Ohio, filed without seals to the name of the corporators, is a nullity..... 27
Subscribers to stock upon which payments are due, made defendants with the company in a suit by a creditor, may set up the defense that the certificate of incorporation is a nullity, for want of seals annexed to the names of the incorporators.. 27
A corporation cannot, in general, transfer its franchise; but, where a mortgage of a franchise by a corporation has been recognized as valid by the legislature, it is good between the parties..... 257
Under the Missouri statutes, the remedy of a judgment creditor of an insolvent manufacturing and business corporation to enforce the personal liability of stockholders is by suit, and not by motion..... 778
A condition that the creditor shall sue the corporation within one year after the debt becomes due is not fulfilled by the commencement of a suit within such time in the state court, in which the creditor took a nonsuit, followed by a suit in the federal court more than a year after the debt fell due..... 778
A special remedy given by statute against stockholders, for the debts of the corporation, *held* exclusive of all other remedies, legal and equitable..... 781
A plea, to a suit against the officers and the corporation for dissolution for malfeasance, that by the statutes of the state a court of equity could dissolve a corporation only under certain specified circumstances, which did not exist in this case, *held* good.. 500
A bill against a corporation and its officers, alleging malfeasance, etc., and praying dissolution, may be amended, as to the prayer, so as to prevent a continuance of the breach of trust, and to compel an account 500
When a stockholder will be allowed to file a bill in his own name in behalf of all stockholders, making the corporation a defendant, to compel its officers to account for breach of official duty, or misapplication of corporate fund..... 976
Where the bill sets out acts ultra vires, which are frauds on the stockholders, plaintiff need not aver an application to and refusal by the corporation or its officers to bring the suit..... 976
Such request and refusal need not be shown where the corporation is under the control of defendants, who must be sued.. 976
The joinder of a person who is not a stockholder is good ground of demurrer to the whole bill..... 976
A person who has no shares standing in his name on the books is not a stockholder, though he holds certificates which he has purchased from others, in whose name they stand, and the corporation has wrongfully refused to allow a transfer..... 976
It is not necessary that directors against whom no relief is asked should be made parties, although the bill prays for an injunction against the corporation and for a receiver 976

Page

A state statute prohibiting nonresident corporations from removing suits into the federal courts having been declared unconstitutional, a provision requiring revocation of a license of a corporation applying for a removal falls with it, and the federal court may restrain a forfeiture thereunder..... 702

COSTS.

See, also, "Bankruptcy."

A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs..... 948
The right of the prevailing party to costs is recognized by the rules of the supreme court and acts of congress..... 818
Under Judiciary Act 1789, § 34, the rights of the parties to costs will be settled by the laws of the state, when not specially provided for by congress..... 818
A libelant in admiralty, for services on board a vessel on the Hudson river, cannot recover costs, where less than $50 is in demand, and he had a clear remedy, known to him, in the local courts, the burden of showing which is on claimant..... 585
A third person claiming property seized on execution has the burden of proof, where an interpleader is directed, and he cannot require the plaintiff in execution, though a nonresident, to give security for costs.... 77
A docket fee of $20 to the proctor is taxable under Act Feb. 26, 1853, § 1, on a final disposition by the court of a cause on the calendar..... 910
So *held* in a case where an appeal in admiralty was dismissed, with costs, for irregularity, without being heard..... 910
Expenses of printing and translating testimony are not taxable by defendant, where the bill is dismissed..... 490
In a suit for the infringement of a patent, copies of plaintiff's models and papers, which he is not obliged to produce, when obtained by defendant, are proper items of costs 818
Act March 1, 1793, allowing parties the same compensation for travel, attendance, and attorney's fees as is given in the state courts, *held* not now in force..... 818
Witnesses are entitled to travel "from the places of their abode," though beyond the line of the state, unless otherwise agreed by the parties..... 818

Counties.

See, also, "Municipal Corporations."

COURTS.

See, also, "Admiralty"; "Bankruptcy"; "Equity"; "Justices of the Peace"; "Maritime Liens"; "Removal of Causes."

In general.

Courts of limited jurisdiction can only exercise their powers in the cases and in the mode prescribed by the legislature..... 686

Comparative authority of federal and state courts: Process.

Where two courts have concurrent jurisdiction, the one which first obtains actual jurisdiction of the parties and subject-matter may proceed to final adjudication..... 168
The pendency in the state court of a suit to determine priority between two liens will not prevent the federal court from assuming jurisdiction on a general creditor's bill to determine priorities as between all lien holders 889

Federal courts—Jurisdiction in general.

Where there is an actual sale and transfer of the subject-matter of the suit, the

Page

fact that it was made for the purpose of giving jurisdiction is immaterial..... 882

The federal courts have jurisdiction in contested elections of state officers only where the title to office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude..... 649

— **Grounds of jurisdiction.**

Where the question of copyright is merely incidental to a dispute about a contract for the original composition of a literary work, a federal court will not entertain jurisdiction 885

The rule that the holder of a negotiable note may sue thereon, although he has no interest therein, is not applicable when the question of jurisdiction is to be determined. 882

The assignee of a note payable to "H. or bearer" may sue on the same in the federal court, regardless of the residence of his assignor 308

Whether action against the maker of a note given to the agent of a foreign corporation for goods sold, and indorsed to the president, may be brought in his name; and pleadings and evidence therein.....1010

A creditor's bill for discovery is a continuation of the suit at law, and a change of residence of the complainant does not oust the jurisdiction..... 805

The joinder of those parties whose citizenship would oust the jurisdiction will be dispensed with, where it can be done without prejudice to their rights..... 674

One defendant cannot object as to jurisdiction over another defendant, who admits that his citizenship is rightfully described to give jurisdiction..... 674

The defendant may waive the privilege not to be sued out of the state where he resides, by a voluntary appearance..... 657

The limit of jurisdiction as to the amount involved is to be determined by the amount laid in the declaration, and, when it consists of the common counts, by the amount in the bill of particulars..... 962

— **Circuit courts.**

The circuit court can exercise jurisdiction, in a case falling within the constitutional grant of judicial power to the United States, only where an act of congress has expressly conferred jurisdiction..... 649

Where jurisdiction is not expressly conferred on the federal courts, the party may resort to the state court..... 649

On a bill in the nature of a general creditor's bill, brought against a railroad company lying wholly within the Eastern district of Virginia, *held*, that the court could obtain jurisdiction of the District of Columbia, as a codefendant claiming a lien.. 889

— **District courts.**

The district courts of the United States, as courts of admiralty, have jurisdiction over policies of marine insurance..... 189

— **Administration of state laws and decisions.**

The circuit court in Pennsylvania has power to issue writs of foreign attachment under the state laws..... 108

The claim law of Georgia, so far as the same applies to real estate, provides for equitable relief, and therefore cannot be administered in the federal courts..... 284

The circuit court of the United States has no power to enjoin a nuisance existing under a local law, which does not amount to a national nuisance..... 33

A state statute prescribing a limitation as to a suit in equity to affect a title to land (Civ. Code Or. § 378) is not binding upon the federal court. (Rev. St. § 721.).. 248

The construction of a state statute by the highest court of the state is controlling

Page

on the federal court, where not in conflict with the constitution of the United States. 33, 862

The question of the rate of interest and damages on nonpayment of a bill of exchange will not be determined by the local law 1021

State decisions in relation to charges to the jury are not binding on federal courts.. 434

Local courts.

An action of debt on a promissory note for $214, reduced by payments to $8.94, will lie in the circuit court for the District of Columbia..... 914

If, in a suit in Alexandria, D. C., the debt be reduced below $50, by offsets, the plaintiff may have judgment for the sum found by the verdict.....1059

CREDITORS' BILL.

A creditor's bill for discovery is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law. 805

CRIMINAL LAW.

See, also, "Arrest"; "Bail"; "Extradition"; "Habeas Corpus."

A sentence to a jail in a certain place will authorize the holding of the prisoner by the keeper of that jail at another place, to which the jail has been removed by authority of the state legislature..... 721

CUSTOM AND USAGE.

The lien on the ship for wages, given to masters of British vessels by the law of the flag, though not existing under the maritime law, may be enforced in the admiralty courts of the United States..... 844

CUSTOMS DUTIES.

Customs laws.

The jury are to be governed in construing the law by the usual and well-known name of the article, and meaning of the words of the law, as understood generally in commerce at the date of the act.....147, 226

Rates of duty.

Brussels and Wilton rugs, composed wholly of linen and worsted, *held* not dutiable as carpets or carpeting, or as manufactures of wool. (Act 1832.)..... 147

"Gambia" *held* synonymous with "terra japonica," and exempt from duty. (Act 1861.) 289

"Hosiery," in Act 1832, has a more general meaning than "stockings," in Act 1816.. 226

Knit shirts and drawers ready to wear, *held* dutiable as "ready-made clothing" (Act 1832), unless known in trade as "hosiery". 226

Invoice: Entry: Appraisal.

The value in China of goods shipped from China to New York, via London, with charges, commissions, etc., accruing prior to their being put on shipboard in China, constitute their dutiable value.....54, 67

The freight from China to London cannot be added as part of the dutiable value..54, 67

The addition of such freight, even though a proper charge, will not authorize the imposition of the 20 per cent. penalty under Act July 30, 1846, § 8, as it would form no part of the "appraised value"..... 54

The owner, consignee, or agent may make addition in the entry to the invoice cost or value to raise the same to the true market value 496

The cost of covering is included in the words "market value," where wool is baled up before it is purchased..... 496

Page

Where the purchase price included the package or covering, charges therefor are not to be added by the appraiser..... 496

Importers cannot qualify the effect of their act in adding to the invoice value by stating that it was made to prevent a seizure..... 139

Goods imported from the country of their production must be appraised at their market value in that country at the time of their purchase..... 66

Time of shipment abroad will be taken as the time of purchase, unless the collector is notified to the contrary..... 603

The consignee who has sworn to the invoice sent by the owner will not be allowed to amend the entry to avoid a penalty after the collector has directed an appraisement. 603

Payment: Protest.

The payment of duties under protest on adding to the invoice value, to obtain possession and to avoid a penalty, *held* not voluntary..... 66

Violations of law: Forfeiture.

The statement that the "master took all precaution in his power to prevent smuggling" *held* insufficient to prevent enforcement of the penalty against the vessel of the value of goods found concealed in the purser's room and the ship's storeroom....1061

Vessel forfeited for unlading foreign goods without a permit, etc., although not actually brought by her from a foreign port, but transshipped into her on the homeward voyage. (Act March 2, 1799, c. 128, § 50.)... 556

Customs officers.

The only defense admissible, in trespass against a customs officer for seizing goods as imported in violation of the revenue laws, is a judgment of condemnation on proceedings in rem in the district court, or a certificate of reasonable cause..... 275

Having possession of the goods, and exercising acts of ownership over them, the plaintiff may sue for a trespass on them in his own name..... 275

DAMAGES.

See, also, "Contracts"; "Collision"; "Patents," etc.

Only reasonable actual damages are recoverable for personal injuries caused by the negligence of a carrier..... 522

In determining such damages, the jury may consider the medical and all other expenses resulting from the injury, the time lost by plaintiff, and the value of his services while disabled, and the nature and extent of his injuries..... 522

A recovery for breach of a contract for payment of money in another country will be for a sum equivalent to that to which plaintiff is entitled there, calculated by the real, and not the nominal, par of exchange. 521

DEATH.

See, also, "Abatement and Revival."

Presumption of death does not arise from the fact that a person who, 22 years ago, was in bad health, would, if now living, be 80 years old..... 204

DEATH BY WRONGFUL ACT.

The widow, although the sole beneficiary, cannot maintain an action in her own name, given by the Illinois statute to the "personal representative" of one whose death is caused by the wrongful act of another... 154

DEED.

Page

See, also, "Boundaries"; "Vendor and Purchaser."

A deed *held* to convey a legal title, as against purchasers on a judgment against the grantor, who subsequently obtained a patent from the government..... 553

DEMURRAGE.

There can be no recovery of demurrage for delays caused by the fault or negligence of the officers of the vessel, regardless of stipulations in the bill of lading..... 221

Where there is no special agreement as to the time within which a vessel is to be unloaded, the law implies that it is to be done within a reasonable time after her arrival 1127, 1127

In the case of a cargo of ice from Maine to New York, *held*, that 15 days was not unreasonable, where the vessel waited her turn in the customary way.....1127, 1127

DEPOSITION.

Where a commission for the examination of witnesses confers the power to execute it upon any one of several commissioners, it may be executed by one of them..... 6

A commission issued to four persons jointly to take depositions in England cannot be validly executed by three of them..... 117

The court may, upon application before trial, allow depositions taken in a suit between the same parties, for the same cause of action, in another court, to be filed as evidence 97

The objecting party should show affirmatively that there was mistake, misapprehension, or other good cause why they should not be received 97

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators"; "Limitation of Actions"; "Wills."

A court of equity has jurisdiction to decree an account and distribution, according to the lex domicilii, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here 746

But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case 746

On a decree of distribution, complainants, residing in France, required to give refunding bonds with security, pursuant to Act Pa. 1794, concerning intestate estates.... 530

The circuit court of the District of Columbia cannot decree the sale of lands of an intestate, where some of the heirs are nonresident infants 791

In a suit to charge real estate of an intestate for deficiency of personal assets, the answer of the administrator, and his accounts settled, are prima facie evidence against the other defendants, who are without personal knowledge 911

The purchaser from the heir may plead, in the name of the heir, to a sci. fa. for execution against the lands of the deceased, that the executor had assets..... 345

If the heir, in an action against him on the bond of his ancestor, plead nothing by descent or devise, and it be found against him, judgment shall be de bonis propriis.. 365

Discharge.

See "Bankruptcy"; "Insolvency."

DISCOVERY.

Page

See, also, "Creditors' Bill."

The theory and basis of a bill of discovery in equity, in aid of a defense in another suit, is that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein of facts material to the defense.....1001

Domicile.

See "Courts"; "Removal of Causes."

DOWER.

The subsequent assent by the wife to a conveyance by her husband, indorsed thereon under seal, *held* not a release of dower.. 252

DURESS.

A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties 870

But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity 870

EJECTMENT.

See, also, "Abatement and Revival"; "Adverse Possession."

Evidence after verdict, by witnesses, on affidavits as to the value of the land in dispute, is admissible to fix the jurisdiction of the court 715

Where a deed was delivered on condition of a lease for life back to the grantor, the grantee cannot recover in ejectment against the grantor, where such condition has not been fulfilled 1181

A substituted grantee, having knowledge of the condition, stands in no better position than the original party 1181

A person setting up a settlement right must prove the same to be prior to an opposing right, and continuing..... 40

Defendant, who sets up an outstanding title in a third person, must show it to be a legal, subsisting title, and better than the plaintiff's 40

An equitable interest or right in defendant is no defense..... 209

A party claiming land under the Illinois limitation laws must deduce a title directly from a specified source, and by a chain of genuine conveyances 1019

Possession for 15 years, under Act Pa. 1785, to bar ejectment, must have commenced when the law was passed..... 40

Under the Oregon Code, defendant cannot avail himself of an estate in the premises, in himself or another, as a defense, unless the fact is pleaded..... 209

A detailed statement of matters which might be evidence in support of a plea of title in defendant is not a sufficient plea of such title, and will be stricken out, on motion, as redundant 209

An extract from the books of the surveyor general of the land office, in Pennsylvania, is not evidence 42

The proceedings of the board of property of Pennsylvania, directing a survey of certain districts, and the survey and plot returned thereon, are not evidence..... 42

A connected plot or sundry tracts, made and put together by an officer in the land office, is not evidence..... 42

The marshal must execute the writ issued upon a judgment in ejectment even as against third persons in possession having a superior title, but he may require an indemnity bond 220

A person in possession, asserting an anterior title, must apply to the court, if he would stay the enforcement of the writ.. 220

ELECTIONS AND VOTERS.

See, also, "Courts."

Method adopted for the appointment of supervisors of election under the federal election laws of 1870, 1871, and 1872..... 654

EQUITY.

See, also, "Courts"; "Injunction"; "Pleading in Equity"; "Practice in Equity."

Jurisdiction.

A mistake of facts going to the essence of a contract avoids it 382

An agreement, coupled with a power of attorney, giving a person a large contingent compensation on the collection of a claim against a foreign government, *held*, should be canceled for mutual mistake, where, unknown to both parties, the claim, a few days prior thereto, was allowed and liquidated by treaty stipulation..... 382

A court of equity has jurisdiction of a suit by heirs to set aside a deed from their ancestor, as obtained by undue influence, or as being taken in trust for his maintenance, and, after his death, for the benefit of the heirs..... 491

Such conveyance may be allowed to stand as security for actual advances and charges, and set aside as to all other purposes, on account of imposition..... 491

Equity has jurisdiction of a suit by the trustee against the cestuis que trustent, to direct an issue devisavit vel non, and to decree possession of the land to the trustee to enable him to execute the trust..... 666

A person who, by negligence, has failed to avail himself of a defense at law, cannot have relief in equity.....1087

The purchaser of all the property of a railroad under a trust deed junior to judgment liens held by him, *held* entitled to maintain a bill to set aside satisfactions of the judgments entered by him, where the trust deed and his purchase were subsequently declared void.....888, 893

A bill in equity will not lie to obtain payment of levee bonds by the enforcement of the levy and collection of a tax stipulated for their payment before judgment obtained on the bonds.....1033

Jurisprudence.

Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits..... 168

In cases of concurrent jurisdiction, equity follows the law as to the statute of limitations; but, in cases of purely equitable rights and titles, equity is not bound by the statute, and only acts in analogy to it. 248, 911

The commencement of a suit in equity within the limitation, which was subsequently discontinued, will not excuse the delay 227

ESCAPE.

The escape of a prisoner while insane is no defense to the sheriff..... 925

Such escape is no breach of the condition of a bond for jail limits..... 925

ESTOPPEL.

An estoppel in pais arises only when the party against whom it is alleged, by his declarations, acts, or omissions, has misled the

Page

other party to a transaction to do that which will be turned to his prejudice by allowing the other party to disavow the legitimate consequences of his own acts... 27

A grantee in possession under an unrecorded deed *held* not estopped, as against a subsequent mortgagee from his grantor, by signing a written appraisement on the application for the loan, in ignorance of the fact that his land was included..... 111

EVIDENCE.

See, also, "Deposition"; "Trial"; "Witness."

Best and secondary.

A copy is inadmissible unless the original is lost or destroyed, or beyond the power of the party to produce..... 177

Documentary.

A bill of sale is properly admitted in evidence where the subscribing witness swears to his signature, though he has no recollection of the paper.....1065

A transcript of the record of a justice of the peace, certified by him to the county court, and certified by the prothonotary and the presiding judge of that court, under the act of congress, *held* sufficient..... 148

A paper purporting to be "a certified extract from the general draft of certain districts as framed by the surveyor genral, remaining in his office, under the seal of the office," is not evidence..... 42

Parol evidence.

Parol evidence to show what time payment was to be made is not objectionable as varying or contradicting a written agreement of sale, silent on such subject..... 306

Competency: Materiality: Relevancy.

The declarations of a witness, not under oath, may be given in evidence to discredit his testimony..... 583

A book published by a deponent respecting the date, etc., of certain surveys, may be read in evidence, with a view to qualify his deposition 553

Whether or not declarations post litem motam are evidence in matters of pedigree 204

EXECUTION.

See, also, "Attachment"; "Bankruptcy"; "Garnishment"; "Judicial Sales."

The signing of the vend. ex. by the deputy clerk, in his own name, *held* a mere irregularity, of which advantage could not be taken in a collateral proceeding..... 59

The plaintiff has a right to enter the defendant's house with the constable, who has a fi. fa., to show the defendant's property, upon which to levy the execution..... 606

A person whose property is levied upon by a United States marshal, under execution against another, cannot resort to a local law which provides for equitable relief, but must file his bill in equity..... 284

A valid promise not to arrest a debtor on the first execution does not, at law, avoid a bond given by the debtor for the prison liberties, when arrested in violation of such promise, which is collateral merely..... 870

A sheriff's deed cannot be given in evidence, without producing the judgment and execution under which the sale was made.. 715

Act March 2, 1867, adopting the state law concerning "modifications, conditions and restrictions upon imprisonment for debt," does not apply to process in admiralty suits.. 465

A claim for damages for an injury to the person with force is not a claim for a debt, within the meaning of the statute and rules relating to imprisonment for debt..... 465

EXECUTORS AND ADMINISTRATORS.

Page

See, also, "Descent and Distribution"; "Limitation of Actions"; "Wills."

The statute of California for the settlement of the estates of deceased persons has no application to the estates of persons who died previous to the organization of the state government 510

A prefect under the Mexican government in California had no jurisdiction over the estates of deceased persons, or authority to appoint an administrator 510

A previous demand for the legacy is not necessary under Code La. art. 1626, where the purpose of the bill is merely to establish the validity of the bequest 168

A deed executed by administrators under an order of the orphans' court cannot be read in evidence without producing the order of the court..... 715

A creditor may sue to recover his debt any time before distribution, though after the expiration of 12 months..... 463

The pendency of a commission of insolvency is no bar to a sci. fa. against an administrator on a judgment had against him. 806

An administrator made defendant after verdict against his intestate, and before judgment, may plead no assets or insolvency on sci. fa. against him 806

Under Act Md. 1798, c. 101, subc. 8, § 15, the court and not the jury, is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim..1050

Evidence may be given to show that the defendant is executrix in her own wrong, without charging her as such 584

Where an executor, who is also a devisee or residuary legatee, enters generally into the possession of the property, he does it as executor, and not as devisee..... 463

The creditor has the burden of showing the amount of assets which came into the administrator's hands, even when he has neglected to return an inventory..... 463

Exemptions.

See "Bankruptcy"; "Homestead."

EXTRADITION.

Rules prescribed for the conduct of proceedings under extradition treaties.....1143

The requisition for the extradition of a fugitive criminal under the treaty with Great Britain of 1842, and Act Aug. 12, 1848, is properly made through the executive of the United States 1025

Sufficiency of warrant to give jurisdiction to arrest and commit a fugitive from justice 1143

Where the crime is forgery, the complaint on which the warrant is founded may charge more than one forgery 1143

Documents which are so authenticated that the tribunals of the country where the offense was committed would receive them are admissible in support of the charge....1143

The proper form of such authentication considered 1143

The circuit court may, on a writ of habeas corpus, in conjunction with a writ of certiorari, revise the action of a commissioner committing a fugitive from justice for surrender under an extradition treaty with a foreign country 1143

The court will look into the evidence on which the judgment of the commissioner rested, and will pass upon its weight, as well as upon its competency.....1143

Where the commissioner acts on legal evidence the court will not reverse his judgment except for substantial error in law, or

Page

for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence.....1143
Documentary evidence of the prisoner having committed the offense charged *held* sufficient, both in form and substance, to warrant his commitment for extradition..1025

FACTORS AND BROKERS.

See, also, "Principal and Agent."

Factor selling bills of his principal, remitted to raise funds, *held* not liable for taking note of third person covering such bills, with other sums, though it is not indorsed by the purchaser 322
Bills transmitted to a factor for sale, and credit on his debt against the principal, *held* to amount to payment, where the notes received therefor were dealt with as the property of the factor..... 322

FISHERIES.

See. also, "Seamen"; "Shipping."

An enrolled vessel sailing under a fishing license is not liable to forfeiture because her part owner, a citizen of the United States, resides in a foreign country.....1160
Construction of Act 1813, c. 34, and Act 1819, c. 212, relating to bounty upon vessels employed in fisheries..... 588
A vessel is "at sea," within the intent of such acts, when she is without the limits of any port or harbor on the sea coast.... 588
The forfeiture provided by Act July 29, 1813, for fraudulently obtaining bounty attaches only when there is actual fraud and deceit used in obtaining it.....588, 594
An almanac with underscored or dotted dates *held* inadmissible to prove the date of sailing and returning of a vessel engaged in fisheries 588

FIXTURES.

New fixtures substituted for old ones by the tenant cannot be removed without accounting for the latter.....1063
The right to remove fixtures is not lost by nonpayment of rent and notice to quit, but only by quitting.....1063
A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures 1063
A negotiable note received on account of rent *held* no bar to a distress for the whole rent due before its maturity..... 32

FORFEITURE.

See, also, "Customs Duties"; "Fisheries"; "Internal Revenue"; "Shipping."

An amendment will not be allowed, to insert a new, substantive defense, where the statute of limitations has run against it.. 556
The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree..... 59

Fraudulent Conveyances.

See "Assignment for Benefit of Creditors"; "Bankruptcy."

Game.

See "Contracts."

GARNISHMENT.

See, also, "Attachment"; "Execution."

Funds in the hands of an assignee for the benefit of creditors are not subject to garnishment under executions issued against the assignor after the date of the assignment 843
One to whom a note was assigned with knowledge that the maker had been summoned as guaranty in a suit against the payee cannot recover thereon against the maker 142
The pending attachment may be pleaded in abatement to an action brought against the maker in anotner state..... 142
The garnishee may answer after bill taken for confessed at the rules..... 708

GIFTS.

The indorsement of a certificate of deposit, when of such a character as to absolutely prohibit the indorsee from claiming any present title to the money, or any right to demand payment until after the death of the indorser, *held* not a valid gift causa mortis 788

GRANT.

See, also, "Boundaries"; "Mines"; "Public Lands."

A legislative grant is equivalent to a patent, and one made to a class of persons is as valid as one made to an individual..... 33.
A grant to an individual, of franchises, is to be strictly construed, but a grant to a purchaser must be interpreted according to the ordinary meaning of its language..... 33
"Adjacent," as used in a grant, does not mean "adjoining," but signifies "convenient," "near to," or "in the neighborhood"..1084
Objections to confirmation of grant of land in San Joaquin county, Cal., *held* to have been removed by additional testimony as to performance of conditions.... 49
A confirmation of a Mexican land grant under Act March 3, 1851, determined nothing as to the equitable relations between the confirmees and third persons..... 510
A survey returned and accepted is prima facie presumed to have been legally made 40, 42, 621
A warrant and survey returned into the land office and accepted, in Pennsylvania, vests a legal title..... 42
A survey made by a deputy surveyor, out of his district, is void, and the patentee cannot recover in ejectment..... 42
Ex parte proceedings by the board of property, ordering a survey to be struck from the records, are not binding on a person claiming thereunder..... 42
What is a sufficient survey of a number of tracts adjoining each other, belonging to the same person..... 40
A survey in the district appropriated to satisfy depreciation certificates, made without going upon the land and running the lines, *held* valid where the boundaries can be ascertained with mathematical certainty by the lines of adjoining surveys..... 42
A right of settlement and improvement is merged in the title acquired under a survey under a warrant by the owner of the settlement and improvement..... 621
The warrant is functus officio after a survey has been once regularly made under it by direction of the warrantee..... 621
What laches in a settler will postpone him to a warrant and survey..... 40
A call in an entry may be made good by description, though the object called for is not notorious.....1084
Where the calls in an entry are indefinite, the survey should be made either in a square or an oblong.....1084

GUARANTY.

Page

See, also, "Bills, Notes, and Checks"; "Indemnity"; "Principal and Surety."

A guaranty of a certain annual dividend on corporate stock, indorsed thereon, *held* a collateral undertaking; and a demand and notice must be averred and proved, or an excuse alleged, to charge the guarantor.... 433

The total insolvency of the principal supersedes the necessity of a demand of the principal, and notice to the guarantor..... 433

An averment, in a declaration on a guaranty of a certain annual "dividend or income" on corporate stock, that the company, within the time specified, "neither declared or paid any dividend or income whatever," *held* insufficient..... 433

The measure of damages for breach of guaranty of the "amount due" on a note is the value of a judgment, if one had been obtained against the makers..... 954

Where the makers were solvent, but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty..... 954

GUARDIAN AND WARD.

See, also, "Parent and Child."

A notice of the appointment of a guardian by reading the order of the court *held* not sufficient under Act R. I. Dig. 1822, p. 246, § 3..... 686

HABEAS CORPUS.

The petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy..... 646

A prisoner under charges for trial by court-martial will be discharged on habeas corpus, where such charges are found wholly insufficient to show jurisdiction.....1067

A convict sentenced in court by a judge de facto, acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus..... 7

Where the identity of the prisoner arrested as a deserter is established on a traverse to a return that he was a regularly enlisted soldier, he will be remanded.... 319

A person brought from another state under a writ of habeas corpus ad testificandum, and discharged on habeas corpus, must be sent back in charge of the marshal of the district..... 319

HOMESTEAD.

See, also, "Bankruptcy."

The cestui que trust under a trust deed to secure present loans and future advances will be protected, as to such advances, against the claims of the borrower, who has declared the land a homestead, and has subsequently obtained such advances, and fraudulently concealed his declaration of homestead..... 134

HOMICIDE.

The officers of a steamboat are liable for any act or omission in not properly regulating the fires or amount of steam, or any neglect of duty likely to create danger, or for not taking proper precaution, where loss of life is caused thereby. (Act 1838, § 12.)..1164

HUSBAND AND WIFE.

A feme covert need not acknowledge her deed, to render it valid under Act Ill. 1869 (Pub. Laws, 359)..... 870

Page

A married woman is entitled, under Act Ill. 1869, to retain, as her own, commissions earned in making sales for her husband under a contract of agency with him..... 886

The provision in the statute that it shall not be construed to give the wife any right to compensation for any labor performed for her husband or minor children, is in applicable to cases where there is a special agreement between the husband and wife..... 886

INDEMNITY.

See, also, "Guaranty"; "Principal and Surety."

A bond executed in Michigan, to indemnify a person for signing a note in another state, which is void under the laws of that state, is also void..... 898

Infancy.

See "Guardian and Ward"; "Parent and Child."

INJUNCTION.

See, also, "Equity"; Patents."

The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted..... 156

An injunction against a corporation is binding upon an officer upon whom it is served, or to whom it is known to exist.... 799

After satisfaction on execution of a judgment at law, on the dissolution of an injunction, plaintiff cannot recover, upon the injunction bond, interest accruing upon the judgment while delayed by the injunction.. 95

INSANITY.

See, also, "Wills."

The law presumes sanity in a grantor, and prior or subsequent lunacy, except where it is habitual, does not change the burden of proof..... 261

In determining the ability of an alleged insane person to execute any particular act, the inquiry should first be what degree of mental capacity is essential to the proper execution of the act in question, and then whether the party possessed at the time such capacity..... 261

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors"; "Bankruptcy"; "Composition."

Upon the trial of an issue as to the right to a discharge, the debtor must produce his account books, if called for..... 152

Order of discharge rescinded on allegations filed and ex parte evidence in support thereof, where defendant failed to appear.. 912

A certificate of discharge in insolvency is not conclusive evidence that the discharge was duly obtained..... 917

A discharge of the principal under a state insolvent law must be pleaded, to entitle bail to a release..... 917

A discharge under a state insolvent law is invalid against a creditor of another state, who did not voluntarily become a party to the proceedings..... 182

Nonresident creditor *held* not bound by the discharge of his debtor under the insolvent law of the District of Columbia, though he had brought suit on his claim within the District 647, 649, 842

INSURANCE.

See, also, "Marine Insurance."

The creditor of the insured has no right of action on a policy of fire insurance pay-

Page

able to such creditor "as his interest may appear." 808

The question, "Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with * * * or any other hereditary disease?" *held* to have been truthfully answered 2

The insurance solicitor has no authority, simply from the nature of his business, to bind the company to a waiver of payment of the premium..... 312

Agreement of insurance solicitor to carry the insurance *held* not a waiver of condition requiring payment of premium to validate renewal 312

A policy of insurance by a New York mutual company on the life of a citizen of Alabama is suspended, and not dissolved, during the continuance of the Civil War, and the rights thereunder may be enforced on the return of peace.....351, 402

Such policy is not unlawful, as continuing to insure the life of an alien enemy; it appearing that the insured was a neutral, passive, noncombatant enemy, who remained such in fact..... 351

The refusal of the company when applied to by the insured, on the return of peace, to recognize the policy or receive the premiums, relieves him from the necessity of paying premiums subsequently accruing..... 351

Repudiation of obligation under the policy while it is still legally binding gives the insured a right of an immediate action for damages 402

Insured, claiming waiver of terms of policy requiring premium to be paid to validate a renewal, must show special agreement, or one arising by necessary implication from the circumstances..... 312

A person engaged in the insurance business, who has expert knowledge of the existence of facts affecting the premium, may give such knowledge in evidence on the question of the materiality of such facts represented or concealed by the assured..... 874

Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state 502

INTEREST.

Judgment may be rendered for 10 per cent. interest until paid, where that rate is expressed in the contract.....1083

INTERNAL REVENUE.

The owner of a patent, who has the patented machines made for him at a fixed price, and then sells them to others, *held* to be the manufacturer, and liable for the tax upon the sums realized by their sale. (Act July 13, 1866, §§ 79, 86.).....1097

"Profits used for construction" *held* not to include money used by a railroad company, to replace a wornout bridge with a much more costly structure..... 699

The tax on a pecuniary legacy accrues on the death of testator, though not payable until the legatee becomes entitled thereto (Act June 30, 1864, §§ 124, 125; Act July 13, 1866, § 9); and a repeal of the statute does not affect the liability of the executor.....1056

When taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary..1097

Moneys paid for the services of an inspector at plaintiff's private bonded cellar *held* not recoverable..... 603

The failure to take an appeal to the commissioner of internal revenue, as provided by Act July 13, 1866, § 19, to be available

Page

in an action to recover a tax as illegally assessed, must be pleaded in abatement....1097

JUDGE.

See, also, "Courts"; "Justices of the Peace."

The acts of a court presided over by a judge disqualified by the fourteenth amendment, but holding office before it was adopted, are valid..... 7

JUDGMENT.

See, also, "Interest."

Rendition and entry.

Judgment cannot be confessed before the return term of the writ..... 148

Where a party dies during term, judgment may be entered as of a day antecedent to his death; otherwise where he dies before the beginning of the term..... 60

Under an agreement for judgment for the amount due on a promissory note, plaintiff must settle the amount due on notice to defendant before issuing execution..... 401

Operation and effect.

The lien of the judgment on property is suspended during imprisonment on a ca. sa. in favor of other levying creditors..... 63

After reversal on appeal in the state court, and new trial ordered, plaintiff may dismiss his suit, and bring another in the federal court..... 924

Plaintiff, in such case, is bound by the ruling of the court on appeal, unless he makes a different case in the new forum..... 924

Of the nature and effect of a decree in a court of probate, and as to the parties whom it binds..... 740

A decree of the supreme court of probate reversing that of the inferior court, decreeing distribution, is no bar to a subsequent suit by the parties claiming as heirs or legal representatives 740

Where the record fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be regarded as an obiter dictum..... 862

Relief against: Opening: Vacating.

Judgment by default opened where motion made at the same term, and defendant showed a good defense..... 419

Variance between the capias and declaration cannot be pleaded to set aside an office judgment 719

Satisfaction and discharge.

The recovery of a judgment in one court in an action on a judgment of another court is no satisfaction thereof..... 63

Discharge of the debtor from imprisonment without the consent and against the will of the plaintiff, under a state law reserving to the creditors certain rights as to future-acquired property, will not operate as a satisfaction of the judgment..... 63

Satisfaction of a judgment which is the foundation of a judgment obtained in another jurisdiction will not be entered of record where the creditor is entitled to continue the latter in force under the local law 63

JUDICIAL SALES.

Where the purchaser neglects to pay the purchase money, and suffers the property to be sold for taxes, the court, upon the petition of the trustee, will order so much of it to be resold as will pay the taxes and redeem the residue..... 974

JURY.

Proper practice in case of a loss by the marshal of a special jury list struck by the parties 246

JUSTICES OF THE PEACE.

Page

A justice of the peace in Washington, D. C., has jurisdiction of penalties, under by-laws, not exceeding $50..... 278

A justice of the peace may reject a plea of misnomer in abatement..... 278

Landlord and Tenant.

See "Fixtures."

License.

See "Mines"; "Patents."

Liens.

See "Admiralty"; "Maritime Liens"; "Shipping."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession"; "Ejectment"; "Equity."

The principle that the statute will not protect trustees applies only to express, not to constructive, trusts..... 911

The California statute applies to both equitable and legal remedies. It is directed to the subject-matter, and not to the form, of the action, or the tribunal before which it is prosecuted..... 510

Act N. C. 1789, c. 23, § 4, requiring creditors of decedents to bring their actions within three years, is inapplicable where there is no executor or administrator of the estate..... 95

Inability of the creditor to proceed against the real estate of decedent until the personal was exhausted, or a deficiency ascertained, is no bar in equity to the statute of limitations..... 911

If the statute begins to run in the lifetime of the intestate, it is not interrupted by his death, and the want of administration..... 911

When the statute once begins to run upon a right of action to recover lands, it is not interrupted by the subsequent descent of such right of action to a party laboring under a disability to sue..... 640

An offer after commencement of suit, made to plaintiff's agent, to pay the debt, upon terms which he is not authorized to accept, will not take the case out of the statute..... 321

LOTTERIES.

A lottery for the sale of lots or lands is within the prohibition of Act Md. 1792.... 878

MANDAMUS.

A circuit court of the United States has power, by mandamus, to compel the Union Pacific Railroad Company to operate its road as required by law. (Act March 3, 1873.)..... 268

Private persons, who suffer damage and inconvenience from the failure of the company to operate its road as required by law, may institute proceedings under Act March 3, 1873, without the sanction of the attorney general..... 268

Cases in which the attorney general must, and in which private citizens may, apply for the writ, considered..... 268

MARINE INSURANCE.

See, also, "Average."

The contract—Generally.

The charter provisions that "all the conditions of policies issued by the company shall be printed or written on the face thereof," and that certain officers "shall sign the policies," made by order of the directors, does not prevent the making of an oral contract, or liability upon an implied contract.....1132

Quaere as to the validity of an insurance by seamen of their shares in the proceeds of an adventure, where the shares are in the nature of wages, though given in lieu thereof..... 409

The insured is entitled to have the policy reformed so as to secure the protection which the correspondence between the parties shows that the insured intended, and the insurer knew to be his understanding.. 965

Correspondence *held* not to justify reformation of policy..... 973

—— Insurable interest.

A lien, or an interest in the nature of a lien, though the debtor may be pursued personally, is an insurable interest..... 409

An interest does not cease to be insurable in the progress of the voyage simply because it is subject to contingencies, or has not at the moment anything corporeal or tangible to which it is attached..... 409

The policy attaches as soon as the voyage commences, where the insured has then an inchoate right to freight under a contract, although the cargo is not taken in..... 683

—— Interpretation.

General rules for the construction of policies laid down by Betts, J.....1189

It is not an ingredient of the contract of insurance that it shall be enforced conformably to the law of the place where it was executed..... 69

The usage of trade must be taken into consideration in the construction of policies..... 409

The usage of vessels engaged in the trade in question is not admissible in the interpretation of a contract of insurance which is not ambiguous..... 973

The terms, "to port in Cuba, and at and thence to port of advice," do not give the right to go to a second port in Cuba to load.....963, 969

Evidence of the usage of vessels in the trade in question to discharge at one port, and then to proceed to another for return cargo, *held* inadmissible to establish a usage under the policy.....963, 969

Depositions admitted de bene esse to show that on a voyage of this kind the vessel might, under a usage, go to a second port in Cuba to load..... 963

Representations.

A statement that the vessel would take her register tonnage of coal *held* not a material misrepresentation, where she in fact carried more than that quantity..... 965

The stipulation, "outward cargo of coal not to exceed registered tonnage," *held* not a material misrepresentation, where the policy provided for indemnity though the cargo exceeded the registered tonnage..... 965

The meaning of the representation, "coppered ship," in the application, is to be understood according to the ordinary sense and usage of such terms in the place where the insurance is made.....*934

A policy is void, as founded on mutual mistake, where the owner and insurer understood certain terms of representation to be used in totally different senses..... 934

The risk.

A written policy cannot be extended to other risks than those named, by an averment that it was so understood, construed, and intended by the parties; but there may be a new parol contract, covering such different risks.....1132

Page

A collision at sea, whether the result of accident or negligence, is a peril of the seas, within the meaning of insurance policies.. 189
All expenses resulting as a direct and immediate consequence of a peril insured against are covered by the policy..... 189
The insurers of a vessel are liable for a sum paid by its owners in compromise of damages sustained by another vessel from a collision caused by the negligence of the insured vessel, as well as the damages to the insured vessel..... 189
A loss of a ship, by worms, in an ocean where worms ordinarily assail and enter the bottoms of vessels, is not a peril of the sea, within the policy..... 934
The loss of a false keel at the Cape de Verd Islands, exposing the vessel to the action of worms, which destroyed her, while in the Pacific Ocean, *held* not within the policy..... 934

Deviation.
A vessel armed and insured as a letter of marque has no right to cruise at large for prizes, but she may chase and capture hostile vessels coming in sight in the course of her voyage..... 846
A vessel, whether armed or not, has the right to attack or chase an enemy ship in self-defense..... 846
A vessel capturing a hostile vessel in self-defense may take possession, and man out the prize..... 846

Abandonment.
To make an abandonment effectual, the cause of the loss must be stated in the letter of abandonment, for the benefit of the underwriters..... 934
Where the injury exceeds one-half the value of the vessel, the insurer must engage to pay for all necessary repairs, regardless of amount, if it insists upon a continuance of the voyage..... 683
After an abandonment accepted, the insurers are owners for the voyage, liable for seamen's wages, and entitled to freight, from such time..... 387
Where vessel and freight are separately insured, and abandoned, the insurers on the freight are entitled only to that earned before the abandonment..... 387
The continuance of the voyage by the insurers without objections will be presumed to be on the original terms, as to compensation of master and seamen..... 387
Right of master on abandonment, under insurance, of a moiety of freight, which he had contracted to receive in lieu of wages.. 387

Right of recovery.
Interest at the time of the loss *held* sufficient to entitle the insured to recover, although he had no interest at the commencement of the risk.....1189
Quaere: Where the assured had property in the goods insured at the time of the insurance, whether a subsequent change of interest, before or after loss, would affect his right to recover..... 409
An insurance on outfits in a whaling voyage does not terminate pro tanto with their consumption or distribution, but attaches to the proceeds of the adventure..... 409
Stores shipped for sale to the crew during a sealing voyage, or their proceeds, may be insured under a valued policy..... 409
Where freight is insured in a valued policy, the right to indemnity attaches if any part of the cargo is shipped..... 683
As between the parties, a valued policy is conclusive as to the true value of the subject insured, where the valuation is not shown to be fraudulent or grossly excessive 69
The liability, under a valued policy on freight, on jettison of a portion of the cargo, is computed on the basis of the valuation in the policy, and is not limited by the insured's contribution on a general average adjustment..... 69

Suits.
Where a vessel, not having been heard from, is considered as lost, interest is calculated after 12 months and 30 days from the last period when the vessel was heard from..... 289
A policy for a succession of voyages, "on account of whom it may concern," loss payable to H., is valid and enforceable in a suit by H. in his own right or as trustee...1189
A declaration on such policy, averring that at the time of the loss H. was interested in her to the amount of the insurance, *held* sufficient.....1189
A declaration that the insurance was for the use and benefit of H., as trustee for N., need not set forth the nature or extent of the trust.....1189

MARITIME LIENS.

See, also, "Admiralty"; "Affreightment"; "Charter Parties"; "Demurrage"; "Salvage"; "Seamen"; "Shipping."

The right to a lien.
To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly, by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea.... 123
Under the general maritime law, a lien arises or is implied for the benefit of material men, unless the ship be in her home port, or credit be to the master or owner.. 565, 630
A lien arises for labor and materials furnished in a foreign port in rebuilding a vessel which had been burned to the water's edge..... 518
No lien arises under the maritime law for supplies furnished a vessel in the state in which she is owned.....1086
There is no lien for wages of a watchman on board a ship in port.....1084
A master may hypothecate his vessel for necessaries in a foreign port, unless he has at his command funds or credit of his owner..... 126
Supplies furnished at the request of the master create a lien, though they exceed the vessel's actual need, in the absence of mala fides or collusion..... 126
The power of the master to contract for necessary supplies for which a lien arises under the maritime law is not controlled by the law of the flag..... 827
A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel, and for advances for their wages... 126
Every person who furnishes supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself, as a principal debtor, as well as with the master and owners..... 952
A lien attaches for casks furnished to a whaler for the receipt of oil.....1178
A person who is neither owner nor master cannot contract for work or materials necessary for building, repairing, or supplying a vessel, which will create a lien thereon..... 577
The seller of coal, bought, by one holding himself out as master and owner, for a tug lying in a distant port, must ascertain the extent of the purchaser's authority, and the necessity for the purchase..... 367

Page

The builder of a vessel, who furnishes materials, and is to be paid in installments, is a vendor, and has no lien, either under the maritime law, or under Act N. Y. March 29, 1855, giving a lien for work or materials "furnished." 477

Masts and spars furnished to a vessel while she is being built are not maritime supplies 4

Repairs to a vessel while in the hands of a purchaser under a conditional sale constitute a lien upon her, in the hands of the seller, after possession resumed for breach of the condition 869

A chartered vessel is liable for necessary supplies furnished in a port in which she herself, her charterer, and her owners are all strangers 565

A vessel in the hands of mortgagees, who were in fact the real owners, *held* not a foreign vessel in the port of their residence, as to one advancing money with knowledge of the facts 110

Priority and enforcement.

The relative priorities and dignities of many claims upon the same vessel, asserted by libels and petitions, composed, adjusted, and settled 827

The lien of a shipper for the performance of the contract of shipment takes preference over the lien of a prior chattel mortgage 1087

The claimant, in answer to a libel by a material man, need neither admit nor deny that the articles furnished were necessary .. 126

Waiver: Discharge: Extinguishment.

The material man's lien is not lost or waived by taking a negotiable note from the owner or master, unless it is received as payment. But an absolute transfer of the note will extinguish the lien 630

The right to proceed against a vessel in rem for supplies is not analogous to liens at common law or by statute, and is not, like them, affected by mere transfer of possession 565

Courts of admiralty are not governed by any absolute rule of limitations, but they will never do injustice to bona fide purchasers by the enforcement of old secret liens 597

Demand *held* stale, after two years, as against a mortgagee without notice, where the vessel was most of the time within the jurisdiction, and libelants were under no disability to sue 67

A lien given by the maritime law is a right given by the laws of the United States which cannot be abrogated, displaced, or superseded by state enactments .. 626

The seizure and sale of a vessel under a state law do not divest a lien given by the general maritime law 626

Liens under state statutes.

A lien of workmen and material men on a vessel, in a port to which she belongs, depends entirely on the provisions of the state law by which it is given 577

A lien arises for services rendered in taking care of a ship in port under the New York statute, where they amount to $50, enforceable in admiralty 586, 724

The lien for work done in the construction of a vessel, given by the local law, is lost by a failure to comply with its provision for enforcement 1193

A lien upon a vessel, given by the local law, may be enforced by a proceeding in rem in the admiralty court, under the change of May 6, 1872, of rule 12 in admiralty 783

Under the New York law, it is not necessary to file a specification of lien, where the vessel has not left the state before seizure, under process to enforce it 1178

MASTER AND SERVANT.

See, also, "Apprentice."

Page

A shipkeeper, by night or day, is not obliged, without an engagement to that end, to pump the ship, wash her decks, etc. 724

No abatement of wages will be made for occasional absence from the ship, if no objection is made thereto until the whole period of service has expired 724

There can be no recovery for an injury arising from incompetency or unskillfulness of a coservant, or from defects of machinery, unless it appear that the master knew of such incompetency, etc., or did not exercise proper care in selection *835

Each employé engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his coemployés 835

Master mechanics, foremen of roundhouses, and other persons engaged in the repair of machinery and rolling stock, are fellow servants with engineers, conductors, and other persons engaged in running trains 835

MINES.

A grant of a right to dig, take, and carry away all iron ore to be found within a tract of land, on paying so much a ton, *held* a mere license, under which no property in the ore accrues until the privilege is exercised 89

The right is without stint, but is not exclusive of the owner of the soil 89

Such license is indivisible, and an assignee in part cannot support a suit against the owner of the soil 89

In the case of interfering locations, for which patents have lawfully issued upon due notice to adverse parties, priority of right is determined by priority of patent, and not by priority of location 222

The party having priority of title (even by patent) cannot take all the ore of the cross vein found within his lines, but is limited to that contained in the space of intersection. (Rev. St. § 2336.) 222

In the case of parties owning veins which unite in their downward course the oldest patent will take the vein below the point of union, including the space of intersection. (Rev. St. § 2336.) 222

A preliminary injunction preserving mining property in statu quo will not be dissolved where there is a strong controversy, in which the right of neither party clearly appears 222

MORTGAGES.

See, also, "Chattel Mortgages."

A stipulation requiring payment without deduction for taxes, charges, or assessments does not prevent the mortgagor retaining the amount of income tax on the accrued interest, chargeable against the holder, and paid by the mortgagor 161

Pending foreclosure, the mortgagor cannot create a mechanic's lien which will affect the rights of the mortgagee 502

A decree of foreclosure in the federal court *held* not objectionable, in not giving the time allowed for redemption by the state statute 502

The mortgagee, after foreclosure, may recover at law, upon the attendant bond or note, the deficiency of the mortgaged property to pay the debt due, calculating the value of such property at the time of the actual foreclosure 810

MUNICIPAL CORPORATIONS.

See, also, "Railroad Companies."

The corporation of Washington, D. C., has authority to prohibit gaming 278

Page

A municipal corporation is not liable for the unlawful acts of its officers, committed ultra vires, and not colore officii, in the known and willful violation of law..... 681

A municipal corporation is not liable for the neglect of its mayor and police officers to protect private property against a known violation of law, though they have sufficient power for that purpose..... 681

Negotiable bonds, made under a legislative authority reciting that they are issued "for the purpose of aiding internal improvements in said township," *held* valid in the hands of a holder for value, though in fact issued to aid a private enterprise..... 98

Negotiable bonds, issued without authority, *held* invalid in the hands of a bona fide purchaser for value, where the recitals were sufficient to put him on inquiry....*144

An alderman of Washington, D. C., is not competent to try a person for a violation of a by-law of the corporation..... 278

NAVIGABLE WATERS.

See, also, "Riparian Rights"; "Waters and Water Courses."

The state has the right to the soil under navigable water within her territorial limits, subservient only to the right of the general government to regulate interstate and foreign commerce 33

Navy.

See "Army and Navy."

Negotiable Instruments.

See "Bills, Notes, and Checks"; "Bills of Lading."

NEUTRALITY LAWS.

The participation by the citizens of a neutral state in an attack by one belligerent power upon another is an offense against the law of nations, and may be punished as such by such neutral state.....1099

The federal judiciary, in the absence of legislation by congress, has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law.....1099

NEW TRIAL.

Letters of one of the defendants being read on the trial is no ground for surprise, for which a new trial can be granted....1066

Misbehavior of jurors is not a ground for a new trial, if it has not affected the verdict 1188

The drinking of liquor by the jury before the verdict is rendered, where it is not affected thereby, is no ground for a new trial, where not furnished by the party in whose favor it was rendered..... 663

Vacillating conduct of a juryman, in voting in the jury room, *held* no ground for a new trial..... 663

An error in a charge, which might have been corrected by the court, is not available on motion for new trial, where objection was not raised at the time..... 373

PARENT AND CHILD.

See, also, "Guardian and Ward."

The mother of minor heirs has no power to authorize an agent to act for them in matters relating to their real estate..... 553

PARTIES.

It is no cause of demurrer for want of parties that a lunatic is not made a party, but it is a good objection for want of parties 666

Page

In a suit in equity to convert the holders of the legal title to land into trustees for the true owners, a previous holder of such legal title, who has parted with all his interest in it, is not a necessary party..... 510

PARTNERSHIP.

See, also, "Bankruptcy."

The actual intention of the parties will alone constitute a partnership, as between themselves 927

A mere participation in the profits will not make the parties partners inter sese.. 927

The use of the word "Company" in the title of a firm formed as a special partnership under the New York statute renders all the partners liable as general partners.... 400

A special partner, who has withdrawn any part of his capital from the firm, is liable, at suit of creditors, to pay it back.... 400

One partner cannot sue the other in relation to a partnership matter until the partnership accounts have been finally adjusted, and a balance struck..... 177

The firm is not liable for goods sold to one of the partners with knowledge that they were for his separate use, although he ordered them to be charged to the firm.... 111

A chattel mortgage executed by one partner under seal, in the firm name, for money advanced to it, where the other partner subsequently assents thereto, will bind the firm 879

No agreement between the partners on their dissolution can affect the rights of their creditors, unless there is an express or implied agreement by the creditors to accept the continuing partner as the debtor, and to discharge the other..... 637

The retiring partner will be *held* discharged where the creditors, with full knowledge of the continuing partner's agreement to assume the debts, enter into a totally new contract with him, entirely changing the nature of the debt..... 635

PATENTS.

Patentability: Invention: Novelty: Anticipation.

The application of a known thing to a new purpose, as the use of rivets to fasten parts of a shoe instead of sewing, is not patentable 925

The principle that cotton spun directly from the gin produces a better and stronger yarn than cotton after it is baled, is not patentable 1150

A pavement composed of stone blocks, of which the ends lying in the line of travel are smooth, and fit closely together, while the sides lying across the street are rough, so that spaces are left between them, in which the horses' feet may take hold, is patentable 103

A new combination of old devices is patentable, if the result produced is new and useful 162

A combination of old devices, which produces merely the aggregate of the several results of the devices when used separately, is not patentable..... 162

The rule that the application of an old machine or combination to a new purpose does not involve invention does not hold good in the case of the application of a new combination to an old purpose.....1012

A hotel register with side margin occupied with printed advertisements and the middle left vacant for names of guests, *held* patentable, and not anticipated by city directories containing marginal advertisements.....856, 866, 875

An invention made and used in a private way, and abandoned, and not given to the

Page

public, to which a subsequent inventor had no access, will not invalidate the patent to him.....768, 900, 1019

An invention *held* not anticipated by a prior machine, substantially abandoned, and passing out of the memory of those who used it, until recalled by the patented invention 211

A pre-existing device, which only when out of order operated like the patented device, and was not accessible to the public, and passed out of existence, and was unknown to the patentee, will not invalidate the patent.....711

Who may obtain patent.

The patentee must not only be an original inventor, but the first inventor..... 900

The fact that a subsequent inventor had obtained a patent, and put the invention into actual use, will not bar a patent to the first inventor, who was not guilty of laches 1003

"Reduced to practice" does not import bringing the invention into use, but rather reducing it to such form as to remove it from the condition of mere theory.....1003

The making of a model and drawings from which one skilled in the art would be enabled to carry the invention into actual use is a reducing to practice.....1003

A foreign patentee may at any time during the life of the foreign patent obtain a patent in this country, provided the invention shall not have been introduced into public use in this country for more than two years prior to the application. (Act 1870.).1182

Prior public use or sale.

Public use in good faith, for experimental purposes, while perfecting the invention, is not within the meaning of the statute.....1180

The date from which the time of prior use or sale is to be reckoned is the date of the earliest application, where the same was rejected improperly.. 1180

"Public use" means use in a public manner, and not use by the public generally...1182

Prior description, or foreign invention or patent.

Prior use in a foreign land does not invalidate the patent, where the patentee supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work.. 915

The description in the prior printed publication should be sufficient to enable a mechanic skilled in the art to construct the machine 915

Abandonment: Laches.

A delay of three years in making an amendment is no ground of rejection of the amended specification, where the patent office had acted upon the merits of the case.. 894

Incompleteness of prior application is no evidence of a change in patentable features, where it appears that the machines are identical 894

A withdrawal of the application under a mistake caused by an error of the patent office is no abandonment, though the applicant suffer his invention to go into public use 899

The omission to file a caveat while maturing an invention does not impair the rights of the inventor.....1003

Application and issue: Interference.

The inventor may make each improvement the subject of a separate patent, or combine them, if he chooses..... 899

Upon the application for a patent, the testimony of practical men as to the utility of the invention is entitled to consideration.. 899

Extent of claim.

Both the specification and claim will be looked to, to ascertain the invention..... 900

Page

The specification and claims are to be liberally construed to carry out the intention of the inventor..... 341

A claim for a result produced substantially in the manner and for the purpose described will be construed to be for the mechanism described, and not for the result itself 1079

The drawings must be considered in connection with the specifications..... 341

The description of each separate element must be read and construed with reference to the entire combination and its results... 341

Appeals from commissioners' decisions.

The commissioner is bound to answer the reasons of appeal in cases of single applications as well as in cases of interference. (Act March 3, 1839, § 11.).....1150

The court cannot consider loose drawings sent up with the papers, which are not signed by the inventor, and attested by two witnesses 1150

Reissue: Disclaimer.

A disclaimer arising from inadvertency, accident, or mistake will not prevent the patentee from embracing the part so disclaimed in a reissue of his patent..... 899

Duration.

A domestic patent expires at the same time as the original term of a foreign patent for the same invention. (Rev. St. § 4887.).....1182

Extension: Renewal.

A purchaser of the exclusive right to make, use, and vend patented parts in a particular combination, without limitation of time, *held* should be protected, as against an assignee of an extended term of the patent 394

Assignment.

The failure to record an assignment does not impair its validity as between parties and against strangers. The recording is only necessary by way of notice to purchasers 255

Licenses.

The question of what amounts to a delivery of a license considered..... 391

A license of the "exclusive right to use and sell" in a certain territory, reserving the "right to manufacture," construed, and *held* assignable..... 346

Mere licensees have no interest capable of affording the foundation of a suit in their names 81

One of three instruments executed contemporaneously as part of the same transaction was recorded, though none were required to be recorded by law. *Held*, that they were all valid, as against a bona fide purchaser under the recorded instrument.. 348

Sale of patented machine or product.

The purchaser of a patented machine from the grantee of the exclusive right to make and use, and license others to use, has no right, as against the patentee or his assigns, to continue the use of the machine after an extension of the patent..... 883

Infringement—What constitutes.

A combination of old devices does not prevent others from using them separately, or in a new combination.....162, 187

A patentee cannot repudiate one of the parts of his machine after another inventor has taught him to dispense with it.. 187

A patent claiming invention of an hotel register with alternate leaves of bibulous paper, for advertisements, *held* infringed by the use of yellow medium paper for such advertisements 867

An hotel register with advertisements at the top and bottom of the pages *held* an infringement of a patent for a register with side margins for printed advertisements... 875

Page

A wire gauze dipper, substituted for a perforated dipper, for stirring oil, and raising enough for a single operation, *held* a mere equivalent 764

—— Who liable.

The keeper of an hotel, who keeps an infringing hotel register, is liable as the user of the invention 866, 867, 875

The manufacturer, the seller, and the user of an infringing article are liable for the infringement 768

A patent for the application or employment of armor on a vessel is not infringed by one who puts the same on a vessel under contract with the government 1008

Whether the grant of a patent excludes the United States from the right to make and use the invention for themselves, quaere 1008

—— Preliminary injunction.

Not granted as against a party who has been in possession of the invention for a long time under color and claim of right.. 255

A judgment or decree after a judicial investigation, or an exclusive possession for a long time, is necessary to make out a prima facie case under the patent 83, 129

The presumption of the validity of the patent is diminished in force where it appears that the judgment was obtained, without resistance, in an action in which several patents were in issue 83

Four years' use of a pavement laid by the patentee under a contract with the city *held* insufficient to raise a presumption in favor of the validity of the patent 105

The alleged public acquiescence in a patent must be attended with circumstances indicating that such acquiescence would not have occurred if any fair doubt had existed as to the validity of the patent 105

Public acquiescence in a patent will not be construed as acquiescence in a reissue, where both patents do not claim the same thing 83

The affidavit of the manufacturer of an article, stating its composition from his personal knowledge, will prevail over the affidavits of dealers, stating their opinions 129

—— Procedure.

A patentee may assign his right to recover for past infringements 364

In a suit by an assignee to recover damages and profits accruing both before and since the assignment, the assignor need not be made a party 1180

Where an exclusive license has been granted, the licensee and the patentee are both necessary parties to a suit for infringement 391

The patentee may maintain an action for infringement of his valid claims, though he did not disclaim the invalid claims before bringing the action. (Act March 3, 1837, §§ 7, 9.) 280

The question whether there has been unreasonable negligence or delay in entering such disclaimer is a question which goes to his right of action. (Act March 3, 1837, § 9.) 280

A disclaimer is necessary only where the thing claimed without right is a material and substantial part of the thing patented.. 280

The want of a disclaimer is no ground for invalidating the patent, where the invalid claim is not an essential part, and was introduced without intent to defraud or mislead.. 280

The particulars of the infringement need not be stated in a bill in equity 845

Bill for infringement of 33 claims, in 4 several patents, *held* demurrable for multifariousness 908

Want of novelty, as a defense, must be specially alleged 103

Page

The defense that the subject of the invention is not of a patentable character is admissible under the general issue 103

It is a question for the jury whether the production of the article involved inventive genius 768

A patent not introduced in evidence before the examiner will not be received at the hearing 81

—— Evidence.

Defendant is estopped to deny the utility of the invention 915

The patent is prima facie evidence that the patentee was the original and first inventor of the thing described 775

Defendant must give notice of the place where and the parties by whom the thing relied on under the defense of prior use has been used 915

A reference to a county in which, it is alleged, the prior use took place, is not sufficient 915

It may be shown that the devices set forth in the foreign patent offered to show anticipation are inoperative, impracticable, and worthless 764

The proof of prior use or previous knowledge, to defeat a patent for want of novelty, must be such as to establish the fact clearly, and beyond a reasonable doubt. Mere preponderance is not sufficient 856

Testimony that a machine of great merit was anticipated by an old machine, made years ago, will be examined with great care 900

Weight and sufficiency of evidence as to the novelty 900

A patentee who claims several distinct improvements must show himself entitled to each, to sustain the action 1037

—— Injunction and its violation.

Defendant must take the judgment of the court as to the portions of the enjoined machine which he is entitled to use. Advice of counsel is no justification 366

—— Accounting: Damages.

The damages should have reference to the scope of the invention, and the extent to which it enters into the infringing machine 900

Exemplary or vindictive damages cannot be given, but only the actual loss sustained 280

The amount which plaintiff might have obtained from advertisers in his patented advertising hotel register, as well as the profits he might have made upon selling the book, must be considered, in estimating damages 867, 875

A verdict for damages gives no right to the defendants to use the infringing devices 900

The court will increase the amount of verdict only where the circumstances are aggravated, and repel the bona fides of the infringement 132

The failure to file a disclaimer until after suit brought (Act March 3, 1837, § 7) will prevent the patentee recovering costs, but will not prevent the court increasing the amount of the verdict 132

Marking patented articles: Penalty.

Each article should be stamped with the day of the month, as well as the year. The word "Patented" may be abbreviated 882

In a qui tam action under Act 1842, § 6, the proof as to the patent must correspond with the allegations as to the sale of the article 882

Various particular inventions and patents.

Brick press. No. 2,768, for improvement, construed 280

Chains. No. 43,987, for an improved machine for stretching chains, *held* valid and infringed 211

Page

Coal scuttles. Reissue No. 3,438, for improvement in manufacture, *held* not infringed 139
Cotton cleaner. Hayden's improvement *held* patentable 894
Cotton cleaners. Nos. 18,742 and 29,971, for improvements, *held* valid and infringed.. 900
Ferrotypes and ferrotype plates. Reissue No. 6,982, for improvement, *held* valid....1019
Firearms. Improvement in priming tubes, *held* to involve patentable invention..... 292
Fly traps. Reissue No. 6,493, for improvement, *held* valid and infringed..... 573
Hotel register. No. 63,889, for an advertising hotel register, *held* valid and infringed 856, 866
Hubs. Reissue No. 5,366, for improvement in hubs of wagon wheels, *held* valid and infringed 233
Lubricating machinery. No. 36,603, for improvements in machinery for oiling or lubricating wool or other fibrous materials, *held* valid and infringed..... 764
Pavements. Reissue No. 4,106, for Belgian pavement, *held* invalid for want of novelty .....105; Contra, 103
Sawmills. No. 51,310, for improvement, *held* valid and infringed.....341, 364
Sewing machines. No 29,785, for improvement, *held* valid and infringed..... 775
Shades. Reissue No. 2,756, to Hartshorne, for improvement in spring fixtures, construed broadly, and *held* to be infringed. 708, 710, 711
Shears. No. 1,092, for improvement in tailors' shears, *held* valid and infringed....1037
Spoons and forks. Reissue No. 2,682, for improvement, *held* valid and infringed.... 72
Squares. Reissue No. 5,408, for improvements in machinery for graduating carpenters' squares, *held* valid and infringed..... 694
Stoves. Reissue No. 3,523, for improvement in self-feeding coal stoves, *held* valid and infringed.....1079
Turning lathes. Reissue No. 1,400, for machine for shaping irregular surfaces in wood, *held* not infringed by the machine patented to Oakes for cutting irregular forms.. 187
Wagon gearing. No. 16,648 (reissued No. 6,660), for improvement, *held* valid and infringed 305
Water-cooling pitcher. Hebbard's invention, *held* patentable.....1012
Wells. No. 42,126, for improved method of putting down and operating bored wells, *held* not infringed..... 768

PAYMENT.

See, also, "Bills, Notes, and Checks"; "Compromise."

Note against one partner *held* paid by agreement of other partner to credit its amount on a note which he held against the payee, where the proper credits were made in the firm accounts..... 133
Payments, without objection, of illegal exactions by government officials, cannot be recovered back..... 332

Pilots.

See "Admiralty."

PLEADING AT LAW.

See, also, "Abatement and Revival."

A writ in debt, "that they answer unto him of a plea of debt of $1,000," *held* good on a demurrer to a plea in abatement that the writ did not run in the debet and detinet 110
Matter in defeasance of an action need not be stated in the declaration..... 378

Page

The continued use of an improvement, where, under the agreement with plaintiff, nonuser was to release defendant from his obligation to pay, need not be alleged in the declaration..... 378
A plea is bad which sets up matters in defense, and neither denies nor admits, and avoids plaintiff's allegation..... 308
A plea is bad which states facts that amount only to the general issue..... 308
A plea is bad, if it set up two distinct matters of defense, either of which is sufficient to defeat plaintiff's action..... 308
Defendant may plead inconsistent or contradictory defenses to the same action under Civ. Code Or. § 72..... 209
A plea to a declaration on a bond conditioned to pay a certain sum in pounds sterling, that it was not equivalent to, and that defendant did not owe, the sum in United States money, as averred in the declaration, *held* bad on demurrer..... 124
A plea in abatement does not waive process. It may be abandoned, and a motion made to quash the writ for defective service 306
A demurrer puts in issue the sufficiency of all previous pleadings, and judgment will be given against him who committed the first fault..... 690
A repleader is never awarded in favor of him who commits the first fault in pleading, nor where there is one material issue in the cause..... 698
A variance between November and September in the allegation and proof of the making of a usurious contract *held* not material 583
Profert of the bond declared on, and a collateral agreement necessary to establish the right to a recovery, being made in the declaration, defendant is entitled to oyer. 380

PLEADING IN ADMIRALTY.

See, also, "Maritime Liens"; "Seamen."

Impertinent and irrelevant allegations in an answer stricken out on motion..... 126
Articles signed by "William Henderson," as cook and steward, *held* admissible on a libel for wages by "William Henry".....1179

PLEADING IN EQUITY.

A bill uniting a controversy as to the validity of a will, with claims of heirs, with the suit of a creditor, and with a demand for an account by the executor, *held* multifarious 168
Where the bill is good in part, a demurrer covering the whole bill will be overruled 976
A general demurrer to the whole bill cannot be sustained as a demurrer to relief prayed in respect of persons who are not made parties to the bill..... 976
The practice, with reference to a plea in bar for want of parties, stated..... 391
The waiver of an answer on oath is ineffectual if defendant does not choose to accept it 976
An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed..... 911
The answer, so far as it is responsive to the allegations in the bill, is conclusive evidence, unless contradicted by two witnesses 574

PLEDGE.

A silver cornet was delivered to the landlord, with an absolute bill of sale, as security for rent. The tenant subsequently borrowed it to use, and failed to return it. *Held*, that the transaction was a pledge, and that the lien was gone..... 528

PRACTICE AT LAW.

Page

An unnecessary plea will, on motion, be directed to be withdrawn, as improperly incumbering the record..... 143

PRACTICE IN ADMIRALTY.

See, also, "Admiralty"; "Maritime Liens"; "Seamen."

The remedy against the vessel and the remedy against the owner cannot be united or enforced in the same action..... 189

The affidavit on a motion for additional security for costs may be made by the proctor of the party 586

A statement by the advocate of the party, in open court, the day after the hearing, made by authority of the party, may be taken as an admission in contradiction of the evidence submitted by him..... 675

The decree of distribution does not follow the report of the auditor, as matter of course, because no exception has been taken thereto 577

A party having a prior right to a vessel may claim distribution from surplus proceeds in admiralty, although his original demand was not one entorceable in admiralty 577

Where a vessel, bona fide assigned by the owner, is subsequently sold under a maritime lien, the assignee is entitled to a distribution of the surplus, in preference to a creditor having no such appropriation..... 577

PRACTICE IN EQUITY.

The court will not allow a rule respecting parties, adopted for convenience, to operate so as to defeat the ends of justice..... 257

Before a bill can be taken for confessed, defendant must have been ruled to answer, under rule 17..... 176

The court will not permit the bill to be taken for confessed where defendant offers to file his answer..... 176

A cross bill seeking a discovery from complainants is unnecessary, in view of Act July 6, 1862, § 1; Act July 3, 1864, § 3,—permitting parties to be witnesses.....1001

Substituted service of a cross bill against alien complainants in the original bill cannot be made upon their solicitors, where they file a stipulation that the answers may be amended by setting up the matter contained in the cross bill.....1001

On exceptions to an answer for impertinence and scandal, the court give the answer a liberal consideration, having regard to the nature of the case as made by the bill 61

Where a cause is set down for hearing on the plea that defendant has not been served with process within the state, docket entries showing a prior appearance by a solicitor cannot be considered 657

An amendment was allowed after argument, by which the plaintiff was allowed to traverse the fact of such an appearance having been entered 657

A dismissal of a bill, except upon the merits, is no bar to a subsequent bill for the same cause 95

An order for the dismissal of a bill taken ex parte, where the defendant died after it was granted, may be entered as of a date antecedent to his death..... 60

The rules of evidence, except the answer of the defendant, are the same in chancery as at law..... 551

Testimony of complainant in support of the allegation of the bill, directly contradicted by an officer of defendant corporation, *held* insufficient to overcome the denials in the answer..... 918

An affidavit not sworn to before a judge of the court, or a commissioner appointed to administer an oath, cannot be read in evidence 156

No exception can be taken at nisi prius to the opinion of the judge who tries an issue of devisavit vel non..... 658

PRINCIPAL AND AGENT.

See, also, "Factors and Brokers"; "Master and Servant."

The principal is bound by the acts of a sale agent, though not personally known to him, where authority to employ sale agents is implied from the nature of the duties and powers committed to his general agent 111

PRINCIPAL AND SURETY.

See, also, "Bail"; "Duress"; "Guaranty."

The liability of sureties on the official bond of the cashier of a bank is limited to his acts during the term of office to which he was elected when the bond was given.. 612

Arrest and discharge of bail on a cap. ad sat. will not prevent resort to security taken in the shape of notes of a third person..... 719

PRIZE.

See, also, "War."

Enemy property, shipped by an enemy, from an enemy port, to his creditor, to be applied on a debt, is subject to capture at sea before it comes to the creditor's hands 441, 443

Vessel having been used by the enemy without the knowledge of her owners, and recaptured from the enemy, will be restored, with costs to the libelants.....1163

A vessel approaching a blockaded port, with intent to violate the blockade, is not entitled to be warned off..... 290

A capture as prize of war overrides and supplants all claims of private liens, and a libel on the instance side of the admiralty court will be dismissed.....524, 524

The master of the vessel is not entitled to be paid freight for the voyage out of the proceeds of condemned property..... 444

The failure to send the officer or crew of the captured vessel into port with her, or produce them as witnesses, *held* cured by the subsequent appearance and examination in preparatorio of the master.....1178

Where the apparent ownership of a cargo is in an absent party, capable of claiming, it will not be condemned until he has had the benefit of the rule allowing a year for the assertion of claims.....1194

Decree of condemnation opened to permit loyal owners to show that the vessel had been previously captured from them by an enemy's privateer, and restoration awarded on the payment of one-eighth of the value, as salvage, to the captors..... 825

On an appeal to the circuit court, the property follows the appeal into that court, and the district court has no authority to bail or sell it..... 78

Act July 17, 1862, forbids the allowance to a prize commissioner in the Southern district of New York of any larger emolument than a salary of $3,000 a year..... 826

A vessel condemned because her destination was falsified at the port of departure, and because the master, in the preparatory examination, made false statements as to the ownership of the cargo.....1194

Vessel released, as not being enemy property, and restored on payment of costs, there having been reasonable cause for her seizure 441

Cargo condemned as enemy property, employed in aiding the insurrection on foot at the place of its capture.....1163

Page

Vessel and cargo condemned as enemy property, and for a violation of the blockade of Charleston.....1178
Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade of Mobile.....1177
Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade of Savannah..... 290

PUBLIC LANDS.

See, also, "Grant."

The interest of a pueblo in lands in California, and the rights acquired by the United States upon the cession, considered... 56
The president of the United States may reserve from sale certain lands within a pueblo, by order to that effect..... 56
Validity of San Francisco alcalde titles.. 261
The title of the city of San Francisco to its municipal lands within its charter limits became perfected on the passage of Act July 1, 1864..... 640
The statute of limitations of 1863 commenced to run in favor of the adverse possession of such lands at such time..... 640
A settler under the Oregon donation act, who dies before the conditions requisite for vesting title in him have been fulfilled, has no devisable interest in the land, and his heirs and widow take as donees of the government 248

QUIETING TITLE.

The rule is not universal that more than one trial at law is required to authorize a bill of peace 551
On a bill to quiet title, the court cannot direct that on a second trial before a court of law the same evidence shall be received as was used upon the first trial..... 551

QUO WARRANTO.

When an information in the nature of a writ of quo warranto may be sustained against a person usurping an office under a private corporation 116

RAILROAD COMPANIES.

See, also, "Carriers"; "Corporations"; "Mandamus."

Bonds issued for stock in a consolidated company under a vote for subscription for stock in a constituent company, where the facts were recited therein, *held* void in the hands of a bona fide holder for value..... 676
The insertion of a power of sale in a mortgage to trustees for the benefit of bondholders does not supersede the right of foreclosure by bill in equity..... 257

Real Property.

See "Adverse Possession"; "Boundaries"; "Deed"; "Ejectment"; "Grant"; "Public Lands."

RECEIVERS.

Receiver appointed at the suit of stockholders in an action by one corporation against another, where certain persons, who are directors in both companies, are about to discontinue the action in favor of the one in which they have the greater interest 946
A suit cannot be maintained against a receiver without leave being first obtained from the court by which he was appointed 185
A state statute providing that receivers appointed by any court may be sued without leave of the court is inapplicable to receivers appointed by the federal court... 185

REMOVAL OF CAUSES.

See, also, "Courts." Page

Right of removal.
Quaere: Whether Rev. St. § 639, subd. 3, allowing removal on the ground of prejudice and local influence, has been repealed by Act March 3, 1875..... 117
A foreign corporation, by having an office and transacting business within the state of New York, does not lose the privilege of having all its members regarded as citizens of the state in which it was incorporated. (Act N. Y. April 10, 1855.)..... 799
A suit in which citizens of the state are joined as defendants with a foreign corporation and nonresidents cannot be removed, under Act Sept. 24, 1789, § 12, unless the citizens of the state are merely nominal parties 799
Officers of a corporation, joined as defendants with the corporation, against whom, in their individual capacities, no relief is claimed, are merely nominal parties 799
Nominal defendants will not be considered, in determining the right of removal..... 799
If a case is within Act 1789, § 12, the fact that it is connected with and grows out of matters litigated in the state court, will not prevent its removal..... 808
A person brought into court by order to interplead will not be regarded as voluntarily before the court, and waiving his right of removal 962
A consent to a reference at the time a cause is called for trial, and might, in the ordinary course, have been tried, *held* a waiver of the right of removal on the ground of prejudice or local influence..... 448

Time of removal.
Application must be made at or before the first term at which the cause may be tried, although the court and parties may not be ready to try it..... 117
The jurisdiction of a county or circuit court in Virginia on appeal from a board of county supervisors is original, and not appellate 117
Application to remove must be made at or before the first term of the court after the appeal is taken 117

Proceedings to obtain.
Where the proper steps to effect a removal have been taken, and evidence thereof is presented to the state court, the right of removal may be perfected by defendant's entering the proper papers in the federal court, and appearing..... 799
No order by the state court for the removal of the cause is necessary..... 799

Effect of removal: Subsequent proceedings.
When a case is removed under Act 1789, any injunction issued before its removal, ipso facto, falls 799
Where the cause is removed on the ground of citizenship, it will not be remanded on motion, where the question of citizenship is fairly disputed 975

REPLEVIN.

After issue joined in replevin, it is too late to move to quash the writ..... 289
Upon the plea of property, plaintiff has the burden of proof, and the right to open and close 1079
Judgment for defendant should, in all cases, be for a return.....1066
A finding for defendant, with damages in the value of the goods, will not prevent defendant maintaining an action upon the replevin bond, and recovering damages beyond the value of the goods.....1066

RIPARIAN RIGHTS.

Page

See, also, "Navigable Waters"; "Waters and Water Courses."

The proprietor of adjoining lands, who is also owner of the bed of a creek, may grant and convey the bed of the creek, separate from the land which bounds it..... 715

SALE.

See, also, "Vendor and Purchaser."

An absolute bill of sale of personal property, unaccompanied by possession, is void, at common law, as to subsequent purchasers without notice, although acknowledged and recorded agreeably to Act Md. 1729, c. 8, §§ 5, 6 340

Sending a circular naming "present price" of an article, *held* an offer to sell, and its acceptance in a reasonable amount completes a contract 234

The property does not pass unless there be a certain price agreed upon, and a delivery of possession 574

When there is no unfairness, the price agreed upon, though extravagant, must be paid 1066

To disaffirm a contract, the property must be returned, if practicable 1066

The purchaser of property sold without title cannot recover the purchase money, in assumpsit, without proof of a return, or offer of return, of the property, nor where there was a bill of sale under seal, with an express warranty of title 115

Where notes given for the purchase price of property are misdescribed in the declaration, plaintiff may recover on the general counts, but in such case the recovery is limited to the market value.....1066

The purchaser may claim as damages the difference between the contract price at the time delivery was to be made and the current price of the article at the actual time of delivery 306

SALVAGE.

Right to salvage compensation.

Salvage service is such service as is rendered in rescue or relief of property at sea, in imminent peril of loss or deterioration.. 948

Towing may be a salvage service, when performed in aid of a vessel in distress... 948

Services rendered by a tug in towing to a wharf a vessel which, being overtaken by a storm while entering a harbor, was left by her crew, *held* entitled to salvage remuneration 948

Services in towing into harbor a vessel leaking badly, anchored near shore of Cohasset, and liable to stranding on change of wind, *held* entitled to salvage remuneration 1128

Where no agreement is made for compensation for towing a vessel in distress, the rate is to be governed by considerations applicable to salvage cases..... 948

Seaman discharged from a ship of war at sea, to assist in bringing into port a short-handed whaling ship, *held* entitled to compensation as for a salvage service..... 726

What a pilot does beyond the limits of his duty, as such, may be the foundation of a claim for salvage, but not such acts as are within them 413

A steamboat dismantled and stripped of her motive power, and fitted and used as a saloon and hotel, cannot be the subject of salvage services 1085

Contracts for salvage services.

A contract made by the master with salvors, for the recovery of the cargo of a sunken vessel, sustained 525

Page

Forfeiture of salvage.

Salvors who fall into distress, and are relieved by other salvors, do not thereby lose their original right to salvage. The second salvors cannot lawfully make a contract to that effect 1166

Salvage on derelict cases and boxes not forfeited for refusal to deliver to owners' agent at a small port, into which the vessel put because of adverse winds..... 713

A person who recovers property lost at sea, or shipwrecked, and sells the same and appropriates the proceeds, in violation of law, forfeits the right to salvage..... 526

Amount.

The amount is estimated by the compound consideration of the danger and importance of the service..... 413

The fact of the property being derelict only makes out a prima facie case of extreme danger of total loss, which enhances the award..... 243

The rule to allow a moiety in case of derelict is not departed from, except under extraordinary circumstances.....1166

A stoppage to save life is not a deviation which discharges a policy of insurance, but a stoppage merely to save property is a deviation 1166

Extraordinary expenses, such as the breaking of a propeller, in rendering salvage services, are not included in the compensation 830

A vessel with cargo of cotton on fire was towed into shallow water, and scuttled and sunk. *Held*, that the amount which they brought at a sale in such condition was the measure of value in estimating salvage.... 897

$750 allowed on net proceeds of $2,000 of vessel lying dismasted, and in a helpless condition, near the shore of a dangerous coast, at a great distance from any port..... 830

$1,500, on a valuation of $9,500, allowed a schooner for towing into port derelict bark found near the mouth of Delaware Bay.... 243

$3,600 allowed for towing to Boston a ship valued, with cargo, at $120,000, anchored near dangerous reefs near the shore of Cohasset 1128

$21,050 allowed on cargo of iron valued at $36,222, saved, by diving, from vessel wrecked on Carysfort Reef.....1039

One-fourth allowed on a valuation of $12,583, where a small schooner loaded with coal saved floating cases and boxes..... 713

Salvors awarded 14 per cent. on dry cotton saved, amounting to $168,000, and 40 per cent. on damaged cotton, amounting to $22,000, and on materials sold at $3,078.. 763

Remedies for recovery.

Salvors have a right to the possession of the salved property until their claims are legally adjusted 713

Cosalvors omitted from the original libel may present their claims by suitable allegations without notice or process to the other parties 1166

Apportionment of costs among cosalvors and claimants.....1166

Apportionment.

A second set of salvors have no right to interfere, and become participators in the salvage, unless it appears that the first set will not be able to save the property without their aid..... 413

Rule of apportionment between the master, officers, and crew, and between cosalvors 1166

The owner of the salvor vessel is usually allowed one-third, but, in cases of extraordinary merit or peril to the ship, a greater allowance may be made.....1166

Right to property or proceeds.

Underwriters cannot make any claim for salvage property in the admiralty, unless

Page

there has been an abandonment of the property to them, and an acceptance.....1166

Review.

An appeal by any parties interested in the distribution of salvage, as to their shares, brings up incidentally a review of the whole decree, so far as the distribution is concerned 1166

SEAMEN.

See, also, "Admiralty"; "Maritime Liens."

The contract of shipment.

No stipulation contrary to the maritime law, to the injury of seamen, will be allowed to stand, unless explained to them, and an adequate additional compensation be given to them.....480, 963

Where a master agrees, with a mariner, to carry the latter's goods free of expense, a charge for freight thereon cannot be supported, as between the master and mariner 648

A seaman injured during a voyage, and left sick in a foreign port, is entitled to wages during such sickness, and up to his arrival home, together with medical expenses, deducting wages actually earned on the return voyage..... 624

The expenses of curing a sick seaman, chargeable against a ship, include, not only medicines and medical advice, but nursing, diet, and lodging, where the seaman is carried ashore..... 480

A stipulation, that the seamen shall pay for medical advice and medicines, without any condition that there shall be a suitable medicine chest, etc., is void, as contrary to the policy of the act of congress..... 480

The onus probandi in respect to the sufficiency of the medicine chest lies on the owner 480

Conduct of master or mate in respect to seamen.

The action of the master in confining seamen for insubordination, and in sending seamen on shore for supplies of wood and water, where they were attacked by savages, *held* justifiable..... 957

The master must hear complaints made in a reasonable manner against superior officers, and redress grievances found to exist.. 816

The master is liable for an unjustifiable assault by one of his officers upon one of the crew, when done by his connivance, consent, or authority..... 469

Such consent and authority will be presumed when it appears that he knew of the trespass, or had reason to know it, and did not interfere to prevent it..... 469

A receipt acknowledging satisfaction of all claims for assault and battery is not binding unless shown to have been the result of a fair compromise, on compensation given 469

A receipt for all "demands and dues" against a vessel, her master and officers, is not, upon its face, a receipt for assault and battery 469

The vessel owner is not responsible for injuries to a seaman, caused by negligence of the mate, where no personal negligence on the part of the owner appears..... 310

Rules for assessment of damages in cases of beating and wounding a seaman..... 469

Wages—Right to.

Where freight is lost by the fraud or wrongful act of the master, seamen are still entitled to their wages.....1139

Seamen are not entitled to the two-months wages allowed by law, where the vessel is abandoned to the insurers in a port of necessity, where it would cost more than half her value to repair her.....1139

The unjustifiable discharge of a mariner in a foreign port entitles him to wages, and

Page

to damages, also, if accompanied with oppression 909

The discharge made in a foreign port must be before the consul, but the money settlement need not be; and the consul is not entitled to charge a commission on the amount paid, for merely witnessing the payment... 816

A seaman on a whaling voyage, discharged abroad without his own fault, *held* entitled to the pro rata settlement provided in the articles for a discharge from sickness 816

Rights of a nonconsenting mariner, where the cruise of a privateer is broken up, and a new one commenced, with the consent of all the others..... 171

—— Remedies for recovery.

The mate and cook of a porgy steamer employed for the fishing season at stipulated wages have a lien upon the vessel therefor..1042

A minor employed on such steamer by the master, at all work, has a lien for his wages, even though the owner is authorized by the sharesmen to retain from their shares his wages 1042

An agreement of the charterer, with the owner, to pay the seamen's wages, will not bar their lien, where they contracted with the master..... 685

The lien for wages is not lost by taking the owner's time note in settlement, where the circumstances rebut the presumption of payment 1042

The taking of such note operates as an extension of time of payment.....1042

Acceptance of nonnegotiable note of master, on giving a receipt for wages, and putting the note in suit, do not waive the lien.. 587

A receipt in full of all demands is open to inquiry and explanation. A settled account for wages, etc., is not conclusive, but it may be surcharged and falsified..... 480

A seaman's lien for wages will not be enforced in admiralty, as against a bona fide purchaser, after the lapse of two seasons.. 597

A new clause in the shipping articles, relied upon to repel a claim for wages, must be pleaded..... 963

—— Deductions: Extinguishment, etc.

Owners of whaling vessels are not allowed to charge the officers or crew commissions for selling the oil..... 928

The owners, on the ground of established usage to the contrary, have no right to deduct the value of the casks from the sales of the cargo..... 928

The cash market price is the measure of compensation for the officers and crew who are to be paid lays..... 928

There can be no specific forfeiture or deduction for misconduct which is not specially charged in the answer..... 689

Wages cannot be forfeited under Act July 20, 1790, where there is no entry in the log book of the absence of the seaman without leave, and he is received on board again...689

It is not desertion for seamen to leave the vessel, against orders, to go before the consul and complain of their treatment..... 689

Such conduct will not justify their imprisonment, nor the deduction from their wages of the amount paid other hands, in their places, while so imprisoned..... 689

An intention to desert will not bring seamen within the act of July 20, 1790, where there is no actual desertion..... 689

An American ship was captured by a French cruiser, recaptured by an English frigate, and restored on payment of salvage. *Held*, that a seaman carried into France by the French cruiser was entitled to wages for the entire voyage, after deducting his proportion of salvage..... 687

Temporary absence, occasioned by imprisonment upon a charge of a trivial offense, is not a total desertion..... 909

Page

A seaman, who, in the peril of a collision, jumped aboard the colliding vessel, and afterwards endeavored, without success, to rejoin his own vessel, will be allowed wages up to the time of collision..... 472

SHERIFFS AND CONSTABLES.

Sufficiency of averments in debt upon a constable's bond, in not conveying realty sold to plaintiff on a fi. fa.....939, 940

SHIPPING.

See, also, "Admiralty"; "Affreightment"; "Average"; "Carriers"; "Collision"; "Demurrage"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage"; "Wharves."

Title to vessel.

Equitable ownership in a vessel, or ownership pro hac vice, need not be shown by a bill of sale or registry..... 227

A boat with an entirely new hull, with parts of the machinery and upper works of an old boat, which had been abandoned or dismantled, *held* a new boat..... 720

The master.

General advances made by the owners to the master and co-owner of a whaling vessel, *held*, might be appropriated in payment of his lay..... 928

The forfeiture provided in the shipping articles for taking on board spirituous liquors will not be decreed against the master's entire lay..... 928

The master is not personally liable for the wages of the hands..... 642

Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship also is primarily, although not exclusively, liable for the compensation..... 189

A sale of the vessel by the master will only be sustained where enjoined by a policy so clear as to be equivalent to a moral necessity..... 706

The burden of proof is on the purchaser to show that the sale of the vessel by the master was bona fide and necessary..706, 1153

The facility with which a stranded vessel was reclaimed is evidence on this question..1153

The presence of the owner's agent at the sale does not constitute the sale any the less a sale by the master.....1153

The receipt by a special agent of the proceeds of the sale is no ground for the presumption of ratification by the owner.....1153

A paper purporting to be a survey, but not drawn up, subscribed, or sworn to prior to the sale, will not be received as evidence of a survey.....1153

Sale, without notice to owner, of unseaworthy vessel, safely anchored in the harbor of St. Thomas, and not exposed to any immediate peril, *held*, did not pass title..... 673

A sale in a foreign port by a master, who is without means or credit to repair the vessel, advised on a survey by disinterested persons, where there was no time to consult with the owner, will be upheld.....1196

The purchasers of a stranded vessel at an authorized sale by the master will be allowed the value of necessary repairs, the expenses of navigating her home, and the price paid 1153

The right to the freight earned upon the homeward voyage follows the ownership of the vessel.....1153

Employment of vessel.

The master of a vessel upon the Great Lakes has power, under the custom of the port, to bind the vessel by receiving for transportation goods subject to prior charges, which he is to collect from the consignee, and to return to the shippers.....1087

Page

The lien of a shipper for the performance of such contract is a privileged hypothecation, and takes preference over the lien of a prior chattel mortgage.....1087

A contract to collect the price of goods shipped, and the freight, from the consignee, and to pay the balance to the consignor, is within the scope of the master's authority, and binding on the vessel owner, where the shipper had no knowledge that the vessel was already chartered..... 503

Where a child was taken sick with smallpox while on the voyage, *held*, that the master was justified in changing his quarters, and in quarantining him, with his parents, who insisted on going with him..... 398

Liabilities of vessels or owners.

The vessel is not liable for performance of a contract of affreightment, where the property has not been shipped in pursuance thereof..... 437

A shipowner is not liable personally for work upon the ship, unless done by his order or on his credit.....1193

The general owners of a vessel are not liable for supplies or repairs furnished in a foreign port, to a vessel hired on shares, to one who was to victual, man, and control the vessel, but the vessel is liable..... 952

A master appointed by the owner, and sailing the vessel on shares with him, has no power to bind one who holds the title merely as security, for supplies furnished in her home port, by representing such person as owner..... 602

Slander.

See "Libel and Slander."

SLAVERY.

Right to freedom on failure of executor to carry imported slave out of the district.... 625

Right of importation of slave under Act Md. 1796, c. 67, *held* forfeited by a sale within three years..... 611

SPECIFIC PERFORMANCE.

Specific performance of a contract for the sale of land will be decreed if the vendor is able to make a good title at any time before the decree is pronounced, notwithstanding dismissal of a former bill by the vendor on account of defective title.....*1191

STATES.

The resolution of annexation of Texas, assented to by the convention of Texas, is equally binding on the state, whether considered as a treaty or as a contract..... 403

The recognition by the national government of the government established at Wheeling, Va., after the secession of the state, as the lawful government of Virginia, is binding on the judiciary..... 7

Act June 25, 1868, to admit certain of the seceding states to representation in congress, did not re-enact the constitutions of such states..... 795

The acceptance by congress of the cession by a state of exclusive jurisdiction over territory in a military reservation which existed before the state was created, is not necessary to vest such jurisdiction in the United States, under Const. art. 1, § 8....1010

A bill filed against the commissioner of the general land office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state, is not a suit against the state..... 403

Page

The colonization contract made with Mercer, January 22, 1844, *held* valid and binding on the republic of Texas..... 403
Vacant unappropriated lands in Texas are to be applied to the payment of the debts and liabilities of the republic of Texas, under the conditions of the resolution of annexation..... 403

STATUTES.

See, also, "Constitutional Law."

All the provisions or sections of a penal statute must be taken together, and interpreted according to the import of the words, so as to give effect to its objects and intent..... 588
Similarly, all statutes relating to the same subject-matter are to be interpreted together 588
As between conflicting sections of the same statute, the last in order of arrangement will control..... 222

Surface Water.

See "Waters and Water Courses."

TAXATION.

See, also, "Internal Revenue."

The power of taxation belongs to the legislative department of the government. The judicial department has no general jurisdiction over the subject.....1033
Personal estate upon the premises may be distrained for taxes against the realty.. 913
Realty in Washington, D. C., cannot be sold for taxes, even with the assent of the true owner, if there be upon it personal property sufficient to pay them.....1060
A fee simple cannot be sold for taxes where an estate for life, in existence, is of sufficient value to pay them.....1060

Towage.

See "Collision"; "Salvage."

TRADE-MARKS AND TRADE-NAMES.

The word "Centennial" is general property, and cannot be used for a trade-mark.. 697
An ornamented tin pail, given away on the sale of paper collars contained therein, *held* not a trade-mark..... 605
The commissioner of patents may institute an interference between opposing claimants for registration of the same trade-mark, to determine ownership..... 429
The decision of the examiner cannot be questioned collaterally, and the successful party is entitled to a provisional injunction against the licensees of the unsuccessful party when no doubt exists as to the infringement..... 429
Equity will not protect by an injunction the trade-marks of owners of quack medicines.....1007

TREATIES.

See, also, "Extradition."

Treaties with foreign nations comprise a portion of the public and supreme law of the land, and a violation by a citizen of the United States may be punished in the federal courts by indictment.....1099
A debt due to a British subject may be recovered, under the treaty of peace of 1783, though paid to a state under its confiscation act..... 336

TRIAL.

See, also, "Continuance"; "Evidence"; "Judgment"; "New Trial"; "Practice"; "Witness."

Page

Where the plaintiff holds the affirmative of any of the issues, he has a right to open and close the whole case.....1079
A jury may be waived in a civil case in the circuit court, on the filing of a stipulation with the clerk..... 963
Upon the cross-examination of a witness, he may be asked leading questions, to draw a further disclosure in reference to the matter testified about on his direct examination, but not as to other matters..... 658
Defendant, by reading in evidence part of plaintiff's account filed with declaration, makes the whole account evidence for plaintiff..... 32
An objection to evidence, on which the court is divided, does not prevail.....1188
The court will not give an instruction upon a point not material to the issue..... 583

TROVER AND CONVERSION.

See, also, "Replevin."

The possession of tobacco notes *held* evidence of the possession of the tobacco which they represent..... 401

TRUSTS.

See, also, "Executors and Administrators"; "Guardian and Ward"; "Wills."

Wherever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of equity will convert him into a trustee of the true owner..... 510
Persons who secure the legal title of a Mexican grant by the presentation of a worthless document as a transfer of the grantee's interest will, in equity, be treated as trustees of the heirs of the grantee..... 510
An executor who has taken charge of a trust estate under a will, will not be displaced, and a receiver appointed, unless it appear that the property is in danger, and the trustee is irresponsible..... 168
Neither lapse of time, nor any defense analogous to the statute of limitations, can be set up by the trustee of an express trust as a defense to his liability to execute the trust..... 403
A trustee resident in the Confederate States *held* not personally liable for the amount of investments in Confederate bonds, where he did not deal directly with the Confederate government, except as to nonresident cestuis que trustent adhering to the United States..... 956
Trustees implicated in a common breach of trust are liable to suit jointly or severally, at the election of the cestui que trust.. 976
The same doctrine applies to any wrongdoer who is confederated with a fraudulent trustee..... 976

VENDOR AND PURCHASER.

See, also, "Boundaries"; "Deed"; "Fraudulent Conveyances"; "Sale"; "Specific Performance."

A written contract by a bank to convey, under the hands and seals of the president and cashier, reciting authority from the directors, is admissible without further evidence of authority of such officers to make the contract..... 130
The vendee may recover back the purchase money in assumpsit, where the vendor's title was defective, though he has been in possession several years..... 130
An insufficient deed, received by the vendee of land, *held* admissible in evidence, in

Page

an action to recover back the purchase money, to show defective title..... 130
The vendee cannot recover back the purchase money paid upon failure of the vendor to convey, without tendering the form of a deed of conveyance, unless the vendor's title is defective..... 130
Actual possession is constructive notice to all the world of the title under which it is held 111
The purchaser is chargeable with notice of a fact which the instrument through which he is obliged to make out his title leads him to 510
Recitals in patent *held* not sufficient to affect the grantee of the patentee with constructive notice of defective proceedings under which the land was sold..... 504

WAR.

See, also, "Insurance"; "Prize."

A contract for the purchase of cotton, made during the Civil War by a subject of Norway, domiciled in New York, with a citizen of Texas, actually residing therein at the date of the contract, *held* void..... 141
Regulations of secretary of treasury, exacting certain payments as condition precedent to shipment of cotton from disloyal states (Act July 13, 1861), *held* legal and valid 332
Trading with the enemy's country, which has been reduced to subjection, with permission and encouragement of the invading army, is not unlawful..... 559
Private property may be seized to prevent it from falling into the hands of the enemy, or for use of an army in some immediate danger, such as will not admit of delay....559
Private property cannot be seized for the purpose of insuring the success of a distant expedition upon which the army is about to march 559
An officer cannot justify an unlawful seizure by showing the orders of his superior officer 559
A citizen of a loyal state, during the Civil War, is not entitled to the benefit of both the suspension of the statute of limitations by reason of his residence, and the suspension under a state statute (Act Miss. Dec. 31, 1862) of actions of ejectment..... 960

WAREHOUSEMEN.

In the absence of statute or usage, "warehouse receipts" need not be in a particular form 619
An instrument, "Received in store, for account of B. & W., 3,000 sacks of corn," signed by a warehouseman, *held* a warehouse receipt, and the title to the corn will pass by its indorsement and delivery..... 619

WATER COMPANIES.

A company required to supply water to a city, "in case of fire or other great necessity, without charge," *held* bound to furnish free water for irrigating public parks and squares, flushing sewers, etc..... 862

WATERS AND WATER COURSES.

See, also, "Navigable Waters"; "Riparian Rights."

Twenty years' possession of an easement or use of a water course is a conclusive presumption of right, if unexplained..... 931
Unity of possession does not extinguish the right to use a water course appurtenant to a mill..... 931

Page

The owner of a lower mill lowered his dam so as to prevent obstruction of an upper mill, and, after 38 years, sold his mill to the upper owner, who sold it to a third person. *Held*, that the lower owner had no right to raise the dam so as to obstruct the upper mill..... 931
Twenty years' adverse possession of water which had previously flowed to plaintiff's mill *held* to vest a complete title, which was not impaired by three years' nonuse, during which the water reflowed to plaintiff's mill, where defendant did not intend to abandon its right..... 156
Acquiescence by plaintiff or his grantors in a diversion of water by defendant, even for a shorter period than 20 years, *held* sufficient to induce a refusal of injunction..... 156

WILLS.

See, also, "Descent and Distribution"; "Executors and Administrators."

The person to whom a fee is given by testator if she should survive his daughter dying without issue then living, is not a competent witness..... 658
The devisee must show that the will was read or that its contents were known to testator, where it appears that he was blind or incapable of reading, or if a reasonable ground be laid for believing that it was not read to him, or that there was fraud in the transaction 658
The testator should appear to have had a sound disposing mind and memory; that is, that he was capable of making his will, with an understanding of what he was doing 658
A witness may depose as to what he thought of the testator's sanity, at or about the time the will was made; but not as to what the witness had declared upon the subject to others..... 658
A man may be capable of disposing by will, and yet incapable, by reason of infirmity, of making a contract, or of managing his estate..... 658
The proceedings of the Pennsylvania orphans' court, upon the offer for probate of a will as to personal property, and the decree of the prerogative court, refusing the probate, are not admissible upon an issue to determine the validity of the will to pass real estate..... 658
A devise to the executor, in trust to apply the rents and income to the support of the widow, with power to sell the estate if the income should not be sufficient, is a devise in fee to the executor, and he is entitled to receive the rents accruing after the death of the wife..... 516

WITNESS.

See, also, "Bankruptcy"; "Costs"; "Deposition"; "Trial."

A person is a competent witness for either party if he is liable in either event of the suit 648
The principal obligor in a bond is a competent witness for the surety..... 583
Possession of goods by a witness will not render his testimony inadmissible in favor of the party under whom he holds..... 365
An interested witness, who has been sworn in chief and examined, and whose interest is disclosed upon cross-examination, may be released, and re-examined..... 225
A release may be executed by the party leaving a blank for the name of the witness, to be filled up by the party's attorney..... 225
The testimony of witnesses, who, while testifying under circumstances calculated to

Page

create a strong bias, state what is, in its nature, incredible, need not be believed...1047

The fact that an expert requires payment for his opinions, as such, should not discredit him before the jury..... 736

Plaintiff's witness cannot be cross-examined by plaintiff to discredit himself by confessing that he had previously made a different and inconsistent statement of the matter 615

A previous and contradictory statement of a witness may be given in evidence to impeach his credit, but not as proof of the facts formerly stated..... 413

A witness supported by his previous deposition, though not on file, will be believed, rather than one whose previous deposition does not support his testimony..... 214

The fees must be paid or tendered at the time the summons or subpoena is served... 4

If the fees are not paid, and the witness attends, they may be collected as in ordinary actions..... 4

Page

Where a case is suspended for a few days, witnesses from a distance will be paid for continued attendance, rather than for travel fees home and return.....4, 401, 818

The attendance of a witness living within 100 miles, but outside, of the District of Columbia, may be compelled by the circuit court of the District..... 128

Witnesses residing more than 100 miles from the place of trial, and out of the district, cannot be compelled to attend.....1189

WRITS AND NOTICE OF SUITS.

Where personal service is not made, the requisites of the statutes substituted for it must be strictly complied with..... 306

The service of process, in an action against a county, upon the chairman of the county board, where the statute requires it to be made upon the county judge, gives no jurisdiction 76

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.